

**SIMPLIPHI POWER, INC.**  
**Terms and Conditions**

**TERMS & CONDITIONS APPLYING TO ALL SALES OF PRODUCTS AND SERVICES OFFERED BY SIMPLIPHI POWER, INC. (“PHI”):**

**1. Defined Terms:** The following terms shall have the following meanings:

- A. “Acceptance”** has the meaning ascribed to it in Section 3.C.
- B. “Buyer”** means any person or entity that submits a Buyer’s Order to PHI.
- C. “Buyer’s Order”** has the meaning ascribed to it in Section 3.B.
- D. “Confidential Information”** means information that is designated as confidential or should reasonably be understood to be confidential.
- E. “Contract”** means, with respect to a Product or a Service, the combination of a Buyer’s Order and the Acceptance thereof by PHI.
- F. “Days”** means calendar days unless otherwise stated.
- G. “Dispute”** has the meaning ascribed to that term in Section 18.A.
- H. “Estimated Ship Date”** or **ESD** means the date estimated by PHI for shipment of a Product to Buyer.
- I. “Express Warranty”** has the meaning ascribed to it in Section 13.
- J. “Final Invoice”** means, with respect to any sale of a Product or Service, the actual invoice for Payment issued by PHI to Buyer.
- K. “Force Majeure Event”** means any event or circumstance outside of PHI’s reasonable control, including but not limited to acts of God, strikes, lock outs, accidents, war, fire, breakdown of plant or machinery or shortage or unavailability of raw materials from a natural source of supply.
- L. “Party”** or **“party”** means PHI or Buyer as the case may be; the term **“Parties”** or **“parties”** means, collectively, PHI and Buyer.
- M. “Payment”** means PHI has received cleared funds from Buyer in PHI’s bank account on or before the invoice due date.
- N. “PHI”** means **SimpliPhi Power, Inc.**, a Delaware corporation.
- O. “PHI’s Designated Shipping Point”** means PHI’s manufacturing facility located in Ojai, California, or, if PHI has manufactured or assembled, or caused to be manufactured or assembled, the Product at a manufacturing or assembly plant other than its Ojai, California, facility then the site of such other manufacturing or assembly plant.
- P. “PHI’s website”** means [www.simpliphipower.com](http://www.simpliphipower.com)

**Q. “Product” or “product”** means any product offered for sale by PHI. For clarity, and without limitation, such term excludes Services.

**R. “Representatives”** shall have the meaning ascribed to that term in Section 19.

**S. “Sample”** means a Product that PHI provides to Buyer free of charge for evaluation or testing purposes.

**T. “Service”** means any service or work offered for sale by PHI. For clarity, and without limitation, such term includes specifically defined work, reference designs, marketing collateral, software (unless the software is built into the Product), Samples, prototypes, experimental devices and evaluation modules.

**U. “Specifications”** means measurable electrical and physical characteristics of a particular Product listed in the then-current official data sheet (including errata) for that Product.

**V. “Terms” or “Terms of Sale”** means these Terms and Conditions set forth herein.

Capitalized words defined elsewhere in these Terms and Conditions shall have the meaning ascribed to such term therein or herein.

## 2. Scope of Application.

**A. Terms of Sale.** These Terms of Sale apply to all business transactions between PHI and Buyer including but not limited to each purchase and sale of a Product or Service offered by PHI to a Buyer and each Contract relating to the purchase and sale of a Product or Service.

**B. Offers By PHI.** All offers by PHI will be made, and all Contracts with Buyer will be concluded exclusively on the basis of these Terms of Sale, which shall control over any inconsistent or additional terms or conditions proposed by Buyer in a purchase order or other document.

**C. Modifications.** No modification of these Terms of Sale (including changes in scope, specifications, price or delivery schedule) shall be of any force or effect unless made in writing and signed by PHI; PHI hereby rejecting any additional or inconsistent terms or conditions contained in or incorporated by reference in any purchase order or other document submitted by Buyer.

## 3. Matters Pertaining To Contract Formation

**A. Statements By PHI.** Unless expressly stated otherwise in writing, all statements made by PHI including without limitation any Product or Service descriptions in marketing materials are non-binding, subject to change and without obligation. PHI reserves the right to revise and change any and all Product and Service descriptions at any time.

