



# FANDIS NORTH AMERICA CORP

## TERMS AND CONDITIONS OF SALE February 4, 2017

### 1. INTRODUCTION

- 1.1. The terms and conditions contained herein (the "Agreement") apply to, are incorporated in, and form an integral and substantial part of, any quotation, order, purchase, sale, receipt, delivery, services, or use of any products ("Products") from Fandis North America or any of its subsidiaries or affiliates ("FNA").
- 1.2. The term "Buyer" shall mean the person, firm or corporation executing/submitting a purchase order for Products by phone, fax, electronic mail, or any other means. FNA and Buyer may hereinafter be referred to jointly as the "Parties" and individually as "Party".

### 2. ENTIRE AGREEMENT

- 2.1. This Agreement and the Order Confirmation (as defined herein) constitutes the entire and exclusive agreement between Buyer and FNA. This Agreement shall supersede all negotiations, representations, promises, warranties, understandings, agreements, or statements by any dealer, distributor, agent, salesman or employee of FNA. Without limiting the generality of the foregoing, this Agreement supersedes any terms and conditions of Buyer or contained in an order placed by Buyer.
- 2.2. FNA's failure to object to provisions contained in any communications from Buyer shall not be deemed a waiver of this Agreement.
- 2.3. Any changes to this Agreement must specifically be agreed to in writing by FNA before becoming binding on FNA.
- 2.4. In case of any conflict or inconsistency between Buyer's purchase order, the Order Confirmation, this Agreement and any other document, offer, counteroffer or communication relating to this transaction, then the following order of precedence shall apply to the extent necessary to resolve such conflict or inconsistency: (i) the Order Confirmation and (ii) this Agreement.
- 2.5. No course of prior dealings between the Parties and no usage of the trade shall be relevant to supplement or explain any term used in this Agreement. Acceptance or acquiescence in a

course of performance rendered under the Agreement shall not be relevant to determine the meaning of this Agreement even though the accepting or acquiescing party has knowledge of the nature of the performance and the opportunity for objection.

### 3. ORDERS

- 3.1. Each order and amendment to order shall: (a) be sent to FNA in writing via email or fax, even if Buyer previously communicated via telephone with a dealer, distributor, agent, salesman or employee of FNA; (b) clearly identify [*OR: attach*] the quote provided and the [*approval*] data sheet by FNA; (c) clearly identify the Buyer and its full address; (d) specify the quantities of Products ordered; (e) set forth the order codes of the Products or, for Products not contained in the Price List, provide a detailed description of the Products; (f) set forth any special packaging, customization, or processing requested or required by Buyer.
- 3.2. Each order shall be irrevocable, and may not be amended or cancelled by Buyer without FNA's written approval.
- 3.3. All orders are subject to FNA's approval by written confirmation (the "Order Confirmation"). FNA reserves the right at any time after receipt of Buyer's order to accept or decline such order, or any portion thereof.
- 3.4. FNA reserves the right, at FNA's sole discretion, to limit the quantity of items purchased and/or to prohibit sales to Buyer, notwithstanding any prior sales to Buyer.
- 3.5. Products ordered may become unavailable due to product or parts shortages, discontinuance of Products, or other reasons. In such event, FNA will notify Buyer without unreasonable delay. If a Product from an order becomes unavailable, then the order will be fulfilled based on the available Products.
- 3.6. FNA shall not accept any order for any Products or Services where the aggregate price for all Products listed thereon is less than \$100.00, exclusive of all taxes, shipping, insurance and other costs. Upon Buyer's request, FNA may waive this minimum order requirement, subject to an additional \$40.00 handling charge. All such orders must, and all invoices related thereto will list the handling charge as a separate line item.



