

MEMA Original Equipment Suppliers

Updated Model General Terms and Conditions for Light Vehicles

With Comments

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MEMA Original Equipment Suppliers

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Table of Contents	
1. Scope.....	1
2. The Contract.....	1
2.1 <i>Contract</i>	1
2.2 <i>Offer and Acceptance</i>	1
2.3 <i>Entire Agreement</i>	2
2.4 <i>Changes to the Supplies</i>	2
2.5 <i>Other Changes Prohibited</i>	2
3. Supplies.....	3
3.1 <i>Quantities</i>	3
3.2 <i>Releases</i>	3
3.3 <i>Inputs</i>	3
3.4 <i>Forecasts</i>	4
3.5 <i>Service Parts</i>	4
4. Packing and Shipping.....	4
4.1 <i>Packing</i>	4
4.2 <i>Shipping</i>	5
5. Inspection.....	5
6. Price.....	5
6.1 <i>Contract Price</i>	5
6.2 <i>Equitable Adjustment</i>	5
7. Payment.....	6
8. Warranties.....	6
8.1 <i>Seller's Warranties</i>	6
8.2 <i>Non-Conforming Supplies</i>	6
8.3 <i>Recalls</i>	7
9. Indemnification.....	7
9.1 <i>Indemnification</i>	7
9.2 <i>Procedure</i>	8
10. Compliance with Laws.....	8
11. Intellectual Property Rights.....	8
11.1 <i>Definitions</i>	8
11.2 <i>Background Intellectual Property</i>	8
11.3 <i>Foreground Intellectual Property</i>	8
11.4 <i>Seller's License Rights</i>	9
11.5 <i>Seller's Intellectual Property</i>	9
11.6 <i>Buyer's License Rights</i>	9
11.7 <i>Infringement</i>	9
11.8 <i>Copyright</i>	10
12. Buyer's Property.....	10
12.1 <i>Definition</i>	10
12.2 <i>Maintenance</i>	10
12.3 <i>Payment</i>	11
12.4 <i>Possession</i>	11
12.5 <i>Failure to Release Buyer's Property</i>	11
13. Seller's Property.....	11
14. Default.....	12
14.1 <i>Events of Default</i>	12
14.2 <i>Remedies</i>	12
14.3 <i>Damages</i>	12
14.4 <i>Limitation of Damages</i>	12
15. Duration and Termination.....	12
15.1 <i>Duration</i>	12
15.2 <i>Termination for Convenience</i>	13
15.3 <i>Termination for Default</i>	13
15.4 <i>Seller's Obligations on Termination</i>	13
15.5 <i>Buyer's Obligations on Termination or Expiration</i>	13
16. Information and Data.....	14
16.1 <i>Confidential Information</i>	14
16.2 <i>Rights in Data</i>	14
17. Cybersecurity.....	15
17.1 <i>Enterprise Cybersecurity</i>	15
17.2 <i>Product Cybersecurity</i>	15
17.3 <i>Supply Chain Cybersecurity</i>	15
17.4 <i>No Personal Data</i>	15
18. Assignment and Subcontracting.....	15
19. Excusable Non-Performance.....	16
20. Labor Contracts.....	16
21. Customs.....	17

22. Insurance.....	17	23.5 Waiver.....	18
23. Miscellaneous.....	17	23.6 Severability.....	18
23.1 Advertising.....	17	23.7 Interpretation.....	18
23.2 Audit Rights.....	17	23.8 Notices... ..	18
23.3 Electronic Communication.....	17	23.9 Governing Law and Forum.....	18
23.4 Relationship of the Parties.....	17		

USE AND PURPOSE OF MEMA OE SUPPLIERS MODEL GENERAL TERMS AND CONDITIONS

These Model General Terms and Conditions for Light Vehicles (“Model Terms” or “GTC”) were designed for use in connection with the purchase and sale of automotive original equipment parts. MEMA OE Suppliers developed the Model Terms to promote a more collaborative approach to seller-customer relationships. The goal is to increase cooperation, communication, and trust between buyers and sellers, eliminate ambiguities in responsibilities, reduce transaction costs, increase certainty, and ultimately increase the industry’s competitiveness. The Model Terms should serve as a reference guide and educational tool for buyers and sellers, and are intended to help form the basis for fair and balanced contracts.

USE OF THE MODEL TERMS IS ENTIRELY VOLUNTARY. Price and other terms of sale are determined by the buyer and seller in every transaction, and the Model Terms are not intended to affect that negotiating process. Buyers and sellers are always free to negotiate whatever terms or conditions they believe appropriate in the specific situation. Each buyer and seller should independently decide whether the Model Terms are appropriate for the company or transaction. Under no circumstances should buyers or sellers discuss with their competitors the specific terms and conditions they should adopt in particular negotiations, or agree collectively not to deal with a company refusing to adhere to the recommendations in this document or any other particular terms and conditions. These terms are not intended to provide legal advice.

These Model Terms attempt to follow a more balanced approach to buyer-seller relations than many of the forms currently in use in the automotive industry, both at the OEM and tiered buyer levels. The drafters considered the interests and needs of both buyers and sellers and attempted to apply basic concepts of fairness and good faith dealing to navigate a course between the two. Where both parties had competing legitimate interests or needs, the drafters selected the approach that appeared to represent the greater interest or need.

There is, of course, no one "correct" approach that fits all situations and individuals may disagree about what constitutes "fairness" and "good faith." However, most would agree that the forms currently in use in the automotive industry are neither fair nor balanced. Rather they reflect the ability of the party with superior bargaining power, typically the buyer, to impose terms and conditions that provide maximum protection for that party and little or no protection for the other party. MEMA OE Suppliers believes that a more collaborative approach between buyers and sellers will pay long-term dividends to all parties in a global economy, and that a more balanced approach to contract terms and conditions is an important step in that direction.

GENERAL TERMS AND CONDITIONS

1 Scope.

These General Terms and Conditions (“GTC”) will apply to all goods and services (collectively “Supplies”) that Buyer purchases from Seller. The Supplies, the Buyer and the Seller are identified on the face of the Purchase Order into which these GTC are incorporated. “Purchase Order” includes documents titled “Purchase Order,” “Scheduling Agreement” or any other document, however titled, that performs the same function. The Buyer and Seller are sometimes identified separately as a “Party” and collectively as the “Parties.”

Comment: Section 1 merely provides context and certain key definitions

2 The Contract.

2.1 Contract. The “Contract” is exclusively comprised of the Purchase Order, together with any associated Releases, these GTC, the applicable specifications, and any other documents specifically incorporated into any of them or separately agreed to in writing by the Parties, such as policies. Buyer’s request for quotation and Seller’s quotation are not included in the Contract unless specifically incorporated in the Contract and then only to the extent specified.

Comment:

1. *Section 2.1 establishes the terms and documents that comprise the Contract between Buyer and Seller. Buyer’s Purchase Order is the offer of a Contract. Included in that offer are any documents referenced in the offer as being part of the Contract, including these General Terms and Conditions. All documents and agreements not specifically incorporated in the offer are excluded (see Section 2.3). It is typical for the Contract to include documents, such as guidelines or policies, that are not fully contained within the GTC. In order to avoid disputes, users of this document should identify those incorporated documents by either modifying the GTCs to identify them or by identifying them on the face of the Purchase Order.*

2. *Section 2.1 is intended to promote early identification and resolution of differences between*

the parties. It is incumbent on both parties to consider carefully the documents that comprise the Contract and the language contained in those documents (not just price and payment terms), to be sure that they accurately reflect the agreement between the parties. Most contract disputes arise because the parties skip this critical step.

2.2 Offer and Acceptance. Each Purchase Order is Buyer’s offer to purchase the Supplies on the terms of the Contract. The Contract is formed upon acceptance of the offer by Seller, which occurs if: (1) Seller accepts the Contract in writing; or (2) Seller fails to object or to propose alternate or additional terms in writing within 10 business days after receipt. If Seller timely objects to a Purchase Order or proposes alternate or additional terms, a Contract is formed only if and when Buyer and Seller mutually agree in writing as to the Contract terms, except that if Seller has commenced delivery of the Supplies, a contract will be formed in accordance with the provisions of Section 2-207 of the Uniform Commercial Code.

Comment:

1. *Any contract requires an offer and acceptance. Whether the offer is Seller’s quotation or Buyer’s purchase order is of legal significance and a common subject of conflict. The GTCs attempt to avoid those disputes by identifying the purchase order as the offer, which is consistent with common industry practice.*

2. *Buyer’s offer (Purchase Order) may be accepted in one of two ways. First, the offer may be accepted by a written acceptance from Seller. Second, if there is no written acceptance, the offer will be deemed accepted if Seller begins performance or fails to object or propose different or alternate terms writing within 10 days or receipt. This means that it is essential Seller review, identify and communicate its objections or alternative terms promptly. Once the contract is accepted, it is frequently too late for Seller to protect itself contractually.*

3. *The two modes of acceptance are different and narrower than the typical industry terms, which usually say (with differences in wording) that a seller accepts by doing any work in preparation to perform or by performing (i.e., delivering goods). From a legal*

perspective, this means that Seller cannot begin preparation while continuing to negotiate, since preparation means acceptance. Section 2.1 instead says that, subject to the next bullet point, if Seller makes a timely objection, there is no contract until the areas in dispute are resolved.

