

**NDS SURGICAL IMAGING**  
**STANDARD CUSTOMER TERMS AND CONDITIONS OF SALE**

ALL SALES MADE BY NDS SURGICAL IMAGING, LLC (“NDS”) TO THE CUSTOMER (“CUSTOMER”) ARE EXPRESSLY CONDITIONED ON CUSTOMER’S ACCEPTANCE OF THE FOLLOWING TERMS AND CONDITIONS. THESE TERMS AND CONDITIONS CONSTITUTE THE ENTIRE AGREEMENT BETWEEN NDS AND CUSTOMER AND SUPERSEDE ALL PREVIOUS NEGOTIATIONS, DISCUSSIONS AND UNDERSTANDINGS, WHETHER ORAL OR WRITTEN, BETWEEN THE PARTIES WITH RESPECT TO THE SUBJECT MATTER HEREOF UNLESS THERE IS A WRITTEN AGREEMENT, SIGNED BY NDS AND CUSTOMER, IN WHICH CASE SUCH AGREEMENT SHALL SUPERSEDE WITH RESPECT TO ANY INCONSISTENT TERMS SET FORTH HEREIN. NDS WILL NOT BE BOUND BY ANY TERMS OF CUSTOMER’S PURCHASE ORDER OR OTHER DOCUMENTS THAT ARE ADDITIONAL TO OR INCONSISTENT WITH THE TERMS HEREIN AND ALL SUCH TERMS SHALL BE EXCLUDED. THESE TERMS MAY ONLY BE AMENDED OR WAIVED BY A WRITING SIGNED BY AN AUTHORIZED REPRESENTATIVE OF NDS.

**1 Terms and Conditions of Supply of Products**

**1.1 Order and Acceptance.** All orders for products shall be made by written purchase order. No order shall be binding upon NDS until accepted by NDS in writing, and NDS shall have no liability to Customer with respect to purchase orders that are not accepted. Customer shall submit purchase orders to NDS in accordance with NDS’s then current lead times. All orders are non-cancellable and may not be modified by Customer unless otherwise approved in writing by NDS.

**1.2 Delivery, Shipping, Risk of Loss.** NDS will use reasonable commercial efforts to deliver products at the times specified in NDS’s acceptance of Customer’s purchase order, provided, however, that all delivery dates are estimates only and deliveries may be in installments. All products delivered hereunder will be suitably packed for shipment in NDS’s standard containers, marked for shipment to the address specified in Customer’s purchase order, and shipped, absent contrary terms approved by NDS either through a separate writing or on the face of an order acknowledgement, Ex Works San Jose, CA Incoterms 2000. The delivery point for purposes of title transfer and risk of loss, shall be the NDS facility issuing the order acknowledgement or such other location as the parties shall agree in writing (“**Delivery Point**”). All freight, insurance and other shipping expenses from the Delivery Point will be borne by Customer. If NDS fails to deliver an order to Customer that was acknowledged by NDS within a reasonable period of time following the delivery date furnished to Customer, NDS’s sole liability and Customer’s sole remedy will be to cancel the delayed order free of charge.

**1.3 Acceptance of Products.** Customer shall be deemed to have accepted products upon shipment from the Delivery Point provided that NDS shall promptly issue a credit to Customer (following return of non-conforming products) for amounts paid by Customer with respect to such order for products for which the type or quantity of products does not conform to Customer’s purchase order. Customer must notify NDS in writing of such non-conformance within five (5) business days following receipt of such products.

**1.4 Price; Payment Terms.** Prices for products shall be NDS’s standard list price unless otherwise indicated by NDS (“**Purchase Price**”). NDS has the right to revise the Purchase Price upon advance written notice to Customer. Price increases will apply to all purchase orders received after the effective date of the price revision. Price decreases will apply to all accepted but unshipped purchase orders. Subject to NDS’s continuing approval of Customer’s credit status and financial condition, all payments shall be made in U.S. dollars (or other currency stated in NDS’s quote or purchase order acknowledgment) by check or wire transfer to an account designated by NDS and shall be due thirty (30) days from invoice date. NDS, in its sole discretion, reserves the right to specify, and to change from time to time, Customer’s credit line and payment terms. Any invoiced amount not paid when due shall be subject to a service charge equal to the lesser of one and one-half percent (1.5%) per month or the maximum rate permitted by law. If NDS undertakes collection or enforcement efforts, Customer shall be liable for all costs thereof, including attorney’s fees.

