

# WYKO/MESNAC

## TERMS AND CONDITIONS OF SALE (US)

The following Terms and Conditions apply to and govern all sales by Davian Enterprises, doing business as WYKO Tire Technology, hereafter referred to as WYKO, and are to be deemed incorporated into all purchase orders, quotes, and purchase agreements, irrespective of how titled. By placing an order with WYKO, all Buyers (as defined herein) acknowledge they have read, understand and agree to these Terms and Conditions.

**1. Interpretation and Definitions.** The capitalized terms used in these Terms and Conditions shall have the following meanings:

"Buyer" means the person whose order for the Goods is accepted in writing by Seller.

"Goods" means the goods and all services associated therewith (including without limitation any installation, maintenance, repair and service of the Goods or any part of them) which Seller is to supply in accordance with the Contract.

"Seller" means **WYKO** whose address is 6435 Highway 411 South, Greenback, Tennessee 37742.

"Conditions" means the standard terms and conditions of sale set out in this document and (unless the context otherwise requires) includes any special terms and conditions agreed in writing between Buyer and Seller in accordance with Conditions 2.3

"Contract" means all documents and writings comprising the terms of the sale and purchase of the Goods, including without limitation all purchase orders, quotes and purchase agreements, however titled, provided the same are accepted in writing by Seller.

1.2 Any reference in these Conditions to any provision of a statute shall be construed as a reference to that provision as amended, re-enacted or extended at the relevant time

1.3 The headings in these Conditions are for convenience only and shall not affect their interpretation.

## 2. Basis of the Sale

2.1 Seller shall sell and Buyer shall purchase the Goods in accordance with the Contract which is accepted in writing by Seller subject to these Conditions which shall govern the Contract to the exclusion of any other conflicting terms and conditions subject to which any such order is made or purported to be made by Buyer. No terms or conditions offered by Buyer which conflict with these Conditions shall be binding upon or enforceable against Seller.

2.2 Quotations issued to Buyer by Seller may be withdrawn or varied at any time and unless otherwise specified shall be deemed to be automatically withdrawn and terminated if not accepted by Buyer in writing upon the earlier of (a) thirty (30) days after the date of the quotation, or (b) any expiration date set forth in the quotation. No binding contract shall in any event arise until Buyer's written order has been accepted and confirmed in writing by Seller's authorized representative.

2.3 No variation of these Conditions shall be binding upon or enforceable against Seller unless agreed in writing by a duly authorized representative of Seller.

**2.4 Buyer acknowledges that: (a) Seller's employees or agents are not authorized to make any representations concerning the Goods unless confirmed by Seller in writing; and (b) Buyer has not received and is not relying on any representations or warranties pertaining to the Goods except those given in writing by Seller by and through its authorized representative.**

2.5 Any advice or recommendations given by Seller or its employees or agents to Buyer or its employees or agents as to the use, storage, application, maintenance, service or repair of the Goods which is not confirmed in writing by Seller is followed or acted upon entirely at Buyer's own risk, and Seller shall not be liable for any such advice or recommendation which is not so confirmed. Buyer hereby releases and discharges Seller (including Seller's shareholders, officers, directors, employees, and agents) from and against all liability, losses and claims arising from or relating to any such advice or recommendations.

### 3. Orders and Specifications; Cancellation

- 3.1 Buyer shall be solely responsible to Seller for ensuring the accuracy of all terms of any order for Goods (including without limitation all applicable specifications and performance standards) submitted by Buyer, and for giving Seller all necessary information relating to the Goods within a sufficient time to enable Seller to perform the Contract in accordance with its terms.
- 3.2 The quantity, quality and description of, and /or any specification for, the Goods shall be those set out in Buyer's order as accepted by Seller in writing.
- 3.3 No order which has been accepted by Seller in writing may be cancelled by Buyer except with the agreement in writing of Seller and in compliance with Seller's Cancellation Policy. In the event of any accepted cancellation: (a) all deposits theretofore paid by Buyer to Seller shall be paid to Seller as liquidated damages and Buyer shall have no right therein or claim thereto; (b) Buyer shall indemnify Seller in full against all payments, advances, loss, costs, damages (including consequential damages and lost profits), charges and expenses (including without limitation, reasonable legal fees and expenses) paid or incurred by Seller as a result of cancellation. **See the WYKO Cancellation policy at [www.wykous.com](http://www.wykous.com).**