4. *If the parties begin buying and selling before resolving the areas of dispute, it is not feasible to say that there is no contract – by the very act of buying and selling, Seller is bound to deliver, Buyer is obligated to pay, there are quality standards that must be met, etc. Uniform Commercial Code (UCC) §2-207 (often labelled the “battle of the forms”) is addressed to that problem. Grossly oversimplified, it provides rules for a court to decide what the business deal will be when Buyer and Seller can’t agree. But there is no good way for a court to create an “agreement” that neither party has agreed to, and each party is likely to be unhappy with the agreement that the UCC creates for them.*

5. *These, or any other contract provision or legal rules, cannot eliminate uncertainty and risk when the parties have not actually agreed on the terms. A Buyer and Seller that do business without actual agreement on the contract terms do so at their own risk.*

2.3 **Entire Agreement.** The Contract constitutes the entire agreement between the Parties with respect to its subject matter and supersedes all prior oral or written representations or agreements by the Parties with respect to the subject matter of the Contract.

Comment: *Also known as an “integration clause,” Section 2.3 clarifies that the Contract consists of the documents referenced in Section 2.1 and excludes all other prior written and oral agreements and understandings. If an important concept is not already addressed in the Contract, the parties should make sure that it is put in writing and made part of the Contract. Special consideration should be given to the various types of agreements which often precede the first production purchase order and which may contain terms that were intended to carry over to the parties’ production relationship. If so, they should be identified in the purchase order.*

2.4 **Changes to the Supplies.** Buyer may from time to time by notice to Seller make reasonable changes to the drawings, specifications, materials, manufacturing processes or location, packaging or testing of the Supplies (collectively “Buyer Change”). At Seller’s request and with reasonable supporting documentation, the Contract Price, as defined in Section 6, and times for performance will be equitably

adjusted (up or down) to reflect the impact of the Buyer Change. The Parties will engage in good-faith negotiations to agree on an equitable adjustment, but failure to agree will not defeat the right to an equitable adjustment, nor will it prevent prompt implementation of the Buyer Change. Seller may not make a change to the Supplies without Buyer’s written consent, but Buyer will not unreasonably withhold or delay consent to changes proposed by Seller. If a Buyer Change or approved change proposed by Seller makes any Supplies, work in progress or components or materials obsolete, then Buyer will compensate Seller (i) for the Supplies at the Contract Price, as defined in Section 6; (ii) for the components or materials at their acquisition cost; and (iii) for work in progress at an equitable price, provided that the quantities of Supplies, work in progress and/or components or materials are reasonable in amount under the circumstances.

Comment:

1. *Under Section 2.4, Buyer may unilaterally impose changes to drawings, specifications, and other Contract requirements listed, but Seller is entitled to an equitable adjustment of price or schedule, if requested by Seller and appropriately documented. Although agreement on an equitable adjustment is encouraged, there can be no assurance that agreement will be reached. In that case, the parties must rely on contractual or noncontractual dispute resolution mechanisms to determine the equitable adjustment.*

2. *Seller must implement the changes on the (reasonable) timetable directed by Buyer, regardless of whether the parties have agreed on an equitable adjustment.*

3. *Seller may also request changes to the Contract, but they require Buyer’s approval. All changes must be documented in writing. The differing treatment between the parties recognizes that Buyer must have the ability to make changes that are necessary to improve its products or meet its customer’s requirements during the course of the Contract, while there is not generally a corresponding need by Seller to impose changes.*

4. *Section 2.4 also expressly addresses Seller’s entitlement to compensation for obsolete materials, which is a topic not expressly addressed in the typical industry contract*

2.5 **Other Changes Prohibited.** Except for the changes described in Section 2.4, neither Party may make any changes to the Supplies, the manufacturing processes or location, or the Contract (including to the

GTC) without the signed written agreement of each Party.

***Comment:** The typical industry terms say, in substance, that the Contract is subject to Buyer's then current standard terms and conditions. If a new or revised purchase order is issued and the standard terms and conditions have been modified since the original purchase order, those modified terms may significantly change the deal that had been agreed to. The drafters believe that it is unfair to change an existing contract merely by posting different terms to a website, without any affirmative manifestation of acceptance. Section 2.5 reflects that belief.*

3 Supplies.

3.1 **Quantities.** Unless a fixed quantity is specified in the Purchase Order or elsewhere in the Contract, the Contract is a requirements contract, and Buyer will purchase and Seller will sell 100% of Buyer's requirements for the Supplies (or a specific percentage of requirements specified in the Contract.).

***Comment:** Under Section 3.1, Contracts are presumptively requirements contracts. This is an increasingly common provision in the industry and, in most cases, reflects the actual expectations of the parties. In addition, it prevents potential legal risks relating to the applicable statute of frauds. A contract that lacks a written quantity term is not enforceable under the statute of frauds, (with exceptions that do not change the basic point). Under the UCC, an obligation to purchase "requirements" is considered a quantity, so the typical industry contract that specifies "requirements" or the equivalent is enforceable. Before contracting for something other than requirements or a fixed quantity, consider consulting with counsel to avoid non-compliance with the statute of frauds.*

3.2 **Releases.** Unless otherwise stated in the Contract, Buyer will communicate its delivery date and quantity requirements to Seller through periodic written "Releases." Releases specify the firm quantities and delivery dates for the first four weeks of the Release schedule. Seller will deliver the Supplies in accordance with the Releases, of which the delivery dates and quantities therein will be reasonably determined by Buyer. Whether Releases are "reasonably determined" will take into account, without limitation: (i) any capacity limitations specified in the Contract or otherwise agreed to by Buyer and Seller in writing; and (ii) unusual volume

or timing fluctuations that are inconsistent with customary lead time requirements or any lead time requirements specified in the Contract or otherwise agreed to by Buyer and Seller in writing. However, in all events, Seller will use best efforts to meet Buyer's Releases, provided that Buyer will equitably compensate Seller for expenses arising out of an unreasonable Release, such as overtime or expedited shipping. For clarity, (i) once the Contract is formed in accordance with Section 2.2, a Release may not be rejected, and (ii) if Seller is unable to fully satisfy a Release that is not reasonably determined despite best efforts, it shall nevertheless deliver the portion of the released quantity that is reasonably achievable.

Comment:

1. *The industry typically uses blanket purchase orders which allow Buyer to specify quantities and delivery dates through releases, which typically include both brief "firm release" information and longer "forecast" information beyond the firm release period. However, the optimal firm release period is likely to vary from purchase order to purchase order depending on a variety of factors. The parties should consider modifying the four-week period as appropriate in the purchase order.*

2. *Seller is obligated to satisfy a release so long as it is "reasonable." Section 3.2 recognizes that releases may be unreasonable if they are inconsistent with capacity limitations, lead time requirements or unusual volume fluctuations. However, even if a release is unreasonable, Seller must use its best efforts to satisfy Buyer's releases, or as much of the requirements as feasible. If Seller is required to incur costs incurred in satisfying an unreasonable release, it is entitled to compensation.*

3. *The provisions regarding unreasonable releases are a response, in part, to recent industry experience in which releases have become increasingly erratic and unreliable, causing Seller's to incur significant expenses. Anecdotally, the increase in unreasonable releases is driven by supply chain shortages and similar factors which are not within the control of Buyer. The purpose of the unreasonable release provisions is not to punish Buyer for "bad" behavior, but rather to offer some protection to Sellers from the consequences of erratic and unreliable releases.*

3.3 **Inputs.** Seller is responsible for obtaining and maintaining at its expense all materials, components, inventories, and other resources

(“Inputs”) reasonably necessary to meet Buyer’s Releases.

Comment: *Section 3.3 is consistent with typical industry contract terms, except, perhaps, for the inclusion of the “reasonable” limitation.*

3.4 **Forecasts.** Buyer or its Customer may provide Seller with forecasts or estimates of delivery times and quantities, estimated program length or similar information for periods beyond the firm Release period, whether in Releases or other documents. All such information constitutes estimates provided for planning purposes only, is subject to change from time to time, and will not be binding upon Buyer or Seller.

3.5 **Service Parts**

3.5.1 **Current-Model Service Requirements.** During the vehicle production period (*i.e.*, the period in which the vehicle in which the Supplies are used is in serial production), Seller will make Supplies available to Buyer for Buyer’s current-model service requirements at the then-current production prices under the Contract, plus any additional costs for special packaging, shipping, handling, and other expenses specific to service parts. If only components of the Supplies are ordered for service purposes, the price shall be equitably determined by the Parties.

Comment: *Section 3.5.1 is consistent with typical industry contract terms, although many of those terms do not allow for recovery of service part-specific expenses during the current-model period.*

3.5.2 **Past-Model Service Requirements.** After the vehicle production period, Seller will make Supplies available to Buyer for Buyer’s past-model service requirements for a period of 10 years. The price will be the production price at the end of the vehicle production period plus any additional costs for special packaging, shipping, handling, and other expenses specific to service parts, which price will further be equitably adjusted annually based on the cost of materials and labor. If only components of the Supplies are ordered for service purposes, the price shall be equitably determined by the Parties.

Comment:

1. *Section 3.5.2 balances Buyer's legitimate interest in securing a continuing source of service parts after regular production has ended with Seller's legitimate interest in recovering any added costs to*

produce small quantities at irregular intervals, often long after regular production has ended.

