GENERAL TERMS AND CONDITIONS OF SALE OF DSM NUTRITIONAL PRODUCTS IBERIA, S.A.

1. GENERAL

1.1. General Terms and Conditions of Sale ("Conditions") govern the offering, sale and delivery of all goods and/or services (hereinafter jointly referred to as the "Product(s)") from or on behalf of DSM Nutritional Products Iberia, S.A., C/ Honduras, parcela 26, Pol. Ind. El Descubrimiento, 28806 Alcalá de Henares, Madrid, Spain ("DSM"), to customer ("Customer") who apply to all transactions between 3.2 DSM and Customer. 

1.2. By contracting on the basis of the Conditions, Customer agrees to the applicability thereof in respect of all future dealings, even if this is not explicitly stated.

1.3. These Conditions shall govern exclusively the relation between DSM and Customer, supersedes any other condition or agreement. DSM expressly rejects the applicability of any general terms and conditions of Customer. Furthermore, the Conditions supersede any and all terms of prior oral and written quotations, communications, agreements and understandings of the parties in respect of the sale and delivery of the Products and shall apply in preference and supersedes any and all terms and conditions of any order placed by Customer and any other terms or conditions submitted by Customer. Failure by DSM to object to the terms and conditions set by Customer shall in no event be construed as an acceptance of any of the terms and conditions of Customer. Neither DSM’s commencement of production or delivery of products shall be deemed as acceptance of any of Customer’s terms and conditions. If the Conditions differ from any of the terms and conditions submitted by Customer, the terms and any subsequent communication or conduct by or on behalf of DSM, including, without limitation, confirmation of an order and delivery of Products, constitute a counter-offer and not acceptance of such terms and conditions submitted by Customer. Any communication or conduct of Customer which confirms an agreement for delivery of Products by DSM, as well as acceptance by Customer of any delivery of Products from DSM shall constitute an unqualified acceptance by Customer of the Conditions.

1.4. The current version of the Conditions is available at www.DSMNutritionalProducts.com and www.cccwbo.org. DSM reserves the right to amend the Conditions at any time. DSM will notify Customer of any such amendments by sending an email to the Customer posting them on the aforementioned Internet site or otherwise. The amended Conditions will take effect on the date of notification of these amendments. Amendments or modifications of the Conditions shall not affect the validity of all transactions concluded between Customer and DSM after the date of such notification.

1.5. Any electronic communication between DSM and Customer shall be in electronic form. Any electronic communications shall be considered to be a “writing” between the parties. The electronic communication system used by DSM with whom Customer is in contact, and any delivery or receipt of such electronic communications.

2. QUOTATIONS, ORDERS AND CONFIRMATION

2.1. Unless stated otherwise by DSM, quotations made by DSM in whatever form are not binding to DSM and merely constitute an invitation to Customer to make an offer to Customer. DSM reserves the right to rescind or modify any offer at any time either prior to or after the acceptance of such offer by Customer. DSM will notify Customer of any such amendments by sending an email to the Customer posting them on the aforementioned Internet site or otherwise.

2.2. Price quotations based on estimated or projected quantities are subject to increase in the event that actual quantities purchased during the specified period are less than the estimated or projected quantities.

2.3. Each delivery shall stand as a separate transaction and any failure to deliver shall have no consequences for other deliveries.

3. PRICES

3.1. Prices and currencies of DSM’s Products are as set out in the Confirmed Order. Unless otherwise agreed, DSM’s prices include standard packaging but do not include Value Added Tax or any other similar applicable taxes, duties, levies or charges in any jurisdiction levied in relation to the Products or the delivery thereof ("Taxes"). The amount of any Taxes levied in connection with the sale of Products to Customer shall be for Customer’s account and shall either be added to each invoice or separately invoiced by DSM. In the event of default or other counterclaim, this discount only relates to the delivery specifically mentioned in the Confirmed Order.

3.2. Unless otherwise indicated as firm by DSM in the Confirmed Order, DSM is entitled to increase the price of the Products still to be delivered if the cost price determining factors have been subject to a change out of DSM’s reasonable control or at the request of a third party which is not limited to: raw and auxiliary materials, energy, products obtained by DSM from third parties, wages, salaries, taxes, charges, freight costs and insurance premiums. DSM shall notify Customer of such increase which shall not exceed the increase in the determining cost factors.

