



# **KAPALUA**

**MARINE, FUELS AND LUBES**

TEXAS ENTERPRISES, INC. *dba* KAPALUA MARINE, FUELS & LUBES.  
GENERAL TERMS & CONDITIONS  
January 16<sup>th</sup> , 2018



# KAPALUA MARINE, FUELS & LUBE



## **GENERAL**

This is a statement of the terms and conditions according to which Texas Enterprises, Inc. *dba* Kapalua Marine, Fuels & Lubes (hereinafter called "CO") will sell bunkers/marine fuels.

These conditions apply to all offers, quotations, orders, agreements, services and all subsequent contracts of whatever nature, except where otherwise is expressly agreed in writing by CO.

General trading conditions of another party will not apply, unless expressly accepted in writing by CO.

In the case that, for whatever reason, one or more of the (sub)clauses of these general conditions are invalid, the other (sub)clauses hereof shall remain valid and be binding upon the parties.

## **DEFINITIONS**

Throughout this document the following definitions shall apply:

- "Marine Fuels" or "Bunkers" - means products derived from crude oil, delivered or to be delivered to the Vessel for consumption;
- "Seller" – means Aransas Fuel or the party contracting to sell and deliver or to sell and to arrange to deliver Marine Fuels/Bunkers;
- "Buyer" – means the Vessel supplied and jointly and severally her Master, Owners, Managers, Operators, disponent Owners, Charterers and any person(s) who contract(s) to purchase, take delivery of and pay for the Marine Fuels/Bunkers;
- "Owner" – means the registered Owner, Manager or Bareboat Charterer of the vessel;
- "Vessel" - means the Buyer's Vessel, Ship, Barge or Offshore Unit that receives the supply/bunkers; either as end-user or as transfer unit to a third party;
- "Nomination" – means the written request/requirement by the Buyer to the Seller for the supply of Bunkers;
- "Order Confirmation" – means the written confirmation as issued by the Seller and forwarded to the Buyer to confirm the conclusion of the negotiated sale/purchase of the Bunkers. In case of conflict between the Nomination and the Order Confirmation, unless the Seller otherwise agrees in writing, the wording and content of the Order Confirmation is deemed to contain the prevailing terms of the Agreement;
- "Agreement" – means the concluded terms for the sale/purchase of the Bunkers;
- "Supplier" – means any party instructed by or on behalf of the Seller to supply or deliver the Bunkers;
- "GTC" – means these General Terms and Conditions which shall govern the contractual regulations between the Seller and the Buyer;
- "BDN" – means the Bunker Delivery Note, being the document(s) which is/are signed by the Buyer's representative(s) at the place of the supply of the Bunkers to the Vessel, evidencing the quality and quantity of the Bunkers supplied to and received by the Vessel.
- "Master of Vessel" – means the individual authorized to represent the Receiving Vessel;
- "Bunker Tanker Safety Check List" – means the document signed and stamped before commencement of bunkering operations by the Master of the Vessel requesting delivery of Marine Fuels or his representative, and by the Seller or its representative, which shall enable them to check that all the safety requirements have been met. Signature of the Bunker Tanker Safety Check List by the Seller does not relieve the Buyer from its primary obligation to ensure the safety of Vessel receiving Marine Fuels. Safety on board the Vessel receiving Marine Fuels shall remain the sole responsibility of the Buyer.

### **1. OFFER, QUOTATION AND BINDING AGREEMENT**

- a. An Agreement shall only be concluded and binding on the Seller when the Seller sends the Order Confirmation to the Buyer. Each Order Confirmation shall incorporate these GTC by reference so that the GTC are considered a part of the Confirmation.
- b. Agreements entered into via brokers, or any other authorized representative on behalf of the Seller, shall only bind the Seller upon the Sellers' broker or other authorized representative sending the Order Confirmation to the Buyer or the Buyer's broker, as the case may be.
- c. The price of the Marine Fuels shall be that stated in the Seller's Quotation or in the Seller's Written Acceptance, whichever is issued last. That price shall be either a fixed price per unit of Marine Fuels delivered or a price calculated on the basis of a formula as stated in the Seller's Quotation or in the Seller's Written Acceptance, whichever is issued last.



## KAPALUA MARINE, FUELS & LUBE



- d. The price shall be valid for the time range (the “price validity time range”) identified in the Seller’s Quotation or in the Seller’s Written Acceptance whichever is issued last.

The Seller shall be under no obligation to deliver if the Receiving Vessel arrives outside of the price validity time range. If the Receiving Vessel does not arrive within the price validity time range, the Seller is entitled to terminate the Sale Contract forthwith and to claim damages as per Clause 15 above as if the contract had been cancelled by the buyer more than three (3) days after the Buyer’s Order. The Seller is also entitled, at its sole discretion, to elect to deliver the Marine Fuels on new terms to be agreed between the Buyer and the Seller and without prejudice to the Seller’s right to claim damages as if the contract had been cancelled by the Buyer more than three (3) days after the Buyer’s Order (see Clause 15).