**1.5 Taxes.** In addition to the Purchase Price, Customer will be responsible for payment of all taxes (including without limitation, withholding, excise, sales, value-added, and use taxes) and customs duties paid or payable, however designated, levied, or based, but exclusive of taxes based on NDS’s net income, unless Customer provides a certificate of tax exemption to NDS. Customer shall be deemed the “importer of record” on any shipments made to locations designated by

Customer which are outside of the country of the Delivery Point and on any product returns pursuant to Section 4.3.

**2 Substitutions and Modifications.** NDS will have the right to make substitutions and modifications in the specifications or composition of products or protocols related to products sold by NDS provided that such substitutions or modifications will not materially affect overall product performance, and that any changes which affect form, fit or function of products ordered by Customer, shall not be made without Customer’s consent.

**3 Confidentiality**

**3.1 “Confidential Information”** means any proprietary information disclosed by one party to the other that is in written, graphic, machine readable or other tangible form and is marked “Confidential” or “Proprietary” or in some other manner to indicate its confidential nature. A product and related documentation will be deemed to be the Confidential Information of NDS whether marked as such or not. Confidential Information may also include oral disclosures provided that the information is designated as confidential at the time of disclosure and reduced to a written summary by the disclosing party within forty-five (45) days after its oral disclosure, which is marked in a manner to indicate its confidential nature and delivered to the receiving party. Confidential Information will not include any information that (a) was publicly known and made generally available prior to the time of disclosure by the disclosing party; (b) becomes publicly known and made generally available after disclosure by the disclosing party to the receiving party through no action or inaction of the receiving party; (c) is already lawfully in the possession of the receiving party at the time of disclosure; (d) is obtained by the receiving party from a third party without a breach of the third party’s obligations of confidentiality; or (e) is independently developed by the receiving party without use of or reference to the disclosing party’s Confidential Information. The parties agree that information disclosed by Customer regarding current or future NDS product functions or features shall not be deemed Customer’s Confidential Information, unless otherwise agreed to in writing by NDS.

**3.2 Non-Use and Non-Disclosure.** Each party will (a) treat as confidential all Confidential Information of the other party; (b) not disclose the Confidential Information of the other party to any third party, except on a “need to know” basis to third parties that have signed a non-disclosure agreement containing provisions substantially as protective as the terms set forth herein, provided that the disclosing party has obtained the written consent to the disclosure from the other party; and (c) will not use the Confidential Information of the other party except in connection with performing its obligations or exercising its rights under these terms. Each party is permitted to disclose the other party’s Confidential Information if required by law so long as the other party is given prompt written notice of the requirement prior to the disclosure and assistance in obtaining an order protecting the information from public disclosure. Without limiting the foregoing, the recipient shall not reverse engineer or otherwise perform any analytical experiments on any Confidential Information of the disclosing party.

**4 Limited Warranty and Disclaimer**

**4.1 Limited Product Warranty.** NDS warrants and represents that the product, and any accompanying product accessories, shall be in compliance with the specifications provided by NDS therefore and shall be free from defects in materials and workmanship as defined in such specifications for a period of twelve (12) months (or such longer period as set forth in a written extended warranty purchased in connection with such

product or if the product is quoted by NDS to Customer in writing with a longer warranty period, in which case, such longer period shall apply) following the dates of shipment of the products by NDS. Notwithstanding the foregoing, such warranty may be extended for an additional three (3) month period, pursuant to prior written approval by NDS, with respect to any product purchased by Customer that is intended to be held by Customer in inventory prior to resale by Customer. Furthermore, warranty periods for software products shall be as stated in the applicable software license (which may be less than 12 months). Any non-warranty repairs performed by NDS, which are paid for in full by Customer, shall be warranted for ninety (90) days from date of shipment of such repaired product to Customer. NDS shall not be liable for any breach of these warranties which might arise, or be caused by Customer, its distributors or an end-user, as a result of, or connected with, to the extent of or otherwise attributable to: (i) misuse, mishandling and/or improper operation, including the opening or disassembly of any product; (ii) modifications or alterations performed by any person or entity, other than NDS or an authorized repair facility of NDS; (iii) servicing or repair of the product (including, without limitation, installing periodic software updates) by any person or entity other than by NDS or an authorized repair facility of NDS, (iv) use in combination with adaptors and/or equipment from other manufacturers, except as may be approved by NDS; or (v) Customer's failure to apply software/firmware updates or hardware replacement parts as indicated by NDS, to the extent that damages would have been prevented by such application. This Section 4.1 sets forth the sole and exclusive remedy for a breach by NDS of the product warranty described in this Section 4.1.

