

## PAJARITO POWDER, LLC – TERMS AND CONDITIONS OF SALE

- 1. Controlling Terms and Conditions.** These terms and conditions of sale of Pajarito Powder, LLC ("Seller") and any attachments hereto take precedence over Purchaser's additional or different terms and conditions to which notice of objection is hereby given. Acceptance of Purchaser's order is expressly conditioned upon Purchaser's acceptance of these terms and conditions. These terms and conditions, together with any other written agreement directly related to this transaction shall constitute the entire agreement between the parties with respect to the goods sold to Purchaser hereunder.
- 2. Payment Terms.** Unless otherwise stated on the face of this quote or invoice, the invoice is due and payable Net 30 days from the date of the invoice. No discount is allowed on sales or federal excise taxes and/or freight charges. Unless otherwise stated on the face of the invoice, payment terms for export transactions are payment in advance, payment by irrevocable Letter Of Credit (LOC), or payment of cash to documents. All other methods of payment must be arranged in writing prior to acceptance of the order. No discount is available for export transactions unless otherwise stated on the face of the invoice. All payments made on the invoice must be made in U.S. dollars. If the invoice involves payment for goods from an entity organized outside of the United States, all payments to be made on the invoice shall have been approved by all appropriate government foreign exchange control agencies and Purchaser shall immediately upon demand provide Seller with evidence of such approval. Seller retains a security interest in the goods until payment in full is received.
- 3. Variation in Goods.** Delivery of goods pursuant hereto shall be subject to normal variation in weight, color, size, quantities and similar characteristics as are standard.
- 4. Risk of Loss, Shipment, Freight Charges and Packing.** Title and all risk of loss to the goods shall pass to Purchaser upon delivery. Delivery shall occur FOB Seller's place of business in Albuquerque, NM. Purchaser shall pay all rigging, draying, insurance and transportation charges. Seller shall ship in accordance with Purchaser's shipping instructions, or if Purchaser's instructions are deemed unsuitable, Seller reserves the right to ship by the most appropriate method. Unless otherwise agreed to in writing by Seller, all products shall be packed, if appropriate, for shipment and storage in accordance with standard commercial practices. All packing will conform to requirements of carrier's tariffs. Seller's weights taken at shipping point shall govern. If shipment is to a location outside the state of New Mexico, Purchaser represents and warrants that the goods will be first used outside the state of New Mexico.
- 5. Claims and Limitation Period.** Claims for nonconformity of the goods shall be made in writing to Seller within ten (10) days after the discovery thereof, and in any event within in thirty (30) days after delivery. All other claims must be asserted in writing within ten (10) days after delivery or the scheduled delivery if the claim is for non-delivery. Any notice of claim must specify the nature of the claim. Purchaser's failure to notify Seller in writing within the applicable time frame of any claim shall constitute an absolute unconditional waiver of such claim. An action on any claims must be commenced within six months from the date of delivery, or after the scheduled date of delivery, as the case may be, or such other period as conforms to law not to exceed one year, or the claim will be forever barred. After notice of any claim, Seller shall be afforded a reasonable opportunity to inspect the goods and effect a cure of any defects, if Seller in its sole discretion elects to do so.
- 6. Limitation of Liability.** In no event shall Seller be liable for punitive, incidental or consequential damages to person or property, loss of use, loss of time, inconvenience, equipment rental, loss of earnings or profits or any other commercial loss. The remedies of Purchaser as set forth herein are exclusive and the liability of Seller with respect to the sale, delivery or resale of any goods pursuant to this contract whether in contract, in tort, under any warranty or otherwise, shall not exceed the difference between the price of the goods as specified in this contract and the value of the goods as delivered by Seller. Seller shall not be liable for any loss or damage arising from delay or inability to deliver beyond Seller's control, improper maintenance, alteration or misuse of the goods.
- 7. Taxes.** Liability of any sales, use, excise, transaction, privilege, gross receipts, retailers' occupational tax or any similar tax levied in connection with the sales arising from this contract or any liability or interest charge due on these taxes will be the sole responsibility of and be payable by Purchaser even if not collected originally by Seller, unless an approved State of New Mexico sales tax exemption or resale certificate is on file with Seller. In the event Seller pays such amounts, Purchaser will immediately reimburse Seller for such amounts.
