

These Terms of Trade are applicable to all sales transactions conducted by Open Country Dairy Limited:

## 1. DEFINITIONS

- 1.1. "Company" means Open Country Dairy Limited.
- 1.2. "Contract" means any agreement to supply the Goods to the Customer that arises when the Company issues a Sales Contract to the Customer.
- 1.3. "Customer" means the Customer named in any Contract with the Company (if more than one, jointly and severally).
- 1.4. "Goods" means the goods that are the subject of a Contract.
- 1.5. "Intellectual Property" means the Company's proprietary interests in and relating to the Goods, whether arising under statutory or common law, including without limitation: the Company's brands; its patents and patent applications; know-how; specifications; manufacturing methods; formulations; research and development; quality control procedures; technical documentation; and trade secrets.
- 1.6. "Maximum Age" means the maximum age of the Goods from the date of manufacture to date of despatch from the factory as specified in the Sales Contract.
- 1.7. "Sales Contract" means the confirmation of a purchase of Goods by a Customer issued by the Company under clause 7.1 of these Terms.
- 1.8. "Specification" means the specifications for Goods published by the Company from time to time varied as necessary to comply with any stipulation in the relevant Sales Contract.
- 1.9. "Terms" means these Terms of Trade.

## 2. SCOPE

- 2.1. All sales by the Company to the Customer shall be subject to these Terms and the Terms set out in the relevant Sales Contract. All other terms and conditions are expressly excluded.
- 2.2. The Company's agents and representatives have no authority to make any oral representations, statements, warranties, conditions or agreements that conflict with these Terms or the terms of any Sales Contract.

## 3. PRICE

- 3.1. Unless otherwise stated in the Sales Contract, the price does not include any applicable GST which shall be the responsibility of the Customer.
- 3.2. The price includes an ullage allowance of 0.15% of the quantity of the Goods specified in the Sales Contract ("Ullage Allowance") to cover minor damage to or loss of the Goods that may occur after despatch from the factory up to delivery to the Customer. The Company will not compensate the Customer for any damage to or loss of the Goods below the Ullage Allowance. The Company may in its sole and absolute discretion provide reasonable compensation if the damage or loss is in excess of the Ullage Allowance and satisfactory photographic evidence that the damage or loss occurred prior to delivery is provided to the Company

within 10 days after the delivery date into the Customer's nominated warehouse location.

- 3.3. In the case of palletised shipments, a pallet surcharge will be imposed above the price.
- 3.4. If the Sales Contract does not specify a destination for the Goods, any additional costs of delivering to the notified destination, including packing, administration, testing, freight and any other costs will be payable by the Customer in addition to the price in the relevant Sales Contract.
- 3.5. The Company may round the quantity of the Goods specified in the Contract up or down by 5% from the quantity stated in the Sales Contract and the total price the Customer is required to pay for the Goods will be proportionally increased or decreased. Delivery of the rounded quantity of Goods over or under the amount specified in the Contract will constitute delivery in satisfaction of the Contract.

## 4. PAYMENT

- 4.1. The Customer will arrange for payments to be made in the manner and at the time(s) set out in the relevant Sales Contract.
- 4.2. If the Company requires the Customer to post security for payment the Customer must post such security before the Goods are loaded for shipment.
- 4.3. In the event of late payment, or if the Customer fails to post security by the required date, the Company may charge the Customer interest at a rate equivalent to the bank indicator lending rate applicable to the Company plus 7% pa on the amount outstanding or to be secured (as the case may be) until payment (including after judgment).
- 4.4. The Customer may not withhold payment or make any deduction or set-off from any amount owing to the Company without the Company's prior written consent.
- 4.5. Where there is a dispute between the parties as to the amount owing to the Company, the Customer may not withhold, and must pay without deduction or set-off, any undisputed portion of the amount owing. Clause 4.3 applies to any undisputed amount not paid by the required date.
- 4.6. The Company may deduct money that is owing to it by the Customer from money that the Company is owing to the Customer.

## 5. DELIVERY

- 5.1. The terms of delivery under a Sales Contract will be FIS (Free into Store) to the destination nominated by the Customer other than to the extent they are expressly overridden by these Terms or by a Sales Contract. The provisions of a Sales Contract will override these Terms but only in respect to that Contract.
- 5.2. If the Contract makes provision for delivery in instalments each instalment is deemed to constitute a separate Contract.