**4.2 Warranty Disclaimer.** EXCEPT FOR THE EXPRESS WARRANTY PROVIDED IN ACCORDANCE WITH SECTION 4.1, NDS MAKES NO ADDITIONAL REPRESENTATION OR WARRANTY OF ANY KIND WHETHER EXPRESS, IMPLIED (EITHER IN FACT OR BY OPERATION OF LAW), OR STATUTORY, AS TO ANY MATTER WHATSOEVER. NDS EXPRESSLY DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY, NON-INFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE. CUSTOMER AND ITS DISTRIBUTORS WILL NOT HAVE THE RIGHT TO MAKE OR PASS ON ANY REPRESENTATION OR WARRANTY ON BEHALF OF NDS TO ANY DISTRIBUTOR, END-USER, OR OTHER THIRD PARTY. Customer and its distributors will not have the right to make or pass on any representation or warranty on behalf of NDS to any distributor, end user, or other third party. No oral or written information or advice given by NDS or its employees will create a warranty or in any way increase the scope of the limited warranties set forth herein, and Customer may not rely on any such information or advice.

**4.3 Repair Services/RMA.** Customer shall immediately notify NDS, by rapid means of communication, if it becomes aware that a product fails to confirm to a NDS warranty contained in Section 4.1. To return a product to NDS as provided by Section 4.1, Customer will request a Return Material Authorization ("**RMA**") number from NDS. Returns made pursuant to an RMA shall be freight pre-paid by Customer and properly insured, in its original shipping carton (if available) with the RMA number displayed on the outside of the carton. In addition, NDS's standard evaluation charge shall apply to any evaluations conducted by NDS for a product which is not covered by the warranty set forth in Section 4.1 and which was not approved for repair by Customer or its designee within five (5) days following such evaluation, or a product for which NDS was unable to reproduce the failure. Upon receipt of the defective product and verification of any claim of defect or nonconformity of a product to its specifications, NDS shall use commercially reasonable efforts to correct the defect or provide the Customer with a new or refurbished replacement product or parts thereof to the extent necessary to honor NDS's warranties contained in Section 4.1. NDS shall repair or replace a defective product at NDS's expense per the terms of NDS's applicable warranty for such product. To the extent that NDS is unable to repair or replace the defective product pursuant to Section 4.3, NDS may elect, at its sole option, to take back the product and refund the Customer the Purchase Price. This Section 4.3 shall be superseded by the terms set forth in a written extended warranty purchased in connection with a product. For products returned for repair from any country other than the country of the original Delivery Point, the shipment of defective products to NDS shall be DDP Delivery Point Incoterms 2000, and the shipment of the return of a repaired or replaced product to Customer shall be Ex-Works Delivery Point Incoterms 2000, and

Customer shall maintain title to the product and bear the risk of loss and all costs associated with such shipments.

## **5 Legal Compliance**

**5.1 Compliance with Laws.** NDS represents and warrants that it shall manufacture the products and Customer represents that it shall resell and distribute such products in compliance with all application international, federal, state, and local statutes, laws and regulations. Specifically, Customer acknowledges that it is familiar with and shall comply with and be solely responsible for its obligation under all laws, rules and regulations as they pertain to the responsibility of a distributor of electronic medical products in the territories in which such products are resold and distributed.

**5.2 End-User Customer Complaints & Corrective Actions.** Customer shall be responsible for complying with applicable regulatory procedures relating to end-user customer complaints, incidents and corrective actions, including without limitation, investigating complaints by Customer's end-user customers relating to the products, filing with the U.S. Food and Drug Administration (or foreign equivalent regulatory authority) reports relating to device deficiencies, if and to the extent needed, and maintaining the appropriate records regarding corrective actions taken in connection therewith. Customer shall inform NDS immediately at such time as it becomes aware that an incident has occurred and will maintain any records of all such incidents and any corrective actions undertaken. If NDS decides to recall, replace or take other action with respect to any product, it shall notify Customer by rapid means of communication and Customer shall immediately cease distribution and sales of any units of product in its possession or control, which are subject to the action until the course of action to be taken has been determined. Any documentation filed with any regulatory authority by Customer shall also be provided contemporaneously to NDS.

