

# Malnove Terms and Conditions

## Terms and Conditions of Credit

- 1. PAYMENTS; INTEREST AND ATTORNEY FEES.** All payments will be due and payable within thirty (30) calendar days of the due date shown on Company's invoice. Any payments received will be applied first to outstanding finance charges or reimbursable expenses, then to any past due balance, then to any new purchase. Payments received on a regular business day will be credited to the Applicant's account on the day payment is received. Additional interest shall be payable by the Applicant on any amount not paid when due at the rate of one percent (1.0%) per month, or the maximum rate allowable by law, whichever is less. Applicant shall reimburse Company for all collection costs, court costs, administration costs, investigation costs, attorneys' fees and all other incidental costs, charges or expenses incurred in the collection of past due amounts or otherwise resulting or arising from any breach by Applicant of any of its obligations to Company. Notwithstanding anything to the contrary contained herein, the total liability for payments of interest and payments deemed to be interest by applicable law shall not exceed the limit imposed by applicable usury laws. In the event the total liability for payments of interest and payments deemed interest by applicable law shall, for any reason whatsoever, result in an effective rate of interest which exceeds the limit imposed by applicable usury laws, all sums in excess of those lawfully collectible as interest for the period in question shall, without further agreement or notice by, between, or to any party hereto, be deemed to have been applied immediately upon receipt of such sums by Company and shall be applied as a credit on the principal due or thereafter arising on Applicant's account.
- 2. REFUSAL TO EXTEND CREDIT.** Notwithstanding anything to the contrary in this Agreement, Company may, in its sole discretion and for any lawful reason, refuse to extend credit to Applicant and require Applicant to make payments in cash or other immediately available funds prior to selling goods to Applicant. Company shall have no duty to fulfill any order if Applicant fails to make such advance payment.
- 3. DISPUTED CHARGES.** Applicant must notify Company of any disputed charge within thirty (30) days after the date of the invoice on which the charge appears. After thirty (30) days, all charges are considered valid and no adjustments will be made. Notice to Company of a disputed charge shall be given by Applicant in writing and shall include the following information: (i) Applicant's name and account number; (ii) the dollar amount of the disputed charge; (iii) the reason Applicant is disputing the charge; and (iv) a copy of the statement on which the disputed charge appears.
- 4. WAIVER.** Applicant hereby unconditionally waives all rights to notice of acceptance of this Agreement by Company.