#### 4. PRICES AND PAYMENT TERMS

- 4.1. FNA maintains a price list for Products (the "Price List"). The Price List is merely indicative, does not constitute an offer, and shall not be construed to bind FNA in any way whatsoever. The Price List can be modified by FNA at any time without notice. If Buyer places an order for Products and the price charged by Seller in the Order Confirmation is more than ten percent (10%) higher than the price listed on the Price List, Buyer shall have the right to cancel its order, in writing, within seven (7) days of receipt of the Order Confirmation.
- 4.2. The Price List does not include any sales tax that may apply to the sale of the Products. Buyer bears all responsibility for such taxes.
- 4.3. Prices for Products listed in the Price List are intended per unit, with standard packaging exclusive of charges for special packaging, customization, or processing requested or required by Buyer. For customized or made-to-order custom Products, FNA will inform Buyer of the price prior to issuing an Order Confirmation.
- 4.4. All payments shall be made in compliance with the payment terms set forth in the Order Confirmation. FNA reserves the right to modify its payment terms at any time for new orders.
- 4.5. If Buyer fails to pay any amount owed to FNA, FNA shall be entitled to suspend production and delivery of all of Buyer's orders until Buyer has paid all amounts owed to FNA. Buyer shall have no claim against FNA arising out of or relating to such suspension, even in the event that Buyer makes payment in full and FNA resumes production and delivery.
- 4.6. All payments shall be made to FNA at its address or to such persons at such places as set forth in the Order Confirmation. If Buyer is unaware or unsure of where payment is to be sent, Buyer shall contact FNA to request such information.
- 4.7. No debit notes, set-offs, deductions, discounts, rebates or credits of any kind are authorized, unless otherwise agreed to in writing by FNA.
- 4.8. If FNA extends credit to Buyer, and Buyer exceeds the limit of such credit, FNA reserves the absolute right to suspend all orders to the extent they exceed such credit limit.
- 4.9. In the event that Buyer fails to make payment in full by the payment date stated in an invoice

from FNA, such failure will constitute a material breach of contract by Buyer permitting FNA to suspend, or condition on advance payment, production, shipment, or delivery of any and all Products to Buyer, without notice, even if an Order Confirmation has been issued for such Products. Buyer shall pay to Seller interest on any unpaid amount at the maximum rate permitted by law, or at two percent (2%) per month, whichever is less, calculated daily and compounded monthly. Buyer shall reimburse FNA for all costs incurred in collecting any late payments, including, without limitation, attorneys' fees.

- 4.10. Buyer acknowledges that FNA may suspend production, shipment, or delivery of any and all Products to Buyer, without notice, in the event that Buyer has become the debtor in a bankruptcy case, becomes insolvent, or experiences a deterioration in its financial position, as determined by FNA in its sole discretion.

#### 5. DELIVERY TERMS

- 5.1. All sales and shipments of Products originating in Italy shall be Ex Works (EXW) Incoterms® 2010 FNA's warehouse specified in the Order Confirmation, unless otherwise provided in the Order Confirmation.
- 5.2. All sales and shipments of Products originating in the United States shall be FOB FNA's warehouse specified in the Order Confirmation, unless otherwise provided in the Order Confirmation.
- 5.3. Delivery and shipping dates are estimates only and not binding. A delivery delay of ninety (90) business days or less shall not entitle Buyer to refuse delivery, or to claim any damages, refunds, or set-offs. FNA reserves the right to make partial shipments.
- 5.4. If the Parties agree in writing to a binding and peremptory delivery date, and delivery is delayed for causes attributable solely to FNA, FNA's liability for such delay shall be limited to, as liquidated damages, 0.5% of the price of the delayed Products per each entire week of delay, up to maximum damages of 2% of the price of the delayed Products. No other responsibility shall be borne by the FNA due to delayed delivery.
- 5.5. If the Parties agree in writing that FNA shall arrange for transport of the Products to Buyer,



such transport shall be at Buyer's risk and the costs of transport shall be borne by Buyer.

## 6. INSPECTION AND ACCEPTANCE

6.1. Buyer shall inspect the Products within forty-eight hours of delivery ("Inspection Period"). Unless Buyer provides FNA with written notice during the Inspection Period of any claim for shortages of, Nonconformity (as herein defined) of, or Defects (as herein defined) that were or should have been apparent on reasonable inspection, such Products shall be deemed finally inspected, checked and accepted by Buyer. "Nonconforming or Nonconformity" with respect to Products means only that: (i) the Products are different than identified in the Order Confirmation or (ii) the Products' labels or packaging incorrectly identify their contents. "Defect or Defective" means nonconformance to the Product Limited Warranty under Section 8.

## 7. RETURNS

7.1. Any return of Defective or Nonconforming Product must be authorized in advance, in writing, by FNA. Buyer shall fill out a request form identifying the Products Buyer seeks to return, and stating the reason for the return. If Buyer contends that the return is due to any reason within FNA's control, Buyer shall provide a detailed explanation, together with photographs or other documentation of its contention.

7.2. Buyer's submission of a return request shall not relieve it of its obligation to pay the full invoiced price for the Products.

7.3. The receipt by FNA of Products whose return has not been approved in writing shall not be deemed approval of the return, and Buyer shall bear all costs and risks relating to such Products.

7.4. Any shipments of Products from FNA to Buyer, on account of a return, shall be governed by the same conditions as those that govern initial deliveries.

