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DIVISIONS OF SPINTECH HOLDINGS, INC.



# COMMERCIAL TERMS & CONDITIONS

Smart Tooling/Hawthorn Composites  
1150 South Patton Street  
Xenia, Ohio 45385

## **1. GENERAL:**

a. Any sale of products by Smart Tooling (hereinafter called "SELLER") is governed exclusively by these Standard Terms and Conditions of Sale (hereinafter called "Standard Terms") which, unless otherwise agreed by an authorized officer of SELLER in writing, shall be a part of the sales contract and shall supersede any inconsistent terms on BUYER's purchase order or any other document provided by or on behalf of BUYER. BUYER's (1) signature on SELLER's order confirmation form, or (2) failure to object to these Standard Terms in SELLER's proposal or order confirmation form within fourteen (14) days of the date thereof, or (3) acceptance of SELLER's products or services shall constitute BUYER's acceptance of these Standard Terms.

b. Any order placed with SELLER must be in the form of a written purchase order or a letter from BUYER authorizing SELLER to proceed on the basis of its proposal to BUYER ("Authorization Letter"). All proposals, quotations, bids or other similar communications from SELLER will be considered invitations to BUYER to submit an offer to contract, subject to these Standard Terms only, in the form of a written purchase order. A binding sales contract, which shall in all events be subject to these Standard Terms, will result when SELLER accepts BUYER's order, represented by its purchase order or its Authorization Letter, at SELLER's office in Xenia, Ohio (or other office designated by SELLER) by mailing its order acknowledgment to BUYER. No terms or conditions contained in BUYER's written purchase order, Authorization Letter or other documents, which contradict or conflict with, or add to, these Standard Terms or SELLER's order acknowledgment are binding upon SELLER unless specifically agreed to in writing by an authorized officer of SELLER, and without such specific written agreement, SELLER hereby rejects all such contradictory and additional terms and conditions proposed or provided by BUYER.

## **2. WARRANTY AND REMEDIES:**

a. The warranty contained in this section is exclusive and in lieu of all other representations and warranties, expressed or implied, and Smart Tooling expressly disclaims and excludes any implied warranty of merchantability or implied warranty of fitness for a particular purpose. Any and all statements, technical information, and recommendations provided by SELLER to BUYER are based on tests believed to be reliable at the time of purchase, but the accuracy or completeness thereof is not guaranteed. SELLER's and manufacturers only obligations shall be to replace such quantity of the product proved to be defective. Before using, BUYER shall determine the suitability of the product for its intended use and BUYER assumes all risk and liability whatsoever in connection therewith.

b. Specific components of SELLER's products and/or systems may be covered by independent warranties of their respective manufacturers, which manufacturers' warranties control with respect to these separate component parts and do not constitute obligations or warranties of SELLER.

c. THE WARRANTIES STATED IN THIS PARAGRAPH 2 ARE EXCLUSIVE AND IN LIEU OF, AND SELLER HEREBY DISCLAIMS, AND THERE SHALL BE EXCLUDED FROM THE RELATIONSHIP BETWEEN BUYER AND SELLER, ALL OTHER GUARANTEES, WARRANTIES, CONDITIONS OR REPRESENTATIONS, EITHER EXPRESS OR IMPLIED, WHETHER ARISING UNDER STATUTE, COMMON LAW, COMMERCIAL USAGE OR OTHERWISE, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

d. Under no circumstances whatsoever shall SELLER be liable to any person, firm or corporation for any special, indirect or consequential damages, whether for breach of contract, negligence, misrepresentation or otherwise and whether resulting in lost profits, interest on money borrowed or invested, impairment of goods, work stoppage or otherwise, in any way arising out of the sale of any products or services by SELLER to BUYER or any transaction to which these Standard Terms apply. The liability of SELLER and the exclusive

remedy of BUYER for any defect or breach or for any action relating to the sale of any products or services by SELLER to BUYER, whether based in contract, negligence, strict liability, tort, breach of warranty, or otherwise, is limited, at SELLER's option, to repair or replacement of the defective goods or services or refund of the purchase price therefore. The foregoing shall constitute the sole and exclusive liability of SELLER and the sole and exclusive remedy of BUYER or anyone claiming on behalf of or through BUYER.

