

Terms and Conditions

1. General Terms.

These Terms and Conditions ("Terms") apply to all testing and analysis services ("Services") set forth in the above Sample Submission Form ("Submission Form", and together with these Terms, collectively, "Agreement") performed by Dairy Farmers of America, Inc. dba ELS Lab Services ("Company") for the customer named in the Submission Form ("Customer"), unless Customer and Company have agreed to different terms and conditions in a separately-signed written agreement. The Agreement supersedes and takes precedence over any contrary, inconsistent, or additional terms submitted in any prior or subsequent purchase order or other document from Customer. The Agreement does not obligate Company to accept any purchase orders, and Company may cease performing Services at any time. In the event of any inconsistency between the Agreement and any purchase order or any of Customer's other documents, the Agreement shall control. As a condition to Company providing the Services, or causing the Services to be provided, Customer agrees to timely deliver or cause to be delivered to Company, at the direction of Company, the samples of the products on which the Services are to be performed.

2. Price, Payment.

a. The prices for the Services will be those separately provided by Company. Company shall provide invoices to Customer for Services performed hereunder and Customer shall pay to Company the total amount of such invoice in accordance with the payment terms set forth in the invoice. Amounts not paid when due shall incur a monthly charge of 1.5% on the overdue balance.

b. Failure by Customer to make any payment when due shall constitute a material breach of the Agreement. Upon default of payment for any outstanding invoices, Company shall reserve the option to deduct the total outstanding invoice, and any associated fees, from any current letter of credit, to the extent that Customer has provided Company with the same (in addition to any other remedies available to Company at law or in equity). Additionally, Customer shall, promptly upon receipt of notice from Company, pay to Company all costs and expenses (including, without limitation, attorneys' fees or fees paid to a collection agency) incurred by Company to collect any such overdue balances or charges. A resort to any remedy by Company shall neither be in lieu of nor a waiver of any other remedy available to Company at law or in equity.

c. Customer shall provide to Company a fully completed credit application and any other financial information reasonably requested by Company for the purpose of establishing credit. Company reserves the right to request additional financial information and/or security and/or to modify and adjust the manner and terms of payment to fairly address the current financial exposure to Company for the Services performed hereunder.

3. Limited Warranties.

a. All dates provided by Company are approximate only. All Services which Company renders or causes to be rendered to Customer shall be provided on a "reasonable efforts" basis. A "reasonable efforts" basis means performing the Services, or causing the Services to be performed, in compliance with the NCIMS Certification Program and/or industry standards, as applicable. Company does not make any other warranties regarding the Services hereunder, or the results thereof. Customer acknowledges that test results provided only indicate the condition of the sample received and in no way are a guarantee of an entire production lot distribution of any particular organism or otherwise. Customer must make its own decision regarding the use or sale of its products following receipt of the test results provided by Company hereunder, and Company is not responsible for Customer's use or sale thereof.

b. THE WARRANTIES ABOVE CONSTITUTE THE SOLE WARRANTIES, EXPRESS OR IMPLIED, GIVEN BY COMPANY IN CONNECTION WITH THE SERVICES AND COMPANY DISCLAIMS ALL OTHER WARRANTIES, INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

4. Limitation of Liability.

In no event shall Company be liable for any consequential damages, lost profits, incidental or indirect damages, damages for personal injury, death, property damage, loss of production, punitive damages, or any other damages, claims or expenses, whether any of the foregoing arise out of breach of contract, tort, negligence, strict liability, claims of Customer's customers, or otherwise (each of which are excluded to the fullest extent permitted by law). Company's total liability with respect to the Agreement, whether based on contract, tort (including negligence), strict liability, or any other theory or form of action, shall not exceed the amounts paid by Customer to Company hereunder. If either party commences an action against the other to enforce any of the terms hereof, the non-prevailing party, as determined by a court of competent jurisdiction in a final non-appealable order, shall pay to the prevailing party the costs and expenses incurred in connection with the prosecution or defense of such action, including, without limitation, accountants' fees, reasonable attorneys' fees and costs.

5. Other Terms.

a. Customer shall defend, indemnify and hold Company harmless from any and all liabilities, claims, losses, damages, demands, lawsuits, proceedings, attorney fees, and costs arising out of, pertaining to, relating to, or connected with, directly or indirectly, (i) Customer's breach of the Agreement, (ii) Customer's or its employees' or agents' negligence or willful misconduct, or (iii) Customer's sale or use of its products.

b. Customer shall not at any time disclose to third parties, or use, any confidential or proprietary information of Company or its affiliates which Customer receives from Company. Customer shall return all such information to Company, upon request of Company.

c. In the event any provision of the Agreement shall be ruled invalid or unenforceable, such provision shall be reformed and enforced to the maximum extent permitted by applicable law, and such invalidity, illegality or unenforceability shall not affect any other provision of the Agreement.

d. The Agreement shall be construed, interpreted and enforced in accordance with the laws of the State of New York, without reference to conflict of law provisions. THE PARTIES HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT THAT THEY MAY HAVE TO TRIAL BY JURY OF ANY CLAIM OR CAUSE OF ACTION, OR IN ANY LEGAL PROCEEDING, DIRECTLY OR INDIRECTLY BASED UPON OR ARISING OUT OF THE AGREEMENT.

e. The Agreement may not be amended or waived except by a written document, signed by authorized representatives of each party, which makes specific reference to the Agreement.

f. Headings are for descriptive purposes only, and do not form a substantive part of the Agreement. Acceptance or acquiescence in a course of performance hereunder shall not be deemed to waive any rights hereunder, nor shall it be relevant to determine the meaning of the Agreement, even though a party has knowledge of the nature of the performance and an opportunity for objection.

g. It is understood that Company does not agree to perform Services to Customer exclusively.

h. Nothing herein shall be construed to grant Customer any right, interest, or license in or under any patent, trademark, copyright, trade secret, or other proprietary right or material owned or licensed by Company.

i. Customer agrees that it shall comply at all times with all applicable laws, rules and regulations, including applicable import and export control laws, regulations, orders and requirements. Customer warrants that it is not obtaining the Services for the purposes of selling or otherwise allowing the consumption of raw unprocessed milk, and Company hereby refuses to perform Services for any such purpose.

j. If Customer violates any of the terms of the Agreement, Company may, immediately and without notice, terminate the Agreement and/or any purchase order submitted by Customer, and/or any business arrangement or relationship with Customer.

l. In case of strike, lockout, other labor trouble, riot, war, rebellion, fire, flood, drought, earthquake, pandemic, epidemic, other act of God, equipment failure, acts or omissions of suppliers, or any other circumstance beyond the reasonable control of Company that prevents, delays, or renders impracticable Company's performance of the Agreement, no liability for non-performance of the Agreement caused thereby, during the time or continuance thereof, shall arise or exist.

m. Neither party may transfer, assign or otherwise convey any rights or delegate any duties or obligations hereunder without the prior written consent of the other party.