7.5. In the event that Buyer returns goods that differ from those it was authorized to return, Buyer shall withdraw the Products at its own expense. FNA shall be entitled to dispose of the Products five (5) days after sending due notice to Buyer advising that the return was not authorized.

7.6. If, after receiving a request for a Product return, FNA determines, at its sole discretion, that any

Product is Defective or Nonconforming, FNA reserves the right to either (i) replace the Defective or Nonconforming Products with conforming Products, or (ii) credit or refund Buyer the price for such Defective or Nonconforming Products. Buyer acknowledges and agrees that the remedies set forth in Section 7.6 are Buyer's exclusive remedies for the delivery of Defective or Nonconforming Products.

7.7. Buyer shall not be entitled to any return, refund, or claim arising out of Products that have undergone any modification or processing by Buyer.

7.8. Any return of promotional Products shall be expressly denied, without prejudice to what is provided for in this section.

7.9. If FNA authorizes a return, Buyer shall return the Products no later than ten (10) days from the date of the authorization.

7.10. Buyer shall return Defective or Nonconforming Products to FNA in accordance with all instructions and procedures provided by FNA, including and instructions as to packaging and carrier. FNA reserves the right to reject any returned Products if Buyer fails to comply with FNA's instructions.

## 8. PRODUCT LIMITED WARRANTY

8.1. The Products are covered by the version of the FNA Limited Warranty that is posted on the FNA website ([www.fandisna.com](http://www.fandisna.com)) as of the date of the Order Confirmation or provided with the Products, which is incorporated by reference into this Agreement.

## 9. LIMITATION OF LIABILITY; DISCLAIMERS

9.1. REGARDLESS OF WHETHER ANY REMEDY SET FORTH HEREIN FAILS OF ITS ESSENTIAL PURPOSE, FNA (INCLUDING ITS SUBSIDIARIES, AFFILIATES, OFFICERS, DIRECTORS, EMPLOYEES, AGENTS OR SUBCONTRACTORS, ALL OF WHICH ARE REFERRED TO HEREIN COLLECTIVELY AS THE "AFFILIATES") SHALL NOT BE LIABLE UNDER ANY CIRCUMSTANCE TO BUYER OR ANY OTHER PARTY FOR ANY SPECIAL, CONSEQUENTIAL, INCIDENTAL OR EXEMPLARY DAMAGES ARISING OUT OF OR IN ANY WAY CONNECTED WITH THE PRODUCTS OR OTHERWISE, NOR FOR ANY DAMAGES (WHETHER DIRECT OR CONSEQUENTIAL) FOR LOST PROFITS,



LOSS OF THE PRODUCTS OR ANY ASSOCIATED EQUIPMENT, COST OF CAPITAL, COST OF SUBSTITUTE OR REPLACEMENT EQUIPMENT, FACILITIES OR SERVICES, DOWN TIME, BUYER'S TIME, LOST DATA, INJURY TO PROPERTY OR ANY DAMAGES OR SUMS PAID BY BUYER TO THIRD PARTIES, EVEN IF FNA OR ANY OF ITS AFFILIATES HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATION OF LIABILITY SHALL APPLY WHETHER ANY CLAIM IS BASED UPON PRINCIPLES OF CONTRACT, WARRANTY, NEGLIGENCE, STRICT LIABILITY OR OTHER TORT, BREACH OF ANY STATUTORY DUTY, PRINCIPLES OF INDEMNITY OR CONTRIBUTION, THE FAILURE OF ANY LIMITED OR EXCLUSIVE REMEDY TO ACHIEVE ITS ESSENTIAL PURPOSE, OR OTHERWISE. SOME STATES/JURISDICTIONS MAY NOT ALLOW THE LIMITATION OR EXCLUSION OF LIABILITY OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATION OR EXCLUSION MAY NOT APPLY TO YOU. IN SUCH STATES, FNA'S LIABILITY SHALL BE LIMITED TO THE GREATEST EXTENT PERMITTED BY LAW.

- 9.2. If, notwithstanding the other provisions of this Agreement, FNA or any of its Affiliates is found to be liable to Buyer for any damage or loss which arises out of or is in any way connected with the Product or this Agreement, the total liability of FNA or its Affiliates for any loss, damage or claim, whether in contract, tort (including FNA's active or passive negligence or strict liability) or otherwise, arising out of, connected with, or resulting from this Agreement, the performance or breach of any purchase order or contract of sale accepted or executed by FNA pursuant to this Agreement, or from the manufacture, sale, delivery, resale, inspection, testing, or use of any Product or from the performance of any service shall not, in any event, exceed the price allocable to the Product or service which gives rise to the claim, loss or damage.