## Terms and Conditions of Sale

- 1. APPLICABILITY.** This Agreement is the only agreement which governs the sale of goods from Company to Applicant. Applicant acknowledges and agrees that if Applicant has a claim or cause of action under this Agreement, Applicant's claim or cause of action shall be against the applicable affiliate or subsidiary of Malnove Holding Company, Inc. which provided the applicable goods. Applicant hereby acknowledges and agrees that there is no joint or several liability between or among Malnove Holding Company, Inc., its subsidiaries and affiliates.
- 2. WAREHOUSING.** Except as otherwise agreed to in writing by Company, Company will warehouse the goods for up to ninety (90) days from the date of manufacture ("Storage Period"). Goods not shipped within the Storage Period may be invoiced to Applicant, at Company's discretion. Company will warehouse the goods at Applicant's risk and expense. A warehouse fee of fifteen (\$15) per pallet, per month, may be charged by Company, in its sole discretion, on any goods (including goods owned by Applicant) stored by Company beyond the Storage Period.
- 3. ACCEPTANCE.** Applicant shall inspect the goods within thirty (30) days of receipt ("Inspection Period"). Buyer will be deemed to have accepted the goods unless it notifies Company in writing of any Nonconforming Goods during the Inspection Period and furnishes such written evidence or other documentation as reasonably required by Company. "Nonconforming Goods" means only the following: (i) goods shipped are a different type than the goods ordered; (ii) the label or packaging of the goods incorrectly identifies its contents; and (iii) goods which vary in quantity in excess of ten percent (10%) from the quantity ordered. If Applicant notifies Company of Nonconforming Goods within the Inspection Period, and subject to Company's right to inspect such Nonconforming Goods, at Company's election, Company shall, in its sole discretion, (a) replace such Nonconforming Goods with Conforming Goods, (b) repair or correct the Nonconforming Goods, or (c) credit or refund the price for such Nonconforming Goods. Applicant shall ship, at its expense and risk of loss, the Nonconforming Goods to the location designated by Company. If Applicant uses or disposes of any portion of the alleged Nonconforming Goods without the prior written approval of Company, any and all claims pertaining to such Nonconforming Goods shall be deemed waived by Applicant. Application acknowledges and agrees that the foregoing remedies are Applicant's exclusive remedies for the delivery of Nonconforming Goods. Applicant agrees to accept without objection, goods which vary up to ten percent (10%) above or below the quantity ordered, and shall pay the applicable price for such goods, as adjusted based on the quantity actually delivered.
- 4. DELIVERY; TITLE AND RISK OF LOSS.** All delivery dates provided by Company are estimates only. Company reserves the right to make delivery in installments, and all such installments, when separately invoiced, shall be paid for when due without regard to subsequent deliveries. Delay in delivery of any installment shall not relieve Applicant of its obligation to accept remaining deliveries. Company shall not be liable for any delays, loss or damage in transit. Title shall pass to Applicant upon payment of the purchase price in full. Risk of loss passes to Applicant upon delivery of the goods to the carrier.
- 5. ORDERS; PRICE.** No order shall be binding on Company until received in writing and accepted by Company in writing, or by commencing performance of such order. Applicant shall purchase the goods from Company at the prices set forth in Company's quote, order confirmation, or other written document issued by Company. All prices are exclusive of all sales, use and excise taxes, and any other similar taxes, duties and charges of any kind imposed on Applicant. Applicant shall be responsible for all such charges, costs and taxes. Unless otherwise specifically agreed in writing, all prices are for goods packaged for domestic shipment, and are subject to adjustment on account of specifications, quantities, shipment arrangements or other terms and conditions which are not part of the original price quotation.
- 6. CANCELLATION BY APPLICANT.** If Applicant cancels any order after receipt by Company, Applicant shall be responsible for cancellation fees which shall take into account all expenses related to such order, including but not limited to expenses: (i) already incurred, including but not limited to expended materials, labor and work in progress; (ii) for outstanding commitments that cannot be cancelled; and (iii) for all incidental costs and expenses, including but not limited to storage and handling fees. Applicant will pay such cancellation fees within thirty (30) days of the date of Company's invoice.
- 7. INDEMNIFICATION.** Applicant shall indemnify, defend and hold harmless Company, its affiliates, and their officers, directors, employees and agents from and against any and all liabilities, losses, damages, actions, claims, costs and expenses (including without limitation attorneys' fees and costs), whether third party or direct, arising out of or relating to Applicant's (i) acts or omissions in connection with this Agreement and (ii) use, operation or possession of the goods, except to the extent arising out of Company's gross negligence or willful misconduct.

8. **FORCE MAJEURE.** Company shall not be liable for any loss, delay or failure to perform resulting from any circumstance, direct or indirect, reasonably beyond its control including, without limitation, fire, flood, accident, explosion, mechanical breakdown, strike or other labor trouble, plant shutdown, unavailability of or interference with the usual means of transporting the goods, any law, regulation, order, recommendation or request of any governmental authority having or claiming to have jurisdiction over Seller, its subcontractors and/or its suppliers, and any other cause beyond Company's reasonable control. In addition, Company shall be so excused in the event it is unable to acquire from its usual sources and on terms it deems to be reasonable, any labor or material necessary for manufacturing the Products or performing the Services. In the event that there should be a shortage of any Product, Seller may apportion its available Product among itself, its affiliates and all its customers in such equitable manner as it deems fair and reasonable. Upon giving prompt written notice to Buyer of any such causes of a delay or failure in its performance of any obligation under the Contract, the time of performance by Seller shall be extended, at Seller's option, to the extent of any delay resulting from any force majeure event.

9. **SECURITY INTEREST.** Applicant hereby grants to Company a security interest to secure the payment, performance and satisfaction of all present and future debts, obligations or other indebtedness of Applicant to Company in the following property, whether tangible or intangible, whether now owned or hereafter acquired, and wherever the same may be located (collectively, the "Collateral"): all accounts, equipment, goods, inventory, documents, instruments, chattel paper, investment property, general intangibles, money, deposit accounts, and books and records, and the proceeds of each of the foregoing. Each category of Collateral set forth above shall have the meaning set forth in the Uniform Commercial Code ("UCC"), it being the intention of Applicant that the description of the Collateral set forth above be construed to include the broadest possible range of assets. Applicant hereby irrevocably authorizes Company from time to time to file a copy of any initial financing statements, continuation statements and any amendments thereto to perfect its security interests and to provide any other information required to make any such filings. In the event of a breach of this Agreement, Company may exercise any and all its rights it has under this Agreement and applicable law, including but not limited to the UCC.