- e. The price stated in the Seller’s quotation is exclusive of all taxes and charges which are levied against the Seller/Supplier by the State of delivery and/or by any governmental, regional, and/or local authorities in connection with the Sale Contract, including but not limited to:
- i. Wharfage charges, barging charges or other similar charges,
  - ii. Mooring charges or port duties incurred by the Seller,
  - iii. Duties, taxes, charges, freights or other costs in the country where delivery takes place,
- f. At ports where the Seller is not the direct Supplier, the Seller reserves the right to invoice the Buyer for any additional charges/dues/taxes that the Supplier demands from the Seller after the Seller has issued its Written Acceptance of the Buyer’s Order.
- g. If the party requesting Bunkers is not the Owner of the Vessel, the Seller shall have the right (but will not be obliged) to insist as a precondition of sale that a payment guarantee is provided by the Owner. The Seller shall have the right (but will not be obliged) to cancel any agreement with the Buyer at any time, if such payment guarantee is not received upon request thereof from the Seller to the Owner. The Seller’s decision to forego obtaining a payment guarantee under this Clause 1(g) shall have no effect on Seller’s right to a lien on the Vessel for any Bunkers supplied under this Agreement.
- h. The Buyer warrants that it is authorized as agent to order Bunkers for the Vessel, and that the Seller has a lien on the Vessel for any Bunkers supplied under this Agreement. If the party requesting Bunkers is not the Owner of the Vessel, Buyer assumes the sole responsibility for communicating the terms and conditions of this Agreement to the Owner of the Vessel prior to the date of delivery.
- i. If at any time before the delivery the financial standing of the buyer appears to the Seller (in its absolute discretion) to have become impaired or unsatisfactory, the Seller may require cash payment or security to be provided by the buyer prior to delivery, failing which the Seller may cancel the delivery without any liability on the part of the latter or its subcontractors.

### **2. SPECIFICATIONS (QUALITY – QUANTITY)**

- a. The Buyer assumes the sole responsibility for the choice of nominating the quantity and quality of bunkers and determine (if applicable) potential compatibility with any Bunkers already onboard the Vessel. The Buyer also assumes sole responsibility for the selection and fitness of its choice of Bunkers for any particular use or purpose, and the Seller shall assume no responsibility whatsoever for the compliance of fitness of the Bunkers for a specific type of engine or equipment which the Buyer may or may not have agreed upon in any C/P (Charter Party) term or otherwise. This includes but is not limited to the quality, Sulphur content and any other specific characteristics of the Bunkers whatsoever. Any and all warranties regarding the satisfactory quality, merchantability, fitness for purpose, description or otherwise, are hereby excluded and disclaimed. Where specifications designate a maximum value, no minimum value is guaranteed unless expressly stated in the Order Confirmation, and conversely where minimum values are provided in a specification, no maximum values are guaranteed unless expressly stated in the Order Confirmation.
- b. The quality and the quantity shall be as agreed between the Seller and the Buyer and shall correspond to the Seller’s Order Confirmation. Unless otherwise agreed in writing the Bunkers are delivered and sold based on metric tons in vacuum.
- c. Where standard specifications are being given or referred to, tolerances in accordance with ISO 4259 in respect of Reproducibility/Repeatability in quality are to be accepted without compensation or other consequences whatsoever.



## KAPALUA MARINE, FUELS & LUBE

- d. In respect of the quantity agreed upon the Seller shall be at liberty to provide, and the Buyer shall accept a variance of five percent (5%) from the agreed quantity, with no other consequence than a similar variance to the corresponding invoice from the Seller.
  - e. Information regarding the typical characteristics of the Bunkers at any delivery location shall only be indicative of the Bunkers that have been made available at that location and shall not form a part of the specification of the bunkers to be delivered. All grades of product may contain petroleum industry allowed bio-derived components.
- 3. Documentation**
- a. Before commencement of delivery, the Master of the Receiving Vessel shall sign a DOI in the form presented by the Seller/Supplier and containing the quantities and the grades of the Marine Fuels to be delivered. In the bunker Requisition Form, the Master of the vessel shall confirm the name of the receiving Vessel, her IMO number, the details of the Vessel's Owners, her Managers, her Operators, her disponent Owners and her Charterers.

Before commencement of delivery operations, the Seller or its representative shall also present to the Master of the receiving Vessel or his representative, a bunker Tanker Safety Check List or similar document, which shall be signed by the Seller or its representative and by the Master of the receiving Vessel or his representative, which shall enable to check that all safety requirements have been met. Signature of this document by the Seller does not relieve the Buyer from its primary obligation and sole responsibility to ensure safety onboard its Vessel.