2. *Industry contract terms regarding past-model service parts vary widely, both as to the duration of the obligation and pricing and incremental cost recovery. However, the model of a base price equal to the last production price adjusted for incremental service part costs is common, although which incremental costs are compensable vary widely.*

3. *Section 3.5.2 varies from industry norms by providing for annual cost-based price adjustments. The premise of the provision is that it is unreasonable to hold Seller to firm-fixed pricing not only for the production period, but also for the lengthy service-part period.*

3.5.3 **Effect of Termination.** Seller’s obligations under Section 3.5 will survive termination, except that the obligations will terminate if the Contract is terminated by Buyer pursuant to Section 15.2 or Seller pursuant to Section 15.3.

Comment: *Under the typical industry terms, Seller must provide service parts even if the supplies have been re-sourced. This will typically be infeasible, as the replaced Seller will not remain in possession of tooling, and is not necessary, as the replacement Seller will be able and bound to supply those parts. Section 3.5.3 conforms the Contract to that reality.*

4 **Packing and Shipping.**

4.1 **Packing.** Seller will comply with Buyer’s reasonable instructions regarding the method of packing, transporting, storing and labelling, as well as associated documentation requirements. If Buyer has not provided such instructions, Seller will pack and ship Supplies in accordance with sound commercial practices. If Seller is required to use Buyer’s returnable packaging, Seller will be responsible for cleaning and returning the returnable packaging. Buyer will be responsible for replacement of returnable packaging, unless due to Seller’s neglect. If returnable packaging is not available, Seller may use expendable packaging, and Buyer will reimburse Seller for the reasonable costs of expendable packaging, unless Seller is responsible for the unavailability of returnable packaging.

Comment: *Because packing and shipping requirements vary substantially among Buyers, Section 4.1 leaves to each Buyer the right to specify its own particular requirements. From Seller's standpoint, it is important to understand Buyer's*

packing and shipping requirements so that the costs can be reflected in Product pricing. 2. Following industry practice, Section 4.1 assumes that Buyer will provide returnable packaging for the Products. If returnable packaging is not available, Buyer will be responsible for either providing or paying for expendable packaging. Seller must reflect in its pricing the cost of cleaning and returning returnable packaging.

4.2 **Shipping.** Unless otherwise stated in the Contract, Supplies will be delivered FCA (Incoterms 2020), and title will transfer upon receipt of the Supplies by the freight carrier. If Supplies are not ready for delivery in time to meet Buyer's Releases, the Party causing the delay will be responsible for additional costs of any resulting expedited or other special transportation.

Comment: *If desired, the FCA default standard can be modified either in the GTCs or the Purchase Order. Further information about FCA and other Incoterms is available from the International Chamber of Commerce at <http://www.iccwbo.org/incoterms>. Section 4.2 establishes a fault-based standard for additional transportation costs.*

5 Inspection.

Buyer may, upon reasonable advance notice to Seller and in compliance with Seller's reasonable restrictions or conditions regarding safety and confidentiality, inspect production processes and Property (as defined in Section 12) and, subject to Seller's prior written approval, conduct testing at Seller's premises for the sole purpose of verifying Seller's performance under the Contract. Buyer is not required to inspect Supplies, and no inspection or failure to inspect will reduce or alter Seller's obligations under the Contract.

Comment: *Section 5 balances the need for Buyer to inspect production processes and its property with Seller's need to maintain the confidentiality of its and its other customers' proprietary information. Section 5 also clarifies that Buyer is not required to inspect Supplies upon receipt, and that Seller's obligations (such as warranty obligations) are not affected by Buyer's inspection or failure to inspect.*

6 Price.

6.1 **Contract Price.** "Contract Price" means the unit price stated in the Purchase Order, as it may be adjusted only in accordance with: (i) any provision of the Purchase Order, such as agreed raw material or currency indexing; (ii) a Contract modification

consistent with Section **Error! Reference source not found.**; (iii) Sections 2.4 or 15; or (iv) Section 6.2. Unless otherwise stated in the Contract, the Contract Price includes all applicable federal, state, provincial, and local taxes and duties other than sales, value added, or similar turnover taxes or charges. Seller will separately invoice Buyer for any sales, value added, or similar turnover taxes or charges that Seller is required by law to pay or collect from Buyer.

Comment: *Consistent with industry standards, the Contract Price is a firm-fixed price for the Term (see Section 15.1). It is adjustable only in the limited circumstances covered by the provisions identified in Section 6.1, or under Section 6.2, discussed below.*

6.2 **Equitable Adjustment.** Notwithstanding Section 6.1, upon Seller's showing of severe and sustained increased production costs caused by reasons outside of Seller's control, the Parties shall engage in good-faith negotiations regarding an equitable pricing adjustment. Good-faith negotiations shall consider, without limitation, the extent by which the amount of the increase exceeds historical fluctuations, the expected duration of the increase in production costs, and the commercial likelihood that Buyer will be able to pass on any increase in the Contract Price.

Comment:

1. *Section 6.2 is a significant, although anticipated to be rare, departure from industry norms, because it provides Sellers with the possibility of cost-based price increases based on "severe and sustained increased production costs" The drafters recognize that it is likely to be very controversial and concerning to Buyer's, but believe that it protects the interest of both Sellers and Buyers by minimizing the frequency of supply chain disruptions. Under the current industry model, if a Seller is faced with severe cost increases that make supply at the usual Contract Price commercially untenable, Seller may resort to extra-contractual remedies, such as supply cutoff threats. In response, Buyer's will frequently turn to courts for relief, asking the court to force the Seller to continue supply. The outcome of that litigation is very uncertain and creates significant continuity risks. Section 6.2 is intended to serve as a "pressure relief valve" to reduce that risk*

2. *The conditions for price relief in Section 6.2 are general and do not provide bright-line answers. This is necessary given the variety of circumstances that the GTCs are intended to cover. The parties*

should consider negotiating more specific criteria for relief to further minimize continuity risk.

7 Payment.

Payment terms are as set forth in the Contract or, if not stated, 45 days net. Seller will promptly submit correct and complete invoices or other agreed billing communications with appropriate supporting documentation and other information reasonably required by Buyer after delivery of Supplies, and Buyer may withhold payment until a correct and complete invoice or other required information is received and verified. Buyer will pay Seller in the currency specified in the Contract or, if none is specified, in U.S. Dollars. Buyer may set off or deduct from sums owed to Seller under the Contract those sums owed by Seller to Buyer and agreed to in writing between the Parties prior to setoff or upon final determination. Unless Seller consents in writing, Buyer may not set off or deduct amounts owed to Buyer by Seller's affiliates or others who are not parties to the Contract.

***Comment:** Buyer may setoff or deduct only those amounts that are determined to be owed by Seller, either by agreement of the parties or through dispute resolution. This is contrary to standard industry practice, which typically allows Buyer to unilaterally setoff amounts that are disputed by Seller. The risk of unilateral setoff by Buyer can be very coercive and lead to unbalanced results. The right of setoff is also limited to amounts owed by Seller to Buyer, and does not extend to amounts owed by Seller's affiliates, or to Buyer's affiliates, or others who are not parties to the Contract.*

8 Warranties.

8.1 Seller's Warranties. During the warranty period, Seller warrants to Buyer that, on delivery, the Supplies will: (i) be free from defects in workmanship and materials; (ii) conform to the specifications, drawings, samples, and performance requirements specifically incorporated in the Contract; and (iii) conform to applicable Laws, as defined in Section 10. Unless otherwise specified in the Contract, the warranty period is the period for which the automobile manufacturer warrants the Supplies to end users or, if the Supplies are not warranted to end-users, thirty-six months from delivery of the Supplies. Seller also warrants to Buyer that it will transfer to Buyer ownership and good title to the delivered Supplies. Unless otherwise specifically stated in the Contract, Seller does not warrant the design of the Supplies.

THE FOREGOING WARRANTIES ARE THE SOLE WARRANTIES, AND ALL OTHER WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, ARISING BY LAW OR CUSTOM, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE EXPRESSLY DISCLAIMED.

***Comment:** Section 8.1 recognizes that an appropriate allocation of risk and responsibility for warranty claims often depends on the nature of the Supplies and Seller's role in its design and manufacture. It sets forth Seller's basic warranties including freedom from defect, conformity to specifications conformity to Law (see Section 10) and title. Fitness for purpose and design warranties are excluded, but may be appropriate if Seller is design-responsible, in which case this section should be modified or a separate warranty agreement should be used. Any product warranties apply for the same period as any corresponding consumer warranty, or, if not subject to a consumer warranty, 36 months.*

8.2 Non-Conforming Supplies. Subject to Sections 8.3 and 9 and the following sentence of this Section 8.2, Buyer's sole remedy for Supplies that do not conform to the warranties in Section 8.1 will be to (i) reject the non-conforming Supplies; (ii) require Seller, at Seller's option and expense (including applicable shipping costs necessary to meet delivery schedules and avoid interruption), to either repair or replace the non-conforming Supplies; and (iii) if repair or replacement is infeasible, require Seller to refund or credit the purchase price. In addition, Buyer may: (i) require Seller to implement at Seller's expense containment, inspection, sorting, and other quality assurance procedures if Buyer reasonably determines (through statistical sampling or other quality assessments) that a substantial quantity of incoming Supplies do not conform to the warranties in Section 8.1; and (ii) require Seller to reimburse Buyer for any reasonable, direct costs incurred in the repair or replacement of defective Supplies that had been installed during production of a new vehicle or other product. To the full extent possible, Buyer will provide Seller with access to any available warranty data and other information related to the non-conforming Supplies and any available field-returned Supplies. Buyer will also provide Seller with an opportunity to participate in any root-cause analysis performed by Buyer concerning the Supplies. Each Party will provide prompt notice to the other as soon as possible after it determines that a material non-conformity exists.