**B. Buyer’s Orders.** PHI’s receipt of a written order (“**Buyer’s Order**”) from Buyer constitutes a binding offer from Buyer to enter into a binding agreement with PHI.

**C. PHI’s Acceptance.** PHI may accept or reject Buyer’s Order(s) in its sole discretion. If PHI accepts a Buyer’s Order, such acceptance (herein called “**Acceptance**”) requires written communication from PHI within two weeks after receipt of such order. PHI’s issuance of an invoice referencing a specific Buyer’s Order within two weeks after receipt of such order shall be deemed Acceptance of such Buyer’s Order. Without Acceptance of a Buyer’s Order being

delivered to Buyer within two weeks after PHI's receipt of Buyer's Order, PHI shall be deemed to have rejected the Buyer's Order.

#### **D. Other Specific Matters**

(i) Unless otherwise expressly stated in an Acceptance, or in technical product descriptions or data sheets referenced in an Acceptance, or in separate written communication from PHI signed by an authorized representative subsequent to Acceptance, any and all information regarding properties and characteristics of Products or Services are for illustrative purposes and not binding. Likewise, public statements, recommendations or advertisements do not constitute contractual statements of any nature including but not limited to the nature or quality of a Product or a Service.

(ii) All terms relating to quantities and time of delivery of Products or Services set forth in an Acceptance are subject to availability, technical feasibility and timely delivery of components to PHI by its suppliers. PHI reserves the right to deliver Products or perform Services with reasonable deviations from dimensions, weight, nature or quality of such Products or Services confirmed in any Acceptance. PHI specifically disclaims any warranty to include specific components in any Product or Service. PHI, in its sole and absolute discretion, has the right to select the components of each Product or Service in accordance with technical feasibility and availability.

(iii) Any performance or profitability calculations available to Buyer from PHI's website or other marketing materials or documents, or derived from any software program provided by PHI, are illustrative in nature and not binding upon PHI. Buyer acknowledges, agrees and understands that any results derived from such calculations may substantially deviate from actual performance or profitability.

(iv) PHI may assign, in whole or in part, the fulfillment of any Buyer's Order to any third party in PHI's sole and absolute discretion and shall have a right, in its sole and absolute discretion, to instruct such third party on terms of execution. No consent by the Buyer is required therefore.

**E. Proprietary Rights.** Each Product is protected pursuant to copyright laws and international copyright treaties, as well as other intellectual property laws and treaties. All right, title and interest in the intellectual property embodied in a Product and in the methods of manufacturing and assembling the Product belong solely and exclusively to PHI.

**F. Specific Provision Re: Intellectual Property Rights.** All Intellectual Property Rights produced from or arising as a result of the performance of these Terms of Sale shall, so far as not already vested, become the absolute property of the PHI, and Buyer shall do all that is reasonably necessary to ensure that such rights vest in PHI by the execution of appropriate instruments, agreements and documents.

**G. RoHS ("restriction of hazardous substances").** PHI is aware of the European Union Directive 2002/95/ED ("Directive") and its requirements on the restriction of the use of certain hazardous substances in electrical and electronic products and equipment. All internal process material fabrication, machining and finishing operations controlled by PHI are fully compliant with the Directive. However, notwithstanding the issuance of an Acceptance of a Buyer's Order, if the Buyer specifies the material and type of finish used, then the Buyer shall be solely responsible for complying with the Directive since PHI will not have had control over material specification control.

**4. Submitted Documents.** Subject to any third party rights, PHI reserve all right, title and interest, including without limitation all intellectual property rights, patent rights, copyrights and trademark rights, in and to all documents, technical information, images, drawing, calculations and other information provided to Buyer and any and all intellectual property embedded therein. Without PHI's express written consent, Buyer shall not copy any document, technical information, image, drawing or calculation provided by PHI, reverse engineer any Product delivered by PHI, or otherwise attempt to circumvent PHI's right, title or interest in any of the foregoing.

#### **5. Prices; Terms Of Payment; Holding Fee; Cancellation Fee**

**A. Prices.** PHI communicates pricing to Buyers in various ways (e.g. quotes, estimates). However, unless otherwise stated in an Acceptance, prices to be paid by a Buyer for PHI's products or services shall be those set forth on PHI's general price list in effect on the date of Acceptance.