- b. Once the delivery is completed and quantities measured as per Clause 4, a Bunker Delivery Note shall be signed and stamped by the Master of the Receiving Vessel or his representative and by the Seller or his representative, and returned to the Seller or its representative, as acknowledgement of the delivery. A BDN shall also be retained by the Master of the Receiving Vessel and kept onboard the receiving Vessel for a minimum of three (3) years from the date of delivery. In addition to the information in the Bunker Requisition Form, the BDN shall contain the following information:
  - Vessel's name and IMO number
  - Seal number of samples taken during delivery
  - Delivered quantity in metric tons
  - Density in kg/m<sup>3</sup> at 15°C or at ambient in conformity with local Port regulations - Sulphur content

**4. MEASUREMENTS – NON CLAUSING OF THE BDN(S)**

- a. The quantities of bunkers shall be determined only from the official gauge or meter of the bunkering barge, tank truck or of the shore tank in the case of delivery ex-wharf.
- b. The buyer's representative shall together with the Seller's representative measure and verify the quantities of Bunkers delivered from the tank(s) from which the delivery is made. When supplied by bunkering barge/tanker the particular barge/tankers will present its tank calibration and ullage sounding records, which are agreed to be the sole valid and binding document(s) to determine the quantity or quantities supplied. Quantities calculated from the Receiving Vessel's sounding shall not be considered.
- c. Should the Buyer's representative fail or decline to verify the quantities, the measurements of quantities made by the Seller or the Supplier shall be final, conclusive and binding and the Buyer shall be deemed to have waived any and all claims in regard to any variance.
- d. The Buyer expressly undertakes not to make any endorsement, complaint/comment (including but without limitation any "No-Lien" clausung) on the BDN when presented for signature by the Buyer's representative(s), any such insertion shall be invalid and of no effect whatsoever.
- e. In the event of complaint/comment on the quantity of Bunkers delivered, the Buyer or the Master of the Vessel shall give to the Seller/Supplier a letter of protest separately, followed by a complaint in detail to the Seller, setting out the exact quantity(ies) claimed short-supplied, and with full supporting vouchers, in writing with seven (7) days thereof, failing which any such claim by the Buyer shall be extinguished as non-existent, and the Buyer shall be deemed to have expressly waived any such claim against the seller/Supplier, the relevant claim being time-barred, and the Seller/Supplier's weight and measurements shall be conclusive evidence of the quantity of Bunkers delivered.



## KAPALUA MARINE, FUELS & LUBE



### **5. SAMPLING**

- a. The Supplier shall arrange for four (4) representative samples of each grade of Bunkers to be drawn throughout the entire bunkering operation. The Buyer's representative has the responsibility to witness that such samples are drawn correctly and shall confirm his witnessing thereof and also confirm the proper and correct sealing by signing the labels of the sample bottles.
- b. In case that drip sampling is not available onboard the barge, tank truck or shore tank, samples shall be taken as a composite of each tank from which supplies are made, onboard the barge (respectively at the shore tank or tank truck), divided with 1/3 from each of the top, mid and bottom of the tanks.
- c. The samples shall be securely sealed and provided with labels showing the Vessel's name, identity of the delivery facility, product name, delivery date and place and seal number, authenticated with the Vessel's stamp and signed by the Seller's representative and the Master of the Vessel or his representative. The seal numbers shall be inserted into the BDN/Bunker Delivery Note, and by signing the BDN both parties agree to the fact that the samples referred to therein are deemed valid and taken in accordance with the requirements as specified in this Chapter 5.
- d. Two (2) samples shall be retained by the Seller for ninety (90) days after delivery of the Bunkers, or if requested by the Buyer in writing, for as long as the Buyer reasonably requires. The other two (2) samples shall be retained by the receiving Vessel, one of which being dedicated as the MARPOL sample.
- e. In the event of a dispute in regard to the quality of the Bunkers delivered, the samples drawn pursuant to this Chapter 5, shall be conclusive and final evidence of the quality of the Bunkers delivered. One, and only one, of the samples retained by the Sellers shall be forwarded to an independent laboratory to perform a set of tests, the result of which is to be made available to both parties. Those test results shall be final and binding upon both Buyer and Seller as to the parameters tested. The parties are to use best endeavors to agree on the independent laboratory to perform the tests. If, however, no agreement can be reached on the choice of laboratory within three (3) days of the Buyer being advised of the Seller opting to have the sample tested, the Seller is at liberty to send the sample to a reputable and independent laboratory of its choice for the tests to be conducted, and those test results will be final and binding upon Buyer and Seller as set out above.
- f. The seal must be breached only in presence of both parties unless one/both in writing have declared that they will not be present, or fails to be present at the appropriate time and place; and both parties shall have the right to appoint independent person(s) or surveyor(s) to witness the seal breaking.
- g. No samples subsequently taken shall be allowed as (additional) evidence. If any of the seals have been removed or tampered with by an unauthorized person such sample(s) shall be deemed to have no value as evidence.
- h. Any eventual samples drawn by Buyer's personnel either during bunkering or at any later date after bunkering shall not be valid as indicator of the quality supplied. The fact that such samples may eventually bear the signature of personnel on board the barge or tank truck or other delivery conveyance shall have no legal significance as such local personnel have no authority to bind Seller to different contractual terms. Seller shall have no liability for claims arising in circumstances where Buyer may have commingled the products onboard the Vessel with other fuels.