**5.3 Corrupt Practices.** Customer shall ensure that its agents and employees, and its distributors, and any of their respective agents and employees, comply with the U.S. Foreign Corrupt Practices Act (or other similar laws promulgated and administered by the government of any country having jurisdiction over the parties or the transactions contemplated herein), by not directly or indirectly making any offer, payment, or promise to pay, authorize payment; or offer a gift, promise to give, or authorize the giving of anything of value for the purpose of influencing any act or decision (including a decision not to act) of an official of any government or inducing such a person to use his or her influence to affect any such governmental act or decision in order to assist Customer, its distributors or NDS in obtaining, retaining or directing any business.

**5.4 Import and Export Licenses.** Customer shall, at its own expense, obtain all import and export licenses and permits, pay customs charges and duty fees, and take all other actions required to accomplish the export and import of the products purchased by Customer. Customer understands that NDS is subject to regulation by agencies of the U.S. Government, including the U.S. Department of Commerce, which prohibit export or diversion of certain technical products to certain countries.

**6 Intellectual Property Indemnification.** NDS shall have the right and agrees that it will, at its own expense, defend and/or settle all suits or proceedings instituted against Customer to the extent based on any claim that any product sold hereunder constitutes an infringement of any U.S. patent or copyright, existing as of the date such product was sold to Customer, and NDS will pay damages finally awarded against Customer in such suits or proceedings, provided, that Customer (i) gives immediate written notice to NDS of such suits or proceedings, and (ii) gives NDS through its counsel sole control over the defense and/or settlement of the same and gives NDS all needed information, assistance, and authority to enable NDS to do so. Notwithstanding the foregoing, NDS shall not be obligated to indemnify or be liable for costs and damages if the infringement arises out of (a) Customer's contributory infringement; (b) the combination or incorporation of one or more NDS products with any other products or components, or (c) any use for a purpose or application for which the product is not indicated. NDS's obligations hereunder shall not apply to any infringement occurring after Customer has received notice of such proceeding or other communication alleging the infringement unless NDS has given written permission for such continuing use. If the product is enjoined or NDS reasonably believes the product may infringe any U.S.

patent or copyright, NDS, within a reasonable time, may, at its option, either (I) secure for Customer the right to continue using the product by procuring for the Customer a license, or by some other means, or (II) at NDS's own expense, replace the product with a non-infringing product, or (III) remove the enjoined product and refund the sum paid therefore. THE FOREGOING STATES NDS'S ENTIRE LIABILITY AND OBLIGATION (EXPRESS, STATUTORY, IMPLIED OR OTHERWISE) WITH RESPECT TO INTELLECTUAL PROPERTY INFRINGEMENT OR CLAIMS THEREFORE.

**7 Customer Indemnification.** Customer shall defend, indemnify, and hold harmless NDS from and against any liability, damage, loss, or expense (including reasonable attorneys' fees and expenses of litigation) in connection with any third party claims, suits, or proceedings arising out of or relating to the use of the product, unless proximately caused by the sole gross negligence or willful misconduct of NDS. The provisions of this Section 7 shall not limit NDS's obligations pursuant to Section 6.

## **8 Limitation of Liability.**

**8.1** Neither party's liability: (a) for death or personal injury caused by the party's negligence or the negligence of its employees or agents; (b) for breach of any condition as to title or quiet enjoyment implied by section 12 Sale of Goods Act 1979 or Section 2 supply of Goods and Services Act 1982; (c) for breach of section 3,6,or 7; (d) for fraud or fraudulent misrepresentations; (e) to pay sums properly due and owing to the other in the normal course of performance of its obligations under these terms and conditions; or (f) for willful breach of these terms and conditions, is excluded or limited by these terms and conditions even if any other term hereunder would otherwise suggest that this might be the case.

**8.2** Other than as set out in Section 8.1, neither party shall be liable (whether for breach of contract, negligence or for any other reason) for any: (a) loss of profits; (b) loss of sales; (c) loss or damage to reputation or goodwill; (d) wasted management or other staff time; (e) loss of any software or data; or (f) indirect, consequential or special loss, and for the purposes of this section 8.2 the term "loss" includes partial loss or reduction in value as well as a complete or total loss.