***Comment:** Section 8.2 generally limits remedies for warranty claims to rejection or repair or replacement of the non-conforming Supplies. However, Seller may also: (i) be responsible for costs of repair or replacement of Supplies that have already been installed in vehicles; (ii) be responsible for certain recall expenses under Section 8.3; (iii) be required to indemnify Buyer for claims of third parties arising from the nonconforming Supplies under Section 9; and (iv) be subject to termination for material breaches under Section 15.3. In addition, Buyer may require quality assurance procedures if a substantial quantity of non-conforming Products are delivered. This is a departure from current industry terms and conditions, which typically impose no limit on remedies.*

8.3 Recalls. This Section 8.3 applies to any voluntary or government-mandated offer by Buyer (or the vehicle manufacturer) to vehicle purchasers to remedy a defect (a “Recall”). Seller will be liable for costs and damages resulting from a Recall only if the Recall results in whole or in part from a failure of the Supplies to conform to the warranties in Section 8.1 during the warranty period specified in the Contract. If Seller is liable for a Recall, the extent of Seller’s liability will be negotiated on a case-by-case basis based on: (i) a good-faith allocation of responsibility for the defect or non-compliance that resulted in the Recall; (ii) the reasonableness of the costs and damages incurred; (ii) the quantity purchased and Contract Price of the affected Supplies; and (iv) other relevant factors. As a condition precedent to Seller’s liability under this Section 8.3, Buyer must (i) notify Seller as soon as practicable after Buyer learns that a Recall being considered implicates the Supplies; (ii) provide Seller with available warranty data, customer complaints, performance evaluations, accident reports, engineering investigations, communications with governmental agencies, including NHTSA, and other data relating to the potential Recall; (iii) provide Seller a reasonable opportunity to participate in inquiries and discussions among Buyer, its customer, and governmental agencies regarding the need for and scope of the Recall; and (iv) consult with Seller about the most cost-effective method of remedying the alleged defect or non-compliance.

***Comment:** Recalls are a sub-set of warranty claims, usually but not always safety-related, that involve notification to the ultimate vehicle purchasers of the availability of a remedy. Section 8.3 provides a general framework for dealing with Recalls that assigns responsibility for Recall costs based on the relative fault of the parties and other factors listed, and contemplates that the actual liability will be negotiated between the parties in good faith based on*

these factors. Fault is an important consideration in these situations, as often the Recall results not solely from a defective part but also from a defective or inadequate design or specifications, or from integration issues, that may not be the responsibility of Seller. Seller’s responsibility for a Recall is limited to situations in which Products fail to conform to the warranties in Section 8.1 during the applicable warranty period. This is a departure from ordinary practice. Finally, Section 8.3 requires that Seller be reasonably informed and reasonably involved in the Recall process as a condition of continuing liability for Recall costs.

9 Indemnification.

9.1 Indemnification. Seller will indemnify and defend Buyer against third-party claims or demands (“Claims”) for injury or death to persons, property damage, economic loss, and any resulting damages, losses, costs, and expenses (including reasonable legal fees) (collectively, “Loss”), regardless of whether the claim or demand arises under tort, contract, strict liability, or other legal theories, if caused by (i) Seller’s delivery of non-conforming Supplies and (ii) with respect to Claims unrelated to the performance of the Supplies, Seller’s negligent acts or omissions in its performance under the Contract. However, if Buyer or other parties materially contributed to the Loss, responsibility for the Loss will be equitably allocated based on relative fault. This Section 9.1 will not apply to the extent that the injury, loss, or damage results from: (i) Buyer’s design of the Supplies; (ii) any alteration or improper repair, storage, maintenance, handling, or installation of the Supplies; or (iii) the integration or interaction of the Supplies with systems or components not supplied by Seller. Indemnification under this Section 9.1, Section 11.7 and Section 12.1 are the sole indemnity rights, express or implied, under or arising out of the Contract.

Comment:

1. Section 9.1 provides for what is sometimes called “third party indemnity,” meaning that it applies only if Buyer is subject to a third party claim as a result of either non-conforming Supplies or negligent performance (other than the delivery of non-conforming Supplies). The provision is narrower than the typical industry provision, which often allow for both first-party and third-party indemnity.

2. Similar to the approach to Recalls in Section 8.3, Section 9.1 allocates responsibility based on fault.

3. *Section 9.1 requires both indemnification (i.e., paying to Buyer the amount of the liability and certain expenses incurred to the third party) and defense (i.e., defending Buyer in the underlying third-party claim).*

4. *The GTCs also provide for indemnity of certain intellectual property claims (see Section 11.7).*

9.2 **Procedure.** Buyer will notify Seller promptly after Buyer becomes aware of the basis for a Claim under this Section 9 or under Section 11.7. The Parties will cooperate with each other to determine the root cause of a defect in or failure of the Supplies (and related systems and components) and an equitable allocation of responsibility among all responsible parties. Seller may examine and test all available Supplies and related systems and components that are subject to a third-party Claim. Buyer will endeavor to include Seller in settlement discussions where indemnity has been or will be sought from Seller, and Buyer may not settle or compromise any third-party Claim that gives rise to an indemnification claim without Seller's prior written consent, which will not be unreasonably withheld or delayed.

Comment: *Section 9.2 provides procedures to allow Seller to effectively protect itself and Buyer when defending and indemnifying under Section 9.1, including the right to approve any settlement, where Buyer seeks indemnification*

10 Compliance with Laws.

Seller will comply with applicable laws, ordinances, rules and regulations ("Laws") of the United States, Canada, Mexico and any other country in which the Supplies are manufactured or delivered (as well any of their respective states, provinces or other political subdivisions). Each of the Parties will supply the other Party with all certifications and information reasonably requested by the other to assist the requesting Party in complying with its obligations under any Laws.

Comment: *Section 10 is a typical provision that requires Seller to comply with applicable laws, but is limited to laws of the US, Canada, Mexico and any other country where the Supplies are manufactured or delivered. Section 10 also requires both Buyer and Seller to provide information needed to comply with applicable Laws.*

11 Intellectual Property Rights.

11.1 Definitions.

11.1.1 "Intellectual Property Right" means any patent, trade secret, trademark, service mark, copyright, mask work, or other intellectual property right.

11.1.2 "Background Intellectual Property Rights" means any Intellectual Property Rights of either Buyer or Seller relating to the Supplies (i) existing prior to the effective date of this Contract or prior to the date Buyer and Seller began any technical cooperation relating to the goods or services contracted, whichever is earlier; or (ii) that each Party acquires or develops after these dates but in a strictly independent manner and entirely outside of any work conducted under the Contract.

11.1.3 "Foreground Intellectual Property Rights" means any Intellectual Property Rights, except Background Intellectual Property Rights that are developed in connection with this Contract.

Comment:

1. *There is no industry standard intellectual property provision – they vary more widely in both nomenclature and substance than any other industry contract provision. Section 11.1 uses the increasingly common approach of distinguishing between "background" and "foreground" intellectual property, to differentiate the parties' rights and responsibilities.*

2. *Intellectual Property Rights are sometimes the most important and contentious issue in a Contract and sometimes of little or no importance. When those rights are important, it may be appropriate to enter into a separate, more specific licensing agreement to avoid conflict down the road.*

11.2 **Background Intellectual Property.** Buyer and Seller will each retain ownership of their respective Background Intellectual Property Rights.

Comment: *Under Section 11.2, each party retains sole ownership of its Background IP.*

11.3 **Foreground Intellectual Property.** Buyer and Seller will each retain ownership of any Foreground Intellectual Property Rights that are solely created or made by their respective employees, agents or subcontractors ("Personnel") without material

assistance of the other Party. Foreground Intellectual Property Rights that are created with material assistance of both Parties will be jointly owned, and Buyer and Seller will each have the ability to grant licenses without consultation and without any duty of accounting to each other for any use or purpose. For clarity, unless an express written period of exclusivity has been promised to Buyer, Foreground Intellectual Property Rights owned or controlled by Seller may be immediately exploited by Seller in connection with Seller's business with Seller's other customers and will not be exclusive to Seller's performance of the Contract.

Comment:

1. Under Section 11.3, ownership of Foreground IP depends on whether it was developed collaboratively or by only one of the parties without material assistance of the other. If developed by only one party, it is owned by that party. If developed collaboratively, it is jointly owned, with each party having the right to economically exploit the IP.

2. Depending on the facts, disputes are possible as to whether particular Foreground IP is jointly or solely owned. Especially if valuable IP is expected to be created under the Contract, it may be prudent to specifically assign ownership (sole or joint) in a Contract-specific agreement.