### **6. DELIVERY**

- a. The time of delivery, as given by the Seller, has been given as an approximate time, unless it has been otherwise specifically agreed in writing between the parties.
- b. The time of delivery will only be binding upon the Seller when all information necessary for the Seller to comply with its obligations hereunder have been properly delivered to the seller in reasonable time before the delivery. In the event the Nomination addresses a spread of dates for delivery, the Seller has the sole discretion to commence the delivery within any time, day/night/sshinc of these dates, always subject to the circumstances set out below in Clause 6(c).
- c. The Vessel shall, under all circumstances, be bunkered as promptly as the prevailing circumstances permit, having regard to congestion affecting the delivery facilities of Seller, its Suppliers or agents and to prior commitments of barges or other delivery means. The Seller and/or the Supplier shall not be liable for any consequences or any time lost due to the Vessel having to wait for berth for bunkering or for completion of bunkering, and unless otherwise agreed in writing, the Seller shall not be obligated to delivery prior to the nominated date or spread of dates. The Seller is not responsible for delays caused by local customs, pilots, port or other authorities.



## KAPALUA MARINE, FUELS & LUBE



- d. In any case the Buyer, unless otherwise agreed in writing, must give not less than seventy-two (72) hours approximate notice of readiness of the Vessel for delivery, which is to be followed by forty-eight (48) hours and twenty-four (24) hours notices, where the last notice must also specify the exact place of delivery. All these notices must be given to the Sellers and the Seller's representatives/agents in writing.
- e. The Seller shall not be required to deliver any Bunkers if any customs and/or other government permit required for such purpose has not been obtained in due time before the delivery.
- f. If the Seller, at any time or for any reason, believes that there may be a shortage of supply at any place and that as a result thereof it may be unable to meet the demands of all its customers, the Seller may allocate its available and anticipated quantity(ies) of Bunkers among its customers in such a manner as it may determine appropriate in its sole discretion.
- g. The vessel shall be accessible at all times to Seller and Supplier and shall be bunkered as promptly as the circumstances permit. The Seller and/or the Supplier shall not be liable for any demurrage paid or incurred by the Buyer or for any loss, damage or delay of the Vessel (consequential and/or liquidating damages included) of any nature whatsoever due to congestion at the loading terminal, prior commitments of available barges or tank trucks or any other reason.
- h. The Buyer shall ensure that the Vessel provides a free, safe and always afloat and accessible side for the delivery of bunkers and that all necessary assistance as required by the Seller or the Seller's representative is rendered in connection with the delivery. If in the Supplier's opinion clear and safe berth is unavailable, delivery might be delayed or, in Seller's option, cancelled and all costs related to above will be on account of the Buyer.
- i. The Vessel shall moor, unmoor, hoist and lower bunkering hose(s) from the barge(s) whenever required by the Seller, Seller's representative or Supplier, free of expenses and in any way as may be requested to assist the barge equipment to a smooth supply. The Buyer shall make and be responsible for all connections and disconnections between the delivery hose(s) and the Vessel's bunker intake manifold/pipe and ensure that the hose(s) are properly secured to the Vessel's manifold prior to commencement of delivery.

During bunkering the Vessel's scuppers must be safely blocked, which blocking must be made by the Vessel's own crew. Furthermore, the Vessel must ensure that all pipes and manifolds and receiving tanks are properly checked and ready to receive the Bunkers, including but not limited to ensuring proper opening/closing of relevant valves, without any risk for spillages, etc., during the bunkering. Local further special requirements for receiving Bunkers must be followed strictly by the Vessel, whether advised or not by the Seller or the Sellers representative, as it is always the Vessel and the Buyer who remains solely responsible for the knowledge and awareness of such eventual additional requirements for safety reasons.

- j. In the event that the Vessel is not able to receive the delivery promptly, the Buyer is thereby in default and shall pay damages and/or any reasonable demurrage claim to the barging/supplying facilities and shall indemnify the Seller in each and every respect as a result thereof.
- k. Delivery shall be deemed completed and all risk and liabilities, including loss, damage, deterioration, depreciation, contamination, evaporation or shrinkage to the Bunkers delivered and responsibility for loss, damage and harm caused by pollution or any other manner to third parties shall pass to the Buyer from the time the bunkers reach the flange/connecting pipe line(s)/delivery hose(s) provided by the Seller on the barge/tank truck/shore tank.
- l. If the Buyer for whatever reason is unable or refuses to receive the full quantity ordered, the Seller shall have the right to invoice the Buyer for the loss incurred by having to transport the undelivered Bunkers back to the storage or by having to sell the Bunkers in a degraded form or at a lower price. The Seller may exercise this right without prejudice to the Seller's other rights for damages or otherwise pursuant to these conditions.
- m. The Vessel shall provide and have appropriate and segregated tanks to receive the contracted quantity of Bunkers; and the Vessel shall always be able to perform its own blending onboard if any blending is deemed to be required by the Buyer. The Vessel shall upon delivery test the Bunkers supplied by running her engines or auxiliaries or equipment, for which the Bunkers are supplied, for a minimum of one (1) hour to determine that the Bunkers are satisfactory. In the event the Bunkers are not considered satisfactory, the Seller and Supplier are to be notified in writing immediately after such test period has expired. Otherwise it shall be deemed that the Bunkers were satisfactory and that, in any event, the Buyer has waived any right to claim in this regard.



