

# Terms and Conditions of Sale



## merconics GmbH & Co. KG (“merconics”) Terms and Conditions of Sale

**1. GENERAL.** Orders are accepted by merconics and Subsidiaries (“Seller”) subject to these terms and conditions. In case of a conflict, inconsistency or addition not expressly stated in writing by Seller, the terms and conditions of sale provided herein shall be considered as superseding the conflicting, inconsistent or additional terms stated in Buyer’s purchase order, order form, contract or otherwise. The acceptance of an order will supersede all prior communications and constitute a complete and binding contract between the party purchasing equipment hereunder (“Buyer”) and Seller, which contract cannot be modified or canceled without the written agreement of both parties.

**2. SHIPMENT.** Seller shall attempt to comply with, but will not guarantee, shipping date and loading and routing instructions. Seller reserves the right to allow or prorate shipments against all orders whenever, in its judgment, an oversold condition exists as to any particular product manufactured or sold by it. In the event of a default by Buyer, Seller may decline to make further shipments without waiving any of its rights under such order. If, despite such default, Seller elects to continue to make shipment, its action shall not constitute a waiver regarding, or otherwise diminish, Seller’s legal remedies with respect to such default or any future default.

**3. TITLE AND DELIVERY.** All sales are made FCA factory (ex works), Incoterms 2010 and Buyer shall pay all freight, duties, cartage and handling. Title and risk of loss or damage shall pass from Seller to Buyer upon Seller’s putting the material purchased hereunder in good condition into the possession of a common carrier, such carrier acting as Buyer’s agent. All claims for damages must be filed with the carrier.

**4. PRICES.** Irrespective of any prices quoted by Seller or listed on Buyer’s order, an order is accepted only at the prices shown on Seller’s written quotation (the “Quotation”). Installation of utilities required for equipment is not included in the specified price.

### 5. PAYMENT TERMS.

**(a)** Invoices are payable at the place set forth in the Quotation or the invoice no later than thirty (30) days after the date of the invoice. Any exchange charges, any charges for nonpar clearance of checks or collection charges (including reasonable attorneys’ fees) will be paid by Buyer. Any amounts not paid when due will bear interest at a rate of 6 % per annum or, if lower, the maximum rate permissible by law.

**(b)** All orders are subject to credit approval by Seller. The amount of any credit extended by Seller to Buyer may be changed, and such credit may be withdrawn by Seller. With respect to an order on which credit is not extended by Seller or, if extended, is subsequently withdrawn, shipment or delivery shall be made, at Seller’s election, cash with order (in whole or in part), C.O.D., letter of credit or Sight Draft attached to Bill of Lading or other shipping documents, with all costs of collection (plus 18% interest on Sight Drafts not paid at maturity) for the account of Buyer. If, in the judgment of Seller, the financial condition of Buyer does not justify continuation of production or shipment on the terms of payment originally specified, Seller may require full or partial payment in advance. In the event any proceeding is brought by or against Buyer under any bankruptcy or insolvency laws, Seller shall be entitled, in addition to any other remedies at law or in equity, to (i) stop or divert any shipment in transit, (ii) cancel any order then outstanding and/or (iii) receive reimbursement for its cancellation charges.

**(c)** Each shipment shall be considered a separate independent transaction, and payment therefor shall be made accordingly. If for any reason Buyer is not prepared to accept delivery of goods, Seller may store the goods at Buyer’s expense and risk in the name of Buyer, and such storage shall constitute shipment and delivery to Buyer.

**6. TAXES.** Quoted prices do not include federal, state or local excise, sales, use or similar taxes. Accordingly, in addition to the prices specified on the Quotation, the amount of any applicable excise, sales, use and/or similar taxes will appear as separate items on the invoice and will be paid by Buyer unless prior to shipment Seller receives an appropriate tax exemption certificate from Buyer.

**7. CUSTOMER SPECIFIC ACCEPTANCE (“CSA”).** Except as provided in the Quotation, Seller’s standard commercial factory acceptance test(s) performed at Seller’s factory will comprise acceptance for the equipment sold by Seller. If the Quotation references CSA provisions, then Buyer will accept the purchased equipment in accordance with such CSA provisions. The parties will give priority to achieving CSA and the purchased equipment shall not be used by Buyer for material production, for development of new processes or for any purposes other than achieving CSA, prior to successful completion or waiver of the CSA provisions. Any such use of the equipment prior to successful completion of the CSA provisions shall be deemed to constitute CSA passage. It is the responsibility of the Buyer to ensure that all the required facilities are ready and site preparation is completed for successful commencement of CSA on delivery of the equipment. If CSA has not been commenced within 30 days after delivery and completed within 60 days after delivery (through no fault of Seller), the equipment shall be deemed accepted and as having achieved CSA.

**8. FORCE MAJEURE.** Seller shall not be liable for failure to perform occasioned by strikes, lockouts, labor difficulties, riots, inability or difficulty in obtaining or procuring supplies, labor or transportation, fires, storms, floods, earthquakes, explosions, accidents, acts of God, interference by civil or military authorities, whether legal or de facto, acts of the public enemy, war, rebellion, insurrection, sabotage, embargoes, orders given priority by any public authority or any other cause beyond the reasonable control of Seller.