### **3. DRAWINGS:**

All illustrations, drawings, tables, graphs and the like issued by SELLER or contained in SELLER's catalogues, price lists, advertisements or any other publications must be regarded as close approximations only. Weights, measurements, capacities and all other particulars of products offered by SELLER are stated in good faith as being approximate and no responsibility is accepted for their deviation from the approximations stated unless otherwise specified in writing in SELLER's proposal or order acknowledgment. In turnkey systems provided by the SELLER, SELLER warrants that the proposed products will perform the tasks outlined in the proposal based on the BUYER's data referenced in the proposal.

### **4. SHIPMENT, DELIVERY, FORCE MAJEURE, PROPOSALS, ACCEPTANCE AND ERROR:**

- a. Shipment and delivery dates are quoted in good faith and are approximate. Shipment and delivery dates are subject always to these Standard Terms and BUYER's timely compliance with these Standard Terms and such reviews and approvals as are required of BUYER. SELLER shall not be liable to pay any penalty for a delay in shipment, nor shall it be bound by any provision for the payment of a penalty of any nature whatsoever claimed by reason of any delay in shipment unless it has expressly consented to such penalty provision in a writing executed by SELLER.
- b. In no event shall SELLER be liable for any delay or damages (consequential or otherwise) caused by delay in shipment due especially, but not exclusively, to force majeure and other causes beyond its reasonable control. The term force majeure shall include, but is not limited to, war, blockade, civil disturbances, strikes and lockouts, labor shortages, fire and other casualties, accidents and governmental acts (including regulations concerning export and import licensing and currency exchange). In case of non-delivery or failure to timely deliver and cancellation of the order, SELLER's obligation shall be limited to the refund of any advance payment received from BUYER.
- c. Unless otherwise specified in writing signed by SELLER, all shipments are E.X.W. SELLER's or its suppliers manufacturing plant or warehouse and are firm as to the price for not greater than thirty (30) days from the date of the proposal from SELLER or such lesser period as SELLER specifies. After the expiration of the initial up to thirty (30) day period, the applicable prices are those in effect at the time an order is placed with SELLER by the BUYER. The SELLER will provide any price changes to BUYER for incorporation into a revised order prior to acceptance by SELLER. Any reference to E.X.W. or other delivery terms shall, unless otherwise provided herein, have the same meaning as that ascribed by the International Chamber of Commerce in its current edition of Incoterms.
- d. (1) The price quoted by SELLER assumes BUYER will accept delivery of the items purchased within fifteen (15) days following the anticipated date of delivery (as the same may be extended by agreement of the parties) and BUYER agrees to take delivery within that time period. If the BUYER refuses to take delivery within the fifteen (15) day period, SELLER has the right to charge BUYER for storage at the rate of \$8.00 per square foot per month calculated on a daily basis for each day after the fifteen (15) days that BUYER refuses to accept delivery plus interest charged at SELLER's standard rates to compensate SELLER for the use of its production floor space beyond anticipated time periods attributable to BUYER's conduct. If the BUYER makes all payments due at contracted time of delivery, SELLER, at its

discretion, may allow BUYER to have delayed items shipped to a SELLER designated warehouse whereby the BUYER will be charged for storage at a rate of \$1.00 per square foot per month calculated on a daily basis for each day shipping is delayed, plus all shipping, handling and interest charges at SELLER's standard rates. (2) Unless otherwise agreed to by SELLER, SELLER will, at BUYER's expense, arrange for the transportation of the products from manufacturing plant or warehouse designated by SELLER. BUYER is responsible to timely procure all necessary import licenses in the country of destination and all permits required for the consummation of the transaction.

e. Clerical errors in any element of a proposal, purchase order or contract are subject to correction by SELLER.

