

OMNIGUIDE® SURGICAL
TERMS AND CONDITIONS OF SALE

AGREEMENT: These Terms and Conditions, together with any order or other agreement signed by both OmniGuide, Inc. ("OmniGuide") and the customer ("Customer") (collectively, the "Agreement") govern all purchase and sale, rental, lease, and other transactions between OmniGuide and Customer involving OmniGuide products, including, without limitation, any such OmniGuide devices and capital equipment collectively referred to herein as "Products". OmniGuide will not be bound by, and specifically objects to, any term, condition, or other provision which is different from, or in addition to, the provisions of this Agreement (whether or not it would materially alter this Agreement) which may be submitted by Customer in any purchase order, receipt, acceptance, confirmation, correspondence, or otherwise, unless OmniGuide specifically agrees to such provision in a written instrument signed by OmniGuide. OmniGuide's acceptance of any order by Customer for the purchase of OmniGuide Products is expressly conditioned on Customer's agreement to the terms and conditions of this Agreement.

1. DEFINITIONS: "OmniGuide" means OmniGuide, Inc., 4 Maguire Road, Lexington, MA 02421, phone: 888-666-4484, fax: 888-490-6020, e-mail: customerservice@omni-guide.com. "Customer" means the purchaser of Products.

2. ACCEPTANCE OF ORDERS: Customer and OmniGuide shall agree to the purchase price for the Product(s). Customer shall submit a Purchase Order (the "Purchase Order"), or a signed OmniGuide Quote document ("Quote"), to OmniGuide to facilitate the purchase of OmniGuide Product(s). OmniGuide will deliver to Customer, and Customer will accept and pay for, all Products and services which have been ordered by Customer pursuant to a Purchase Order or a Quote. All orders are subject to acceptance by OmniGuide either (i) in writing, or (ii) by OmniGuide's shipping of Products to Customer. OmniGuide may accept any order in whole or in part and OmniGuide's shipment of less than all Products ordered by Customer will constitute acceptance only as to those Products shipped.

3. PRICES: Prices are subject to change at any time. Price changes will not affect orders accepted by OmniGuide prior to the date of any pricing change. All prices are exclusive of applicable sales, use, value added, excise, federal, state, local or any other taxes other than taxes on OmniGuide's income. Customer shall pay all such taxes or, in lieu thereof, provide OmniGuide with an appropriate exemption certificate. If pricing reflects a discount or rebate, pursuant to 42 C.F.R. § 1001.952, Customer may have an obligation to report the discount or rebate in applicable cost reports and/or may need to provide information concerning the discount or rebate to federal or state agencies upon request.

4. PAYMENT: All Customer payments due OmniGuide shall be due and payable within thirty (30) days of Customer's receipt of the Products ordered. OmniGuide reserves the right to require an upfront deposit in advance of shipping Products to Customer and shall reject any Purchase Order, or Quote that is not accompanied by such required deposit. Customer shall, unless expressly agreed otherwise by OmniGuide in writing, pay the balance of the purchase price due (net of the corresponding deposit) within thirty (30) days of receipt of the Products ordered. The title to the Products shall pass to the Customer according to the standard for the shipping term used. All amounts payable under this Agreement are denominated in United States of America (U.S.) dollars (as stated in the Purchase Order or Quote) and Customer will pay all such amount in lawful money of United States unless expressly agreed otherwise by OmniGuide. Interest on all late payments and any other sums due to OmniGuide under this Agreement shall be charged to Customer at the greater of (i) eighteen percent (18%) per annum, or (ii) the maximum rate allowed in the jurisdiction of this Agreement until said payments are received in full. If Customer becomes insolvent, files for protection under a bankruptcy code, makes an assignment for the benefit of creditors, has a receiver or trustee appointed, or is generally unable to meet its financial obligations as they come due, OmniGuide may terminate this Agreement, withhold delivery of Products, and retain Customer's deposit(s) as liquidated damages. In any event, OmniGuide may, at its discretion, demand full payment in advance of the shipment of some or all Product(s). If Customer refuses to make such advance payment, OmniGuide may terminate this Agreement and retain Customer's deposit as liquidated damages, in addition to any other remedies available to it.