**B. Quoted Prices.** All prices quoted in an Acceptance are net of delivery charges, taxes, customs or other governmental charges, and are quoted as payable in United States dollars at PHI's place of business in Ojai, California. All prices are (i) F.O.B. PHI's Designated Shipping Point, if shipped within the United States or (ii) EXW PHI's Designated Shipping Point (Incoterms 2010) if shipped internationally, excluding in each instance packaging and transport. Packing and transport will be charged separately. Any applicable taxes and other governmental charges, including, without limitation, value added taxes, sales or use taxes, other local, state, provincial or federal taxes arising from the sale or delivery of the Products or Services will be stated separately on PHI's Final Invoice and will be payable in United States Dollars together with the purchase price for such Products or Services, unless Buyer provides a current and valid exemption certificate.

**C. Price Adjustments.** Prior to delivery, PHI's price for a Product or a Service may change due to adjustments in specifications, quantities, shipment arrangements, requested delivery dates, or other changes to conditions including but not limited to any costs increases that occur between the time of Acceptance and delivery. *The final price in effect on the date of delivery as stated in PHI's Final Invoice applies.*

**D. Payment Terms For Products.** Unless agreed by the parties otherwise, terms of Payment for Products are (i) sixty percent (60%) of the purchase price within five (5) days after receipt of Acceptance by Buyer and (ii) forty percent (40%) of the purchase price upon PHI advising Buyer the Product is available for delivery.

**E. Payment Terms For Services.** Unless agreed by the parties otherwise, the terms of payment for any Service are (i) thirty percent (30%) of the service fee within five (5) days after receipt of Acceptance by Buyer (ii) fifty percent of the service fee immediately prior to commencement of the Service, and (iii) twenty percent (20%) of the service fee ten days following completion of the Service.

**F. Wire Transfers.** Unless agree by the parties otherwise, Payments by Buyer must be made by wire transfer to the account designated by PHI. All prices are quoted, and must be paid, in United States Dollars, or as otherwise specified on the quotation.

**G. Failure To Make Payment.** If Buyer fails to make any Payment of an invoice according to its terms or upon such credit terms as expressly agreed to in writing by PHI, then, in addition to all other rights and remedies available to PHI under applicable laws, in contract or in equity:

(a) Buyer shall be responsible for any and all commercially reasonable charges, expenses or commissions incurred by PHI to stop delivery, shipping and storage of any Product or performance of any Service and in connection with the return or resale of any Product;

(b) PHI shall have the right to terminate its Acceptance and the Contract related to such Acceptance or to suspend further performance under the Contract; and

(c) Buyer shall be liable to PHI for all reasonable costs of collection, including but not limited to reasonable attorneys' fees.

**H. Past Due Amounts.** Past due amounts are subject to service charges of the lesser of 1.5% per month or the maximum rate allowed by applicable law.

**I. No Withholding Of Payment.** Buyer shall have no right to withhold, offset against or suspend any Payment due PHI on account of any counterclaim that Buyer may have against PHI unless either (i) the amount of such counterclaim has been established pursuant to a final, non appealable judgment issued by a court of competent jurisdiction or (ii) the withholding, offsetting or suspension directly relates to a Product or Service for which Buyer is obligated to make Payment and PHI has agreed to the withholding, offsetting and/or suspending of the Payment in writing.

**J. PHI's Application Of Payments.** Notwithstanding any other directions by Buyer to the contrary, and except as otherwise agreed by PHI in writing, PHI will have the right to apply any Payment received from Buyer first to any outstanding interests and costs, if any, owed by Buyer to PHI and then to any other amounts owed by Buyer to PHI, in any order PHI determines, acting in its sole discretion.

**K. International Buyers.** In the event a Buyer's Order relates to Products or Services to be delivered by PHI outside the United States, payment shall be made in immediately available funds, denominated in United States Dollars, and shall, upon the written request of PHI, be made to a paying agent designated by PHI. Buyer shall pay any costs charged by the paying agent.