- 5.3. Any time stated for delivery in a Sales Contract is an estimate only of the delivery date of the Goods. The Company shall not be liable for any losses, costs or damages arising due to delay in delivery or shipment of the Goods and no such delay will constitute a right of cancellation.
- 5.4. Under normal operations quantities of Goods delivered may vary from the precise quantities stated in an order. The Customer agrees that the quantity of Goods deemed to be in a Sales Contract is that quantity of Goods delivered in accordance with normal operations.
- 6. STOCKFOOD/SECONDS**
- 6.1. If the Goods are sold to the Customer as stockfood/seconds, the Customer acknowledges that the Goods are not fit for human consumption and are sold on the representation from the Customer that it will only be used or onsold exclusively for the purpose of feeding animals.
- 7. ORDERING PROCEDURE**
- 7.1. The Customer must comply with ordering procedures notified by the Company from time to time. The Company has not accepted an order unless the Customer has received from the Company a written Sales Contract for that order.
- 8. PACKAGING AND LABELLING**
- 8.1. Except where clause 8.2 applies, the Company will use its standard packaging and labelling, as detailed in the Specifications.
- 8.2. The Company shall not be obliged to comply with any special packaging and/or labelling requirements of the Customer except to the extent those requirements are stipulated in a Sales Contract.
- 9. CUSTOMER OBLIGATIONS**
- 9.1. If the Sales Contract does not specify a destination for the Goods, the Customer must issue instructions for delivery fully and sufficiently in advance to allow the Company to deliver the Goods by the estimated date of delivery, and in any event must issue instructions for delivery at least 5 working days prior to the estimated date of delivery.
- 9.2. Unless otherwise agreed between the Company and the Customer, the Customer must not sell directly or indirectly any of the Goods to any subsequent customer knowing or having reason to believe that they would be resold or supplied beyond the agreed subsequent customers as agreed between the Company and the Customer. In the event of any dispute about on selling the Company will have the sole right to determine the matter and its determination will be final and binding on the Customer. Except with the Company's express written permission, the Customer may not export to or use the Goods in any market outside New Zealand or sell the Goods to any other party who may do so.
- 9.3. The Customer must use all reasonable endeavours to satisfy any special condition specified on a Sales Contract requiring action by it prior to the estimated date of delivery in the Sales Contract. If the Customer has not otherwise notified the Company within that timeframe then the special condition will be deemed to be satisfied.
- 9.4. The Customer acknowledges that from time to time it may have access to certain information (whether written or oral) relating to the Goods or the Intellectual Property of the Company or the affairs of the Company or its customers and which information is not generally known to the public including, without limitation, price quotations, lists of the Company's customers and confidential or commercially sensitive methods and know how. The Customer agrees with and undertakes to the Company not, without the prior written consent of the Company, to disclose such information to any third party or use such information for the Customer's own benefit or for the benefit of any other person or in any way exploit such information, nor will the Customer provide any person with a copy of or disclose to any person the contents of any document containing such information.
- 9.5. If any fees, levies, charges, surcharges or any other costs are charged to or imposed on the Company after the Company has entered into a contract of carriage with its nominated carrier for the delivery of the Goods to the destination specified in the Sales Contract, then the Customer acknowledges and agrees that it is responsible and liable, and will indemnify and reimburse the Company, for the payment of those fees, levies, charges or other costs.
- 9.6. The Customer will not use the Goods, or allow the Goods to be used by any person, for any purpose other than the purpose specified in the Specifications or as intended by the Company. Under no circumstances will the Company be liable to the Customer or any person for any use of the Goods that is inconsistent with the Specifications or not intended by the Company.
- 10. DELAYS**
- 10.1. Without prejudice to cancellation or any other rights of the Company, in the event of a breach by the Customer of any provision in any Contract or where the Company is otherwise hindered to any extent by the Customer in despatching the Goods, the Company may at its sole discretion do any one or more of the following: (a) despatch Goods that are of an age greater than the Maximum Age at the date of despatch from the factory; or (b) delay the delivery of Goods (in the case of breach or hindering, until a reasonable date following rectification of the breach or hindering) and invoice the Goods on the original estimated date of delivery and demand immediate payment. The Customer must also pay such fee as the Company reasonably determines to cover storage costs, inventory financing charges, insurance, and such other charges incurred by the Company and relating to the delayed Goods.