4. PAYMENT AND CUSTOMER’S CREDIT

4.1. Unless stated otherwise in the Confirmed Order, payment shall be made on the basis of net cash, to be received by DSM within 30 (thirty) days following the date of DSM’s invoice. All payments shall be made without any deduction on account of any Taxes and free of set-off or other counterclaims except for set-offs with uncontested and/or enforceable counterclaims.

4.2. With regard to payment for the Products, time is of the essence. DSM may, without prejudice to any other rights of DSM, charge interest on any overdue payment at 12% (twelve percent) per annum from the date of DSM’s invoice until the date on which such debt is paid in full. All costs and expenses incurred by DSM with respect to the collection of overdue payments (including, without limitation, reasonable attorney fees, expert fees, court costs and other expenses of litigation) shall be for Customer’s account.

4.3. Every payment to Customer shall in the first place serve to pay the judicial and extra-judicial costs and the accrued interest and shall afterwards be deducted from the oldest outstanding claim regardless of any advice to the contrary from Customer.

4.4. Any complaint with respect to the invoice must be notified to DSM in writing within 20 (twenty) days after the date of invoice. Thereafter, Customer shall be deemed to have approved the invoice.

5. DELIVERY AND ACCEPTANCE

5.1. Unless stated otherwise in the Confirmed Order, all deliveries of Products shall be CIP (Carriage and Insurance Paris) as defined in the latest version of INCOTERMS published by the International Chamber of Commerce in Paris, France, at the time of delivery. All deliveries of Products shall be deemed to be an unconditional acceptance of the Products of the essence. DSM may, without prejudice to any other rights of DSM, be entitled to require immediate return of the Products, or to repossess the Products, in case of a disaccord between the parties and the party unable to bear the related costs of the laboratory.

5.2. A determination of whether or not delivered Products conform to the Specifications shall be done solely by DSM analysing the samples or records retained by DSM and taken from the batches or production runs in which the Products were produced in accordance with the methods of analysis used by DSM. In case of a disaccord between the parties concerning the quality of a batch or production run of Products supplied by DSM to Customer, DSM will submit representative samples of said batch or run to an independent entity chosen by the parties and the party having determined whether or not the batch or run in question has met the Specifications. The results of such analysis shall be binding upon the parties and the party unable to uphold its position shall bear the related costs of the laboratory.

5.3. Every price quotation shall not entitle Customer to reject the entire delivery of the Products, unless Customer cannot reasonably be expected to accept delivery of the remaining non delivered Products. In this case, Customer shall be entitled to rescind of the entire contract and to recover any damages not attributable to Customer’s obligation to pay as defined in Article 4.

6. TRANSFER OF RISK AND PROPERTY

6.1. The risk of the Products shall pass to Customer according to the applicable Incoterms (see Article 5.1).

6.2. The title to the Products shall not pass to Customer and full legal and beneficial ownership of the Products shall remain with DSM unless and until DSM has received payment in full for the Products, including costs such as interest, charges, expenses, etc.

6.3. In the event of termination on the basis of Article 16, DSM shall, without prejudice to any other rights of DSM, be entitled to require immediate return of the Products, or to repossess the Products, for which DSM may set-off the price.

7. LIMITED WARRANTY

7.1. DSM solely warrants that on the date of delivery the Products shall conform to the Specifications. If and to the extent Products are in breach with such warranty, as determined in accordance with Article 7, DSM may at its discretion at Customer’s sole cost and expense at any time either repair or replace the Products at no charge to Customer, or issue a credit for any such Products delivered to Customer from DSM. Accordingly, DSM’s obligation shall be limited solely to repair or replacement of the Products or for cost of the Products (the “Specifications”).

7.2. DSM’s obligation to repair, replace, or credit shall be contingent upon receipt by DSM of timely notice of any alleged non-conformance of Products.
and, if applicable, the return of the Products, in accordance with Article 13.2.