**L. Cancellations.** In the event Buyer cancels a Buyer's Order for which PHI has delivered an Acceptance, Buyer shall pay one of the following fees (whichever is applicable) for purposes of reimbursing PHI for its reasonable administrative expenses associated with such cancellation:

(a) A fee of 1.5% of the gross sales price for the Product(s) or Service(s) the subject of the cancelled Buyer's Order; but only if (i) PHI has not ordered any components, has not commenced production and has not mobilized any personnel to fulfill such Buyer's Order and (ii) Buyer orders a different version of the Product(s) or Service(s);

(b) A fee of 2.5% of the gross sales price for the Product(s) or Service(s) the subject of the cancelled Buyer's Order but only if (i) PHI has not ordered any components, has not commenced production and has not mobilized any personnel to fulfill such Buyer's Order and (ii) Buyer does not order a different version of the Product(s) or Service(s); or

(c) A fee of 5% of the gross sales price for the Product(s) or Service(s) the subject of the cancelled Buyer's Order if the fees in clause (a) and clause (b) immediately preceding are not applicable.

Additionally, in the event of the cancellation of any Buyer's Order, PHI expressly reserves the right to claim any damages in addition to the reimbursement of administrative expenses.

**6. Taxes.** Prices do not include applicable taxes or duties. Buyer is solely responsible for paying all applicable taxes and duties. PHI will add sales taxes to the sales price where required by applicable law and Buyer will pay such taxes unless Buyer provides PHI with a duly executed sales tax exemption certificate. If Buyer is required by law to withhold any amount of tax from its Payment to PHI, Buyer will take all reasonable steps to minimize such withholding tax, provide PHI with a receipt or certificate as evidence the tax has been paid, and reimburse PHI for the amount of withholding so that PHI receives Payment for the full value of the invoice.

## **7. Delivery, Delivery Dates And Partial Deliveries.**

**A. Estimated Ship Date.** PHI may communicate an Estimated Ship Date to Buyer. PHI will not be liable for any damage, loss, or expense incurred by Buyer if PHI fails to meet the Estimated Ship Date. A delivery date specified in any Acceptance shall be construed as an Estimated Ship Date and shall be non-binding unless confirmed as a binding delivery date by PHI in writing.

**B. PHI's Compliance.** PHI's compliance with a binding delivery date will be subject to (a) timely receipt of required product components by PHI, free of defect, and (b) timely and full performance by Buyer of its obligations under these Terms of Sale and under the Contract to which the delivery date applies. As to a Product, PHI shall be deemed to have complied with any binding delivery date if PHI makes the Product the subject of the binding delivery date available to Buyer at PHI's Designated Shipping Point on or prior to the delivery date and communicates that fact to Buyer in writing. As to a Service, PHI shall be deemed to have complied with any binding delivery date if PHI attempts to perform the Service at the place of performance on or prior to the delivery date.

**C. Partial Deliveries.** PHI and Buyer may agree that partial deliveries or Products or Services under a Contract are acceptable. If so and unless otherwise agreed to in writing by PHI and Buyer, upon partial delivery of Product(s) or Service(s), Buyer shall be obligated to pay to PHI for that portion of the Products or Services so delivered a dollar amount equal to a reasonable proration of the total purchase price for such Product(s) or Services as reflected in the Contract; such reasonable proration to be determined by PHI, acting in its sole discretion.

**D. Stocking Fee.** With respect to each Contract covering one or more Products, PHI will ship within five (5) days of receiving a final payment for the Product(s). If Buyer postpones the shipment, Buyer will pay to PHI a stocking fee equal to one percent (1%) of the Final Invoice for such Product(s) for each thirty (30) days (or portion thereof) the shipment is delayed; payment to be made to PHI by Buyer prior to shipping

## **8. Shipping: Transfer Of Risk**

**A. PHI's Designated Shipping Point.** Unless stated otherwise in an Acceptance, each delivery of Product, if within the United States, will be FCA PHI's Designated Shipping Point (Incoterms), or if International, will be EXW – PHI's Designated Shipping Point (Incoterms 2010). Shipment of the Product will be made to the destination stated in the Acceptance ("Destination"). If shipments are International, Buyer shall be the importer of record and shall be responsible for all import duties, taxes and any other expenses incurred or licenses or clearances required.

**B. Risk Of Loss.** Risk of loss with respect to any Product shall pass to Buyer upon delivery at PHI's Designated Shipping Point. Any subsequent loss or damage to the Product will not relieve Buyer from its obligations. Buyer is solely responsible for costs of freight and insurance after PHI's delivery to the Product to Buyer at PHI's Designated Shipping Point. If

PHI incurs freight or insurance costs on Buyer's behalf, Buyer must promptly reimburse PHI for such freight or insurance costs.

