Terms and Conditions

1. Scope of Agreement. All shipments, services, sales and quotations between ERBE USA, INC. ("ERBE") and the purchaser ("Buyer") are subject to the terms and conditions of this Agreement ("General Terms and Conditions"), and receipt by Buyer of the General Terms and Conditions without immediate written objection thereto and/or acceptance by Buyer of an order of Products (as hereinafter defined) which is confirmed or accompanied by the General Terms and Conditions, shall constitute an acceptance by Buyer of the General Terms and Conditions and any additional terms and conditions of ERBE set forth on any attachment(s) hereto or on the reverse side hereof. Any additional or different terms and conditions contained in any response hereto by Buyer to ERBE ("Buyer’s order") or otherwise shall be the subject of a separate, written agreement acceptable to Buyer, unless otherwise specified in writing by ERBE.

2. Acceptance of Order. Each order of Products shall not become effective and shall not be binding on ERBE until the earlier of (i) shipment by ERBE of the Products conforming to such order or (ii) transmittal by ERBE of a written acceptance of such order to Buyer.

3. Cancellation; Indemnification. An order placed with and accepted by ERBE can be canceled by Buyer only with the prior written consent of ERBE and only upon terms that will indemnify ERBE for all losses incurred by ERBE associated with Buyer’s cancellation, including but not limited to, the costs already incurred by ERBE in performance of ERBE’s contractual duties and any profits which ERBE would have realized had the contract been completed. If Buyer makes an assignment for the benefit of creditors, or if a petition or other proceeding, voluntary or involuntary, is filed by or against Buyer under applicable bankruptcy, reorganization or other insolvency laws, ERBE will, therefore, be at liberty to exercise its option, in its sole discretion, and without notice and in no event, to demand assurance of Buyer’s ability to pay whenever it reasonably appears that the value of such assurance is required to perfect and maintain ERBE’s security interest in Buyer’s collateral.

4. Product Descriptions. All references in sales brochures, technical data sheets and offers as to size, weight, technical specifications, price and other details of the Products are approximate and shall not be binding on ERBE unless expressly incorporated in an accepted order. ERBE reserves the right, from time to time, to modify, in whole or in part, any one or more of the Products or specifications thereof, to substitute new products in lieu of any one or more of the Products, and to add new products to the Products, whereupon in each case the term of Product as used in this Agreement shall be deemed automatically to reflect such events.

5. Taxes. Prices quoted by ERBE for the Products do not include applicable sales taxes, value added taxes, excise taxes, any other governmental taxes, charges or levies ("Taxes") that the Buyer is required to remit and/or pay. For the Products, Buyer shall pay all such taxes which under applicable statutes are required to be paid as a result of the sale to Buyer regardless of the party upon whom the obligation to pay is placed. Taxes may be included on ERBE’s invoice, on any such new products or may be separately invoiced at the discretion of ERBE. In such event, any such invoice shall specify each category of taxes which Buyer is required to pay.

6. Shipment; Installments. Buyer will give ERBE reasonable notice regarding Buyer’s requirements for time and delivery of the Products unless otherwise specified in a writing signed by ERBE. Buyer understands and agrees that ERBE will use ERBE’s reasonable efforts to ship the Products approximately on the estimated supply date set forth in an accepted order. ERBE ensures that the Products will be packaged and prepared for shipment to Buyer in a reasonable manner such as to prevent damage and shall comply with applicable regulations. ERBE shall not be responsible for any delays in shipment beyond ERBE’s reasonable control but shall notify Buyer of any anticipated delays. It is expressly understood that ERBE may delay release of the Products to Buyer or Buyer’s agents until such time as payments due, as set forth herein, have been received by ERBE. ERBE reserves the right to make delivery in installments unless otherwise specified in writing by Buyer. Buyer shall notify ERBE of the contractual terms by which the Products sold herein are required to be shipped and ERBE shall be responsible for the Products sold herein if they are not delivered in compliance with Buyer’s instructions. ERBE may require proof of insurance to protect against loss of the Products or Buyer’s rights in the Products prior to delivery. Buyer acknowledges the risk to Buyer and agrees that Buyer is solely responsible for any loss or damage to the Product including renewals thereon and/or the Products in transit or in storage. If Buyer’s instructions are not given within five (5) days of the shipment date, the Products shall be deemed delivered to Buyer at the place of shipment and any liability for the Products shall pass to Buyer without further notice.

