



# **KAPALUA**

**MARINE, FUELS AND LUBES**

TEXAS ENTERPRISES, INC. *dba* KAPALUA MARINE, FUELS & LUBES.  
GENERAL TERMS & CONDITIONS  
Effective September 1, 2020



# KAPALUA MARINE, FUELS & LUBE



## GENERAL

This is a statement of the general terms and conditions (“GTC’s”) applicable to all sales and deliveries of marine fuels/bunkers by Texas Enterprises, Inc. *dba* Kapalua Marine, Fuels & Lubes (“Kapalua”) from and after the Effective Date.

These GTC’s apply to, and expressly are incorporated into, all offers, quotations, orders, agreements, services and contracts to which Kapalua is a party, unless a variation of these GTC’s expressly is agreed to in a writing duly signed by Kapalua.

The general trading conditions of another party shall not apply, unless those general trading conditions expressly are accepted in separate writing signed by Kapalua.

In the case that, for whatever reason, one or more of the (sub)sections of these general terms and conditions are invalid, the other (sub)sections hereof shall remain valid and be binding upon the parties.

## DEFINITIONS

Throughout this document the following definitions shall apply:

- **“Marine Fuels”** or **“Bunkers”** - means products derived from crude oil, delivered or to be delivered by Seller to a Vessel;
- **“Seller”** – means Kapalua or any party contracted by Kapalua to sell, deliver or arrange to deliver Marine Fuels/Bunkers;
- **“Buyer”** – means the Vessel supplied and (jointly and severally) her Master, Owner(s), Manager(s), Operator(s), disponent Owner(s), Agent(s), Charterer(s) and any other person(s) who contract(s) to purchase, take delivery of and/or pay for the Marine Fuels/Bunkers;
- **“Owner”** – means the registered Owner, Manager and/or Bareboat Charterer of the Vessel;
- **“Vessel”** - means the Buyer’s Ship, Barge or Offshore Unit that receives the Marine Fuels/Bunkers; either as end-user or as transfer unit to a third party consumer;
- **“Nomination”** – means the written request/requirement by the Buyer to the Seller for the supply of Marine Fuels/Bunkers;
- **“Order Confirmation”** – means the written confirmation issued by the Seller and forwarded to the Buyer to confirm the conclusion of the negotiated sale/purchase of the Marine Fuels/Bunkers. In case of conflict between the Nomination and the Order Confirmation, the wording and content of the Order Confirmation is deemed to contain the prevailing terms of the Agreement;
- **“Agreement”** – means the concluded terms for the sale/purchase of the Marine Fuels/Bunkers set forth in the Order Confirmation, together with these GTC’s and any other terms or conditions expressly agreed to in writing by the Seller and Buyer;
- **“Supplier”** – means any party instructed by or on behalf of the Seller to supply or deliver the Marine Fuels/Bunkers;
- **“GTC”** – means these General Terms and Conditions which are incorporated into each Agreement, and govern the contractual relations between the Seller and the Buyer;
- **“BDN”** – means the Bunker Delivery Note signed by the Buyer’s representative(s) at the place of the supply of the Marine Fuels/Bunkers to the Vessel, evidencing the quality and quantity of the Marine Fuels/Bunkers received by the Vessel.
- **“Master of Vessel”** – means the individual authorized to represent the receiving Vessel;
- **“Bunker Tanker Safety Check List”** – means the document signed and stamped before commencement of bunkering operations by the Master of the Vessel (or his authorized representative), requesting delivery of Marine Fuels/Bunkers, and counter-signed by the Seller or its representative, which shall enable them to check that all the safety requirements have been met. Signature of the Bunker Tanker Safety Check List by the Seller does not relieve the Buyer from its primary obligation to ensure the safety of Vessel receiving Marine Fuels/Bunkers. Safety on board the Vessel receiving Marine Fuels/Bunkers shall remain the sole responsibility of the Buyer.



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## **1. OFFER, QUOTATION AND BINDING AGREEMENT**

- a. An Agreement shall only be concluded and binding on the Seller when the Seller sends the Order Confirmation to the Buyer. Each Order Confirmation incorporates these GTC's so that the GTC's form an integral part of the Agreement.
- b. Agreements entered into via brokers, or any other authorized representative on behalf of the Seller, shall only bind the Seller upon the Sellers' broker or other authorized representative sending the Order Confirmation to the Buyer or the Buyer's broker, as the case may be.
- c. The agreed price of the Marine Fuels/Bunkers shall be as stated in the Order Confirmation. That price shall be either a fixed price per unit of Marine Fuels/Bunkers delivered or a price calculated on the basis of a formula stated in the Order Confirmation.
- d. The price shall be valid only for the time range (the "price validity time range") identified in the Seller's quotation or in the Seller's Order Confirmation, whichever is issued last.
- e. If the receiving Vessel does not arrive within the price validity time range, the Seller is entitled to terminate the Agreement forthwith and to claim damages as per Sections 13 and 15 below as if the Agreement had been cancelled by the Buyer more than three (3) days after the Buyer's Order. Alternatively, Seller is also entitled, at its sole discretion, to elect to deliver the Marine Fuels/Bunkers on new terms to be agreed between the Buyer and the Seller and without prejudice to the Seller's right to claim damages as if the contract had been cancelled by the Buyer.
- f. The price stated in the Seller's quotation is exclusive of all taxes and charges that are levied against the Seller/Supplier by the State of delivery and/or by any governmental, regional, and/or local authorities in connection with the performance of the Agreement, including, but not limited to:
  - i. Wharfage charges, barging charges or other similar charges incurred by Seller,
  - ii. Mooring charges or port duties incurred by the Seller,
  - iii. Duties, taxes, charges, freights or other costs in the country where delivery takes place.