## KAPALUA MARINE, FUELS & LUBE



- n. If delivery is required outside normal business hours or on local weekends, Saturday, Sunday, national religious or public holidays, the extra expenses incidental to such delivery shall be reimbursed by the Buyer as additional costs.
- o. In the event the Bunker delivery is made by vessel or barge as a ship-to-ship transfer, any damage caused by contact and/or collision and/or swell and/or other weather or sea related condition or incident, same is to be dealt with by the Owners directly with the owners of the units involved, and Seller/Supplier shall not be held responsible for any such damages. If, however, any of the involved units choose to pursue Seller and/or supplier, Buyer will fully indemnify and hold Seller harmless in relation thereto.
- p. For safety reasons it is agreed that it is solely the Master of the bunkering barge that determines whether mooring alongside is safe, taking weather, swell and forecasts into consideration. Supplier/Seller not to be held responsible for any delays, demurrages, liquidating damages or similar whatsoever as a result of any eventual delays caused by any decision by the Master of the barge in this regard. Supplies being always performed weather permitting.
- q. Without prejudice to any other article(s) herein, any and all supply(ies) will be based on a "best endeavors" basis when/if the Receiving Vessel arrives outside the originally agreed time split as per the Order Confirmation forwarded.

### **7. TITLE**

- a. Title in and to the Bunkers delivered and/or property rights in and to such Bunkers shall remain vested in the Seller until full payment has been received by the Seller of all amounts due in connection with the respective delivery. The provisions in this section are without prejudice to such other rights as the Seller may have under the laws of the governing jurisdiction against the Buyer or the Vessel in the event of non-payment.
- b. Until full payment of the full amount due to the Seller has been made and subject to Article 6(m) hereof, the Buyer agreed that it is in possession of the Bunkers solely as Bailee for the Seller, and shall not be entitled to use the Bunkers other than for the propulsion of the Vessel, nor mix, blend, sell, encumber, pledge, alienate, or surrender the bunkers to any third party or other Vessel.
- c. In case of non- or short payment for the Bunkers by the Buyer, the Seller is entitled (but not obliged) to repossess the Bunkers without prior juridical intervention, without prejudice to all other rights or remedies available to the Seller.
- d. In the event that the Bunkers have been mixed with other bunkers onboard the Vessel, the Seller shall have the right to trace its proprietary interest in the Bunkers into the mixed bunkers and/or a right of lien to such part of the mixed bunkers as corresponds to the quantity or net value of the Bunkers delivered.
- e. The provisions of this Chapter 7 do not prejudice or in any way limit the Seller's right to arrest/attach the Vessel and/or sister ship and/or any sister or associate ship and/or other assets of the Buyer (or the Owner of the Vessel or any other party liable), wherever situated in the world, without prior notice.
- f. Where, notwithstanding these conditions, title in and to the Bunkers delivered has passed to the Buyer and/or any third party before full payment has been made to the Seller, the Buyer shall grant a pledge over such bunkers to the Seller. The Buyer shall furthermore grant a pledge over any other Bunkers present in the respective Vessel, including any mixtures of the delivered Bunkers and other bunkers. Such pledge will be deemed to have been given for any and all claims, of whatever origin and of whatever nature that the Seller may have against the Buyer.
- g. For the avoidance of doubt, where a mortgagee bank enforces any rights against the Vessel and becomes a mortgagee in possession of the Bunkers then as bailee the mortgagee bank is liable to the Seller for fulfillment of the Agreement.

### **8. PAYMENT – MARITIME LIEN**

- a. Payment for the Bunkers and/or the relevant services and/or charges shall be made by the Buyer as directed by the Seller within the period agreed in writing.
- b. Payment shall be made in full, without any set-off, counterclaim, deduction and/or discount free of bank charges to the bank account indicated by the Seller on the respective invoice(s).
- c. (i) If any time after delivery but before the due date the financial standing of the Buyer appears to the Seller (in its sole discretion) to have become impaired or unsatisfying, the Seller may require immediate full payment of all its invoices due and/or those not yet due, or such security as it shall deem to be satisfactory.