11.4 **Seller's License Rights.** Buyer grants to Seller a license to use Buyer's Background Intellectual Property and Buyer's Foreground Intellectual Property (except for jointly owned Foreground Intellectual Property) solely in connection with the performance of Seller's obligations under the Contract. For clarity, Supplies manufactured based on Buyer's drawings, designs, and/or specifications as well as any software code or models provided by Buyer may not be used for Seller's own use or sold to third parties without Buyer's express written authorization.

Comment: Of necessity, Seller must have the right to use Buyer's IP to make the Supplies. Section 11.4 grants that right. That is Seller's only right with respect to Buyer's IP.

11.5 **Seller's Intellectual Property.** Except as stated in this Section 11, Seller does not transfer to Buyer any Intellectual Property Right of Seller related to the Supplies or incorporated in Buyer's Property, other than the right to incorporate Supplies purchased from Seller in vehicles and component parts and to sell those vehicles and component parts to the public. If the Contract is terminated by Seller or Buyer pursuant

to Section 15.2 or 15.3, Seller grants to Buyer a non-exclusive right and license to use Seller's Intellectual Property Rights during the Contract term that would have applied had the Contract not been earlier terminated and, to obtain from alternate sources products and services similar to the Supplies for use only in vehicles or component parts covered by the terminated Contract. There will be no fee for this license if (i) Buyer terminates the Contract for Seller's Default; or (ii) Seller terminates the Contract for convenience pursuant to Section 15.2.1. Otherwise, the Parties will negotiate a reasonable fee for use of Seller's Intellectual Property Rights.

Comment: Of necessity, Buyer must have the right to incorporate the Supplies containing Seller's IP into vehicles or components. Section 11.5 grants that right. In addition, if the Contract is terminated, Buyer may have a need to use Seller's IP to continue production of the vehicle into which the Supplies are incorporated. Section 11.5 grants that right, but a reasonable royalty must be paid if Buyer terminates for convenience.

11.6 **Buyer's License Rights.** Seller grants to Buyer the right to use Seller's Background Intellectual Property and Seller's Foreground Intellectual Property (except for jointly owned Foreground Intellectual Property) to make, have made, use, reproduce, modify, improve, prepare derivative works of, distribute, display, perform, offer to sell, sell and import the goods or services that are the subject of this Contract (the "Limited License"), provided that Buyer or its affiliates will only use this Limited License in the event that (i) Seller breaches or repudiates its obligations by being unable or unwilling to deliver goods or services under this Contract; or (ii) in the event Seller is unable to supply goods or services under this Contract as a result of an Excusable Event as described in Section 19, but in such event only for the duration of Seller's inability to supply. In no event will the term of the Limited License extend beyond the expiration date of this Contract.

Comment: In addition to Buyer's rights under Section 11.5, Section 11.6 grants Buyer license rights to Seller's IP if Seller refuses or is unable to deliver Supplies, including as a result of an Excusable Event (force majeure event).

11.7 **Infringement.** Subject to the following paragraph, Seller will indemnify and defend Buyer and its customers against third-party claims, liabilities, losses, damages, costs, and expenses, including reasonable legal fees, arising out of the actual or alleged infringement by the Supplies of a third-party

Intellectual Property Right (i) in the United States, the United Kingdom, the European Union, or Japan; and (ii) in another jurisdiction if Seller is aware of the actual or alleged infringement in that other jurisdiction at the time the Purchase Order is issued and fails to disclose it to Buyer within 10 days after accepting the Purchase Order. If a claim under this Section 11.7 results, or is likely to result, in an injunction or other order that would prevent Seller from supplying or Buyer from using Supplies for their intended purpose, Seller will, at its option and expense, either (i) secure a license of the Intellectual Property Right that permits Seller to continue supplying the Supplies to Buyer; or (ii) modify the Supplies so that they become non-infringing, so long as the modification does not materially alter the operation or performance of the Supplies, or (iii) replace the Supplies with a non-infringing but practically equivalent alternative. However, Seller will have no liability under this Section 11.7 if (i) Buyer fails to provide Seller with reasonable information, cooperation, and assistance regarding, and authority to defend, a claim, or (ii) a claim of infringement is based on (A) a modification to the Supplies made by Buyer or a third party or at Buyer's request, (B) use or interconnection by Buyer of the Supplies in combination with other products not made or sourced by Seller, or (C) Supplies made to designs or specifications not provided by Seller.

***Comment:** Section 11.7 requires Seller to indemnify Buyer for infringement if the Supplies infringe third-party Intellectual Property Rights in the major automotive markets (the United States, the United Kingdom, the European Union, and Japan), as well as any other jurisdiction where Seller knows of alleged infringement, recognizing that many Sellers lack the resources to search for third-party Intellectual Property Rights worldwide. Section 11.7(A) also requires Seller to take appropriate action to enable Buyer to use the Products for their intended purpose, once a claim covered by Section 11.7 appears likely to limit Buyer's ability to use the Supplies as intended. Section 11.7 also imposes two conditions to Seller's liability. First, it requires that Seller be afforded the opportunity to control defense of the third-party claim. Second, it excludes liability in the circumstances listed, of which the most significant is to exclude Supplies made to Buyer's specifications.. These conditions are not typical of most industry terms, but the drafter's believe that they better align liability with fault.*

11.8 **Copyright.** To the extent that this Contract is issued for the creation of copyrightable works, the works will be considered “works made for hire” for Buyer except to the extent that the works do not

qualify as “works made for hire” for Buyer, in which case Seller hereby assigns to Buyer all right, title and interest in all copyrights and, if lawfully permitted, waives all moral rights therein.

***Comment:** Section 11.8 is generally consistent with customary industry terms.*

12 Buyer's Property.

12.1 **Definition.** Buyer will own the tooling, jigs, dies, gauges, fixtures, molds, patterns, supplies, materials, and other equipment and property used by Seller to manufacture, store, and transport Supplies (“Property”) if (i) Buyer or its customer has provided the Property; or (ii) Buyer or its customer has fully paid for the Property (in either case, “Buyer's Property”). Seller will not purchase any Property for the account of Buyer or charge Buyer for any Property except as authorized in writing by Buyer. Seller will assign to Buyer contract rights or claims in which Seller has an interest with respect to Buyer's Property and execute bills of sale, financing statements, or other documents reasonably requested by Buyer to evidence its or its customer's ownership of Buyer's Property. Seller will indemnify and defend Buyer against claims or liens adverse to Buyer's or its customer's ownership of Buyer's Property except those that result from the acts or omissions of Buyer or its customer. Seller will hold Buyer's Property on a bailment basis and will be responsible for loss or damage to Buyer's Property while in its possession or control. To the extent permitted by law, Seller waives any lien or similar right it may have with respect to Buyer's Property. Buyer will be responsible for personal property taxes assessed against Buyer's Property.

***Comment:** Section 12.1 covers tooling and other property of Buyer that is placed in Seller's custody in order to perform the Contract. It clarifies that Buyer's Property includes only Property that Buyer has provided or paid for. It does not include Property ordered from or through Seller unless and until it has been paid for. It requires Seller to keep the property free of liens and to indemnify Buyer if it fails to do so. Section 12.1 is generally consistent with typical industry terms, although there is significant variation among industry terms with respect to this topic.*

12.2 **Maintenance.** Seller will (i) at its expense, maintain Buyer's Property in good condition and repair, normal wear and tear excepted, throughout the useful life of Buyer's Property; (ii) use Buyer's Property only in connection with its performance under the Contract, unless Buyer otherwise approves in writing; (iii) at Buyer's request and expense, mark

Buyer's Property as belonging to Buyer or its customer; and (iv) not remove Buyer's Property (other than shipping containers and the like) from Seller's premises without Buyer's written approval. All replacement parts, additions, improvements, and accessories to Buyer's Property will become part of Buyer's Property unless they can be removed without damaging Buyer's Property. If Buyer's Property exceeds its useful life, as determined based on Buyer's volume estimates provided at the time the Property was quoted or requires replacement or refurbishment due to normal wear and tear, Buyer will be responsible for the cost of refurbishing or replacing Buyer's Property.

***Comment:** Section 12.2 requires that Seller properly maintain Buyer's Property, but requires Buyer to bear the costs of repair, refurbishment or replacement for property that exceeds its useful life. Section 12.2 also contains requirements designed to assure that Seller is able to return Buyer's Property if required to do so under Section 12.4. Section 12.2 is generally consistent with typical industry terms.*

12.3 **Payment.** Buyer will pay for Buyer's Property that Buyer is required to purchase at the amount specified in the Contract or, if no amount is specified in the Contract, at (i) if manufactured by a third party, Seller's actual cost, including a reasonable markup; or (ii) if manufactured by Seller, Seller's actual cost of purchased materials, components, and services, plus Seller's actual cost of labor and overhead allocable to the Buyer's Property. Unless otherwise stated in the Contract, final payment for Buyer's Property is due (i) on the PPAP (Production Part Approval Process) approval date; or (ii) within 60 days after the Property is tendered for PPAP approval if no action has then been taken on the request for PPAP approval.