### 4. Price of the Goods

- 4.1 The price of the Goods ("Price") shall be the price quoted by Seller in writing and accepted by an authorized representative of Buyer in writing.
- 4.2 Seller reserves the right by giving written notice to Buyer at any time before delivery, to increase the Price of the Goods to reflect any increase in the cost to Seller which is due to any factor beyond the control of Seller, including without limitation any increase in the costs of labor, materials or other costs of manufacture, any change in delivery dates, quantities or specifications for Goods which is requested by Buyer, or any delay caused by instructions of Buyer or failure of Buyer to give Seller accurate information or instructions.
- 4.3 Buyer shall make all arrangements (and shall pay all costs) for transportation, handling and installation of the Goods. Unless otherwise agreed in writing between

Buyer and Seller in writing all Prices are given by Seller on an ex works basis. If Seller agrees to deliver the Goods otherwise than from Seller's point of origin, Buyer shall pay all charges and expenses for transport, packaging and insurance.

- 4.4 The Price is exclusive of any applicable sales, use, value added or other taxes in connection with the sale, which Buyer shall be additionally liable to pay to Seller.

### 5. Payment Terms

- 5.1 Except as stated in writing in the Contract, Buyer shall pay the Price of the Goods (less any discount to which Buyer is entitled as set forth in the Contract, but without any other deduction) within thirty (30) days of the invoice for the Goods or, if Buyer fails to accept delivery, within thirty days of the date on which Buyer should have taken delivery under the terms of the Contract. The time of payment shall be of the essence of the Contract. All payments shall be made in full without deduction in respect of any set-off or counterclaim.
- 5.2 Seller shall have (and Buyer hereby grants to Seller) a purchase money security interest in the Goods until paid in full. Buyer hereby consents to the filing by Seller of UCC financing statements, or the applicable instrument under the law of the jurisdiction of Buyer, reflecting such security interest.
- 5.3 If Buyer fails to make any payment on the due date then, without prejudice to any right or remedy available to Seller, Seller shall be entitled to
  - (1) cancel the Contract and/or suspend any further deliveries to Buyer.
  - (2) retain any payment theretofore made by Buyer and apply such proceeds in such manner as Seller deems appropriate, in its sole discretion; and
  - (3) charge Buyer interest (both before and after any judgement) on the amount unpaid, at the rate of three per cent per annum over the prime commercial lending rate as published from time to time in the Wall Street Journal, or if such publication is no longer in existence, another nationally recognized business publication (such interest being deemed to

accrue from day to day and being compounded on the last day of each calendar month) until payment is made in full.

## 6. Delivery

- 6.1 The date quoted for delivery is an estimate only, and shall be extended by a reasonable period if there is any delay caused by industrial dispute or by any cause beyond the reasonable control of Seller. In no event shall Seller be liable to Buyer damages or delays caused by any such delay, including without limitation lost profits and consequential damages.
- 6.2 Where the Goods are to be delivered in installments, each delivery shall constitute a separate contract and failure by the Seller to deliver any one or more of the installments in accordance with the Contract and these Conditions or any claims by Buyer in respect of any one or more installments shall not entitle Buyer to treat the Contract as a whole repudiated
- 6.3 If Seller fails to deliver the Goods for any reason other than any cause beyond Seller's reasonable control or Buyer's fault and Seller is determined by a court of competent jurisdiction to be liable to Buyer, Seller's liability and Buyer's sole recovery shall be limited to the Price of such Goods. Buyer agrees that damages in such event are incapable of determination and therefore will accept the Price as liquidated damages.
- 6.4 If Buyer fails to take timely delivery of the Goods or fails to give Seller adequate delivery instructions at the time stated for delivery (otherwise than by reason of any cause beyond Buyer's reasonable control or by reason of Seller's breach) then without prejudice to any other right or remedy available to Seller, Seller may: (a) store the Goods until actual-delivery in which event Buyer shall be responsible for payment of all costs (including insurance) of storage; or (b) sell the Goods at scrap metal value and (after deducting all reasonable storage and selling expenses) account to Buyer for the excess over the price under the Contract or Buyer shall pay to Seller the amount of any shortfall below the Price under the Contract.