## KAPALUA MARINE, FUELS & LUBE



- (ii) In the event that the Buyer shall default in making any payment due, the Seller may suspend deliveries of Bunkers until such payment has been made in full (together with default/delay compensation and costs), or the Seller may, in its discretion, elect to treat such default as a serious breach of the Agreement and thereupon terminate the Agreement in whole or in part without prejudice to any claim against the Buyer for damages, including cancellation charges. Such termination or suspension shall not relieve the Buyer of any obligation undertaken by virtue of an Agreement so terminated.
- (iii) Where the Seller has extended any kind of credit facility to a group of companies or associated companies, default by any one relevant Buyer in respect to any invoice of the Seller shall give the right to the Seller to cancel all credit arrangements of the entire group or of all the associates, whereupon sub clauses 8(c)(i) and 8(c)(ii) shall apply as appropriate.
- (iv) Where the buyer fails to pay timely, the Seller has the right to (without prejudice to its right to receive default/delay compensation) take all appropriate steps to secure and enforce its claim; the Seller may also unilaterally cancel any credit arrangements agreed with/extended to the Buyer.
- (v) All judicial and extrajudicial costs and expenses, including pre-action costs, fees, expenses and disbursements of the Seller's lawyers/attorneys-at-law, incurred in connection with non-payment or delayed payment or by any other breach by the Buyer of these conditions, shall be for the Buyer's account, immediately payable by the latter to the Seller. In case of litigation, they Buyers shall also pay all of the relevant expenses to the Seller, including but without limitation, all his reasonable attorneys'/lawyers' fees, costs and disbursements.
- d. Payment shall be deemed to have been made on the date of which the Seller has received the full payment, and such is available to the Seller. If payment falls due on a non-business day, the payment shall be made on or before the business day nearest to the due date. If the preceding and the succeeding business days are equally near to the due date, then payment shall be made on or before the preceding business day.
- e. Any delay in payment of the full sum due shall entitle the Seller to interest at the rate of three percent (3%) per month, compounded monthly for each month or part thereof of non-payment without prejudice to any rights or remedies available to the Seller. Furthermore, the Seller is entitled to charge a delayed payment administration fee of USD \$1.50 per metric ton supplied, or the equivalent thereof in local currency, with a minimum administration fee of USD \$350.00 for each delivery made. All reasonable attorneys' fees incurred by Seller in connection with the collection of overdue payments shall be for the sole account of the Buyer.
- f. Payments made by the Buyer in respect of a supply of bunkers shall at all times be credited in the following order: (1) costs of any kind or nature, including but not limited to legal costs and attorneys' fees, (2) interest and administrative fees, and (3) invoices in their order of age, also if not yet due, or in Seller's sole discretion to specify a payment to any such invoice Seller considers relevant.
- g. All costs borne by the Seller in connection with the collection of overdue payments, including those of the Seller's own legal and credit department and, including but not limited to, reasonable attorneys' fees, whether made in or out of court and in general all costs in connection with breach of any agreement by the Buyer, including but not limited to reasonable attorneys' fees, shall be for the sole account of the Buyer.
- h. The Seller shall, at all times, in its absolute discretion, be entitled to require the Buyer to provide the Seller what the Seller deems to be proper security for the performance of all of Buyer's obligations under the Agreement. Failing the immediate provision of such security upon Seller's demand, the Seller shall be entitled to stop any further execution of any agreement(s) between the parties until such time as the Buyer has provided the required security.
- i. Where Bunkers are supplied to a Vessel, in addition to any other security, the Agreement is entered into and the Goods are supplied upon the faith and credit of the Vessel. It is agreed and acknowledged that the sale of Bunkers to the Buyer and/or their acceptance on the Vessel create a maritime lien over the Vessel for the price of the Bunkers (and all interest and costs payable in respect thereof; including but not limited to the reasonable attorneys' fees), such maritime lien afforded to the Seller over the Vessel. In any event any applicable Law shall not prejudice the right of the maritime lien of the Seller afforded hereunder or by any other applicable Law, be it of the



## KAPALUA MARINE, FUELS & LUBE



place of delivery, or the flag of the Vessel, or the place of jurisdiction and/or an arrest of the Vessel, or otherwise howsoever.

- j. It is mutually agreed that the Bunkers provided by the Seller to the Buyer under the terms of this Agreement have been ordered by the Buyer in the ordinary course of business between Seller and Buyer. All payments from Buyer to Seller for Bunkers supplied under this Agreement are deemed to have been made in the ordinary course of business between Seller and Buyer, according to these ordinary business terms agreed between them.

### **9. CLAIMS**

- a. addition to the obligations referred to in 4(d) and 4(e) herein, any claim in connection with the quantity of the Bunkers delivered must be notified by the Buyer, or the Master of the Vessel, to the Seller or Supplier immediately after completion of delivery in the form of a letter of protest. If the Buyer or the Vessel's Master fails to present such immediate notice of protest to the Seller or supplier, such claim shall be deemed to have been waived and shall be absolutely barred for all purposes.
- b. Always without prejudice to 6(m) herein, any and all claims concerning the quality of the Bunkers delivered or time consumed for the entire operation, shall be submitted to the Seller in writing within fifteen (15) days after delivery with a clear statement as to the nature or the claim(s) along with appropriate supporting documentation, failing which any rights to complain or claim compensation of whatever nature shall be deemed to have been waived and absolutely barred for all purposes.
- c. The Buyer shall be obliged to make payment in full and fulfill all other obligations in accordance with the terms of the Agreement and these conditions, whether or not it has any claims or complaints. If Buyer submits a claim against Seller with respect to the quality or quantity of the products supplied, the Seller or the Seller's nominated representative shall be entitled to board the Vessel and investigate the Vessel's records, log books, engine logs, etc., and to make copies of any such document the Seller or the Seller's nominated representative may consider necessary for its investigations connected to the case. The Buyer shall allow this, or where Buyer has chartered the Vessel then the Buyer shall obtain authorization from Owner to allow the herein stated steps and to provide full assistance and support by the Vessel's officers and crew in any such manner the Seller or Seller's nominated representative may require. Failure to allow boarding and/or produce required copies of documents and/or lack of full cooperation by the Vessel's officers and crew shall constitute a waiver of the Buyer's claims.
- d. The Seller shall be allowed, and the Buyer, Owner, Officers and Crew onboard the receiving Vessel shall agree and in any way support and cooperate with Seller's representative, to draw samples from the Vessel's storage tanks, settling tanks and service tank and/or from before and after the Vessel's centrifuges to have extra tests carried out for such samples at independent laboratory.
- e. In each and every case, any and all claims of the Buyer shall be time barred unless arbitration/legal proceedings have been commenced/issued at the competent tribunal/court set forth in Chapter 16 hereof and service within twelve (12) months from the date of delivery of the Bunkers, or the date that delivery should have commenced pursuant to the Order Confirmation from the Seller.