9.3 The foregoing warranty is exclusive and in lieu of all other warranties, representations, conditions or other terms, express, implied, statutory, common law or otherwise, including, without limitation, any warranty of merchantability, suitability or fitness for any purpose, or absence of infringement of any claim in any intellectual property right covering the Products.

10. LIMITED LIABILITY

10.1 Liability for any and all claims arising out of or in connection with the Products and the Use thereof shall per occurrence be limited to direct damages of DSM and shall under no circumstances exceed the sales value of the defective batch of the relevant Product supplied to Customer.

10.2 DSM shall under no circumstances be liable to Customer or any other person for any kind of special, incidental, indirect, consequential or punitive damage or loss, cost or expense, including without limitation, damage based upon lost goodwill, lost sales or profit, delay in delivery, work stoppage, production failure, impairment of other goods or business or reputation or other arising out of or in connection with breach of warranty, breach of contract, misrepresentation, negligence or otherwise.

11. FORCE MAJEURE

11.1 Neither party shall be liable in any way for any direct, indirect, consequential or punitive damage or loss, cost or expense, including without limitation, acts of God, laws and regulations, administrative measures, orders or decrees of any court, earthquake, flood, fire, explosion, war, terrorism, riot, sabotage, accident, epidemic, strike, lockout, slowdown, labour disturbances, difficulty in obtaining necessary labour or raw materials, lack of or failure of commercial plant or essential machinery, emergency repair or maintenance, breakdown or shortage of utilities, delays in delivery or defects in goods supplied by suppliers or subcontractors (“Force Majeure”).

11.2 Upon the occurrence of any event of Force Majeure, the party suffering therefrom shall promptly inform the other party by written notice thereof specifying the cause of the event and how it will affect its performance of its obligations under the Contract, without prejudice to any of its rights to the extent the obligation to deliver shall be suspended for a period equal to the time loss by reason of Force Majeure. However, should a Force Majeure event continue or be expected to continue for a period extending to more than 60 (sixty) days after the agreed delivery date, either Party is entitled to cancel the affected part of the Confirmed Order without any liability to the other Party.

12. MODIFICATIONS AND INFORMATION: INDEMNITY

12.1 Unless the Specifications have been agreed to be firm for a certain period of time or quantity of Products, DSM reserves the right to change or modify the Specifications and/or manufacture of Products and to substitute materials used in the production and/or manufacture of Products from time to time without notice. Customer acknowledges that data in DSM’s catalogues, descriptive publications distributed or published on its websites may accordingly be varied from time to time without notice.

12.2 Customer must utilise and solely rely on its own expertise, know-how and judgment in relation to the Products and Customer’s Use thereof. Consultation with DSM shall not relieve the additional obligations. Customer shall indemnify and hold DSM harmless from and against any and all damages, losses, claims, expenses, claims, demands and liabilities (including without limitation product liabilities) arising out of or in connection with the Products and Customer’s Use thereof.

13. COMPLIANCE WITH LAWS AND STANDARDS

13.1 Customer acknowledges that the Use of the Products may be subject to requirements or limitations under any law, statute ordinance, rule, code or standard, including, but not limited to, all applicable regulations which would constitute an offence or infringement by reason of the Use of the Products, and Customer explicitly accepts and sanctions party lists (“Laws and Standards”).

13.2 Customer expressly warrants that employees, agents and subcontractors of the Customer shall neither directly nor indirectly (i) accept, promise, offer or provide any improper advantage to or (ii) enter into an agreement (a) with any entity or person - including officers, employees or agent or a government-controlled entity -, or (b) relating to a product, which would constitute an offence or infringement of applicable Laws and Standards.

13.3 Customer shall be exclusively responsible for (i) ensuring compliance with all Laws and Standards associated with its intended Use of the Products; and (ii) obtaining all necessary approvals, permits or clearances for such Use.

14. INDEPENDENT CONTRACTORS

DSM and Customer are independent contractors, and the relationship created hereby shall not be deemed to be that of principal and agent.

15. NON-ASSIGNMENT AND CHANGE OF CONTROL

15.1 Neither party may assign any of the rights or obligations under the Confirmed Order without the prior written consent of the other party, except that either party may assign such rights and obligations to any of its affiliates or to a third party acquiring all or a substantial part of its assets or business relating to the Products.