Buyer shall be solely responsible for all such taxes and charges.

- g. At ports where the Seller is not the direct Supplier, Seller shall have the right to invoice the Buyer for any additional charges, duties, taxes or costs that the Supplier demands from the Seller after the Seller has issued its Order Confirmation.
- h. If the party requesting Marine Fuels/Bunkers is not the Owner of the Vessel, the Seller shall have the right (but will not be obliged) to insist as a precondition of sale that a payment guarantee is provided by the Owner. The Seller shall have the right (but will not be obliged) to cancel any Agreement with the Buyer at any time if such payment guarantee is not received promptly upon request thereof from the Seller to the Owner. The Seller's decision to forego obtaining a payment guarantee under this Section 1(h) shall have no effect on Seller's right to a lien on the Vessel for any Marine Fuels/Bunkers supplied under this Agreement.
- i. The Buyer warrants that it is authorized to order Marine Fuels/ Bunkers for the Vessel, and that the Seller has a lien on the Vessel for any Marine Fuels/Bunkers supplied under this Agreement. If the party requesting Marine Fuels/Bunkers is not the Owner of the Vessel, Buyer assumes the sole responsibility for communicating the terms and conditions of this Agreement to the Owner of the Vessel prior to the date of delivery.
- j. If at any time before the delivery the financial standing of the Buyer appears to the Seller (in its sole discretion) to have become impaired or unsatisfactory, Seller may require cash payment or security to be provided by the Buyer prior to delivery, failing which the Seller may cancel the delivery without any liability on the part of the latter or its subcontractors.

## **2. SPECIFICATIONS (QUALITY – QUANTITY)**

- a. The Buyer assumes sole responsibility for properly nominating the quantity and quality of Marine Fuels/Bunkers and determining (if applicable) compatibility with any Marine Fuels/Bunkers already onboard the Vessel. The Buyer also assumes sole responsibility for the selection and fitness of its choice of Marine Fuels/Bunkers for any particular use or purpose. Seller shall have no responsibility whatsoever for the fitness of the Marine Fuels/Bunkers for any specific type of engine or equipment that the Buyer has or that Buyer may or may not have agreed upon in any C/P (Charter Party) term or otherwise. This disclaimer of Seller's responsibility includes, but is not limited to, the quality, the sulphur content, the chemical properties or any other specific characteristic(s) of the Marine Fuels/Bunkers. Any and all warranties regarding the quality, merchantability, fitness for purpose, description or otherwise, are hereby excluded and disclaimed by Seller. Where specifications designate a maximum value, no minimum value is guaranteed



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unless expressly stated in the Order Confirmation, and conversely where minimum values are provided in a specification, no maximum values are guaranteed unless expressly stated in the Order Confirmation.

- b. The quality and the quantity shall be as agreed between the Seller and the Buyer in Seller's Order Confirmation. Unless otherwise agreed in writing the Marine Fuels/Bunkers are delivered and sold based on metric tons in vacuum.
- c. Where standard specifications are being given or referred to, tolerances in accordance with ISO 4259 in respect of Reproducibility/Repeatability in quality are to be accepted without compensation or other consequences whatsoever.
- d. In respect of the quantity agreed upon, Seller shall be at liberty to provide, and the Buyer shall accept, a variance of five percent (5%) from the agreed quantity, with no other consequence than a similar variance to the corresponding invoiced price from the Seller.
- e. Information regarding the typical characteristics of the Marine Fuels/Bunkers at any delivery location shall only be indicative of the Marine Fuels/Bunkers that have been made available at that location and shall not form a part of the specification of the Marine Fuels/Bunkers to be delivered. All grades of product may contain petroleum industry allowed bio-derived components.

### 3. Documentation

- a. Before commencement of delivery, the Master of the receiving Vessel shall sign a Declaration of Inspection ("DOI") in the form presented by the Seller/Supplier and containing the quantities and the grades of the Marine Fuels to be delivered. In the Bunker Requisition Form, the Master of the vessel shall confirm the name of the receiving Vessel, her IMO number, the details of the Vessel's Owners, her Managers, her Operators, her disponent Owners and her Charterers.

Before commencement of delivery operations, the Seller or its representative shall present to the Master of the receiving Vessel or his representative, a Bunker Tanker Safety Check List or similar document, which shall be signed by the Seller or its representative and by the Master of the receiving Vessel or his representative, which shall enable to check that all safety requirements have been met. Signature of this document by the Seller does not relieve the Buyer from its primary obligation and sole responsibility to ensure safety onboard its Vessel.