***Comment:** Section 12.3 sets the price established in the Contract as the purchase price for Property that has been purchased by Seller for resale to Buyer. Only if the Contract does not establish a fixed price will Seller's acquisition or production costs become relevant. Section 12.3 also sets forth the default payment provisions, which may be modified in the Purchase Order.*

12.4 **Possession.** Subject to Section 12.3, Seller will immediately release to Buyer upon request, and Buyer may retake immediate possession of, Buyer's Property at any time, with or without cause and without payment of any kind unless otherwise provided in the Contract. Seller will release the requested Buyer's Property FCA (Incoterms 2020),

properly packed and marked in accordance with the requirements of Buyer's carrier. If the release or recovery of Buyer's Property or other property renders Seller unable to produce Supplies, the release or recovery will be deemed a termination of the Contract by Buyer for convenience with respect to those Supplies. If Buyer and Seller dispute in good faith whether Buyer's Property has been paid in full, Seller will release and allow Buyer possession upon payment by Buyer of the undisputed portion of the amount claimed by Seller to be owed. Seller's relinquishment of possession will not prejudice any claim or right to payment of Seller for the disputed amounts.

***Comment:** Section 12.4 allows Buyer to obtain possession of its property once it has paid for it, except that if there is a dispute about what is owed, Buyer can obtain possession by paying the undisputed amount, with the dispute to be resolved later.*

12.5 **Failure to Release Buyer's Property.** If Seller does not release Buyer's Property in accordance with Section 12.4, Buyer may, at Seller's cost, (i) obtain an immediate court order for possession, and (ii) enter Seller's premises, with or without legal process, and take immediate possession of Buyer's Property. To the extent permitted by law, Seller waives any right to object to Buyer's repossession of Buyer's Property in a bankruptcy or other proceeding.

***Comment:** Section 12.5, together with Section 12.4, recognizes that the prompt return of Buyer's Property is of fundamental importance to Buyer in order to maintain continuity of supply if Buyer chooses to re-source or otherwise requires its Property. The provision is consistent with typical industry terms.*

13 Seller's Property.

Seller will own all Property that is not Buyer's Property ("Seller's Property"). Seller will, at its expense, furnish, maintain in good condition, and replace when necessary Seller's Property needed to perform the Contract. While a Contract for Supplies remains in effect, Buyer may purchase Seller's Property used exclusively to produce those Supplies and not needed by Seller to produce Supplies or products for other customers, for a purchase price equal to the greater of fair market value or Seller's unamortized acquisition cost.

***Comment:** Section 13 affords Buyer the opportunity to purchase Property (as defined) owned by Seller, so long as Seller no longer needs that Property. It is consistent with typical industry terms.*

14 Default.

14.1 Events of Default. Either Party will be in “Default” under the Contract if it (i) fails to perform any obligation under the Contract and fails to cure the non-performance within 15 business days after written notice from the other party specifying the non-performance, provided that the cure period can be shortened if necessary to prevent irreparable harm; (ii) admits in writing its inability to pay its debts as they become due, commences a bankruptcy, insolvency, receivership, or similar proceeding, or makes a general assignment for the benefit of creditors; (iii) becomes a debtor in a bankruptcy, insolvency, receivership, or similar proceeding commenced by a third party that is not dismissed within 30 days after commencement; or (iv) fails to provide adequate assurance of performance under the Contract within 5 business days after written demand by the Party having reasonable grounds for insecurity.

Comment: Section 14.1 should be read in conjunction with Section 15.2, which permits either party to terminate without cause, and Section 19, which excuses nonperformance caused by an event beyond the control of the affected party. Section 14.1 attempts to strike a balance between giving the non-performing party a reasonable opportunity to cure a non-performance that is capable of cure and giving the performing party the opportunity to begin exercising its remedies. The provisions regarding Seller Default are generally consistent with typical industry terms, although many are less generous to Seller with respect to cure rights. The provisions regarding Buyer default are not typical.

14.2 Remedies. Except for termination for default pursuant to Section 15.3, Sections 8.2, 8.3 and 9 provide Buyer’s exclusive remedies for claims arising out of non-conforming Supplies, and Section 11.7 provides the exclusive remedies for infringement, regardless of the legal theory under which those claims are asserted. Otherwise, either Party may assert and exercise any right and obtain any remedy available at law or equity.

Comment: Section 14.2 clarifies that unless Buyer terminates Seller for Default, Buyer’s remedies for non-conforming supplies or IP infringement are limited to those in Sections 8.2 (warranty), 8.3 (recall), 9 (indemnity) and 11.7 (IP infringement). These provisions are more protective of Seller than typical industry provisions, but, the drafters believe they provide reasonable recovery to Buyer.

14.3 Damages. Subject to Section 14.2, either Party may recover from the other Party direct damages caused by the other Party’s breach of the Contract. In all cases, damages under this Section 14.3 will be reasonably determined based on the nature, type, price, and profitability of the Supplies, industry practices, and the overall volume, scope, and profitability of other business relationships between Seller and Buyer. For clarity, if Buyer terminates the Contract pursuant to Section 15.3, Buyer’s direct damages include its reasonable costs actually incurred to relocate the work to an alternate source.

Comment: In every case, damages are limited to “direct damages,” including, for Buyer, the costs of re-sourcing. Section 14.3 also requires that the overall nature and extent of the commercial relationship be considered when awarding damages under Section 14.3. “Direct damages” is a term of art, the meaning of which depends on the context. This provision is more protective of Seller than typical industry provisions, but, the drafters believe it provides reasonable recovery to Buyer.

14.4 Limitation of Damages. EXCEPT AS OTHERWISE EXPRESSLY AUTHORIZED IN THE CONTRACT, ALL INDIRECT, SPECIAL, CONSEQUENTIAL (INCLUDING LOST PROFITS OR MARKET SHARE OR DAMAGE TO BRAND VALUE), INCIDENTAL, PUNITIVE, AND EXEMPLARY DAMAGES, WHETHER OR NOT FORESEEABLE, ARE EXCLUDED TO THE EXTENT PERMITTED BY APPLICABLE LAW.

Comment: Section 14.4 is, to some extent, a “belt and suspenders” provision that makes clear that Sections 14.2 and 14.3 mean what they say. These limits on damages attempt to balance the goal of making the performing party “whole,” with the recognition that a significant imbalance in financial resources and rewards often exists between the parties.

15 Duration and Termination.

15.1 Duration. The Contract will remain in effect for the Term, unless earlier terminated in accordance with Sections 15.2 or 15.3 “Term” means the time period specified in the Contract or, if the Contract does not specify a term, the period in which the original vehicle program into which the Supplies are incorporated is in production, including any extensions or renewals, provided that at the time of extension or renewal the Contract Price will be adjusted to reflect changes in Seller’s costs.

Comment: Under Section 15.1, the Term is either specified on the Purchase Order or, if not, the life of the program. If the life of the program is extended, the price will be adjusted to reflect changes in Seller's costs. This price adjustment is not typical of industry terms, but the drafters consider it reasonable since program life is often extended significantly beyond the initial expected duration on which pricing was based.

15.2 **Termination for Convenience.** Buyer may terminate the Contract for convenience on at least 60 days written notice.

Seller may terminate the Contract for convenience on reasonable written notice based on the time required for a Buyer to diligently transition supply to a successor Seller, but not less than 60 days or more than 360 days. In all cases, Buyer will use its best efforts to promptly transition supply.

Comment: Section 15.2 allow both Buyer and Seller to terminate for convenience, although the terminating Seller must give significantly longer notice, in order to allow Buyer a reasonable opportunity to re-source. Section 15.2 is not consistent with typical industry provisions, which usually allow Buyer to terminate with little or no notice and do not allow Seller to terminate for convenience. The drafters consider Seller's limited right to terminate reasonable because Sellers are likely to exercise the right only if remaining in the contract is financially ruinous for Seller, and the lengthy notice period protects Buyer's continuity of supply. Similarly to Section 6.2, it serves as a "pressure relief valve," providing Seller with an alternative to brinkmanship and the resultant supply chain uncertainty.

15.3 **Termination for Default.** Upon the occurrence of a material uncured Default by a Party, the other Party may terminate the Contract by notice, effective upon the date specified by the terminating Party in writing.

Comment: Section 15.3 should be read together with Section 14.1, regarding Default and cure. It is consistent with typical industry terms with respect to termination by Buyer, but is not typical with respect to termination by Seller.

15.4 **Seller's Obligations on Termination.** Following notice of termination, Seller will comply with Buyer's reasonable instructions to provide Transition Support during the Transition Support Period. "Transition Support Period" means: (i) if termination is by Seller for Default, the date specified by Seller, but not less than thirty days from the

termination notice; (ii) otherwise, the period reasonably needed by Buyer to complete an orderly transition to the alternate Seller, but not to exceed 360 days from the termination notice. Unless terminated by Buyer for breach, during the Transition Support Period, the Contract Price will be adjusted to reflect changes in Seller's costs, subject to reasonable documentation. All amounts due to Seller for Supplies provided during the Transition Support Period shall be invoiced and paid for in accordance with Section 7 during the Transition Support Period. "Transition Support" means that Seller will at no cost to Buyer, promptly provide reasonable information and documentation, excluding trade secrets and Seller's Intellectual Property (unless licensed pursuant to Section 11.6) continue to fill Buyer's reasonable requirements; and use best efforts to provide special overtime production, storage and/or management of extra inventory of Supplies, extraordinary packaging and transportation and other special services as expressly requested by Buyer in writing. Buyer will pay the reasonable, actual cost of the assistance under this Section 15.4, subject to reasonable documentation, and (B) if the Parties disagree on the cost of Transition Support, Buyer will pay the agreed portion to Seller without prejudice to Seller's right to seek to recover any disputed amounts.