**11. FORCE MAJEURE**

11.1. A 'Force Majeure Circumstance' is any circumstance beyond the reasonable control of the Company which impacts on production. Such circumstances include, without limitation: unavoidable delays in production; delays by suppliers; delays or shortages caused by seasonal factors; shortages of raw materials; delays by the Customer; strikes and labour unrest; shipping delays; acts of war; acts of terrorism; government intervention; fire; flood; drought; accident; natural disaster; or any other event commonly referred to as an "Act of God". For the purposes of this clause a strike, lockout or other labour unrest, whether direct or indirect, lawful or unlawful, to which the Company is a party is deemed to be beyond the reasonable control of the Company.

**12. CANCELLATION AND FORCE MAJEURE CONSEQUENCES**

12.1. The Customer does not have the right to cancel or suspend any order after the Company has issued a Sales Contract for that order.

12.2. The Company may cancel or suspend a Contract (or any part of a Contract) if: (a) the Customer breaches any provision in any Contract; (b) the Customer seeks relief under any insolvency or bankruptcy law or (c) a Force Majeure Circumstance occurs before a Contract is fully performed.

12.3. In the event that a Contract is fully or partially cancelled or suspended, whether pursuant to clause 10.1 or clause 12.2(a) or (b), without prejudice to any other rights or remedies the Customer must reimburse the Company for any costs incurred as a consequence of such cancellation or suspension, including without limitation, packaging and re-packaging costs, storage costs, financing costs, foreign exchange losses, loss of profits and any diminution in the value of the Goods due to price movements. The Customer expressly acknowledges the Company has no obligation to obtain the same market price for the on sale of the Goods in this event as other similar products due to the comparative age of the Goods at that point and the circumstances of the cancellation or suspension. If a Force Majeure Circumstance arises the Company may allocate raw materials to production mixes, and select Sales Contracts to partially or fully cancel or suspend in accordance with clause 12.2(c), entirely in its sole discretion.

12.4. If the Company in its sole discretion chooses to continue to perform the Contract when a Force Majeure Circumstance occurs, the Company will be entitled to charge, and the Customer must pay, such additional freight and costs in relation to the Contract as the Company may determine.

**13. RETENTION ON TITLE**

13.1. The Company retains title to the Goods, pending receipt of payment, to the maximum extent permitted by law. The Company reserves all rights and remedies it may

have under applicable law to recover the Goods sold and delivered to the Customer if the Customer does not pay for such Goods by the payment due date. This includes the right to divert a delivery while in transit, or to enter upon the Customer's premises and remove such Goods and the Customer authorises the Company to take any action required to enforce these rights (including but not limited to registering any required notifications of the Company's interests in the Goods). Such rights are cumulative and not in substitution for any other rights that the Company may have in the circumstances. The Customer will provide the Company all information required in order to allow it to register a financing statement pursuant to the Personal Property Securities Act 1999 (PPSA).

13.2. The Customer waives any rights to receive a copy of a verification statement or financing charge statement relating to the security interest under these Terms.

13.3. The Customer agrees that sections 114(1)(a), 116, 120(2), 121, 125, 126, 127, 129 131, 132, 133 and 134 of the PPSA shall not apply to these Terms and waives any rights it has under those sections.

**14. WARRANTY**

14.1. The Company warrants that the Goods conform to the Specification at the time of delivery to the Customer. Upon request in writing at the time of ordering, the Company will arrange testing of the Goods by SGS Limited (or such other independent laboratory nominated by the Company), whose determination of whether the Goods conform to Specification will be final. All costs of testing will be paid for by the Customer, but such costs will be reimbursed by the Company if it is determined that the Goods do not conform to Specification.

14.2. Unless the Customer requests testing of the Goods in writing at the time of ordering, the Goods will be deemed to conform to the Specification.

14.3. If certain of the Goods are determined not to conform to Specification and are not merchantable, the Company may at its discretion: (a) reimburse the Customer for those Goods; or (b) replace those Goods, but in each case the Customer will have no right to cancel the Contract and the Contract will continue to apply in respect of the remainder of the Goods. In the event that the Goods do not conform to the Specification but are still merchantable, the Company may at its sole discretion: (a) issue a credit to the Customer to compensate for any diminution in value; or (b) require that the Customer rework the relevant Goods so that those Goods conform to the Specification and reimburse the Customer for the reasonable costs of such rework.