- b. Once the delivery is completed and quantities measured Section in accordance with Section 4, a Bunker Delivery Note ("BDN") shall be signed and stamped by the Master of the Receiving Vessel or his representative and by the Seller or his representative, and returned to the Seller or its representative, as acknowledgement of the delivery. A BDN shall also be retained by the Master of the Receiving Vessel and kept onboard the receiving Vessel for a minimum of three (3) years from the date of delivery. In addition to the information in the Bunker Requisition Form, the BDN shall contain the following information:

- Vessel's name and IMO number
- Seal number of samples taken during delivery
- Delivered quantity in metric tons
- Density in kg/m<sup>3</sup> at 15°C or at ambient in conformity with local Port regulations
  
- Sulphur content

### 4. MEASUREMENTS – NON CLAUSING OF THE BDN(S)

- a. The quantities of Marine Fuels/Bunkers shall be determined only from the official gauge or meter of the bunkering barge, tank truck or of the shore tank in the case of delivery ex-wharf.
- b. The Buyer's representative and Seller's representative jointly shall measure and verify the quantities of Marine Fuels/Bunkers delivered from the tank(s) from which the delivery is made. When supplied by bunkering barge/tanker the particular barge/tankers will present its tank calibration and ullage sounding records, which are agreed to be the sole valid and binding document(s) to determine the quantity or quantities supplied. Quantities calculated from the Receiving Vessel's sounding shall not be considered.
- c. Should the Buyer's representative fail or decline to verify the quantities, the measurements of quantities made by the Seller or the Supplier shall be final, conclusive and binding and the Buyer shall be deemed to have waived any and all claims in regard to any variance.



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- d. The Buyer expressly undertakes not to make any endorsement, complaint/comment (including but without limitation any "No-Lien" clausung) on the BDN when presented for signature by the Buyer's representative(s), and Buyer agrees that any such insertion shall be void and of no effect whatsoever.
- e. In the event of complaint on the quantity of Marine Fuels/Bunkers delivered, the Buyer or the Master of the Vessel shall give to the Seller/Supplier a letter of protest separately, followed within seven (7) days by a detailed written complaint to the Seller, setting out the exact quantity(ies) claimed short-supplied, with full supporting vouchers. If the written complaint and vouchers are not provided within within seven (7) days of delivery, the Buyer shall be deemed to have expressly waived any such claim against the Seller/Supplier, the relevant claim being time-barred, and the Seller/Supplier's weight and measurements shall be conclusive established as the quantity of Marine Fuels/Bunkers delivered.

### **5. SAMPLING**

- a. The Supplier shall arrange for four (4) representative samples of each grade of Marine Fuels/Bunkers to be drawn throughout the entire bunkering operation. The Buyer's representative has the responsibility to witness that such samples are drawn correctly and shall confirm his witnessing thereof and also confirm the proper and correct sealing by signing the labels of the sample bottles.
- b. In case that drip sampling is not available onboard the barge, tank truck or shore tank, samples shall be taken as a composite of each tank from which supplies are made, onboard the barge (respectively at the shore tank or tank truck), divided with 1/3 from each of the top, mid and bottom of the tanks.
- c. The samples shall be securely sealed and provided with labels showing the Vessel's name, identity of the delivery facility, product name, delivery date and place and seal number, authenticated with the Vessel's stamp and signed by the Seller's representative and the Master of the Vessel or his representative. The seal numbers shall be inserted into the BDN, and by signing the BDN both parties agree to the fact that the samples referred to therein are valid and taken in accordance with the requirements as specified in this Chapter 5.
- d. Two (2) samples shall be retained by the Seller for ninety (90) days after delivery of the Marine Fuels/Bunkers, or if requested by the Buyer in writing, for as long as the Buyer reasonably requires. The other two (2) samples shall be retained by the receiving Vessel, one of which being dedicated as the MARPOL sample.
- e. In the event of a dispute in regard to the quality of the Marine Fuels/Bunkers delivered, the samples drawn pursuant to this Section 5, shall be conclusive and final evidence of the quality of the Marine Fuels/Bunkers delivered. One, and only one, of the samples retained by the Sellers shall be forwarded to an independent laboratory to perform a set of tests, the result of which is to be made available to both parties. Those test results shall be final and binding upon both Buyer and Seller as to the parameters tested. The parties are to use best endeavors to agree on the independent laboratory to perform the tests. If, however, no agreement can be reached on the choice of laboratory within three (3) days of the Buyer being advised of the Seller opting to have the sample tested, the Seller is at liberty to send the sample to a reputable and independent laboratory of its choice for the tests to be conducted, and those test results will be final and binding upon Buyer and Seller as set out above.
- f. The seal must be breached only in presence of both parties unless one/both in writing have declared that they will not be present, or fails to be present at the appropriate time and place; and both parties shall have the right to appoint independent person(s) or surveyor(s) to witness the seal breaking.
- g. No samples subsequently taken shall be allowed as (additional) evidence. If any of the seals have been removed or tampered with by an unauthorized person such sample(s) shall be deemed to have no value as evidence.
- h. Any eventual samples drawn by Buyer's personnel either during bunkering or at any later date after bunkering shall not be valid as indicator of the quality supplied. The fact that such samples may eventually bear the signature of personnel on board the barge or tank truck or other delivery conveyance shall have no legal significance as such local personnel have no authority to bind Seller to different contractual terms. Seller shall have no liability for claims arising in circumstances where Buyer may have commingled the products onboard the Vessel with other fuels.