#### **10. PATENTS, TRADEMARKS, DISTINCTIVE SIGNS, SOFTWARE**

- 10.1. Buyer expressly acknowledges that the FNA name/mark, its registered distinctive signs, its graphic composition, the design and know-how relating to the Products, and all other patents, copyrights, trademarks and proprietary rights

relating to the Products (collectively, "Intellectual Property") are the property of FNA.

- 10.2. Buyer is forbidden from copying FNA's Products.
- 10.3. Buyer shall not remove or modify any label or marking affixed to the Products relating to the Intellectual Property.
- 10.4. Buyer acknowledges that the FNA brand has acquired a remarkable symbolic value and conveys a high standard of quality and a professional image that are internationally recognized.

#### **11. FORCE MAJEURE**

In the event that either Party is unable to perform any of its obligations under this Agreement, or to enjoy any of its benefits because of (or if loss of the Products is caused by) natural disaster, riots, strikes, freight embargoes, acts of God, acts of war or hostilities of any nature, laws, regulations, actions or decrees of governmental bodies (whether foreign or domestic, federal, state, county or municipal) or communications line failure not the fault of, or that could not reasonably have been prevented or avoided by, the affected Party (hereinafter referred to as a "Force Majeure Event" or "Event"), the Party who has been so affected shall promptly give notice to the other Party and shall notify the other Party in writing of the nature of that event and the prospects for that Party's future performance and shall thereafter, while that event continues, respond promptly and fully in writing to all requests for information from the other Party relating to that event and those prospects. Upon receipt of such notice, all obligations under the purchase order shall be immediately suspended. If the period of nonperformance exceeds thirty (30) days from the receipt of notice of the Force Majeure Event, the Party whose ability to perform has not been so affected may give written notice to terminate the purchase order effective immediately, without liability. Except as provided herein, delays in delivery due to Force Majeure Events shall automatically extend the delivery date for a period equal to the duration of such Events; any warranty period affected by a Force Majeure Event shall likewise be extended for a period equal to the duration of such Event.

#### **12. RETENTION OF TITLE**

Title to the Products shipped to Buyer shall remain with Seller as security until full payment for such Products is made by the Buyer. Buyer shall indemnify Seller for all loss, liability, expenses, costs and damages relating to or arising from the Products prior to transfer of title to the Products pursuant to the terms hereof.



**13. WAIVERS AND AMENDMENTS**

The delay or failure by either Party to exercise or enforce any of its rights under this Agreement shall not constitute or be deemed a waiver of that Party's right thereafter to enforce those rights, nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right. No amendment or waiver of any provision of this Agreement shall be effective unless it is in writing and signed by a legal representative of the Party against which it is sought to be enforced.

**14. SEVERABILITY**

If any provision of this Agreement is held to be void, the remaining provisions shall remain valid and shall be construed in such a manner as to achieve their original purposes in full compliance with the applicable laws and regulations.

**15. GOVERNING LAW**

This Agreement and the rights and obligations of the Parties shall be governed in all respects by, and construed in accordance with, the laws of the State of New York (without regard to the principles of conflicts of laws).

**16. NOTICES**

All notices, requests, demands, applications, services of process, and other communications that are required to be or may be given under this Agreement shall be in writing and shall be deemed to have been duly given if (i) sent by facsimile transmission or by electronic mail (receipt confirmed); provided that in the case of electronic mail or facsimile transmission, each notice or other communication shall be confirmed within one business day by dispatch of a copy of such notice pursuant to one of the other methods described herein, (ii) delivered by nationally/internationally recognized courier service (delivery receipt requested) with charges paid by the dispatching party or (iii) if the address of the recipient is within the United States, mailed, U.S. Mail registered or certified mail, postage prepaid, return receipt requested, to the Party to receive such notice, at the addresses set forth on the face of the Order Confirmation or to such other address that may be designated by the receiving party in writing. Each such notice shall be effective (i) if delivered by courier, upon actual receipt by the intended recipient, or (ii) if sent by facsimile transmission or by electronic mail, on the date of transmission unless transmitted after normal business hours during a business day, in which case on the following date, (iii) if mailed, upon the date of first attempted delivery or (iv) in any case, when actually received.

**17. JURISDICTION.**

The Parties hereby consent to the sole and exclusive jurisdiction of the courts of the State of New York or the United States District Court for the Southern District of New York for purposes of any action or proceeding brought by either of them on or in connection with this Agreement on any alleged breach thereof and hereby waive any right to assert that such court constitutes an inconvenient or improper forum.

**18. 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 this Agreement.

For acceptance of the Terms and Conditions of sale

The Buyer

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Date, (stamp and signature)