**8.3** Subject to section 8.1, NDS's total aggregate liability under or in connection with these terms and conditions (and whether the liability arises because of breach of contract, negligence or for any other reason) shall be limited to an amount equal to the total amount payable by Customer for the products giving rise to such liability.

**9 NDS Intellectual Property.** Customer acknowledges and agrees that all copyrights, patent rights, trade or service marks, design rights or specifications, rights in or relating to databases, rights in or relating to Confidential Information and all know-how, hardware and/or software, or any modifications of any of the foregoing and any other proprietary information (collectively, the "**NDS Proprietary Information**") owned by NDS and incorporated into or sold together with the product, and any improvements thereto or derivatives thereof (regardless of the party who creates such improvements or derivatives), are and at all times shall remain the property of NDS. Products purchased by Customer shall become the property of Customer, provided however, that nothing in any purchase order shall be deemed to convey to Customer any right or interest in, or to, the NDS Proprietary Information. Customer and its employees and agents will not remove or alter any trademark, trade name, copyright, patent, patent pending, or other proprietary notices, legends, symbols, or labels appearing on a product or documentation delivered by NDS. All uses of NDS's trademarks and related goodwill will inure solely to NDS and Customer will obtain no rights or goodwill with respect to any of NDS's trademarks and Customer irrevocably assigns to NDS all right, title, interest, and good will, if any, in any of NDS's trademarks.

**10 Security Interest.** NDS reserves a purchase money security interest in products sold and the proceeds thereof, in the amount of the Purchase Price. In the event of default by Customer in any of its obligations to NDS, NDS will have the right to repossess the products sold hereunder without liability to Customer.

## **11 Miscellaneous.**

**11.1 Independent Contractors.** The relationship of the parties established by these terms and conditions is that of independent contractors, and nothing contained herein should be construed to give either party the power to, (i) act as an agent or direct or control the day-to-day activities of the other, (ii) to hold itself out to be an agent or representative of the other, or (iii) incur any obligation or commitment for the other party in any manner. Financial and other obligations associated with each party's business are the sole responsibility of that party.

**11.2 Governing Law and Arbitration.** The rights and obligations of the parties under these terms and conditions shall not be governed by the 1980 U.N. Convention on Contracts for the International Sale of Goods; rather such rights and obligations shall be governed by and construed under the laws of the State of California, without reference to conflict of laws principles. Any dispute or claim arising out of or in connection with these terms and conditions or the performance, breach or termination thereof, shall be finally settled by binding arbitration in Santa Clara County, California under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said rules. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, either party may apply to any court of competent jurisdiction for injunctive relief without breach of this arbitration provision. The prevailing party in any dispute arising from or relating to these terms is entitled to recover its costs, including reasonable attorney fees.

**11.3 No Waiver.** Failure or delay by either party in exercising any right hereunder shall not operate as, or be deemed a waiver of such right or of any other right hereunder, except for violations which, after discussion and mutual agreement by the parties, are waived in writing.

**11.4 Force Majeure.** Neither party shall be liable for any failure to fulfill any of these terms and conditions (other than the obligation to pay) if fulfillment has been delayed, hindered or prevented by event of force majeure including, but not limited to, any strike, lockout or other industrial dispute, acts of the elements, compliance with requirements of any governmental port or international authority, plant breakdown or failure of equipment, inability to obtain equipment, fuel, power, materials or transportation, or by any circumstances whatsoever beyond its reasonable control, including, but not limited to, demand for products in excess of NDS's ability to produce products or any alleged or demonstrated infringement by the products or their use of any proprietary right of a third party. In the event of excess demand for products, NDS may allocate the supply of products among its customers in the manner it deems most appropriate.

**11.5 Severability.** If any provision of these terms is held to be invalid or unenforceable, the remainder of these terms shall continue in full force and effect and will be interpreted to reflect the original intent of the parties.

**11.6 Assignability.** Except as otherwise provided in this paragraph, no rights or obligations hereunder may be assigned by either party without prior written consent of the other party, which will not be unreasonably withheld. Each party may assign its rights and obligations under these terms: (a) to an entity owning, owned by, or under common ownership with a party; or (b) to a successor in interest in the event of a sale of substantially a controlling interest in the company or substantially all of its assets, if in the case of (a) or (b), the assignee or transferee has agreed to be bound by these terms and conditions.