### **6. DELIVERY**

- a. The time of delivery, as given by the Seller, is an approximate time, unless it has been otherwise specifically agreed in writing between the parties.



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- b. The time of delivery will only be binding upon the Seller when all information necessary for the Seller to comply with its obligations hereunder have been properly delivered to the seller in reasonable time before the delivery. In the event the Nomination addresses a spread of dates for delivery, the Seller has the sole discretion to commence the delivery within any time, day/night/ falling within these dates, always subject to the circumstances set out below in Section Section6(c).
- c. The Vessel shall, under all circumstances, be bunkered as promptly as the prevailing circumstances reasonably permit, having regard to congestion affecting the delivery facilities of Seller, its Suppliers or agents and to prior commitments of barges or other delivery means. The Seller and/or the Supplier shall not be liable for any consequences or any time lost due to the Vessel having to wait for berth for bunkering or for completion of bunkering, and unless otherwise agreed in writing, the Seller shall not be obligated to delivery prior to the nominated date or spread of dates. The Seller is not responsible for delays caused by local customs, pilots, port or other authorities.
- d. In any case the Buyer, unless otherwise agreed in writing, must give not less than seventy-two (72) hours approximate notice of readiness of the Vessel for delivery, which is to be followed by forty-eight (48) hours and twenty-four (24) hours notices, where the last notice must also specify the exact place of delivery. All these notices must be given to the Sellers and the Seller's representatives/agents in writing.
- e. The Seller shall not be required to deliver any Marine Fuels/Bunkers if any customs and/or other government permits required for such purpose has not been obtained in due time before the delivery.
- f. If the Seller, at any time or for any reason, believes that there may be a shortage of supply at any place and that as a result thereof it may be unable to meet the demands of all its customers, the Seller may allocate its available and anticipated quantity(ies) of Marine Fuels/Bunkers among its customers in such a manner as it may determine appropriate in its sole discretion.
- g. Seller and/or the Supplier shall not be liable for any demurrage paid or incurred by the Buyer or for any loss, damage or delay of the Vessel due to congestion at the loading terminal, prior commitments of available barges or tank trucks or any other reason.
- h. The Buyer shall ensure that the Vessel provides a free, safe and always afloat and accessible side for the delivery of Marine Fuels/Bunkers and that all necessary assistance as required by the Seller or the Seller's representative is rendered in connection with the delivery. If in the Supplier's opinion clear and safe berth is unavailable, delivery might be delayed or, in Seller's option, cancelled and all costs related to above will be on account of the Buyer.
- i. The Vessel shall moor, unmoor, hoist and lower bunkering hose(s) from the barge(s) whenever required by the Seller, Seller's representative or Supplier, free of expenses and in any way as may be requested to assist the barge equipment to a smooth supply. The Buyer shall make and be responsible for all connections and disconnections between the delivery hose(s) and the Vessel's bunker intake manifold/pipe and ensure that the hose(s) are properly secured to the Vessel's manifold prior to commencement of delivery.

During bunkering the Vessel's scuppers must be safely blocked, which blocking must be made by the Vessel's own crew. Furthermore, the Vessel must ensure that all pipes and manifolds and receiving tanks are properly checked and ready to receive the Marine Fuels/Bunkers, including but not limited to ensuring proper opening/closing of relevant valves, without any risk for spillages or leakages, during the bunkering. Local special requirements for receiving Marine Fuels/Bunkers must be followed strictly by the Vessel, whether advised or not by the Seller or the Sellers representative, as it is always the Vessel and the Buyer who remain solely responsible for the knowledge and awareness of such eventual additional requirements for safety reasons.

- j. If the Vessel is not able to receive the delivery promptly, the Buyer is thereby in default and shall pay damages and/or any reasonable demurrage claim to the barging/supplying facilities and shall indemnify the Seller in each and every respect as a result thereof.
- k. Delivery shall be deemed completed and all risk and liabilities, including loss, damage, deterioration, depreciation, contamination, evaporation or shrinkage to the Marine Fuels/Bunkers delivered and responsibility for loss, damage and harm caused by spillage, leakage, pollution or any other manner of harm arising from or in connection with the Marine Fuels/Bunkers or the Agreement, shall pass to the Buyer at the time the Marine Fuels/Bunkers reach the



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flange/connecting pipe line(s)/delivery hose(s) provided by the Seller on the barge/tank truck/shore tank.