5. DELIVERY AND ACCEPTANCE: All shipments are F.O.B. OmniGuide's shipping facility, at Customer's expense. Title and all risk of loss or damage shall pass to Customer upon delivery of Product to its agent or common carrier, whichever occurs first. OmniGuide will deliver the Products to a carrier chosen by OmniGuide. Shipping and handling charges will be prepaid by OmniGuide and added to Customer's invoice. Any claims for shortages or damages suffered in transit shall be submitted by Customer directly to the common carrier. Unless Customer has given OmniGuide written notice of such a claim within seven (7) days after Customer's receipt of the Products, Customer shall be deemed to have accepted the shipment. While OmniGuide will use all reasonable commercial efforts to ship Products in accordance with quoted delivery dates, all shipping dates are approximate and not guaranteed and OmniGuide reserves the right to make partial shipments.

6. CHANGE ORDERS AND CANCELLATIONS: Customer may request changes or additions to its order, but OmniGuide shall have no obligation to make such changes. OmniGuide may revise the price and delivery dates for any changes or additions that it accepts from Customer and Customer may not reschedule or cancel an order unless OmniGuide approves the request in writing. Customer agrees to promptly pay any applicable cancellation or rescheduling charges.

7. RETURNS: Customer may not return any Product for any reason without the prior approval of OmniGuide's Customer Service Department. OmniGuide shall issue an RMA number for any and

all authorized Product returns. OmniGuide authorized Product returns shall be delivered to OmniGuide's facility by Customer in the original packaging, clearly labeled with the RMA number. Except as provided in Section 9 below, Customer shall be responsible for all shipping charges and shall assume all risk of loss or damage in transit of Products returned to OmniGuide.

8. PRODUCT CHANGES: OmniGuide reserves the right to change Products without notice to Customer as long as the change does not adversely affect the form, fit or function of the Product.

9. LIMITED WARRANTY: OmniGuide warrants that, under normal use and service, each Product will substantially conform to the specifications set forth in Product documentation for twelve (12) months from the date of shipment unless the expiration date as printed on the applicable labeling is different, in which case the expiration date will prevail. This Limited Warranty shall not apply to a purchase of a refurbished Product. EXCEPT AS PROVIDED IN SECTION 11, THIS IS THE SOLE AND EXCLUSIVE WARRANTY GIVEN BY OMNIGUIDE AND OMNIGUIDE DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ARISING BY OPERATION OF LAW OR OTHERWISE, INCLUDING (BUT NOT LIMITED TO) ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. As Customer's sole remedy for breach of this Limited Warranty, OmniGuide will, in its sole discretion, repair or replace any defective Product if Customer notifies OmniGuide in writing of such defect within the stated warranty period.

IF OMNIGUIDE IS UNABLE TO REPAIR OR REPLACE THE PRODUCT IN A TIMELY FASHION, CUSTOMER'S SOLE REMEDY FOR ALL DAMAGES OR LOSSES SHALL BE TO OBTAIN A REFUND OF THE PRICE PAID FOR THE PRODUCT. This Limited Warranty shall not apply to defects resulting from unauthorized modification, attachment or alteration, abuse, misuse, accident, improper installation, improper configuration, operation outside environmental or operational specifications, or any other cause not the fault of OmniGuide. If Customer supplied information to OmniGuide that OmniGuide relied upon in the selection of the Products, and if actual operating conditions differ from those represented by Customer, any warranties that are affected by such conditions shall be null and void.

10. EXTENDED SERVICE: For any purchase of extended service by Customer, OmniGuide shall provide a guarantee period ("Service Guarantee") for the applicable period purchased by Customer. During the Service Guarantee period any OmniGuide capital equipment experiencing performance issues shall be repaired or replaced, at OmniGuide's sole option, and any necessary labor will be performed, all at no charge to Customer. OmniGuide shall provide Customer with loaner capital equipment to cover any scheduled surgeries while Customer's OmniGuide capital equipment is being serviced subject to Customer providing OmniGuide with a 2-day prior notification of such a need. Such repair or replacement and coverage shall be OmniGuide's sole obligations and shall be conditioned upon OmniGuide receiving written notice of such claimed defect within ten (10) days after Customer's discovery of such defect. At OmniGuide's sole option, any service and repairs of Customer's capital equipment may be performed on-site at Customer's location or at OmniGuide's facilities or another off-site location. Any necessary shipping charges shall be covered by OmniGuide. This Service Guarantee shall be void and of no effect if: (a) anyone other than OmniGuide or a person acting on OmniGuide's express or written instructions, removes an OmniGuide capital equipment casing or makes or attempts to make any modifications, repairs, attachments or additions to the capital equipment or installs or moves OmniGuide capital equipment for which installation is required by OmniGuide; (b) Customer has not maintained or operated the capital equipment in accordance with OmniGuide's instructions, or the capital equipment has been subjected to misuse, abnormal conditions or negligent handling or operation; or (c) the capital equipment is resold, leased or rented to or for the use by any person other than Customer. Service Guarantee includes maintenance in accordance with OmniGuide's requirements. OmniGuide will schedule such maintenance in coordination with Customer. Any parts found to be defective and not functioning properly during any maintenance check will be replaced at no cost to Customer. Service Guarantee shall commence on the earlier of (i) the date of shipment, or date of installation of OmniGuide capital equipment,