15.2 DSM shall have the right to terminate the Confirmed Order with immediate effect if at any time during the term of the Confirmed Order a person or group of persons, who are unrelated to the persons controlling Customer as of the date of the Confirmed Order, acquires control, through ownership of voting securities or otherwise, over Customer. Customer must notify DSM of such acquisition within 10 (ten) days thereof. DSM may exercise its right to terminate the Confirmed Order by giving Customer written notice of such exercise within 10 (ten) days after the date of receipt of such notice.

16. SUSPENSION AND TERMINATION

16.1 If Customer is in default of performance of its obligations towards DSM and fails to provide to DSM adequate assurance of Customer’s performance before the date of scheduled delivery; or if Customer becomes insolvent or bankrupt or is not actuated in good faith or is about to be wound up or to be dissolved or to be liquidated or to surrender its property or undertaking, or is made a party to any compromise, or other administrative, judicial or voluntary procedure is instituted against it, DSM may exercise its right to terminate the Confirmed Order by giving Customer written notice of such exercise within 10 (ten) days after the date of receipt of such notice.

17. WAIVER

Failure by DSM to enforce at any time any provision of the Conditions shall not be construed as a waiver of DSM’s right to act or to enforce any such term or condition and DSM’s rights shall not be affected thereby. Any notice in writing is sufficient notice to enforce any such provision. No waiver by DSM of any breach of Customer’s obligations shall constitute a waiver of any other prior or subsequent breach.

18. SEVERABILITY AND CONVERSION

In the event that any provision of the Conditions shall be held to be invalid or unenforceable, the same shall not affect in any respect whatsoever, the validity and enforceability of the remaining provisions between the parties and shall be severed therefrom. The pertaining provisions held to be invalid or unenforceable shall be reformed to meet the legal and economic intent of the original provisions to the maximum extent permitted by law.

19. LIMITATION OF ACTION

Unless otherwise stated hereunder, no action by Customer shall be brought unless Customer first provides written notice to DSM of any claim alleged to exist against DSM within 30 (thirty) days after the event complained of first becomes known to Customer and an action is commenced by Customer within 12 (twelve) months after such notice.

20. GOVERNING LAW AND VENUE

20.1 The parties’ rights and obligations arising out of or in connection with the Confirmed Order and/or the Conditions shall be governed, construed, interpreted and enforced according to the laws of Spain, without regard to the conflict of laws provisions thereof. The United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980 (CISG) shall not apply.

20.2 The parties agree that any suits, actions or proceedings that may be instituted by any party shall be initiated exclusively before the competent courts of Madrid, without restricting any rights of appeal and without prejudice to DSM’s right to submit the matter to any other competent court.

21. SURVIVAL OF RIGHTS

The parties’ rights and obligations shall be binding upon and inure to the benefit of the parties and their respective successors, permitted assigns, directors, officers, employees, agents and legal representatives. Termination of one or more of the parties’ rights and obligations, for whatever reason, shall not affect those provisions of the Conditions which are intended to remain in effect after such termination.

22. HEADINGS

The headings contained in the Conditions are included for mere convenience of reference and shall not affect the latter’s construction or interpretation.

23. INTELLECTUAL PROPERTY

23.1 DSM shall have the right, as its property, to the fullest extent of law, to enforce DSM’s intellectual property rights arising out of or in connection with the Products shall be the exclusive property of DSM.

23.2 DSM has not verified the possible existence of any trademarks, patents, designs or other intellectual property rights which might be infringed as a consequence of the sale and/or delivery of the Products and DSM shall not be liable for any loss or damage in that respect.

23.3 The sale of Products shall not, by implication or otherwise, convey any license under any intellectual property right relating to the compositions and/or applications of the Products, and Customer explicitly assumes all risks of any intellectual property infringement by reason of the Use of the Products, whether singly or in combination with other materials or in any processing operation.

24. LANGUAGE

The original version of the Conditions is made in the English language. In the event of any inconsistency or contradiction between the English version and any translation thereof, the English version shall prevail.