- i. If the Buyer for whatever reason is unable or refuses to receive the full quantity ordered, the Seller shall have the right to invoice the Buyer for the losses incurred by having to transport the undelivered Marine Fuels/Bunkers back to the storage, storing the undelivered Bunkers, and/or having to sell the Marine Fuels/Bunkers in a degraded form or at a lower price. The Seller may exercise this right without prejudice to the Seller's other rights for damages or otherwise pursuant to these conditions.
  - m. The Vessel shall provide and have appropriate and segregated tanks to receive the contracted quantity of Marine Fuels/Bunkers, and the Vessel shall always be able to perform its own blending onboard if any blending is deemed to be required by the Buyer. The Vessel shall test the Marine Fuels/Bunkers on delivery by running her engines or auxiliaries or equipment for which the Marine Fuels/Bunkers are supplied, for a minimum of one (1) hour to determine that the Marine Fuels/Bunkers are satisfactory. In the event the Marine Fuels/Bunkers are not considered satisfactory, the Seller and Supplier are to be notified in writing immediately after such test period has expired. Otherwise it shall be deemed that the Marine Fuels/Bunkers were satisfactory and that the Buyer has waived any right to claim in this regard.
  - n. If delivery is required outside normal business hours or on local weekends, Saturday, Sunday, national religious or public holidays, the Seller's extra expenses incidental to such delivery shall be reimbursed by the Buyer as additional costs.
  - o. In the event the Marine Fuels/Bunker delivery is made by vessel or barge as a ship-to-ship transfer, any damage caused by contact and/or collision and/or swell and/or other weather or sea related condition or incident, such damage shall be dealt with by the Owners directly with the owners of the units involved, and Seller/Supplier shall not be held responsible for any such damages. If, however, any of the involved units choose to pursue Seller and/or supplier, Buyer shall fully defend, indemnify and hold Seller harmless in relation thereto.
  - p. For safety reasons it is agreed that the Master of the bunkering barge shall determine in his or her sole discretion whether mooring alongside is safe, taking weather, swell and forecasts into consideration. Supplier/Seller not to be held responsible for any delays, demurrages, claims, liquidated or consequential damages whatsoever as a result of any delays caused by any decision by the Master of the barge in this regard.
  - q. Without prejudice to any other article(s) herein, any and all supply(ies) will be based on a "best endeavors" basis when/if the receiving Vessel arrives outside the originally agreed time period specified in the Order Confirmation.
- 7. TITLE**
- a. Title in and to the Marine Fuels/Bunkers delivered and/or property rights in and to such Marine Fuels/Bunkers shall remain vested in the Seller until full payment has been received by the Seller of all amounts due in connection with the respective delivery. The provisions in this section are without prejudice to such other rights as the Seller may have under the laws of the governing jurisdiction against the Buyer or the Vessel in the event of non-payment.
  - b. Until full payment of the full amount due to the Seller has been made and subject to Article 6(m) hereof, the Buyer agreed that it is in possession of the Marine Fuels/Bunkers solely as Bailee for the Seller, and shall not be entitled to use the Bunkers other than for the propulsion of the Vessel, nor mix, blend, sell, encumber, pledge, alienate, or surrender the Marine Fuels/Bunkers to any third party or other Vessel.
  - c. In case of non- or short payment for the Marine Fuels/Bunkers by the Buyer, the Seller is entitled (but not obliged) to repossess the Marine Fuels/Bunkers without prior juridical intervention, without prejudice to all other rights or remedies available to the Seller.
  - d. In the event that the Marine Fuels/Bunkers have been mixed with other bunkers onboard the Vessel, the Seller shall have the right to trace its proprietary interest in the Marine Fuels/Bunkers into the mixed bunkers and/or a right of lien to such part of the mixed bunkers as corresponds to the quantity or net value of the Marine Fuels/Bunkers delivered.
  - e. The provisions of this Section 7 do not prejudice or in any way limit the Seller's right to arrest/attach the Vessel and/or sister ship and/or any sister or associate ship and/or other assets of the Buyer (or the Owner of the Vessel or any other party liable), wherever situated in the world, without prior notice.
  - f. Where, notwithstanding these conditions, title in and to the Marine Fuels/Bunkers delivered has passed to the Buyer and/or any third party before full payment has been made to the Seller, the Buyer hereby grants a pledge over such Bunkers to the Seller. The Buyer shall furthermore grant a



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pledge over any other Bunkers present in the respective Vessel, including any mixtures of the delivered Bunkers and other bunkers. Such pledge will be deemed to have been given for any and all claims, of whatever origin and of whatever nature that the Seller may have against the Buyer.

- g. For the avoidance of doubt, where a mortgagee bank enforces any rights against the Vessel and becomes a mortgagee in possession of the Marine Fuels/Bunkers then as bailee the mortgagee bank is liable to the Seller for fulfillment of the Agreement.

### **8. PAYMENT – MARITIME LIEN**

- a. Payment for the Marine Fuels/Bunkers and/or the relevant services and/or charges shall be made by the Buyer as directed by the Seller within the period agreed in writing.
- b. Payment shall be made in full, without any set-off, counterclaim, deduction and/or discount, free of bank charges to the bank account indicated by the Seller on the respective invoice(s).
- c. (i) If any time after delivery but before the due date the financial standing of the Buyer appears to the Seller (in its sole discretion) to have become impaired or unsatisfying, the Seller may require immediate full payment of all its invoices due and/or those not yet due, or such security as Seller shall deem to be satisfactory.

(ii) In the event that the Buyer shall default in making any payment when due, the Seller may suspend deliveries of Marine Fuels/Bunkers until such payment has been made in full (together with default/delay compensation and costs), or the Seller may, in its discretion, elect to treat such default as a serious breach of the Agreement and thereupon terminate the Agreement in whole or in part without prejudice to any claim against the Buyer for damages, including cancellation charges. Such termination or suspension shall not relieve the Buyer of any obligation undertaken by virtue of an Agreement so terminated.

(iii) Where the Seller has extended any kind of credit facility to a group of companies or associated companies, default by any one relevant Buyer in respect to any invoice of the Seller shall give the right to the Seller to cancel all credit arrangements of the entire group or of all the associates, whereupon sub Sections 8(c)(i) and 8(c)(ii) shall apply as appropriate.