7. Payment. Payment terms shall be thirty (30) days from the date of invoice unless otherwise specified on the invoice. Invoices for equipment and materials shall be payable only in United States currency. ERBE may from time to time demand different terms of payment from those specified herein whenever it reasonably appears that Buyer’s financial condition requires such condition or that Buyer may demand assurance of Buyer’s ability to pay whenever it reasonably appears that such ability is in doubt. ERBE may, upon making such demand, stop production and suspend shipments hereunder. If, within the period stated in such demand for payment from Buyer, Buyer does not pay the amount of such claim in writing, ERBE may demand assurance of Buyer’s ability to pay, and ERBE may at ERBE’s option treat such failure or refusal as a repudiation of any portion of an accepted order that has not been fully performed. In all events, time shall be of the essence with regard to Buyer’s payment obligations to ERBE hereunder. Any amount not paid by Buyer when due shall accrue interest at the lower of eighteen percent (18%) per annum or the highest legal rate allowed under applicable law. In addition, Buyer agrees to pay all reasonable costs and expenses of collection of amounts past due hereunder (including any interest thereon), including, but not limited to, actual fees and expenses of ERBE’s attorneys, and other legal and court costs.

The foregoing rights of ERBE shall be in addition to, and not in lieu of, any other rights or remedies ERBE may have at law or in equity. With respect to amounts remaining due in respect of the purchase price payable hereunder, Buyer shall have no right of offset by virtue of any claim against ERBE, unless and until such claim has been finally adjudicated in favor of Buyer by a court of competent jurisdiction and such adjudication is not subject to appeal, or ERBE has acknowledged the validity and amount of such claim in writing.

8. Grant of Security Interest. Buyer hereby grants ERBE a security interest in the Products and all proceeds thereof to secure Buyer’s obligation to ERBE. As a security deposit, ERBE may place Buyer’s order in escrow. Buyer agrees to give ERBE a security interest in all of Buyer’s interest in any Products at any time hereafter relating to the applicable Product. The applicable Product shall be subject to the terms and conditions offered to such Buyer. Buyer will give ERBE reasonable notice regarding Buyer’s intent to sell or otherwise dispose of the applicable Product. Buyer shall give ERBE notice of any anticipated disposition of the applicable Product and shall give ERBE the opportunity to purchase said Product at the prevailing market price. Buyer hereby grants ERBE a security interest in all proceeds of any disposition by Buyer of the applicable Product. ERBE shall have a security interest in Buyer’s collateral, including, without limitation, all rights and remedies available to a secured creditor under applicable law. In the event ERBE is unable to perfect its security interest in the applicable Product, ERBE may, at its option, take appropriate action to perfect such security interest. Buyer shall according to the terms of this Agreement, promptly execute all documents and take all actions necessary to cause such security interest to be perfected. Buyer will appropriate to the security interest in the applicable Product all proceeds of any sale, transfer or other disposition by Buyer of the applicable Product, including all proceeds of such disposition. Buyer agrees that all amounts due hereunder will be paid to ERBE without deduction or setoff. Buyer grants ERBE a security interest in all of Buyer’s interest in all other property, including any account or deposit, with respect to which Buyer has or acquires possession, without regard to any notice or claim by Buyer of a lien or any other claim against Buyer which is superior to the security interest granted to ERBE hereunder.

9. Carrier and Routing. Unless the parties agree otherwise, ERBE shall have the right to select the carrier(s) and route of shipment. Products sold herein are sold EX WORKS (INCOTERMS in their applicable current version) and shall be delivered to Buyer F.O.B. (“Free On Board”) at Buyer’s expense at Buyer’s risk in accordance with Buyer’s instructions. If any charge or expense of any nature, kind or character, except as contemplated by this Agreement, the Products, when shipped, will comply in all material respects to any specifications referenced in the applicable order, as modified by any order acknowledgement or confirmation issued by ERBE, if so noted on the order form. Invoices may be separately invoiced at the discretion of ERBE; any such invoice shall specify each category of taxes which Buyer is required to pay.

10. Title and Risk of Loss. Title to and risk of loss in the Products shall pass to Buyer upon delivery of the Product by ERBE (or ERBE’s agent or representative) to the carrier at the shipping point.

11. Warranties.

(a) EXCEPT AS PROVIDED HEREINBELOW, ERBE MAKES NO WARRANTY, EXPRESS OR IMPLIED, CONCERNING THE PRODUCT(S) AND DISCLAIMS ALL OTHER WARRANTIES, WHETHER EXPRESSLY OR IMPLIED, SPECIFICALLY INCLUDING, WITHOUT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT. ERBE warrants, for the applicable period of time specified in this Agreement, that the Products are free from defective material and workmanship for the period specified for the applicable Product. The applicable warranty periods for the Products are as follows:

(i) Electrosurgical generators, for a period of two (2) years from the original date of sale.

(ii) APC units, Erbokryo units, Water-Jet units and Lavage Pumps, for a period of one (1) year from the original date of sale.