### **10. LIABILITY / LIMITATIONS**

- a. The Seller and /or Supplier shall not be liable for damages of whatever nature, including physical injury, nor for delay of delivery of Bunkers or services, no matter whether such damages or delay have been caused by fault or negligence on the side of the Seller. The Seller shall furthermore not be liable for damages or delay as described above when such damages or delay have been caused by the fault or negligence of its personnel, representatives, Supplier or (sub)contractors.
- b. Liabilities of the Seller for consequential and/or liquidated damages including but not limited to loss of time, loss of cargo or charter cancelling date, loss of income or profit/earnings, are excluded. In any event and notwithstanding anything to the contrary herein, liability of the Seller shall under no circumstances exceed the invoice value of the Bunkers supplied under the relevant agreement to the relevant Vessel.
- c. The Buyer shall be liable towards the Seller and herewith undertakes to indemnify the Seller for any and all damages and/or costs suffered or otherwise incurred on the Seller due to a breach of contract and/or fault or neglect of the Buyers, its Supplier, agents, Servants, (sub)contractors, representatives, employees and the officers, crews and/or other people whether or not onboard of the Vessel(s). The Buyer furthermore undertakes to hold the Seller harmless in case of any third-party institutes a claim of whatever kind against the Seller whether direct or indirect relation to any agreement regulated by these terms and conditions. Third party shall mean any other (physical or legal) person/company than the Buyer.

### **11. SUBSTITUTION**



# KAPALUA MARINE, FUELS & LUBE



- a. The Seller reserves its right to substitute for itself a third party or the performance of all or part of its obligations under the Sale Contract. The Seller shall remain responsible for the performance of the Sale Contract vis-à-vis the Buyer.

## **12. EXEMPTIONS AND FORCE MAJEURE**

- a. The Seller/Supplier shall not be responsible for any loss, damage, delay or failure resulting from an act of God, or the port of delivery being affected by war, commotion, riot, quarantine, strike, stoppage, lock-out, arrest, restraint of princes, rulers and people, or any other event whatsoever which cannot be avoided or guarded against by the exercise of due diligence.
- b. If the Buyer exercises reasonable diligence, the Buyer shall not be liable for failure to receive any particular delivery if prevented there from by force majeure.  
The Buyer shall indemnify the Seller for the Seller's supplier for any damage caused by the Buyer, the Buyer's agent or employees in connection with deliveries hereunder.
- c. Declaration of Force Majeure shall be given without undue delay once such event(s) have come to the knowledge of the respective party declaring same. However, under no circumstances and for no reason whatsoever, can Force Majeure entitle the Buyer not to pay promptly any invoice of the Seller.
- d. In the event that the Seller, as a result of force majeure, can only deliver a superior grade of bunkers, the Seller is entitled to offer the said grade, and the Buyer must accept delivery thereof and pay the applicable price.

## **13. BREACH/CANCELLATION**

- a. Without prejudice to any other remedies and rights, the Seller shall have the option immediately to cancel the Agreement in full or in part, or to store or procure the storage of the Bunkers, in whole or in part, for the account and risk of the Buyer and to charge the Buyer the expenses thereby incurred, or to hold the Buyer fully to the Agreement, or take any other measures which the Seller deems appropriate, without prejudice to its rights of indemnification, without any liability on the side of the Seller, in any one of, but not limited to, the following cases:
  - when the Buyer, for whatever reason, fails to accept the Bunkers in part or in full at the price and time designated for delivery;
  - when the Buyer fails in part or in full to comply with its obligations to pay any amount due to the Seller and/or provide security as set out in these GTCs;
  - when, before the date of delivery, it is apparent in the opinion of the Seller that the financial position of the Buyer entails a risk to the Seller;
  - when, in case of force majeure the Seller is of the opinion that the execution of the Agreement should be cancelled.
- b. The Seller may terminate any Agreement with the Buyer in whole or in part, in its full discretion, upon the breach of any provisions hereof by the Buyer or in the event that the Buyer fails to make or suspends payment, ceases to carry on business, makes an arrangement with its creditors or undergoes any form of bankruptcy, administration, reorganization, or asset rearrangement.
- c. The Buyer acknowledges that any agreements with the Seller and any actions related to such agreements as well as any interaction with third parties related to such agreements are covered by certain anti-corruption laws and regulations which can include any anti-corruption law, including but not limited to, the U.S. Foreign Corrupt Practices Act ("FCPA"), and the UK Bribery Act. Therefore, the Buyer declares to comply with all applicable anti-corruption laws and regulations and agrees that the Buyer has not, and will not, offer, promise, pay, or authorize the payment of any money, or anything of value, or take any action in furtherance of such a payment, whether by direct or indirect means, to any public official or private individual to influence the decision of such person in the performance of his duties to a government or to his company. Any breach of this clause will void the related Agreement and in the sole discretion of the Buyer any other agreement between the parties, making any claims for payment, delivery or any other obligation of the Seller under this Agreement void. The Buyer is liable for any and all costs or losses incurred by the Seller due to such breach and/or an Agreement becoming void as a consequence.