**9. PATENTS.** If a third party claims that the purchased equipment infringes that party’s patent or copyright, Seller will defend Buyer against that claim and will pay all costs, damages and attorneys’ fees that a court finally awards, provided that Buyer: (a) promptly notifies Seller in writing of the claim, and (b) allows Seller to control, and cooperates with Seller in, the defense and any related settlement negotiations. If such a claim is made or appears likely, Seller, at its option, may obtain a license to enable Buyer to continue to use the product, may modify the product or may replace it with one that is functionally equivalent. If Seller determines that none of these alternatives is reasonably available, Buyer will return the product to Seller upon Seller’s written request, in which case Seller will credit Buyer with an amount equal to the price paid for such product less a reasonable amount for depreciation. Seller’s liability is limited to repair, replacement or adjustment as determined by Seller. Seller shall not be liable for any claim based on (i) anything Buyer provides which is incorporated into a product, (ii) Buyer’s modification of a product or use thereof other than in its specified operating environment, or (iii) the combination, operation or use of a product with products provided by other manufacturers or other products not provided by Seller as a system. This is the exclusive warranty and liability of Seller with respect to intellectual property matters and is in lieu of all other warranties and remedies, express or implied. Sale of products or parts thereof does not confer on Buyer any license relating to (a) the structure of any devices to which the products or parts may be applied or (b) a process or machine in connection with which they may be used.

**10. RESCHEDULING.** If Buyer has any rescheduling rights, such rights shall be as set forth in [Exhibit A](#).

**11. CANCELLATION.** If Buyer has any cancellation rights, such rights shall be as set forth in [Exhibit A](#).

**12. ASSIGNMENT.** Buyer shall not assign this order or any portion thereof without the prior written consent of Seller.

### 13. WARRANTY.

**(a)** Seller warrants to the Buyer that new equipment will be free of defects in material and workmanship for a period of one year commencing on final acceptance or ninety (90) days from shipping, whichever occurs first. This warranty covers the cost of parts and

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labor (including, where applicable, field service labor and travel required to restore the equipment to normal operation).

**(b)** Seller warrants to the Buyer that replacement parts will be new or of equal functional quality and warranted for the remaining portion of the original warranty or 90 days, whichever is longer.

**(c)** Seller warrants to the Buyer that software will perform in substantial compliance with the written materials accompanying the software. Seller does not warrant uninterrupted or error-free operation.

**(d)** Seller's obligation under these warranties is limited to repairing or replacing at Seller's option defective non-expendable parts or software. These services will be performed, at Seller's option, at either Seller's facility or Buyer's business location. For repairs performed at Seller's facility, Buyer must contact Seller in advance for authorization to return equipment and must follow Seller's shipping instructions. Freight charges and shipments to Seller are Buyer's responsibility. Seller will return the equipment to Buyer at Seller's expense. All parts used in making warranty repairs will be new or of equal functional quality.

**(e)** The warranty obligation of Seller shall not extend to defects that do not impair service or to provide warranty service beyond normal business hours, Monday through Friday (excluding Seller holidays). No claim will be allowed for any defect unless Seller shall have received notice of the defect within thirty (30) days following its discovery by Buyer. Also, no claim will be allowed for equipment damaged in shipment. Within thirty (30) days of Buyer's receipt of equipment, Seller must receive notice of any defect which Buyer could have discovered by prompt inspection.

**(f)** Expendable items, including, but not limited to, filters, lamps, pilot lights, filaments, fuses, mechanical pump belts, probes, V-belts, wafer transport belts, pump fluids, O-rings and seals ARE SPECIFICALLY EXCLUDED FROM THE FOREGOING WARRANTIES AND ARE NOT WARRANTED.

**(g)** All used equipment, including demo equipment, is sold AS IS, WHERE IS, WITHOUT ANY WARRANTY, EXPRESS OR IMPLIED. Regular maintenance is excluded from this warranty.

**(h)** Specifically excluded from this warranty is all standalone computer and data storage equipment not manufactured by Seller (such as computers, monitors, printers and printer buffers). Such equipment will carry only the original manufacturer warranty.

**(i)** Seller assumes no liability under the above warranties for equipment or system failures resulting from (a) abuse, misuse, modification or mishandling; (b) damage due to forces external to the machine including, but not limited to, acts of God, flooding, power surges, power failures, defective electrical work, transportation, foreign equipment/attachments or Buyer-supplied replacement parts or utilities or services such as gas; (c) improper operation or maintenance; or (d) failure to perform preventive maintenance in accordance with Seller's recommendations (including keeping an accurate log of preventive maintenance). In addition, this warranty does not apply if any equipment or part has been modified without the written permission of Seller or if any Seller serial number has been removed or defaced.

**(j)** No one is authorized to extend or alter these warranties on Seller's behalf without the written authorization of Seller.