(iv) If Buyer fails to pay timely any amount due to Seller, the Seller has the right to (without prejudice to its right to receive default/delay compensation) take all appropriate steps to secure and enforce its claim; the Seller may also unilaterally cancel any credit arrangements agreed with/extended to the Buyer.

(v) All judicial and extrajudicial costs and expenses, including pre-action costs, fees, expenses and disbursements of the Seller's attorneys incurred in connection with non-payment or delayed payment or by any other breach by the Buyer of these conditions, shall be for the Buyer's account, immediately payable by the latter to the Seller. In case of litigation, Buyer shall also pay all of the relevant costs and expenses of the Seller, including but without limitation, all Seller's reasonable attorneys' fees, expert witness fees, costs and disbursements.

- d. Payment shall be deemed to have been made on the date of which the Seller has received the full payment, and such is available to the Seller. If payment falls due on a non-business day, the payment shall be made on or before the business day nearest to the due date. If the preceding and the succeeding business days are equally near to the due date, then payment shall be made on or before the preceding business day.
- e. Any delay in payment of the full sum due shall entitle the Seller to interest at the rate of the lesser of three percent (3%) per month, compounded monthly for each month or part thereof of non-payment, or the maximum non-usurious interest rate allowed by applicable law. Furthermore, the Seller is entitled to charge a delayed payment administration fee of USD \$1.50 per metric ton supplied, or the equivalent thereof in local currency, with a minimum administration fee of USD \$350.00 for each delivery made. All reasonable attorneys' fees incurred by Seller in connection with the collection of overdue payments shall be paid by Buyer.
- f. Payments made by the Buyer in respect of a supply of Marine Fuels/Bunkers shall at all times be credited in the following order: (1) costs of any kind or nature, including but not limited to legal costs and attorneys' fees, (2) interest and administration fees, and (3) invoices in their order of age, also if not yet due, or in Seller's sole discretion to specify a payment to any such invoice Seller considers relevant.





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- g. All costs borne by the Seller in connection with the collection of overdue payments, including those of the Seller's own legal and credit department and, including but not limited to, reasonable attorneys' fees, whether made in or out of court and in general all costs in connection with breach of any agreement by the Buyer, including but not limited to reasonable attorneys' fees, shall be for the sole account of the Buyer.
  - h. The Seller shall, at all times, in its absolute discretion, be entitled to require the Buyer to provide the Seller what the Seller deems to be sufficient security for the performance of all of Buyer's obligations under the Agreement. Failing the immediate provision of such security upon Seller's demand, the Seller shall be entitled to terminate any pending but unperformed Agreements and stop any further execution of any Agreement(s) between the parties until such time as the Buyer has provided the required security.
  - i. Where Marine Fuels/Bunkers are supplied to a Vessel, in addition to any other security, the Agreement is entered into and the Goods are supplied upon the faith and credit of the Vessel. It is agreed and acknowledged that the sale of Marine Fuels/Bunkers to the Buyer and/or their acceptance on the Vessel create a maritime lien over the Vessel for the price of the Marine Fuels/Bunkers (and all interest and costs payable in respect thereof; including but not limited to the reasonable attorneys' fees), and such maritime lien is granted to the Seller over the Vessel. In any event any applicable Law shall not prejudice the right of the maritime lien of the Seller afforded hereunder or by any other applicable Law, be it of the place of delivery, or the flag of the Vessel, or the place of jurisdiction and/or an arrest of the Vessel, or otherwise howsoever.
  - j. It is mutually agreed that the Marine Fuels/Bunkers provided by the Seller to the Buyer under the terms of this Agreement have been ordered by the Buyer in the ordinary course of business between Seller and Buyer. All payments from Buyer to Seller for Marine Fuels/Bunkers supplied under this Agreement are deemed to have been made in the ordinary course of business between Seller and Buyer, according to these ordinary business terms agreed between them.
- 9. CLAIMS**
- a. In addition to the requirements set forth in 4(d) and 4(e), above, any claim in connection with the quantity of the Marine Fuels/Bunkers delivered must be noticed by the Buyer, or the Master of the Vessel, to the Seller or Supplier immediately upon completion of delivery in the form of a letter of protest. If the Buyer or the Vessel's Master fails to present such immediate notice of protest to the Seller or Supplier, such claim shall be deemed to have been waived and shall be absolutely barred for all purposes.
  - b. Without waiver of the requirements set forth in 6(m), above, any and all claims concerning the quality of the Marine Fuels/Bunkers delivered or time consumed for the entire operation, shall be submitted to the Seller in writing within fifteen (15) days after delivery with a clear statement as to the nature or the claim(s) along with appropriate supporting documentation, failing which any rights to complain or claim compensation of whatever nature shall be deemed to have been waived and absolutely barred for all purposes.
  - c. The Buyer shall be obliged to make payment in full and fulfill all other obligations in accordance with the terms of the Agreement and these conditions, whether or not it has any claims or complaints. If Buyer submits a claim against Seller with respect to the quality or quantity of the products supplied, the Seller or the Seller's nominated representative shall be entitled to board the Vessel and investigate the Vessel's records, log books, engine logs, etc., and to make copies of any such document the Seller or the Seller's nominated representative may consider necessary for its investigations connected to the case. The Buyer shall allow this, or where Buyer has chartered the Vessel then the Buyer shall obtain authorization from Owner to allow the herein stated steps and to provide full assistance and support by the Vessel's officers and crew in any such manner the Seller or Seller's nominated representative may require. Failure to allow boarding and/or produce required copies of documents and/or lack of full cooperation by the Vessel's officers and crew shall constitute a waiver of the Buyer's claims.
  - d. The Seller shall be allowed, and the Buyer, Owner, Officers and Crew onboard the receiving Vessel shall agree and shall support and cooperate with Seller's representative, to draw samples from the Vessel's storage tanks, settling tanks and service tank and/or from before and after the Vessel's centrifuges to have extra tests carried out for such samples at independent laboratory.
  - e. In each and every case, any and all claims of the Buyer shall be time barred unless arbitration/legal proceedings have been commenced/issued at the tribunal/court set forth in Chapter 16 hereof and service within twelve (12) months from the date of delivery of the Marine Fuels/Bunkers, or the date that delivery should have commenced pursuant to the Order Confirmation from the Seller.