**C. Handling of Shipments.** PHI will notify Buyer when Products are available for shipment. If Buyer does not arrange for a freight carrier or freight forwarder to collect the Products within seven (7) calendar days following notification that the Products are available for shipment, PHI may, at its own discretion and at Buyer's cost arrange for the Products to be collected by a freight carrier or freight forwarder for shipment to Buyer. Alternatively, PHI may choose to store the Products and may charge a storage fee. In the event that PHI chooses to store the Products in accordance with the preceding sentence, or in the event that the payment terms require payment prior to shipment and Buyer fails to provide such payment within seven (7) calendar days following notification that the Products are available for shipment, PHI may charge a storage fee in an amount up to 0.2% of the contract price for each day the Products remain unshipped.

**D. Packaging.** PHI shall have the right to select the type of product packaging used for shipping. PHI shall invoice Buyer, separately, for all packaging costs. Buyer shall handle or dispose of the packaging materials as Buyer determines.

**E. Buyer's Inspection.** Buyer shall immediately inspect all Products upon arrival at the Destination and shall promptly notify PHI, in writing, of any alleged defects or non-conformity. Buyer's failure to inspect the Products and give written notice to PHI of any alleged defects or non-conformity promptly upon their arrival at the Destination shall constitute Buyer's irrevocable acceptance of the Products.

## **9. Matters Of Credit And Creditworthiness.**

**A. Credit Terms.** PHI may offer Buyer an amount of credit and terms of payment (collectively "Credit Terms") in conjunction with the sale of a Product. In such case, all unpaid sums due with respect to the sale of the Product will be due strictly in accordance with the Credit Terms. The offer of Credit Terms will be at the sole discretion of the PHI. No Credit Terms shall be applicable to the purchase of any Product the subject of a Purchase Order unless Buyer and PHI have agreed to the Credit Terms in conjunction with that purchase. PHI may change or withdraw credit amounts or payment terms at any time for any reason.

**B. Late Charges.** Unless otherwise provided in the Credit Terms, PHI shall be entitled to a late charge on overdue invoices from the date when payment becomes due from day to day until the date of payment at a rate equal to the lesser of 1.5% per month on overdue amounts or the maximum rate permitted by applicable law; the late charge covering administrative services incurred by PHI. If payment is not made strictly in accordance with the Credit Terms, PHI shall be entitled to (i) require payment in advance of delivery of Product; and, (ii) refuse to make delivery of any undelivered Product without incurring any liability whatever to the **Buyer** for non-delivery or any delay in delivery.

**C. Failure To Pay.** If Buyer fails to perform strictly in accordance with the Credit Terms, PHI may suspend or cancel performance including delay or cancellation of shipment on any open orders. PHI will not be liable for, and Buyer will hold PHI harmless from, any costs or losses resulting from suspension or cancellation on account of Buyer's failure to make payment.

**D. PHI's Right To Withhold Performance.** No matter whether or not Credit Terms have been offered by PHI to Buyer, PHI shall have the right to withhold performance under any Contract with Buyer if PHI has reasonable concerns about changes in Buyer's creditworthiness occurring after Acceptance. If changes in Buyer's creditworthiness have occurred after

Acceptance, PHI may require Buyer to make prepayments or other payment or security arrangement for the benefit of PHI as a condition for PHI to resume performance.

**E. PHI's Right To Terminate Contracts.** If Buyer is unwilling or unable to provide payment or security arrangements as may be required by PHI due to changes in Buyer's creditworthiness, PHI may terminate existing Contracts for cause and Buyer shall bear any damages incurred by PHI as a result of such termination.

## 10. Retention Of Title; Security Interests

**A. Retention Of Title:** PHI retains title to all Products delivered to Customer until Payment of PHI's Final Invoice and all other invoices associated with the Product delivered. Irrespective of whether title to a Product remains vested in PHI, risk of loss for that Product shall pass to Buyer as provided in Section 8.B.