11. INTELLECTUAL PROPERTY INDEMNITY:

11.1 OmniGuide will indemnify and hold harmless Customer against any liabilities, damages and expenses arising from a claim that a Product infringes any United States patent. OmniGuide agrees that it will defend any suit or proceeding brought against Customer insofar as such suit or proceeding is based on such a claim subject to OmniGuide being notified promptly in writing of any such suit or proceeding and is given full control of the defense and reasonable information and assistance by Customer. OmniGuide shall be responsible for all damages and costs finally awarded in any such suit or proceeding against Customer, but shall not be responsible for any settlement made by Customer without the prior written consent of OmniGuide.

11.2 If the Product is held in such suit or proceeding to infringe a United States patent, or if the Product has become, or in the opinion of OmniGuide is likely to become, the subject of a claim of infringement of a United States patent, OmniGuide, at its election and at its own expense, shall:

- (i) Procure for Customer the right to continue using the Product;
- (ii) Modify the Product so that it becomes noninfringing while giving equivalent performance; or
- (iii) Replace the Product with a noninfringing product which gives equivalent performance; or
- (iv) if (i), (ii), and (iii) are not reasonably feasible, remove such unused Product and accept its return, paying Customer a refund equal to Customer's purchase price of the Product.

11.3 OmniGuide shall have no liability to Customer under any provision of this Section 11 if any infringement or claim is based upon a modification of the Product not introduced or approved in writing by OmniGuide.

12. LIMITATION OF LIABILITY: IN NO EVENT, REGARDLESS OF THE NATURE OF THE CLAIM OR CAUSE OF ACTION, SHALL OMNIGUIDE'S LIABILITY TO CUSTOMER, or its customers, EXCEED THE PRICE PAID BY CUSTOMER FOR THE PRODUCT GIVING RISE TO THE CLAIM OR CAUSE OF ACTION. IN NO EVENT SHALL OMNIGUIDE BE LIABLE TO CUSTOMER, or its customers, FOR ANY INDIRECT, SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES RESULTING FROM OMNIGUIDE'S PERFORMANCE OR FAILURE TO PERFORM, OR THE MANUFACTURE, SALE, DELIVERY, REPAIR, REPLACEMENT, PERFORMANCE OR USE OF ANY PRODUCTS, INCLUDING WITHOUT LIMITATION LOSS OF PROFIT OR REVENUE EVEN IF OMNIGUIDE HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS.

12.1 NO ADDITIONAL LIABILITY: If OmniGuide furnishes Customer with advice or other assistance which concerns any Product supplied hereunder or any system or equipment in which any such Product may be installed and which is not required pursuant to this Agreement, the furnishing of such advice or assistance will not subject OmniGuide to any liability, whether in contract, warranty, tort (including negligence and strict liability) or otherwise.

13. CONDITIONS OF USE: Products are designed for use solely for the purposes and under the conditions described in the relevant OmniGuide documentation. EACH OMNIGUIDE FIBER IS DESIGNED FOR ONE-TIME USE ONLY. Training by OmniGuide in the use of Products is required prior to their use and Customer is responsible for taking appropriate precautions for the use of fibers at high optical power levels. OMNIGUIDE SHALL HAVE NO LIABILITY TO CUSTOMER, or its customer's, FOR ANY INJURIES OR DAMAGE TO PERSONS OR PROPERTY RESULTING FROM USES OF PRODUCTS CONTRARY TO THESE CONDITIONS. CUSTOMER AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS OMNIGUIDE, AND ANY OF ITS SUBSIDIARIES, AFFILIATES AND PARENT COMPANY, AGAINST ANY CLAIMS, LIABILITIES, DAMAGES AND EXPENSES ARISING FROM ANY OTHER USE.