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## **10. LIABILITY / LIMITATIONS**

- a. The Seller and /or Supplier shall not be liable to any person or party for claims or damages of any nature, that arise from delays in the delivery of Marine Fuels/Bunkers or services to Buyer, regardless of whether such damages or delays were caused by fault of Seller, its personnel, representatives, Supplier(s) or (sub)contractors.
- b. Seller and/or Supplier shall not be liable to any person or party for consequential, punitive and/or liquidated damages including, but not limited to, demurrage, de-bunkering, loss of time, loss of cargo, loss of equipment, loss of charter, loss of income, loss of profits and/or earnings, arising from or related to Seller's or Supplier's breach of the Agreement.
- c. Seller's liability for any breach of Agreement or for any action or claim arising from Seller's performance of the Agreement strictly shall be limited to, and shall under no circumstances exceed, the invoice value of the Marine Fuels/Bunkers supplied under the relevant Agreement.
- d. The Buyer shall be liable to Seller for any damages and/or costs suffered or otherwise incurred by the Seller due to breach of contract and/or negligence of the Buyer, its Supplier, agents, Servants, (sub)contractors, representatives, employees and the officers, crews and/or other people whether or not onboard of the Vessel(s). The Buyer undertakes to defend and hold the Seller harmless if any third-party institutes a claim of whatever kind against the Seller arising from or relating to any Agreement governed by these GTC's. Third party shall mean any other (physical or legal) person/company than the Buyer.

## **11. SUBSTITUTION**

- a. The Seller reserves its right to substitute for itself a third party for the performance of all or part of its obligations under the Sale Contract. The Seller shall remain responsible for the performance of the Sale Contract vis-à-vis the Buyer.

## **12. EXEMPTIONS AND FORCE MAJEURE**

- a. If Seller/Supplier exercises reasonable diligence, the Seller/Supplier shall not be responsible for any loss, damage, delay or failure resulting from an act of God, or the port of delivery being affected by war, commotion, riot, quarantine, strike, stoppage, lock-out, arrest, governmental restraints, or any other event whatsoever that cannot be avoided or guarded against by the exercise of reasonable diligence (each individually or collectively a "Force Majeure").
- b. If the Buyer exercises reasonable diligence, the Buyer shall not be liable for failure to receive any particular delivery if prevented by Force Majeure.
- c. Declaration of Force Majeure shall be given without undue delay once such event(s) have come to the knowledge of the party declaring same. However, under no circumstances and for no reason whatsoever, can Force Majeure entitle the Buyer not to pay promptly any invoice of the Seller.
- d. In the event that the Seller, as a result of Force Majeure, can only deliver a superior grade of bunkers, the Seller is entitled to offer the said grade, and the Buyer must accept delivery thereof and pay the applicable price.

## **13. BREACH/CANCELLATION**

- a. Without prejudice to any other remedies and rights, the Seller shall have the option immediately to cancel the Agreement in full or in part, or to store or procure the storage of the Marine Fuels/Bunkers, in whole or in part, for the account and risk of the Buyer and to charge the Buyer the expenses thereby incurred, or to hold the Buyer fully to the Agreement, or take any other measures which the Seller deems appropriate, without prejudice to its rights of indemnification, without any liability on the side of the Seller, in any one of, but not limited to, the following cases:
  - o when the Buyer, for whatever reason, fails to accept the Marine Fuels/Bunkers in part or in full at the price and time designated for delivery;
  - o when the Buyer fails in part or in full to comply with its obligations to pay any amount due to the Seller and/or provide security as set out in these GTCs;
  - o when, before the date of delivery, it is apparent in the opinion of the Seller that the financial position of the Buyer entails a risk to the Seller;
  - o when, in case of Force Majeure the Seller is of the opinion that the execution of the Agreement should be cancelled.
- b. The Seller may terminate any Agreement with the Buyer in whole or in part, in its full discretion, upon the breach of any provisions hereof by the Buyer or in the event that the Buyer fails to make



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or suspends payment, ceases to carry on business, makes an arrangement with its creditors or undergoes any form of bankruptcy, administration, reorganization, or asset rearrangement.