**B. Security Interest.** Buyer hereby grants PHI a security interest in (i) all present and future Products sold or delivered by PHI to Buyer and (ii) all proceeds received by Buyer with respect to such Products, whether now owned and existing or hereafter acquired or arising. Buyer agrees, upon request by PHI, to execute promptly any documents and perform any other acts at Buyer's sole expense that PHI deems necessary or advisable to confirm, continue, and/or perfect the security interest granted in this Section 9.B. In addition to and not in limitation or derogation of the foregoing, Buyer hereby irrevocably authorizes **PHI** to execute and file any one or more financing statements covering all the property the subject of the security interests granted in this Section 9.B.

**C. Until Title Passes.** Until title to a Product delivered by PHI passes to Buyer, (a) PHI shall have authority to make any and all filings with governmental agencies against Buyer or otherwise as PHI deems necessary or appropriate; (b) PHI shall have authority to retake, sell or otherwise deal with and/or dispose of the Product; (c) PHI shall be entitled, at any time and without the need to give notice, to enter upon any property upon which the Product is stored, or upon which PHI reasonably believes it to be kept; (d) Buyer shall store or mark the Product in a manner reasonably satisfactory to PHI indicating that title to the Product remains vested in PHI; and, (e) Buyer shall insure the Product for its full replacement value, and arrange for PHI to be included under the policy of insurance as a loss payee.

## 11. Use of Information And Software.

**A. Use of Information.** All devices, equipment, designs, (including drawings and plans and specifications), estimates, prices, notes, electronic data and other documents or information prepared or disclosed by PHI in connection with the Products delivered or Services performed shall remain PHI's exclusive property. Buyer shall not disclose any such material to third parties without PHI's prior written consent.

**B. PHI's Ownership Of Information.** PHI will retain sole ownership of all discoveries, improvements, inventions, patents, trademarks, copyrights, know-how, trade secrets, or other intellectual property rights associated in any way with the Products delivered or Services performed. Buyer specifically agrees that all improvements, inventions, discoveries and copyright in works of authorship, including but not limited to those in formative stages made by either Party (either alone or jointly with others) improving upon or related to a Product shall from the time of conception, or in the case of works of authorship, from the time of creation, be the property of PHI.

**C. Software.** To the extent that the use of software is required for the operation of a Product delivered by PHI, to Buyer, PHI hereby grants Buyer a non-exclusive and non-



transferable right of use of the software, including but not limited to its documentation for the sole purpose of using such software as may be required for the operation of the Product. Buyer has no right to use such software for any other purpose or to reproduce, reverse engineer, translate or convert the software from object code to source code.

**12. Returns and Exchanges.** Buyer agrees to PHI's return policy as stated on the PHI's website. Before returning or exchanging a Product, Buyer must contact PHI to obtain an authorization number for the return of the Product. Buyer must return the Product in its original or equivalent packaging, and Buyer shall be responsible for risk of loss and shipping and handling fees. Additional fees may apply. If Buyer fails to follow the return or exchange instructions, PHI will not be responsible for any loss, damage, or modification of the Product, or processing of the Product for disposal or resale. Credit for partial returns may be less than invoice or individual component prices due to bundled or promotional pricing associated with the Product. Title to a returned or exchanged Product shall pass to PHI upon receipt by PHI of the returned Product and payment of any amount due PHI arising out of the handling or such returned or exchanged Product.

**13. Express Warranty.** PHI provides a Limited Warranty (herein also called the Express Warranty) with respect to each Product.

A. THE LIMITED WARRANTY FOR EACH PRODUCT SHALL BE AS STATED IN THE DOCUMENTATION PROVIDED WITH THE PRODUCT. IF THERE IS NO SUCH DOCUMENTATION, THEN THE LIMITED WARRANTY SHALL BE AS STATED ON PHI'S WEBSITE.

B. THE LIMITED WARRANTY DOES NOT COVER DAMAGE DUE TO EXTERNAL CAUSES, SUCH AS ACCIDENT, ABUSE, MISUSE, PROBLEMS WITH ELECTRICAL POWER, SERVICES NOT PERFORMED OR AUTHORIZED BY PHI, USAGES ON INSTALLATIONS NOT IN ACCORDANCE WITH THE PRODUCT INSTRUCTIONS, NORMAL WEAR AND TEAR, OR USE OF PARTS AND COMPONENTS NOT SUPPLIED, INTENDED OR AUTHORIZED FOR USE WITH THE PRODUCT.