Comment: Section 15.4 defines Seller's obligations to provide "Transition Support" as needed to allow for an orderly transition to a replacement supplier. It is generally consistent with typical industry terms.

15.5 **Buyer's Obligations on Termination or Expiration.** Following termination or expiration for any reason, Buyer will: (i) purchase from Seller completed Supplies at the Contract Price and merchantable work-in-process, components and materials at Seller's actual cost, each of which will be owned by Buyer upon payment in full, provided that the quantities of Supplies, work in progress or components or materials are reasonable in amount under the circumstances; (ii) reimburse Seller for the amounts, if any, reasonably paid to third parties by Seller on account of commitments made by Seller; and (iii) pay any amounts owed for Transition Support pursuant to Section 15.4. In addition, if the Contract is terminated by Buyer for convenience or Seller for Default, Buyer will pay to Seller the reasonable cost of unreimbursed and unamortized research and development, capital equipment purchased specifically to perform the terminated Contract, and Property. In all cases, Buyer's obligations will be subject to documentation of costs reasonably requested by Buyer.

Comment: Section 15.5 defines Buyer's obligation to take and pay for Supplies, work in progress and materials upon termination, as well as amounts paid by Seller to cancel commitments made to third parties prior to termination. It differs from typical industry terms in that typical terms limit the buyback to firm releases, while Section 15.5 limit it to "reasonable" amounts. The drafters believe that the proposed approach is preferable because lead times and other factors often require Seller to hold inputs in amounts greater than those needed for the firm release period in order to protect Buyer. The drafters believe that placing Seller at risk for prudent purchases mis-aligns incentives and leads to greater supply chain uncertainty.

16 Information and Data.

16.1 Confidential Information. "Confidential Information" means trade secrets, specifications, drawings, notes, instructions, engineering data and analyses, compositions of matter, financial data, and other technical and business data which are supplied or disclosed by Buyer or Seller in connection with the Contract, in each case that are marked or otherwise identified as confidential or where their confidential nature is apparent at the time of disclosure. The Party disclosing Confidential Information is referred to herein as the "Disclosing Party," and the Party receiving Confidential Information is referred to herein as the "Receiving Party." Confidential Information will be deemed confidential and proprietary to, and remain the sole property of, the Disclosing Party. The Receiving Party may not disclose Confidential Information or use Confidential Information for any purpose other than as contemplated under the Contract without in each case the written consent of the Disclosing Party. Confidential Information will not include information that (i) is or becomes generally available to the public other than as a result of a violation of this Section 16 by the Receiving Party, (ii) was obtained by the Receiving Party on a non-confidential basis from a third party who had the apparent right to disclose it, or (iii) is legally required to be disclosed. Buyer and Seller will each use the same degree of care to safeguard Confidential Information that it uses to protect its own confidential information from unauthorized access or disclosure (but not less than a reasonable degree of care). Upon request by the Disclosing Party, the Receiving Party will promptly return or destroy the original and all copies of Confidential Information received, except that each party may maintain one copy for legal purposes and need not delete or return copies stored through routine

backup or archival processes and not accessible in the ordinary course.

Comment: Section 16.1 protects Confidential Information disclosed by either party. To provide a measure of certainty and recognize the responsibility of the disclosing party to take reasonable steps to protect it, "Confidential Information" is limited to information that is marked as such, except if the confidential nature of the information is apparent at the time of disclosure. Prudent practice would dictate that the best way to assure confidential treatment is to always identify the information as confidential, thus removing all doubt. The standard of care specified is the same degree of care as the recipient uses to safeguard its own Confidential Information, but not less than a reasonable degree of care. Section 16.1 requires the return or destruction of Confidential Information on request, except that the recipient may keep one copy to protect its legal interests and need not destroy computer archival copies.

16.2 Rights in Data. "Buyer Data" means all data and information: (i) provided to Seller by or on behalf of the Buyer or its Affiliates; (ii) obtained, developed or produced by Seller in connection with the Contract; or (iii) to which Seller has access in connection with the provision of the Supplies. "Affiliates" means an entity that controls, is controlled by or is under common control with Buyer. As between Buyer and Seller, all Buyer Data created, collected, generated, stored, transmitted, or otherwise processed is and will remain the property of Buyer. Seller will have no rights in or to such Buyer Data except as expressly set forth in the Contract. Further, Seller agrees that Buyer will own all derivative works of Buyer Data created by Seller but not containing the Seller's Confidential Information, including, but not limited to reports and analysis tools. Seller has a limited, non-exclusive, non-transferable, and revocable license to access, copy, and use the Buyer Data solely for the performance of the Contract.

Comment: Section 16.2 was added because of the increased importance of data and data rights in the industry. The provision gives Buyer ownership of all Buyer Data, which is broadly defined. Similar to the intellectual property provisions of Section 11, data rights are sometimes the most important and contentious issue in a Contract and sometime of little or no importance. When those rights are important, it may be appropriate to enter into a separate, more specific data rights agreement to avoid conflict down the road.

17 Cybersecurity.

17.1 Enterprise Cybersecurity. Seller must: (i) maintain reasonable, risk-based cybersecurity programs, supported by appropriate technical and operational measures including policies and procedures, to protect the confidentiality, integrity, and availability of Confidential Information and Buyer Data, prevent disruption of the production or delivery of Supplies, and respond in a timely and effective manner to any cybersecurity incident that may compromise any Confidential Information and Buyer Data or disrupt production or delivery of Supplies; (ii) promptly, but no less than 48 hours subsequent to Seller's first knowledge of the incident, notify Buyer of any attempted or actual unauthorized possession, access, use, or knowledge of Buyer's Confidential Information and Buyer Data by any person or entity that may become known or suspected by Seller; (iii) promptly furnish all known details of the attempted or actual unauthorized possession, access, use, or knowledge; (iv) take commercially reasonable measures to investigate, remediate or prevent the recurrence of any incursion or attempted or actual unauthorized possession, access, use, or knowledge of Confidential Information and Buyer Data; and (v) upon request, at Seller's expense, demonstrate compliance through a third-party audit or other reasonable measure agreed upon by Buyer.

Comment: Section 17.1 was added because of the increased importance of enterprise cybersecurity in the industry. Because of the intended broad use of the GTCs and the vast difference in the vulnerability and the sophistication of different Sellers, the provision is general in nature, requiring "reasonable, risk-based" protective measures. Program design and implementation are largely left to Seller, although Buyer does have the right to require a third party audit.. Seller must promptly inform Buyer if there are specified cybersecurity incidents.

17.2 Product Cybersecurity. Seller must maintain a reasonable, risk-based program, supported by appropriate technical and operational measures including policies and procedures, to ensure the cybersecurity of any Supplies that include software, hardware, or other electrical components. Seller's product cybersecurity program must provide for security by design, vulnerability management, governance, and any other elements identified by Buyer in a manner consistent with industry best practices, including but not limited to ISO/SAE 21434.

Comment: Section 17.2 was added for the same reasons as 17.1. The standard ("industry best

practices") is somewhat higher than for enterprise cybersecurity because of the magnitude of the unique business and safety threats posed if the security of the product itself is compromised.

17.3 Supply Chain Cybersecurity. Seller will ensure its subcontractors are contractually bound to comply with the provisions of this Section 17 or its equivalent.

Comment: Section 17.3 requires Seller to flow down the obligations of Sections 17.1 and 17.2 to its suppliers. This will likely require revisions to Seller's own purchasing terms.

17.4 No Personal Data. No Personal Data protected under applicable Law is or will be disclosed or processed by either Party.

Comment: A host of laws restrict the use, disclosure or processing of personal data, often with significant liability for violations. Personal data is usually not necessary for the transactions covered by the GTCs, so Section 17.4 assumes and requires that there will be none. If personal data will be involved, a separate compliance agreement will be needed. Note that "personal data" or similar terms used in applicable laws are often broadly defined, so it may be prudent to involve counsel or other subject matter experts in assessing the need for and content of such an agreement.

18 Assignment and Subcontracting.

Neither Party may assign or subcontract its duties or responsibilities under the Contract without the prior written consent of the other Party, which will not be unreasonably withheld or delayed. Unless otherwise stated in the consent, any assignment or subcontracting by either Party, with or without the required consent, will not relieve that Party of its duties or obligations under the Contract or its responsibility for non-performance or Default by its assignee or subcontractor. If Buyer requires Seller to subcontract all or a portion of its duties or obligations under the Contract to a designated subcontractor, Seller will not be responsible for a breach of the Contract caused by that subcontractor's failure to meet its warranty, delivery, or other contractual obligations.

Comment: Section 18 requires approval for any assignment or subcontracting, which makes it incumbent on Seller to seek specific approval from Buyer for all subcontractors. Generally, the party making the assignment or subcontract remains responsible for the actions of its assignee or

subcontractor unless the consent provides otherwise. Where the subcontractor is a directed source by Buyer, however, Seller is not liable for a breach caused by that directed source.