- c. The Buyer acknowledges that any agreements with the Seller and any actions related to such agreements as well as any interaction with third parties related to such agreements are covered by certain anti-corruption laws and regulations which can include any anti-corruption law, including but not limited to, the U.S. Foreign Corrupt Practices Act ("FCPA"), and the UK Bribery Act. Therefore, the Buyer declares to comply with all applicable anti-corruption laws and regulations and agrees that the Buyer has not, and will not, offer, promise, pay, or authorize the payment of any money, or anything of value, or take any action in furtherance of such a payment, whether by direct or indirect means, to any public official or private individual to influence the decision of such person in the performance of his duties to a government or to his company. Any breach of this Section will void the related Agreement and in the sole discretion of the Buyer any other agreement between the parties, making any claims for payment, delivery or any other obligation of the Seller under this Agreement void. The Buyer is liable for any and all costs or losses incurred by the Seller due to such breach and/or an Agreement becoming void as a consequence.

### **14. SPILLAGE, ENVIRONMENTAL PROTECTION**

If a spill occurs while the Marine Fuels/Bunkers are being delivered, the Buyer shall promptly take such action as is necessary to remove the spilled Marine Fuels/Bunkers and mitigate the effects of such spill. Without prejudice to the generality of the foregoing the Seller is hereby authorized by the Buyer in the absolute discretion of the Seller, but at the expense of the Buyer, to take such measures and incur such expenses (whether by employing its own resources or by contraction with others) as are necessary in the judgement of the Seller to remove the spilled Marine Fuels/Bunkers and mitigate the effects of such spill. The Buyer shall cooperate and render such assistance as is required by the Seller in the course of the action. All expenses, claims, costs, losses, damages, liabilities and penalties arising from spills shall be borne by the party that caused the spill by a negligent act or omission. If both parties have acted negligently, all expenses, claims, losses, damages, liabilities and penalties, shall be divided between the parties in accordance with the respective degree of negligence. The burden of proof to show the Sellers' negligence shall be on the Buyer. The Buyer shall give the Seller all documents and other information concerning any spill or any program for the prevention thereof that is required by the Seller, or is required by law or regulation applicable at the time and place of delivery.

### **15. DELAYS AND CANCELLATIONS**

- a. Notwithstanding anything else to the contrary herein, and without prejudice to any rights or remedies otherwise available to the Seller, Buyer expressly agrees that the Seller has the sole discretion to cancel the Agreement or to adjust prices in the event the Vessel is suffering a delay exceeding twenty-four (24) hours from the (last) nomination date.
- b. If the Buyer, for whatever reason, including circumstances entirely outside Buyer's control, cancels the Agreement after Order Confirmation has been sent by Seller, the Buyer shall be liable for any and all losses suffered and liabilities incurred by the Seller and/or the Supplier as a result of such cancellation, including but not limited to, barge costs, costs of restoring of the Bunkers, hedging costs, and any difference between the contract price of the undelivered product and the amount received by the Seller upon resale to another party or, if another purchaser cannot be found, any market diminution in the value of the product as reasonably determined from available market indexes. These losses and liabilities shall be deemed to be in a minimum amount of USD \$4,000.00 by way of agreed minimum liquidated damages, and shall be indemnified in full by Buyer if they exceed USD \$4,000.00.

### **16. LAW AND JURISDICTION**

Any dispute arising out of, or in connection with the Sale Contract or these GTCs, including, without limitation, any dispute with multiple defendants/claimants and indemnity claims, shall be exclusively interpreted and construed in accordance with the laws of the State of Texas, USA, excluding any choice of law rules that would otherwise require application of the laws of any other jurisdiction. Venue for any disputes arising from this Agreement shall be in the applicable state and/or federal courts of Houston, Harris County, Texas. **BOTH PARTIES AGREE THAT, TO THE EXTENT ALLOWED BY THE GOVERNING LAW, EACH PARTY HEREBY WAIVES ALL RIGHTS TO A JURY TRIAL WITH RESPECT TO ANY LITIGATION INVOLVING THIS AGREEMENT.**



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The United Nations Convention on Contracts for the International Sale of Goods (Vienna Sale Convention) signed in Vienna on 11 April 1980 shall not apply to and shall be expressly excluded from the Sale Contract and these GTCs.

### **17. CONFIDENTIALITY**

All data and information acquired directly or indirectly by Buyer from Seller relating to the Agreement or these GTCs or in connection with the performance of this Agreement, excluding information or data in the public domain through no default of the Buyer, shall be held strictly confidential and not be reproduced or used for any purpose unrelated to the Agreement or disclosed to a third party without Sellers' express written consent.

### **18. SAVINGS**

In the event any provision, Section, sentence or part of the Agreement or these GTCs is unenforceable under any applicable law, same shall be deemed to be modified to the extent required to comply with said law (it being the intention of both Parties to enforce to the fullest extent, all terms of the Agreement or these GTCs) and as so modified, the Agreement or these GTCs shall continue in full force and effect. In the event any such provision, Section, sentence or part of the Agreement or these GTCs cannot be modified to comply with the law, then said provision, Section, sentence or portion of the Agreement or these GTCs shall be deemed to be deleted from the Agreement and the remaining terms and conditions shall remain in full force and effect.

**[End of Document]**