(iii) Used Electrosurgical generators, APC units, Erbokryo units, and Water-Jet units, for a period of one (1) year from the original date of sale, and used Lavage Pumps, for a period of ninety (90) days from the original date of sale.

(v) All other reusable/non-disposable accessories for a period of ninety (90) days from the original date of sale.

Buyer acknowledges that any warranty period specified for the Products will commence on the original date of sale of the Product. If the Product is purchased as a used or refurbished product, the original date of sale shall be the date of manufacture of such Product and not the purchase date to Buyer. If the Product is purchased as a used or refurbished Product, however, the original date of sale of such Product will be the date of delivery of such Product to its original buyer. ERBE reserves the right to make available extended warranties to purchasers of designated products. Any such extended warranty shall be subject to the terms and conditions offered to such purchaser, provided that ERBE confirms the applicability of such extended warranty to such Buyer in a writing signed by ERBE.

(b) This warranty shall not cover any failure caused, wholly or in part, by materials delivered from Buyer and incorporated in the Products or by changes or special features requested by Buyer or associated with drawings, blueprints or other technical data delivered by Buyer. This warranty shall apply only if the Products were operated, used and stored according to all safety, training and other instructional guidance provided by Buyer. This warranty shall not cover damage or failure caused, wholly or in part, by misuse, negligence, external electrical fault, accident, normal wear, modification, alteration, carelessness, improper use for a purpose other than that indicated in the applicable product manual, lack of service, use with improper materials, or improper installation, application, service or operation. Buyer acknowledges that some of the ERBE Products are designed for use with ERBE accessories and parts as noted in the applicable product manual or literature. For products that indicate that they are designed for use
with ERBE accessories or parts, failure to use such ERBE accessories or parts may adversely affect the operation of the Product and may result in injury and/or undesirable patient outcomes, and in such instance, ERBE shall not be responsible for any costs or damages incurred as a result thereof. Buyer shall be responsible for proper and sufficient data, workmanship, oral or otherwise furnished by or on behalf of ERBE, or causing such failure or delay to the manufacture and/or distribution thereof. Failure to use such probes function according to ERBE’s specifications. ERBE shall not be liable under this warranty or otherwise if a purchaser has a problem or incident when ERBE APC units are or have been used with non-ERBE APC probes.

(c) Buyer shall make warranty claims, if any, within the warranty period specified above for the applicable Product by notifying an ERBE representative of the defect or nonconformity. Buyer shall obtain a Return Authorization Number ("Return Authorization Number") to be assigned by an ERBE representative within such warranty period. Buyer’s failure to give ERBE written notice of any claim and to obtain a Return Authorization Number within the applicable warranty period shall constitute an absolute and unconditional waiver of such claim. Justified warranty claims shall only obligate ERBE to correct the defect by repairing or replacing the defective Product(s) at ERBE’s sole option. Buyer shall, at Buyer’s expense, return any defective Product(s) to ERBE to the location to be designated by ERBE. Buyer shall pay the expense of removal and reinstatement of the defective Product(s). ERBE shall, at ERBE’s expense, return repaired or replacement Products to Buyer and shall have the right to select the carrier(s) and routing of shipment. At ERBE’s sole option, in lieu of repairing or replacing a defective Product, ERBE may elect to refund to Buyer the amount paid by Buyer to ERBE for the Product, pro rated to reflect the period from delivery of the Product until receipt by ERBE of the warranty claim as compared to the applicable warranty period for the respective Product.

(d) With respect to disposable accessories returned by Buyer in accordance with the Section 11(d), ERBE will issue a credit in the amount of the purchase price of such disposable accessories minus a restocking fee in the amount of twenty-five percent (25%) of ERBE’s original price of such disposable accessories (not taking into account any applicable discounts) to Buyer. Prior to returning any such disposable accessories to ERBE, Buyer must obtain a Return Authorization Number from an ERBE representative. All freight charges for disposable accessories returned to ERBE shall be borne and paid in advance by Buyer. All such disposable accessories returned to ERBE must be in new, original condition, must be unopened and in original packaging, and must have a minimum shelf life of six (6) months remaining as determined by the expiration date of such disposable accessories. ERBE reserves the right to refuse to accept any disposable accessories which have been returned in contracts, TORT, STRICT LIABILITY OR OTHERWISE, THAT ARISE IN CONNECTION WITH THE PRODUCT OR USE THEREOF OR IN CONNECTION WITH EITHER ERBE’S FAILURE TO DELIVER OR ITS LATE DELIVERY OF THE PRODUCT (INCLUDING, BUT NOT LIMITED TO, LOSS OF USE OF THE PRODUCT, LOSS OF REVENUES, AND LOSS OF PROFITS).