14.4. The Company's warranty does not cover deterioration of or damages to the Goods occurring after the Goods have been delivered.

14.5. The warranty in clause 14.1 of these Terms is in place of all other warranties, conditions, guarantees and

representations, whether express or implied. Specifically, and without limiting the generality of the foregoing, the Company hereby excludes any warranty concerning product efficacy or implied warranties of merchantability or fitness for a particular purpose. The Company does not warrant that the Goods are fit for a particular purpose, even if advised of such purpose. The Customer may not rely upon any oral opinions, interpretations, statements, assurances or representations given by the Company. The Customer acknowledges that the Goods are being purchased for business purposes and that the Consumer Guarantees Act 1993 does not apply. The parties agree that the Goods are supplied and acquired in trade within the meaning of the Fair Trading Act 1986, that sections 9, 12A and 13 of the Fair Trading Act 1986 will not apply to the agreement between the parties, and that it is fair and reasonable to exclude their application.

## **15. TECHNICAL ADVICE**

- 15.1. Where the Company gives technical advice, it does so to provide helpful suggestions only. The Company assumes no obligation or liability for any technical advice so given. The Customer accepts such technical advice entirely at its own risk based on its own judgement and not in reliance upon the Company.
- 15.2. The Company's technical documentation comprises its Intellectual Property. The Customer may not alter such documentation for any purpose whatsoever.

## **16. COMPLIANCE WITH LAW**

- 16.1. The Customer must comply with all applicable laws and regulations in the countries where the Customer intends to use, distribute, or market the Goods. Specifically, and without limiting the generality of the foregoing, the Customer must comply with all health and safety requirements, labelling requirements, registration and approval requirements, dating requirements, warranty requirements, truth in advertising requirements and country of origin marking requirements.
- 16.2. The Customer acknowledges that the Company will be relying entirely upon the Customer to convey any specific requirements that the Customer may have in respect to the Goods. The Company will not be responsible for failing to satisfy any such requirements unless the Customer advised the Company of such requirements, in writing, on or prior to the date of the Contract and the relevant Sales Contract stipulates that the Company will meet those requirements.

## **17. LIABILITY**

- 17.1. To the extent that the liability of the Company under any Contract is not otherwise limited or excluded and to the extent permitted by law, the total liability of the Company whether in tort (including negligence), contract or otherwise, for any loss, damage or injury arising directly or indirectly from any defect in the

Goods or any other breach of the Company's obligations under any Contract is limited to the price paid by the Customer for the affected Goods in the relevant order.

- 17.2. Notwithstanding any other provision of any Contract, under no circumstances will the Company be liable for any loss of income or profits or any consequential, indirect or special damage or injury of any kind suffered by the Customer or any other person.
- 17.3. The Customer indemnifies, and holds the Company, its servants, agents and contractors harmless, from and against any and all claims and damages of every kind arising in connection with the Customer's breach of clause 9.6.

## **18. CUSTOMER REPRESENTATIONS**

- 18.1. Other than to the extent that liability arises due to a breach of the warranty in clause 14.1, the Customer indemnifies, and holds the Company harmless, against any claims of whatever nature that arise from of the Customer's marketing of the Goods, including without limitation: Claims arising from death or personal injury, false efficacy claims, breach of warranty claims and claims arising from health and safety violations. The Customer further indemnifies, and holds the Company harmless, against any claims of whatever nature that arise from the Company's use of the Customer's brands, artwork, packaging, formulations and specifications to produce the Goods.
- 18.2. The Customer indemnifies, and holds the Company, its servants, agents and contractors harmless, from and against any and all claims and damages of every kind arising due to the Customer breaching a Contract including but not limited to a breach of section 23 of the Dairy Industry Restructuring Act 2001.
- 18.3. The Customer indemnifies, and holds the Company, its servants, agents and contractors harmless, from and against any third party claims related to Goods or a Contract, unless the Customer demonstrates that the claim is a direct result of the actions or omissions of the Company.
- 18.4. The Customer warrants and represents that it has the benefit of all necessary intellectual property rights in all the Customer's brands, artwork, packaging and formulations used to produce the Goods. The Customer will not make any efficacy claims in relation to the Goods without the prior written consent of the Company (which may be issued at its discretion).
- 18.5. The Customer will take all due care of the Goods and the packaging consistent with best industry practice, will not tamper with or damage the Goods or packaging in any respect, and will comply with any instructions issued by the Company regarding the required storage conditions of the Goods.