#### **5. TERMS OF PAYMENT:**

a. Payment shall be made at the time and place specified, and in the currency indicated, on SELLER's invoice. The failure by BUYER to pay at such time and place and in such currency constitutes a waiver of BUYER's right to demand SELLER's performance under the contract.

b. When an account becomes past due according to its payment terms, interest will be charged at the greater of 1.50% per month (18% per annum) or the maximum permitted by law until paid.

c. If delivery and/or payment in installments is quoted by SELLER or required by BUYER's order and accepted in writing by SELLER, failure of BUYER to make any installment payment when due shall give SELLER the right to suspend work or delivery until such payment is made. In the event that any such default by BUYER continues for more than fifteen (15) days after the due date, SELLER may at any time thereafter cancel the contract by written notice to BUYER (by mail, overnight delivery, telegraph, or facsimile transmission) and shall be entitled to recover the delivered products which have not been paid for in full in accordance with SELLER's security interest granted in paragraph 8 below. In the event SELLER suspends work on BUYER's order due to BUYER's failure to make payment at the agreed time, any claim by BUYER against SELLER for alleged delay in completion of the work shall be barred.

d. All taxes, fees, costs, and other charges connected with shipment, transportation insurance and importation of the products are the responsibility of BUYER, and, if paid by SELLER, such expenses may be recovered by SELLER from BUYER.

e. BUYER is responsible for all taxes applicable to this transaction except taxes levied on SELLER's net income.

#### **6. EVALUATION AGREEMENT**

SELLER is willing to supply SELLER's product to the BUYER solely for internal evaluation and testing purposes. The BUYER agrees to use the product only in the ordinary course of testing and evaluation. The BUYER further agrees to not reproduce or modify the product and to not reverse assemble, reverse compile or reverse engineer the product or otherwise attempt to discover any underlying Proprietary Information with respect to the product. The BUYER also agrees to not lend, lease or sell any portion of the product to outside sources without the consent of Smart Tooling, a division of Spintech Ventures. All Proprietary Information with respect to the product, or otherwise of SELLER, which shall include, but not be limited to, all specifications, know-how, technical information, and other information, shall be deemed to be proprietary to, and owned solely by SELLER, and BUYER shall hold such Proprietary Information confidential, and shall not use or disclose, directly or indirectly, any of such Proprietary Information. BUYER shall not be entitled to duplicate, replicate, or copy any of such Proprietary Information, and shall return such Proprietary Information to SELLER immediately upon SELLER's request. This obligation of confidentiality shall survive indefinitely. SELLER does not grant or transfer to BUYER any patent, trade secret,

trademark, service mark, copyright or other intellectual property right with respect to SELLER's product or any Proprietary Information of SELLER, and at all times SELLER shall have the sole right to use, control, and apply such Proprietary Information. To the extent that BUYER develops any works of authorship, ideas, inventions (whether patentable, patented, or not), know-how, processes, compilations of information, or other intellectual property with respect to SELLER's product or relating to or using SELLER's Proprietary Information, such items shall be the property of SELLER, and BUYER hereby assigns such items to SELLER. BUYER shall not file any registrations for or assert any ownership or license interest or other right with respect to SELLER's product, the Proprietary Information, or any modifications to, inventions to, or variations thereof.

#### **7. FLOW DOWN**

SELLER requires the supplier to flow down to sub-tier suppliers the applicable requirements in the purchasing documents, including key characteristics where required.