- 8. Import/Export License.** Any import or export license required with respect to the goods sold pursuant hereto shall be Purchaser's sole responsibility.
- 9. UN Convention on International Contracts Disclaimed; Governing Law.** Purchaser and Seller hereby expressly agree that the United Nations Convention on Contracts for the International Sale of Goods ("CISG") shall not be a part of the law applicable to this contract. This contract shall be governed by and construed in accordance with the Laws of the State of New Mexico and Purchaser hereby consents to the jurisdiction of and agrees that any legal action commenced with respect to any dispute hereunder shall take place in the state and federal courts located within Bernalillo County, New Mexico.
- 10. Representations of Performance.** By executing this contract and other documents in connection herewith, and by accepting the goods sold pursuant hereto, Purchaser represents and warrants to Seller that it is solvent and financially able to pay the purchase price for the goods; and Seller's performance pursuant hereto is expressly in reliance on such representation and warranty.
- 11. Late Charges/Attorneys' Fees.** Purchaser agrees that in the event it fails to pay the invoice on the date such invoice is due and payable or if Purchaser pays in full or in part by a check that is returned unpaid to Seller due to insufficient funds or any other reason, Purchaser shall pay a late charge of one and one-half percent (1½%) for each month or partial month, compounded monthly, on all outstanding overdue balances. In the event the late charge is in excess of that permitted by applicable state law, then the late charge will be the highest allow by such state law. Additionally, each returned check will be subject to a separate one-time service charge of \$25.00 with any other remedies provided by law. Seller shall be entitled to recover its reasonable costs, including attorneys' fees, in any action or if it refers this agreement to an attorney for enforcement, in addition to any other relief it may be entitled.
- 12. No Waiver.** No waiver of a breach of any provision of this contract shall constitute a waiver of any other breach of such provision.
- 13. Return Goods.** Seller shall, in its sole discretion, determine whether any goods may be returned for credit. Returned goods must be accompanied by the original invoice and invoice number and will be subject to a service charge for the return of the goods. The service charge for return goods will be equal to the manufacturer's restocking charge, if any, plus Seller's estimate of the actual damages which will be incurred by Seller, including, but not limited to Seller's cost for providing such goods to Purchaser, receiving and restocking such goods, and the Seller's lost profit on the sale of such goods. Special Order goods may not be returned. Special Order goods are goods not normally stocked by Seller at the location at which goods are purchased.
- 14. Cancellation.** If Purchaser cancels this contract or any portion of this contract, Purchaser will be liable for a service charge of such cancellations, including, but not limited to, Seller's costs and Seller's lost profit on the sale of such goods. Special Order goods are non-cancelable.
- 15. Change of Delivery Date.** If Purchaser issues a change order causing a delay in the delivery date, Purchaser shall be subject to a service charge equal to Seller's estimate of the actual damages which will be incurred by Seller on account of Purchaser's change order, including, but not limited to, Seller's cost of providing and restocking such goods, if appropriate. In addition, any such change by Purchaser establishing an alternative delivery date greater than thirty days from Purchaser's original order date will constitute a new order for purposes of determining the appropriate list price. Special Orders: No change in the delivery date is allowed after the Special order has been placed.
- 16. Disputed Invoice.** In the event Purchaser disputes an invoice, in order to avoid assessment of late charges on the disputed amount Purchaser must notify Seller in writing within ten (10) days after receipt of the invoice and, if the invoice amount is in excess of \$25,000, Purchaser shall pay into an interest-bearing escrow account in a bank in Albuquerque, New Mexico, agreeable to Seller, the disputed portion of any invoice until resolution of the dispute. Payment of any undisputed amount of an invoice must be timely made. If Purchaser meets these conditions imposition of all service charges shall be suspended while the dispute is pending. If it is established that the disputed amount is due and owing to Seller, the full amount shall be immediately released to the Seller.