C. EXCEPT AS EXPRESSLY STATED ABOVE OR IN THE LIMITED WARRANTY, AND TO THE MAXIMUM EXTENT PERMITTED BY LAW, PHI (INCLUDING PHI'S AFFILIATES, CONTRACTORS, AND AGENTS, AND EACH OF THEIR RESPECTIVE EMPLOYEES, DIRECTORS, AND OFFICERS), ON BEHALF OF ITSELF AND ITS SUPPLIERS MAKES NO EXPRESS OR IMPLIED WARRANTY WITH RESPECT TO ANY OF THE PRODUCTS, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, PERFORMANCE, SUITABILITY, OR NON-INFRINGEMENT.

D. Notwithstanding anything to the contrary implied or stated in the Limited Warranty, PHI will not be liable for the failure of a Product to perform if:

(a) the failure was caused by neglect, misuse, or mistreatment by a person or entity other than PHI, including improper installation or testing, or for any Products that were altered or not wired or connected correctly with any source of electrical power in any way by a person or an entity other than PHI; or,

(b) the failure resulted from the Buyer's design, specifications, or instructions for such Products or improper system design or installation.

E. Notwithstanding anything implied or stated to the contrary in the Limited Warranty, the Limited Warranty as to any Product shall not take effect for the Product unless Buyer has paid for the Product in a timely manner, consistent with these Terms of Sale.

F. Notwithstanding anything implied or stated to the contrary in the Limited Warranty, the Limited Warranty shall be void if Buyer fails to notify PHI of any apparent defects in the Product within ten (10) business days after delivery, or of any hidden defects within ten (10) business days after the defect has been detected.

**14. Product Suitability.** Because local safety standards and regulations vary significantly as to certain certification programs, PHI cannot guarantee that a Product will meet all applicable requirements in a specific locality into which the Product will be shipped, sold or used. Therefore, before purchase and use of a Product, Buyer must (a) review the Product application and whatever national and local code/regulations apply to the Product or the application and (b) verify that the use, application and installation of the Product will be in compliance therewith.

**15. Matters Pertaining To Delays Defects And Liability:**

**A. Limitation Of Liability.** TO THE FULLEST EXTENT PERMITTED BY LAW, AND EXCEPT AS OTHERWISE EXPRESSLY STATED IN THESE TERMS, PHI SHALL NOT BE RESPONSIBLE OR LIABLE IN ANY WAY FOR DAMAGE OR INJURY TO PERSONS OR PROPERTY, OR FOR OTHER LOSS OR INJURY RESULTING FROM ANY CAUSE WHATSOEVER, ARISING OUT OF OR RELATED TO ANY PRODUCTS OR SERVICES SUPPLIED BY PHI. IN NO EVENT WILL PHI BE LIABLE FOR ANY LOSS OF REVENUE, OR CONSEQUENTIAL, INDIRECT, EXEMPLARY, SPECIAL, OR INCIDENTAL DAMAGES EVEN IF AWARE OF THE POSSIBILITY OF SUCH DAMAGES. PHI'S TOTAL LIABILITY WHETHER IN CONTRACT OR IN TORT OR OTHERWISE, SHALL NOT EXCEED THE AMOUNT PAID TO PHI FOR THE PRODUCTS.

**B. Delays.** In the event of a delay in delivery beyond a binding delivery date caused by PHI, and in full compensation of any and all claims and damages Buyer may have incurred resulting from such delay, PHI's liability shall be limited to a liquidated damage payment in an amount equal to 0.5% of the amount invoiced by PHI (as stated in PHI's Final Invoice) for the Products or Services for each week of delay caused by PHI, but in any case not more than an amount equal to 5% of the invoice amount (as stated in PHI's Final Invoice).

**C. Defects.** In the event of a defect in a Product supplied by PHI, Buyer's sole remedy shall be, at PHI's costs and expense for PHI, in PHI's sole discretion, to either repair or replace the defective Product. In the event of a defect in a Service provided by PHI, Buyer's sole remedy shall be PHI's re-performance of the Service.

**D. Buyer To Provide Notice Of Defects.** Except for visible defects of Products and Services for which Buyer shall provide written notice to PHI immediately, Buyer shall provide written notice of any defect to PHI at the earlier of (a) within ten (10) days after discover of such defect, or (b) twelve (12) months after date of delivery.