#### **8. SELLER'S SECURITY INTEREST:**

a. As security for all new, existing and hereafter arising obligations of BUYER to SELLER, BUYER hereby grants to SELLER a security interest in all products received from SELLER for which payment, in full, is not made to SELLER prior to delivery and the proceeds thereof, including, without limitation, accounts receivable and cash payments. This security interest will terminate when SELLER receives payment in full. BUYER hereby appoints SELLER as its attorney-in-fact to execute and file, on BUYER's behalf, all documents as may be necessary to file a lien against all products of SELLER delivered to BUYER but not yet paid for.

b. As long as the security interest granted to SELLER continues to exist, BUYER may not sell the products except in the ordinary course of its business, and any and all payments BUYER may receive from the resale are assigned to SELLER as security for payment of all sums due SELLER, and BUYER agrees to hold in trust so much thereof as may be required to pay all sums due SELLER. SELLER, upon written request, shall in writing release such part of such security as, in the opinion of SELLER, exceeds one hundred twenty (120) percent of the outstanding amounts owed to SELLER. BUYER shall notify SELLER immediately by registered letter if third parties should attach, or cause the attachment of, the products sold by SELLER with the retention of title. BUYER shall be liable for legal expenses SELLER incurs to protect its rights hereunder.

#### **9. RISK OF LOSS:**

Risk of loss or damage to the products shall pass from SELLER to BUYER upon delivery thereof to a carrier for shipment to BUYER, E.X.W. at the manufacturing plant or warehouse designated by SELLER." Without deleting those phrases, it is somewhat inconsistent with EXW which provides that all risk, both of loss and payment, passes to BUYER upon placement by SELLER with the carrier.

#### **10. ENTIRE AGREEMENT; AMENDMENT:**

These Standard Terms and SELLER's proposal constitute complete and exclusive agreement between the parties as to the subject matter hereof. Such agreement may not be amended or modified except by an amended purchase order, a change order or other written document by the authorized representatives of both parties.

**11. CANCELLATION CHARGES:**

a. If BUYER indicates it will refuse to accept delivery, fails to accept delivery, or wrongfully accepts products ordered (“Breach”), without limiting other remedies available to SELLER, BUYER shall pay cancellation charges to SELLER as invoiced by SELLER in an amount equal to:

1. A restocking charge of twenty-five percent (25%) on all stock items returned to SELLER in their packaging and undamaged; and
2. SELLER’s full cost for all material, equipment and SELLER’s labor charges at standard rates for engineering, assembly and/or manufacturing expended on BUYER’s order, except those items returned for credit under subparagraph 1 above; and
3. SELLER’s full cost of purchased services or products from third party vendors (including cancellation therefor) regarding BUYER’s order; and
4. An amount equal to twenty-five percent (25%) of the sums determined under subparagraphs 2 and as liquidated damages for BUYER’s Breach to cover SELLER’s reasonable loss arising therefrom.

b. All items paid for by BUYER, excluding those items returned for credit under subparagraph 1 above, are transferred to BUYER “as is, where is.”

c. In the event BUYER causes unreasonable delays or otherwise unreasonably hampers or interrupts manufacture, shipment or installation of products, SELLER may terminate the sales contract and BUYER shall be liable to pay SELLER the applicable cancellation charges set forth above.

**12. GOVERNING LAW:**

The validity, construction and interpretation of all documents relating to this sale, and duties of the parties hereto, shall be governed by the laws of the State of Ohio, United States of America.

**13. MEDIATION/ARBITRATION:**

Any controversy arising out of the interpretation and/or performance of this contract, except BUYER’s nonpayment of the sums due SELLER, shall first be submitted to mediation in Dayton, to a single mediator acceptable to the parties. If such dispute subject to mediation is not resolved by mediation, shall then be submitted to arbitration in Dayton, Ohio according to the Commercial Arbitration Rules of the Arbitration Association before three (3) arbitrators unless the parties mutually agree in writing on a lesser number.

**14. MISCELLANEOUS:**

a. Failure on the part of SELLER to enforce any of the rights derived from its agreement with BUYER shall not be construed as a waiver of any of SELLER’s rights.

b. The invalidity of one or more of the clauses of these Standard Terms by any competent authority shall not affect the validity of the other clauses, which for this purpose are considered severable.

c. The acceptance by SELLER of an order from BUYER for products bearing any registered SELLER trademark grant to BUYER the right to use such marks in advertising its products. All advertising materials incorporating such marks in any manner must be approved by SELLER in writing prior to its release to the public.