(i) Buyer acknowledges that the remedies provided herein are exclusive and in lieu of all other remedies available to Buyer at law or in equity. 12. Acceptance. Buyer shall inspect all shipped goods immediately following arrival thereof at the destination, and shall give written notice to ERBE within ten (10) days after receipt thereof (i) of any claim that the Products are nonconforming, provided that a reasonable inspection should have revealed such nonconformity, (ii) of any shipping damage to such Products, or (iii) of any claim of shortage of Products. If Buyer shall fail to give such notice within such time period, the Products shall be deemed to conform to the terms of an accepted order. Buyer shall be deemed to have accepted the Products, and Buyer may not make any subsequent warranty claim that should have been revealed upon a reasonable inspection at the time of delivery.

14. Confidentiality and Nondisclosure. Except as required by law, Buyer shall not disclose any of the terms or conditions of an accepted order to any third party (other than a permitted successor or assign) for any reason whatsoever. All specifications, drawings, sketches, models, samples, designs, technical information, plans, information of pervasiveness, inventions, or other data, work, or otherwise furnished or on behalf of ERBE shall remain the property of ERBE and shall be returned (together with all copies) promptly upon ERBE’s request. Such information shall be treated as confidential, and shall not be used, disclosed or reproduced by Buyer, except as required in confidence, in accordance with the terms and conditions of this Agreement. The obligations of confidentiality contained herein shall extend for a period of three years beyond the expiration or termination of an accepted order; provided, however that Buyer’s obligations of confidentiality hereunder with respect to any such information which was also rise to the level of a trade secret (as defined under applicable law) shall remain in full force and effect for so long as such information remains a trade secret under applicable law. For purposes of this Agreement, the confidentiality obligations embodied herein do not extend to any information which, at the time of disclosure, (i) is already known or independently developed by Buyer as evidenced by its written records; (ii) is in the public domain through no wrongful act of Buyer; or (iii) is received by Buyer from a third party who was under no legal obligation not to disclose such information. The parties acknowledge that the rights of ERBE are absolute and unconditional and in addition to their rights, ERBE may have under common law or applicable statutes for the protection of trade secrets.

15. Force Majeure. Under no circumstances shall ERBE be liable for any delay or failure to perform hereunder under such failure or delay is, directly or indirectly, caused by, or in any manner arises from fire, floods, accidents, civil unrest, acts of God, war, terrorist acts, governmental interference or embargoes, strikes, labor difficulties, shortage of labor, fuel, power, materials, or supplies, breakage of machinery or apparatus, transportation delays, or any other cause or causes beyond ERBE’s control whether or not similar in nature to any of the foregoing.

16. Waiver. No waiver by either party of any breach of any of the terms or conditions contained herein shall be construed as a waiver of any succeeding breach of the same or any other term or condition contained herein.

17. Severability. Any provision hereof that is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof or affecting the validity or enforceability of such provisions in any other jurisdiction.

18. Entire Agreement. These General Terms and Conditions supersede all prior agreements between the parties with respect to the subject matter hereof and constitute the entire agreement and understanding between the parties covering the sale and purchase of the Products. Except for demands by ERBE under Section 7 above or other modifications as may be expressly accepted in writing by ERBE, no modification hereof shall be affected by telephone or orally or by the use of purchase orders, acknowledgments, acceptances or other forms at variance with or in addition to the terms and conditions contained herein. In the absence of any conflict in this section, the terms of any attachments hereto or specific terms added to an accepted order, the specific additional terms and/or the terms on the attachment shall control provided such terms were (i) added prior to acceptance by ERBE and (ii) specifically referenced and agreed to by ERBE in writing.

19. Arbitration. Any controversy or claim arising out of or relating to this Agreement, the breach thereof or the purchase, delivery or use of the Products in connection therewith as well as all subsequent dealings between the parties hereto to the subject matter thereof, shall be submitted to and resolved by the American Arbitration Association ("AAA"), with such arbitration to be held in Atlanta, Georgia, USA, in accordance with the AAA’s Commercial Arbitration Rules then in effect. Neither ERBE nor Buyer shall be entitled to present in person at such arbitration any evidence in connection with any claim by any party to the arbitration. The arbitrator shall render a final and binding award on both Buyer and ERBE, and judgment may be entered thereon in any court of competent jurisdiction if necessary. Except as provided to the contrary hereinafter, each party hereto shall pay any and all expenses incurred by such party in connection with such arbitration proceeding, unless otherwise determined by the arbitrator.

20. Assignability. Buyer may not assign these General Terms and Conditions, by operation of law or otherwise (excluding merger), without the express written consent of ERBE.

21. Governing Law. The rights and obligations of ERBE and Buyer shall be governed by the laws of the State of Georgia without regard to principles of conflicts of laws, and ERBE and Buyer shall have all rights and remedies accorded to them by the Uniform Commercial Code, except as such rights are modified by the terms hereof.