14. LIMIT ON RESALE: Customer (excluding OmniGuide Distribution Partners or Agents) may not resell Products.

15. DISCLAIMER AND RELEASE: THE WARRANTIES, OBLIGATIONS, AND LIABILITIES OF OMNIGUIDE AND THE REMEDIES OF CUSTOMER SET FORTH IN THIS AGREEMENT ARE EXCLUSIVE AND IN SUBSTITUTION FOR, AND CUSTOMER HEREBY WAIVES, RELEASES, AND DISCLAIMS, ALL OTHER WARRANTIES, OBLIGATIONS, AND LIABILITIES OF OMNIGUIDE AND ALL OTHER RIGHTS, CLAIMS, AND REMEDIES OF CUSTOMER AGAINST OMNIGUIDE, EXPRESS OR IMPLIED, ARISING BY LAW OR OTHERWISE, WITH RESPECT TO THE PRODUCTS AND ANY OTHER GOODS OR SERVICES DELIVERED UNDER THIS AGREEMENT, INCLUDING, BUT NOT LIMITED TO: (A) ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE; (B) ANY IMPLIED WARRANTY ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR USAGE OF TRADE; (C) ANY OBLIGATION, LIABILITY, RIGHT, CLAIM, OR REMEDY IN TORT, WHETHER OR NOT ARISING FROM THE NEGLIGENCE (ACTIVE, PASSIVE, OR IMPUTED), PRODUCT LIABILITY, OR STRICT LIABILITY OF OMNIGUIDE; AND (D) ANY OBLIGATION, LIABILITY, RIGHT, CLAIM, OR REMEDY FOR INFRINGEMENT.

16. SOFTWARE: OmniGuide retains title to all software and computer programs furnished with any Product. Customer will use such software and/or computer programs only in conjunction with the use or operation of such Product and in accordance with applicable instructions and manuals furnished by OmniGuide. Customer will not copy, modify, make any derivative work based upon such software, publish or distribute any such software. Further, Customer will not reverse engineer, decompile or attempt to discover or recreate any source code to any such software.

17. ASSIGNMENTS AND TRANSFERS: Any Purchase Order or signed OmniGuide Quote accepted by OmniGuide is not assignable by Customer without the prior express written consent of OmniGuide. Customer will not, without the prior written approval of OmniGuide, ship or otherwise transfer any Product(s) to any third party or person or to any location other than the location to which it is shipped by OmniGuide.

18. UNENFORCEABLE PROVISION: The invalidity or unenforceability of any provision of this Agreement will not affect the other provisions hereof, and this Agreement will be construed in all respects as if such invalid or unenforceable provision were replaced with a valid and enforceable provision as similar as possible to the one replaced.

19. SEPARATE ENFORCEABILITY: THE SECTIONS OF THIS AGREEMENT ARE TO BE CONSIDERED AS SEPARATE PROVISIONS AND SHALL EACH BE INDIVIDUALLY ENFORCEABLE.

20. NONWAIVER: Any failure by OmniGuide to insist upon or enforce performance by Customer of any of the provisions of this Agreement or to exercise any right or remedy under this Agreement or applicable law will not be construed as a waiver or relinquishment to any extent OmniGuide's right to assert or rely upon any such provision, right or remedy in that or any other instance.

21. ENUREMENT: This Agreement will inure to the benefit of, and be binding upon, the parties and their respective lawful successors, permitted assigns and legal representatives.

22. FORCE MAJEURE: OmniGuide shall not be liable for any delay in Product performance or non-performance directly or indirectly caused by or resulting from acts of God, fire, flood, accident, riot, war, government intervention, embargoes, strikes, labor difficulties, equipment failure, unavailability of or delays in transportation, inability to procure materials, late deliveries by suppliers or other difficulties which are beyond the control and without negligence or other fault of OmniGuide.

23. GOVERNING LAW AND VENUE: These terms and conditions shall be governed by and interpreted under the laws of the Commonwealth of Massachusetts, without regard to principles of conflicts of laws. The U.N. Convention for the International Sale of Goods shall not apply to any transaction governed by these terms and conditions. OmniGuide and Customer acknowledge and agree that the state and federal courts in Boston, Massachusetts shall be the exclusive venue for all actions arising in connection with this transaction.

24. ENTIRE AGREEMENT: These terms and conditions of sale and the applicable Purchase Order and OmniGuide Quote constitute the entire agreement with regard to this transaction and supersede and replace any prior or contemporaneous agreement, written or oral, relating to said transaction. This Agreement shall be binding upon the successors and assigns of the parties hereto.

25. OTHER: The parties are independent contractors. The unenforceability of any provision hereof shall not affect any other provisions of these terms and conditions, which shall remain in full force and effect.