## **14. SPILLAGE, ENVIRONMENTAL PROTECTION**

If a spill occurs while the Bunkers are being delivered, the Buyer shall promptly take such action as is necessary to remove the spilled Bunkers and mitigate the effects of such spill. Without prejudice to the generality of the foregoing the Seller is hereby authorized by the Buyer in the absolute discretion of the



# KAPALUA MARINE, FUELS & LUBE



Seller, but at the expense of the Buyer, to take such measures and incur such expenses (whether by employing its own resources or by contraction with others) as are necessary in the judgement of the Seller to remove the spilled Bunkers and mitigate the effects of such spill. The Buyer shall cooperate and render such assistance as is required by the Seller in the course of the action. All expenses, claims, costs, losses, damages, liabilities and penalties arising from spills shall be borne by the party that caused the spill by a negligent act or omission. If both parties have acted negligently, all expenses, claims, losses, damages, liabilities and penalties, shall be divided between the parties in accordance with the respective degree of negligence. The burden of proof to show the Sellers' negligence shall be on the Buyer. The Buyer shall give the Seller all documents and other information concerning any spill or any program for the prevention thereof that is required by the Seller, or is required by law or regulation applicable at the time and place of delivery.

## **15. DELAYS AND CANCELLATIONS**

- a. Notwithstanding anything else to the contrary herein, and without prejudice to any rights or remedies otherwise available to the Seller, the Buyer, by its acceptance of these conditions, expressly agrees that the Seller has the sole discretion to cancel or to adjust prices in the event the Vessel is suffering a delay exceeding twenty-four (24) hours from the (last) nomination date.
- b. If the Buyer, for whatever reason, including circumstances entirely outside Buyer's control, cancels the Agreement, where Order Confirmation has been sent by Seller, the Buyer shall be liable for any and all losses suffered and liabilities incurred by the Seller and/or the Supplier as a result of such cancellation, including but not limited to, barge costs, restoring of the Bunkers, and hedging costs, and also in Sellers' sole option, any difference between the contract price of the undelivered product and the amount received by the Seller upon resale to another party or, if another Buyer cannot be found, any market diminution in the value of the product as reasonably determined from available market indexes. These losses and liabilities shall be indemnified by a minimum amount of USD \$4,000.00 by way of agreed minimum liquidated damages, and shall be indemnified in full if they, in total, exceed USD \$4,000.00.

## **16. LAW AND JURISDICTION**

Any dispute arising out of, or in connection with the Sale Contract or these GTCs, including, without limitation, any dispute with multiple defendants/claimants and indemnity claims, shall be exclusively interpreted and construed in accordance with the laws of the State of Texas, USA, excluding any choice of law rules that would otherwise require application of the laws of any other jurisdiction. Venue for any disputes arising from this Agreement shall be in the applicable state and/or federal courts of Houston, Harris County, Texas. **BOTH PARTIES AGREE THAT, TO THE EXTENT ALLOWED BY THE GOVERNING LAW, EACH PARTY HEREBY WAIVES ALL RIGHTS TO A JURY TRIAL WITH RESPECT TO ANY LITIGATION INVOLVING THIS AGREEMENT.**

The United Nations Convention on Contracts for the International Sale of Goods (Vienna Sale Convention) signed in Vienna on 11 April 1980 shall not apply to and shall be expressly excluded from the Sale Contract and these GTCs.

## **17. CONFIDENTIALITY**

All data and information acquired directly or indirectly by Buyer from Seller relating to this Sale Contract or these GTCs or in connection with the performance of this Agreement, excluding information or data in the public domain through no default of the Buyer, shall be held strictly confidential and not be reproduced or used for any purpose unrelated to the Agreement or disclosed to a third party without Sellers' express written consent.

## **18. SAVINGS**

In the event any provision, clause, sentence or part of the Sale Contract or these GTCs is unenforceable under any applicable law, same shall be deemed to be modified to the extent required to comply with said law (it being the intention of both Parties to enforce to the fullest extent, all terms of this Sale Contract or these GTCs) and as so modified, this Sale Contract or these GTCs shall continue in full force and effect. In the event any such provision, clause, sentence or part of this Sale Contract or these GTCs cannot be modified to comply with the law, then said provision, clause, sentence or portion of this Sale Contract or



## KAPALUA MARINE, FUELS & LUBE



these GTCs shall be deemed to be deleted from the Agreement and the remaining terms and conditions shall remain in full force and effect.