## 7. Risk and Property

- 7.1 Risk of damage to or loss of the Goods shall pass to Buyer:
- (a) In the case of Goods to be delivered at Seller's premises, at such time as Seller notifies Buyer in writing that the Goods are available for collection; or
  - (b) In the case of Goods to be delivered otherwise than at Seller's premises, at the time of delivery or, if Buyer wrongfully fails to take delivery of the Goods, the time when Seller or its nominated contractor has tendered delivery of the Goods.
- 7.2 Notwithstanding delivery and the passing of risk in the Goods, or any other provision of these Conditions, title to the Goods shall not pass to Buyer until Seller has received payment in full of the Price of the Goods and all other goods agreed to be sold by Seller to Buyer for which payment is due.
- 7.3 Until such time title to the Goods passes to Buyer, Buyer shall hold the Goods (and replacements therefor, and all proceeds of sale thereof) in trust for the benefit of Seller, as Seller's fiduciary agent and bailee, and shall keep the Goods separate from those of Buyer and third parties and property stored, protected and insured and identified as Seller's property. Until that time Buyer shall be entitled to resell the Goods in the ordinary course of its business, but shall account to Seller for the proceeds of sale or otherwise of the Goods, whether tangible or intangible, including insurance proceeds, and keep all such proceeds separate from any monies or property of Buyer and third parties and in the case of tangible proceeds, properly stored, protected and insured.
- 7.4 Until such time as title to the Goods passes to Buyer (and provided that the Goods are still in existence and have not been resold) Seller shall be entitled at any time to require Buyer to deliver up the Goods to Seller. If Buyer fails to do so promptly, Buyer grants to Seller and Seller's designee(s) license to enter upon any premises of Buyer or any third party where the Goods are stored and repossess the Goods.
- 7.5 Until Buyer pays the Price in full and acquires title to the Goods, Buyer shall not pledge or in any way cause, permit or suffer any encumbrance of the Goods as security for any indebtedness. In the event of the breach of the foregoing covenant, Buyer may immediately

repossess the Goods, and all monies owing by Buyer to Seller shall (without prejudice to any other right or remedy of Seller) shall immediately become due and payable.

## 8. Warranties and Liability

8.1 Unless otherwise stated in any written warranty, Seller warrants that the Goods will correspond with the specifications in the Contract at the time of delivery and will be free from defects in material and workmanship for a period of twelve (12) months from the date of delivery. **EXCEPT AS SET FORTH HEREIN, SELLER DISCLAIMS ANY AND ALL EXPRESS AND IMPLIED WARRANTIES IN ANY WAY RELATING TO THE GOODS, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE**

8.2 The above warranty is given by Seller subject to the following conditions:

(a) IN THE EVENT OF ANY VALID WARRANTY CLAIM, THE OBLIGATION OF SELLER SHALL BE LIMITED TO THE REPAIR OR REPLACEMENT EX WORKS FACILITY DESIGNATED BY SELLER (EXCLUDING SHIPPING COSTS, TO BE PAID BY BUYER), OF THE EQUIPMENT OR SUCH PARTS WHICH SELLER DETERMINES WERE DEFECTIVE IN MATERIAL OR WORKMANSHIP UNDER NORMAL STORAGE, USE AND SERVICE. THIS WARRANTY APPLIES ONLY TO NEW EQUIPMENT AND PARTS AND EXPRESSLY EXCLUDES WEAR PARTS.