## **19. INTELLECTUAL PROPERTY**

- 19.1. The Customer acknowledges the Company's ownership of the Intellectual Property. The Customer disclaims any interest in the Intellectual Property. The Customer will



not challenge the validity of the Intellectual Property. The Customer will not take any action prejudicial to the Intellectual Property.

**20. GENERAL**

- 20.1. New Zealand law governs all transactions between the Customer and the Company. The Customer submits to the exclusive jurisdiction of New Zealand courts. The United Nations Convention on Contracts for the International Sale of Goods is excluded.
- 20.2. No failure by the Company to insist upon strict performance of any Contract, including any of these Terms, or any delay in exercising any of its rights or remedies, constitutes a waiver or variation.
- 20.3. The Customer may not assign its rights or obligations under any Contract. The change in more than 50% of the composition of the person or persons having management or directorial control of the Customer as at the date of the Contract is deemed to be an assignment for the purposes of this clause.
- 20.4. The Company has the right to assign its rights and obligations under any Contract without the consent of the Customer.
- 20.5. In the event that any clause in these Terms is invalid or unenforceable, that clause will be amended, but only to the extent necessary to make it valid and enforceable. If amendment is not possible, that clause will be stricken from these Terms. However, the balance of these Terms will continue in full force and effect.
- 20.6. The Company reserves the right to change these Terms from time to time. The varied Terms will be posted on the Company's website and the varied Terms will apply to all Contracts entered into between the Company and the Customer after the date the varied Terms are posted on the Company's website. It is the Customer's responsibility to regularly check the Company's website to ensure that it is familiar with the latest Terms.
- 20.7. Stipulations as to time for performance by the Customer in a Contract are of the essence and essential terms of that Contract. Stipulations as to time for performance by the Company in a Contract are not of the essence and are not essential terms of any Contract.
- 20.8. A Contract may only be amended, supplemented or novated in writing executed by both the Company and the Customer.
- 20.9. These Terms, together with the Contract, constitute the sole and entire agreement between the parties in relation to their subject matter and supersedes all prior negotiations, dealings, agreements and understandings between the parties. Subject to clause 20.6, these Terms cannot be changed unless the change is agreed in writing and signed by the authorised representatives of both parties. No other terms of trade shall apply between the parties in relation to the sale and supply of the Goods.
- 20.10. The parties agree that these Terms are intended to create legally binding obligations upon the Customer's receipt of a Sales Contract issued by the Company.

**21. DEFAULT**

- 21.1. If the Customer defaults on its obligations to the Company, without prejudice to any other rights, powers or remedies that the Company may have: (a) The Company may cancel all or any part of an order for Goods that has not been performed by the Customer and terminate all other obligations that the Company has under these Terms; (b) All amounts owing to the Company become immediately due and payable in their entirety; (c) The Company may enforce any existing security interest granted by the Customer in relation to the Goods; (d) The Company may invoke the right to repossess the Goods pursuant to clause 13.1 and may recover from the Customer all costs and expenses associated with the repossession of the Goods.
- 21.2. The Customer indemnifies the Company for all losses incurred by it as a result of the Company exercising its rights under this clause.

**22. SEVERABILITY**

- 22.1. If any term within these Terms is held to be void, unenforceable or illegal, the remaining terms shall remain in full force and effect.

**23. PRIVACY ACT 2020**

- 23.1. The Customer authorises the Company and the Company's agents to collect, use, disclose and store personal information about the Customer for the following purposes:
  - (a) assessing the Customer's credit worthiness, including disclosing to and/or receiving information from credit reporters;
  - (b) administering the Customer's orders;
  - (c) marketing; and
  - (d) any other purpose set out in the Company's [Privacy Policy](#).
- 23.2. The Customer acknowledges that the Company may refuse to allow the Customer credit if it does not authorise the Company to obtain all information reasonably required to assess the Customer's credit worthiness from any credit reporter or third party, and authorise those credit reporter or third parties to disclose that information to the Company.