**(k) THE ABOVE WARRANTIES ARE EXPRESSLY IN LIEU OF ANY OTHER EXPRESS OR IMPLIED WARRANTIES (INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE), AND OF ANY OTHER OBLIGATION ON THE PART OF SELLER. SELLER DOES NOT WARRANT THAT ANY EQUIPMENT OR SYSTEM CAN BE USED FOR ANY PARTICULAR PURPOSE OR WITH ANY PARTICULAR PROCESS OTHER THAN THAT COVERED BY THE APPLICABLE PUBLISHED SPECIFICATIONS.**

**14. NO CONSEQUENTIAL DAMAGES; LIMITATION OF LIABILITY.** Seller shall not be liable for consequential damages, for anticipated or lost profits, incidental, indirect, special or punitive

damages, loss of time, loss of use, or other losses, even if advised of the possibility of such damages, incurred by Buyer or any third party in connection with the equipment or services provided by Seller. In no event will Seller's liability in connection with the equipment or services provided by Seller exceed the amounts paid to Seller by Buyer hereunder.

**15. NONSOLICITATION.** Buyer will not solicit the employment of any employee of Seller who has come into contact with Buyer in connection with the products or services provided to Buyer hereunder.

**16. COMPLIANCE WITH LAWS.**

**(a)** The performance of each party hereunder is subject to compliance with all applicable laws.

**(b)** Buyer understands that exports and re-exports of Seller's products and any related software, service, technical assistance, training and related technical data, and any media in which any of the foregoing is contained (the "Items") are subject to U.S. and foreign trade controls, customs, anti-boycott and economic sanctions laws, regulations, rules and orders (the "Export Laws"). In addition to any other remedy it may have, Seller may suspend or cancel the export, delivery, installation, or any maintenance or repair service of any Item if (a) Seller has not received all export-related documentation requested by Seller, including end-user certificates, (b) Seller has not received the governmental approvals that Seller deems to be required, or (c) Seller believes that such activity may violate any Export Laws or Seller's own compliance policies. Buyer shall only use the Items for non-military, peaceful purposes. Buyer shall not export, re-export or otherwise transfer or provide any Item in contravention of any Export Law or any end-user certificate provided by Buyer, including to an embargoed or otherwise sanctioned country, to anyone listed on any prohibited persons list published by the U.S., the UN, the EU or the OSCE, or for a prohibited end-use (such as research on or development of chemical, biological, or nuclear weapons, unmanned air vehicles or missiles, or nuclear explosive or fuel cycle activities). Buyer must notify Seller before providing any technical data to Seller that is controlled under any Export Law. Seller will not be liable to Buyer for any loss or expense if Buyer fails to comply with any Export Law.

**(c)** Buyer will comply with all applicable import laws or other restrictions or conditions respecting the import of Items that are now in effect or are hereafter imposed by any government or other applicable jurisdiction. Buyer shall be responsible for obtaining any necessary import permit, license or authorization at its sole cost and expense. Buyer shall immediately notify Seller if an import permit, license or other authorization is required in connection with any such import.

**17. APPLICABLE LAW AND JURISDICTION.** The contract created hereby shall be interpreted and construed under the laws of Germany, without regard to the choice of law provision thereof and not including the U.N. Convention on Contracts for the International Sale of Goods, if otherwise applicable. The exclusive venue for any disputes arising out of or in connection with such contract shall be in the competent courts of Munich, Germany.

## EXHIBIT A

### ADDITIONAL PROVISIONS

[1. Rescheduling: If Buyer is to have any rescheduling rights, a provision such as the following should be used:

If one rescheduling is requested, the charges shall be determined as follows and shall be due and payable within ten (10) days of the rescheduling:

Number of Weeks of Rescheduling Requested	Rescheduling Charge
Up to 4 Weeks	No Charge
5 to 12 Weeks	15% of Purchase Price
13 to 26 Weeks	35% of Purchase Price
27+ Weeks	Order Considered Canceled

More than one rescheduling of an order will be considered a cancellation of the order. Sixty-six percent (66%) of the rescheduling charge shall be applied against the purchase price if the order is subsequently shipped or against the cancellation charges if the order is subsequently canceled. On any order that is rescheduled and subsequently canceled, cancellation charges will be based upon the time between the originally scheduled delivery date and the date of notice of cancellation.]

[2. Cancellation. If Buyer is to have any cancellation rights, a clause such as the following should be used:

In the event of attempted cancellation by Buyer of any order, Buyer shall pay Seller a cancellation and re-stocking charge based upon the timing of the attempted cancellation notice as follows:

Days Attempted Cancellation Notice Given Before Confirmed Shipment Date of Order	Cancellation Fee Equals the Following Percentage of Purchase Price
More than 90 Days	35% of Purchase Price
61 to 90 Days	50% of Purchase Price
31 to 60 Days	75% of Purchase Price
0 to 30 Days	100% of Purchase Price

Higher cancellation charges, up to the full value of the order, may apply in the case of special, custom or modified equipment.]

[3. Insert any other special provisions.]