(b) THIS WARRANTY SHALL NOT APPLY TO ITEMS MANUFACTURED BY OTHERS ATTACHED TO THE GOODS. THIS WARRANTY DOES NOT APPLY TO FAILURES OR DEFECTS OF THE EQUIPMENT COMPONENTS, AND/OR PARTS (INCLUDING WEAR PARTS) DUE TO ORDINARY WEAR AND TEAR, NEGLIGENCE (INCLUDING BUT NOT LIMITED TO IMPROPER MAINTENANCE AND STORAGE), ACCIDENT, IMPROPER

INSTALLATION OR OPERATION, OR MODIFICATION NOT AUTHORIZED IN WRITING BY SELLER (INCLUDING BUT NOT LIMITED TO USE OF UNAUTHORIZED PARTS OR ATTACHMENTS). ANY ALTERATION OR MODIFICATION OF THE GOODS, OR ATTACHING OF ANY PARTS OR EQUIPMENT NOT MANUFACTURED BY SELLER OR NOT INTENDED TO BE ATTACHED TO THE GOODS, OR MAINTENANCE, USE OR OPERATION OF THE GOODS CONTRARY TO SELLER'S INSTRUCTIONS, SHALL AT SELLER'S ELECTION VOID THIS WARRANTY. THIS WARRANTY SHALL EXTEND ONLY TO THE BUYER STATED IN THE CONTRACT AND IS NOT ASSIGNABLE. THE EXCLUSIVE REMEDY OF BUYER UNDER THIS WARRANTY OR OTHERWISE IN CONNECTION WITH THE GOODS, SHALL BE REPAIR OR REPLACEMENT OF THE GOODS, IN SELLER'S SOLE AND ABSOLUTE DISCRETION.

8.3 Any claim which is based on any alleged breach of warranty, or any defect in the quality or condition of the Goods or their failure to correspond with specification must (whether or not delivery is refused by Buyer) be notified in writing by Buyer to Seller within fourteen (14) days of the discovery of the defect or failure. If Buyer does so notify Seller, Buyer shall provide details of the alleged defect, preserve the Goods alleged to be defective and allow Seller reasonable access to inspect the Goods. If Buyer does not notify Seller of any claim in accordance with these Conditions, or otherwise fails to comply herewith, Buyer shall not be entitled to reject the Goods and Seller shall have no liability for such defects or failure, and Buyer shall be bound to pay the Price as if the Goods had been delivered in accordance with the Contract

8.4 Seller's sole liability in respect of Goods delivered otherwise than in accordance with the Contract shall be limited to the Price of the defective Goods.

8.7 Seller shall not be liable to Buyer by reason of any representation (other than fraudulent misrepresentation), or any Implied warranty,

condition or other term, or any duty at common law, or under the express terms of the Contract for loss of profit, loss of business opportunity or damage to reputation or for any indirect loss or damage, costs, expenses, which arise out of or in connection with the supply of the Goods or their resale by Buyer, except as otherwise expressly provided in these Conditions.

8.8 Seller shall not be liable to Buyer or be deemed to be in breach of the Contract by reason of any delay in performing, or any failure to perform, any of Seller's obligations in relation to the Goods, if the delay or failure was due to any cause beyond Seller's reasonable control. Without prejudice to the generality of the foregoing, the following shall be regarded as causes beyond Seller's reasonable control:

- (a) Act of God. explosion, flood, tempest, fire or accident
- (b) Strikes, lock-outs or other industrial actions or trade disputes (whether involving employees of Seller or third parties).

8.10 The Price for the Goods is based on the liability of Seller being subject to the limitations of this Section 8.

## 9. Tools and Designs

9.1 All drawings, designs, molds, tools, materials, specifications, manufacturing processes and other information created obtained or provided by Seller for the purposes of fulfilling any order or proposed order by Buyer (the "Tools and Designs") shall be and remain Seller's property together with any patent, design right, copyright, trademark or other intellectual property right therein. To the extent used lawfully by Buyer with Seller's permission, Buyer will have only a non-exclusive license therein, which may be terminated by Seller at any time, in its sole discretion.