19 Excusable Non-Performance.

A delay or failure by either Party to perform its obligations under the Contract (except Buyer's payment obligations) will be excused, and will not constitute a Default, only if caused by an event or occurrence beyond the reasonable control of that party and without its fault or negligence (an "Excusable Event"). The Party unable to perform will give notice of the non-performance (including its anticipated duration) to the other Party promptly after becoming aware that it has occurred or is reasonably likely to occur, followed by prompt notices of any material changes in the facts relative to its ability to perform and/or the anticipated duration of the non-performance. Seller and Buyer will share information, confer, seek agreement and otherwise act cooperatively to avoid or mitigate the effects of the potential or actual excused non-performance. If Seller is unable to perform for any reason, Buyer may purchase Supplies from other sources and reduce its purchases from Seller accordingly without liability to Seller. Within three business days after written request by the other Party, the non-performing Party will provide adequate assurances that the non-performance will not exceed 30 days. If the non-performing Party does not provide those assurances, or if the non-performance exceeds 30 days, the other Party may terminate the Contract pursuant to Section 15.2 by notice given to the non-performing Party before performance resumes. If Seller reasonably incurs extraordinary costs in order to maintain or restore supply in response to an inability to perform (or what would be an inability to perform except for those extraordinary costs), including expedited shipping and/or increased costs to obtain substitute materials or components, the costs will be equitably shared between the Parties. Buyer may not require Seller to use substitute materials or components for the Supplies that are not fully validated or tested unless and until the Parties first reach written agreement to reasonably share the risk.

Comment:

1. Section 19 references "excusable nonperformance" rather than the more limiting "force majeure." It specifically includes labor disputes. Prompt notice of the inability to perform is a pre-condition to coverage. Section 19 is broadly

consistent with industry standards, except for the final two sentences

2. The penultimate sentence requires Buyer and Seller to share increased costs if "extraordinary costs" are incurred in order to maintain supply. "Extraordinary" is an inherently imprecise standard and may lead to disputes, but the drafters believe that it is preferable to the current typical provision, under which Seller is faced with the choice of either incurring 100% of conceptually unlimited costs to maintain supply or claiming "force majeure" and cutting off supply, leaving it to either the courts or commercial brinkmanship to sort out whether Seller is in breach.

3. The final sentence makes clear that Seller is not required to maintain production using unvalidated inputs absent an agreement on how to allocate the resultant risks. This is an enhancement to customary terms, in response to increasingly frequent Buyer demands that Sellers maintain supply by substituting components or materials without complying with standard testing and validation requirements.

20 Labor Contracts.

Seller will notify Buyer of a labor contract expiration date at least six months (6) before the expiration of a current labor contract that has not yet been extended or replaced. Buyer may thereafter direct Seller in writing to manufacture up to 30 days of additional inventory of Supplies, specifying the quantities of Supplies required and any packaging and storage requirements. Seller will use commercially reasonable efforts to comply with Buyer's written directions prior to expiration of the current labor contract and until the current labor contract has been extended or a new contract completed. By authorizing the additional inventory, Buyer commits to buy the entire quantity of conforming Supplies requested and produced. Seller is responsible for carrying costs and any additional costs of manufacture.

Comment: *Section 20 recognizes that a labor dispute involving Seller's employees may significantly impact Buyer's ability to continue to operate. Accordingly, Section 20 allows Buyer to require that Seller build a bank of up to 30 days additional inventory to help insulate Buyer from the effects of a potential labor stoppage by Seller's employees. However, by requiring the additional inventory, Buyer commits to purchase that inventory.*

21 Customs.

Transferable credits or benefits associated with Supplies purchased, including trade credits, export credits, or rights to the refund of duties, taxes, or fees, belong to Buyer unless otherwise prohibited by applicable law. Seller will provide Buyer with all information and records relating to the Supplies necessary for Buyer to (i) receive these benefits, credits, and rights; (ii) fulfill any customs obligations, origin marking, labeling, or disclosure requirements, and certification or local content reporting requirements; (iii) claim preferential duty treatment under applicable trade preference agreements or regimes; and (iv) participate in any duty deferral or free trade zone programs of the country of import. Seller will obtain all export licenses and authorizations and pay all export taxes, duties, and fees unless otherwise stated in the Contract, in which case Seller will provide all information and records necessary to enable Buyer to obtain those export licenses or authorizations.

***Comment:** Section 21 adopts the current industry practice that transfers to Buyer credits or benefits associated with Products purchased, to the extent that they are transferable. There are many other legal obligations that may be incident to the import and export of goods. Compliance with those other obligations are required under Section 10.*

22 Insurance.

Prior to commencing work on Buyer's premises or utilizing Buyer's Property, Seller will maintain and upon request furnish to Buyer a certificate evidencing (i) general liability insurance with coverage limits reasonably acceptable to Buyer; (ii) all risk property perils insurance covering the full replacement value of Buyer's Property while in Seller's care, custody, or control and naming Buyer as loss payee; (iii) worker's compensation insurance as required by applicable law; and (iv) other insurance required by applicable law. Insurance coverage required under this section will be subject to commercially reasonable self-insured retentions.

***Comment:** Section 22 requires Seller to provide general liability insurance coverage when performing work at Buyer's premises or using its property, and to provide property perils coverage protecting Buyer's investment in Buyer's property that is utilized by Seller. The requirements of Section 22 are limited and additional obligations may be appropriate for particular Supplies.*

23 Miscellaneous.

23.1 **Advertising.** During and after the term of the Contract, Seller will not advertise or otherwise disclose its relationship with Buyer or Buyer's customers without Buyer's prior written consent, except as may be required to perform the Contract or as required by law.

***Comment:** Section 23.1 adopts the current industry practice of prohibiting Seller from advertising its relationship with Buyer.*

23.2 **Audit Rights.** Seller will maintain records as necessary to support amounts charged to Buyer under the Contract in accordance with Seller's document retention policies. Buyer and its representatives may audit Seller's records of transactions directly related to the Supplies and completed within one year prior to the audit date, to the extent needed to verify the quantities shipped and that the prices charged match the Contract Prices, and subject to Seller's reasonable restrictions or conditions regarding confidentiality. Any audit will be conducted at Buyer's expense (but will be reimbursed by Seller if the audit uncovers material errors in the amounts charged), at reasonable times, and at Seller's usual place of business.

***Comment:** Section 23.2 adopts the current industry practice of allowing Buyer to audit Seller's records for a one year period, but limits the audit scope to those records needed to those directly related to the Supplies. It does not generally permit a wide-ranging review of Seller's costs or operations, financing, business plans, and the like. Seller should protect any Confidential Information disclosed in an audit by marking that information accordingly (see Section 16.1).*

23.3 **Electronic Communication.** Seller will comply with the method of electronic communication specified by Buyer in Buyer's request for quotation and confirmed in the Contract, including requirements for electronic funds transfer, Purchase Order transmission, electronic signature, and communication. Seller will also make commercially reasonable efforts to comply with any modification to Buyer's specified method of electronic communication after the date of the Contract.

***Comment:** Section 23.3 is a standard industry provision, but it places a reasonableness limits on Buyer directed process changes.*

23.4 **Relationship of the Parties.** Buyer and Seller are independent contractors, and nothing in the

Contract makes either Party the agent or legal representative of the other Party for any purpose. Neither Party has authority to assume or to create any obligation on behalf of the other Party.

Comment: *This is a standard commercial contract provision.*

23.5 **Waiver.** The failure of either Party to enforce any right or remedy provided in the Contract or by law on a particular occasion will not be deemed a waiver of that right or remedy on a subsequent occasion or a waiver of any other right or remedy.

Comment: *This is a standard commercial contract provision.*

23.6 **Severability.** A finding that any provision of the Contract is invalid or unenforceable in any jurisdiction will not affect the validity or enforceability of any other provision of the Contract or the validity or enforceability of that provision in any other jurisdiction.

Comment: *This is a standard commercial contract provision.*

23.7 **Interpretation.** When used in these GTC, “including” means “including without limitation,” and terms defined in the singular include the plural and vice versa.

Comment: *This is a standard commercial contract provision.*

23.8 **Notices.** Any notice or other communication required or permitted in the Contract must be in writing and delivered by means and to the person(s) commercially reasonable under the circumstances. Notice will become effective on the date of actual

receipt if the date of actual receipt is a business day or on the next business day if the date of actual receipt is not a business day.

Comment: *This is a standard commercial contract provision.*

23.9 **Governing Law and Forum.** Unless otherwise agreed in writing, the Contract will be governed by and interpreted according to the internal laws of Michigan, excluding its choice of law principles. The United Nations Convention on Contracts for the International Sale of Goods will not apply to the Contract. Any litigation arising out of or related to the Contract will be commenced in the State or Federal courts of the State of Michigan.

Comment:

1. *Section 23.9 requires that litigation will be in Michigan courts under Michigan law. This is consistent with most industry terms, although that is changing as the industry changes. It may be appropriate for the parties to choose a different state and there is no inherent advantages to Buyer or Seller tied to the state chosen, except that it is likely that a Michigan court will have greater experience with automotive supply chain disputes than courts elsewhere and, likewise, there is considerably more legal precedents on automotive supply chain issues in Michigan than elsewhere.*

2. *The GTCs do not provide for arbitration or other formal or informal dispute resolution mechanisms. In the drafters’ experience, there are both advantages and disadvantages to litigation vs. alternative mechanisms, which can be explored with counsel. If alternative mechanisms are desired, appropriate provisions should be added.*