- 17. Suspension of Seller's Duty to Perform.** If Purchaser fails to obtain necessary import license or permit or fails to make timely payment of any invoice, including those invoices dated before or after the date of this invoice, Seller may, in its sole discretion and without waiving any other rights or remedies which Seller may have, suspend delivery on any unfilled purchase orders from Purchaser and unilaterally cancel any obligation of Seller to later perform any unperformed obligations under any contract with Purchaser. PURCHASER HEREBY EXPRESSLY WAIVES ANY RIGHT OR CAUSE OF ACTION AGAINST SELLER, IN CONTRACT, IN TORT OR OTHERWISE FOR ANY SPECIAL, DIRECT OR INDIRECT, OR CONSEQUENTIAL DAMAGES INCURRED AS A RESULT OF SELLER'S CANCELLATION OF ITS FURTHER OBLIGATIONS UNDER THE CONTRACT, AND REFUSAL TO DELIVER UNDER THIS PROVISION SHALL NOT BE CONSIDERED A BREACH OF THE CONTRACT BY SELLER. AS OBTAINING IMPORT LICENSES OR PERMITS AND THE TIMELY PAYMENT OF ALL INVOICE SHALL BE CONSIDERED A NECESSARY CONDITION PRECEDENT TO THE SELLER'S DUTY TO PERFORM. Failure by the Seller to exercise its rights under this provision shall not constitute waiver of its rights to do so in the future. Cancellation of Seller's duty to perform under this provision shall not negate Purchaser's obligations to perform its duties under any contract with Seller.
- 18. Foreign Government and Indian Nation.** If Purchaser is a foreign government or an Indian nation, PURCHASER HEREBY EXPRESSLY WAIVES ITS DEFENSE OF SOVEREIGN IMMUNITY IN THE EVENT OF A DISPUTE BETWEEN PURCHASER AND SELLER REGARDING THIS INVOICE AND PURCHASER EXPRESSLY ACQIESCES TO THE JURISDICTION OF THE UNITED STATES FEDERAL AND NEW MEXICO STATE COURTS located in Bernalillo County, New Mexico.
- 19. Indemnification.** Purchaser agrees to indemnify, hold harmless and defend Seller and its officers, directors, agents and employees from and against any and all claims, liabilities, costs and expenses arising out of or related to Purchaser's use of the goods, or in any way involving injury to person or property or accident occasioned by the goods sold by Seller to Purchaser, except that nothing herein obligates Purchaser to indemnify, hold harmless and defend any claims where such indemnification would be against public policy.
- 20. Severability.** If one or more of the provisions contained in this invoice shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this contract, but this contract shall be construed as is such invalid, illegal, or unenforceable provision had never been contained.
- 21. Warranties and Disclaimer of Warranty.** Seller warrants to the earlier of (a) incorporation into a further product (such as a CCM, MEA or fuel cell stack), or (b) ninety (90) days if stored under normal conditions (sealed container, away from direct sunlight, normal humidity environment, temperatures between 0°C and 30°C) from the date of delivery of the goods purchased by this contract that the goods will be free of defects in material and workmanship. Seller's sole obligation and Purchaser's sole remedy under this Warranty is repair or replacement of the goods (or defective portion thereof) which Seller finds is defective by reason of defects in material or workmanship within the warranty time-period. Any repair or replacement performed under this Warranty shall be performed by the Seller's or designated by the Seller. User shall bear all incidental expenses of repair, including costs of transportation and new parts. Seller's liability is further limited as provided by paragraph 6 of these terms and conditions. SELLER DISCLAIMS ALL OTHER WARRANTIES, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. The above warranty shall be null and void in the event that the goods are altered by the Purchaser, have been, in Seller's judgment, subject to negligence, improper maintenance, misuse (including exceeding specifications for feed size and/or maximum speeds and feeding of non-crushable materials into the crusher), or failure to replace worn parts as needed.
- 22. Intellectual Property.** The Purchaser will not engage in any physical analysis of goods sold nor attempt to reverse-engineer. No analysis may be performed without the prior consent, in writing, of the Seller.