10. **WARRANTY.** Company warrants that all goods will be free from defects in material and workmanship for a period of one hundred eighty (180) days from the date of manufacture. The foregoing warranty shall not apply to goods with defects arising from Buyer's warehousing of the goods (for example, problems caused by extreme climate, crushing or bowing due to double-stacking pallets, or other damage) or use of the goods beyond one hundred eighty (180) days from the date of manufacture. **COMPANY MAKES NO OTHER WARRANTIES, WHETHER EXPRESS, STATUTORY OR IMPLIED, WITH RESPECT TO THE GOODS, INCLUDING WITHOUT LIMITATION, ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OR CONFORMANCE TO DESCRIPTION, OR WARRANTIES ARISING FROM COURSE OF DEALING, TRADE PRACTICE OR OTHERWISE.**

11. **LIMITATION OF LIABILITY.** NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, APPLICANT WAIVES ANY CLAIM AGAINST COMPANY FOR ITS OWN LOST PROFITS OR LOSSES DUE TO BUSINESS INTERRUPTIONS, OR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR OTHER SPECIAL DAMAGES, HOWEVER THE SAME MAY BE CAUSED, REGARDLESS OF THE FAULT, PRE-EXISTING DEFECT OR STRICT LIABILITY OF COMPANY DIRECTLY OR INDIRECTLY ARISING OUT OF ANY GOODS PROVIDED BY COMPANY UNDER THIS AGREEMENT. NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, APPLICANT AGREES THAT (A) COMPANY'S ENTIRE LIABILITY AND APPLICANT'S EXCLUSIVE REMEDY (OTHER THAN WARRANTY CLAIMS), IN LAW AND EQUITY OR OTHERWISE WITH RESPECT TO ANY GOODS PROVIDED BY COMPANY UNDER THIS AGREEMENT IS SOLELY LIMITED TO THE AMOUNT PAID BY APPLICANT TO COMPANY FOR THE GOODS TO WHICH THE APPLICABLE CLAIM RELATES.

12. **TERMINATION.** In addition to any other remedies provided under this Agreement, Company may terminate this Agreement with immediate effect upon written notice to Applicant, if Applicant: (i) fails to pay any amount when due under this Agreement; (ii) has not otherwise performed or complied with any obligation under this Agreement, 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.

13. **ENTIRE AGREEMENT.** This Agreement constitutes the whole and entire agreement of the parties with respect to the subject matter contained herein, and supersedes all prior and contemporaneous understandings, agreements, representations and warranties, both written and oral, regarding such subject matter. This Agreement prevails over any of Applicant's general terms and conditions of purchase regardless of whether or when Applicant has submitted its purchase order or such terms. Fulfillment of Applicant's order does not constitute acceptance of any of Applicant's terms and conditions and does not serve to modify or amend this Agreement. No amendments to this Agreement shall be valid unless they are in writing and signed by the parties.

14. **AFFILIATES; CO-PACKERS.** Applicant acknowledges and agrees that Applicant is liable for the obligations of its subsidiaries, affiliates, co-packers, or any other party that places orders for goods under this Agreement. All obligations of Applicant and its affiliates, subsidiaries and co-packers under this Agreement are joint and several.

15. **RELATIONSHIP OF PARTIES; THIRD 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. 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 this Agreement.

16. **MISCELLANEOUS.** Applicant shall not assign any of its rights or delegate any of its obligations under this Agreement without the prior written consent of Company. Any purported assignment or delegation in violation of this section is null and void. No assignment or delegation relieves Applicant of its obligations under this Agreement. If any provision of this Agreement is found to be invalid or unenforceable, the remainder shall not be affected and shall be valid and enforceable to the fullest extent permitted by law. To the extent permitted by applicable law, the parties hereby waive any provision of law, which renders any provision hereof prohibited or unenforceable in any respect. No waiver by Company of any of the provisions of this Agreement is effective unless explicitly set forth in writing and signed by Company. 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. This Agreement shall be governed by the laws of the State of Nebraska, without regard to the conflict of law provisions thereof. Any action arising out of this Agreement or the parties' rights and duties hereunder shall be brought only in a state court located in Douglas County, Nebraska or the United States District Court for the District of Nebraska, and each party submits itself to the exclusive jurisdiction of such courts. Section F(1), Sections G(9), G(10), G(11), G(14) and this Section G(16) will survive the expiration or earlier termination of this Agreement, as well as any other provision that, in order to give proper effect to its intent, should survive such expiration or termination.