9.2 Any amount payable by Buyer to Seller in respect of the Tools and Designs is deemed to be a license fee and part of the Contract Price and payment of such sum shall not give Buyer any right, title or interest in the Tools and Designs or any part thereof unless otherwise agreed.

9.3 Buyer warrants to Seller that none of the drawings, designs or specifications which it might supply to Seller in connection with a Contract will infringe the rights of any third party and that it has full authority to provide the same to Seller for use in connection with the Contract. Buyer shall indemnify and hold harmless Seller and its employees and agents against any claim made against, or any loss, cost damage, injury or expense suffered by Seller or its employees or agents due to any action, claim or demand brought or threatened by a third party in connection with the infringement of the rights of such third party

## 10. Insolvency of Buyer

This Condition applies if:

- (a) Buyer makes any voluntary arrangement with its creditors or becomes subject to an administration order or (being an individual or firm) becomes bankrupt or (being a company) goes into liquidation (otherwise than for the purpose of amalgamation or reconstruction); or
- (b) an encumbrancer takes possession, or a receiver is appointed, over any of the property or assets of Buyer; or
- (c) Buyer ceases, or threatens to cease, to carry on business; or
- (d) Seller reasonably apprehends that any of the events mentioned above is about to occur in relation to Buyer and notifies Buyer accordingly.

10.2 If this Condition applies then, without prejudice to any other right or remedy available to Seller, Seller shall be entitled to cancel the Contract or suspend any further deliveries under the Contract without liability to Buyer, and if the Goods have been delivered but not paid for the price shall be become immediately due and payable notwithstanding any previous agreement or arrangement to the contrary.

## 11. General

11.1 Buyer shall hold all drawings, designs, samples, specifications and other information supplied or

provided by Seller in strict confidence and will not disclose or provide any part thereof to any third party. Upon breach or threatened breach of this Section 11.1, Seller shall be entitled to such injunctions or restraining orders, or such other injunctive relief, as it shall seek.

11.2 Any notice required or permitted to be given by either party to the other under these Conditions shall be in writing addressed to the other party at its registered office or principal place of business or such other address as may at the relevant time have been notified pursuant to this provision to the party giving the notice.

11.3 Waivers by Seller shall not be binding unless made in writing signed by an authorized representative of Seller. No waiver by Seller of any provision or breach of the Contract by Buyer shall be considered as a waiver of any subsequent breach of the same or any other provision.

11.4 If any provision of these Conditions is held by any competent authority to be invalid or unenforceable in whole or in part the validity of the other provisions of these Conditions and the remainder of the provisions in question shall not be affected thereby.

Section 11.1 hereof and to obtain appropriate relief. Legal proceedings brought by Seller in any arbitration or other legal action shall not preclude legal proceedings by it in any other jurisdiction by way of substantive action, ancillary relief, enforcement or otherwise. In any such action, the prevailing party shall be entitled to collect all legal fees and expenses incurred in such action.

## **12 Dispute Resolution**

12.1 These Conditions shall be governed by and construed in all respects in accordance with the laws of the State of Ohio, without reference to the conflicts of laws provisions thereof.

12.2 Any and all disputes arising under the Contract or these Conditions, or in any way connected to the sale of the Goods, or any other dispute between Seller and Buyer shall, at the written election by Seller, be subject to determination by a binding arbitration conducted by a sole arbitrator in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration shall be held in a location specified by Seller in the city shown as the address of Seller in Section 1 of these Conditions.

12.3 Nothing in Section 12.2 shall be deemed to limit Seller's right to bring legal proceedings in any court of competent jurisdiction including without limitation the courts that have jurisdiction by reason of Buyer's domicile, in order to enforce