**E. PHI's Response To Notice Of Defects.** Should PHI be unable to repair or replace defective Product(s) or re-perform defective Service(s) so that the Product(s) or Service(s) conform to the Contract within thirty (30) days after written notice from Buyer of such defect, Buyer shall grant PHI a ten (10) day cure period in writing. If PHI fails to replace the defective Product(s) or re-perform the defective Service(s) so that the Product(s) or Services(s) conform to the Contract within such ten (10) day cure period, Buyer shall have the right to rescind the Contract and PHI shall promptly reimburse Buyer for all invoices paid to PHI by Buyer on account of such defective Product(s) or Service(s).

**F. PHI's Liability To Repair, Replace or Re-Perform.** PHI shall have no liability to repair or replace any defective Product or Service if

- (a) Buyer fails to inspect the Product or the Service as required hereunder,
- (b) Buyer fails to inform PHI about the defect(s) as required hereunder,
- (c) Buyer fails to observe the operating and maintenance instructions provided by PHI relating to the Product,
- (d) the Product or a part of the Product has been opened, modified, repaired, processed, replaced or installed by, or any other work has been performed in relation to or that affects the Product by, a person other than a person approved by PHI; or,
- (e) any other act or omission has occurred that has resulted in the loss of the Product's Express Warranty.

In the event PHI determines that an alleged Product or Service defect did not exist or, if the defect did exist, PHI has no liability for such defect, Buyer shall reimburse PHI for all costs and expenses incurred by PHI with respect to such repairing, replacing or re-performing.

**G. Remedies Exclusive.** TO THE FULLEST EXTENT PERMITTED BY LAW, THE REMEDIES SET FORTH IN THIS SECTION 15 FOR DELAYS OR DEFECTS SHALL BE THE SOLE AND EXCLUSIVE REMEDY OF BUYER AND BUYER SHALL HAVE NO OTHER REMEDIES IN CONTRACT, TORT OR EQUITY UNDER APPLICABLE LAW.

**H. Shipping Damages, Errors, Returns and Claim Policies.** With respect to shipping damages, errors in shipment (e.g. overage, shortage or missing items), Returns and Claims related thereto, reference is made to PHI's Returns, Damages and Claims Policies that are set forth on its website; the policies being incorporated herein by reference.

## 16. Indemnification

**A. Buyer's Indemnification.** Buyer agrees to defend, indemnify and hold PHI harmless from, against and on account of all bodily injury and property damage claims asserted by third parties as a result of Buyer's negligent or intentional acts or omissions.

**B. PHI's Indemnification.** PHI agrees to defend, indemnify and hold Buyer harmless from, against and on account of any third party claim alleging that a Product purchased by Buyer infringes upon a valid and enforceable United States patent, provided Buyer gives PHI written notice immediately when such claim is asserted, directly or indirectly. Notwithstanding the foregoing, PHI shall have no liability to Buyer if any patent infringement or claim thereof is based upon or arises out of (a) compliance with designs, plans or specifications furnished by or on behalf of Buyer; (b) use of a Product in a manner for which the Product was neither designed nor contemplated; or (c) the claimed infringement of any patent in which Buyer or any affiliate or subsidiary of Buyer has any direct or indirect interest by license or otherwise.

## 17. Default and Termination.

**A. Default.** The failure of either Party to comply with these Terms or any additional terms and conditions of a Contract between the Parties shall constitute a default ("Default") under the Contract.

**B. Notice of Default With Right To Cure.** Upon Default by a Party (the "Defaulting Party"), the other Party ("Non-Defaulting Party") shall deliver written notice ("Notice of Default") to the Defaulting Party specifying the nature of the Default. The Defaulting Party shall have

thirty (30) days from the date of delivery of the Notice of Default in case of non-monetary defaults and ten (10) days from the date of delivery of the Notice of Default in case of monetary defaults to cure the Default.

**C. Termination.** If the Default is capable of being cured within the applicable cure period and is not cured within such cure period, the Contract may be terminated by the Non-Defaulting Party. In the case of a non monetary Default that cannot be cured within the applicable cure period, the Contract shall not be terminated as long as the Defaulting Party has commenced and is diligently pursuing curing the non-monetary default; provided that if such non-monetary Default has not been cured by on or before ninety (90) days from the date of delivery of the Notice of Default.

## 18. Applicable Law, Venue, Jury Trial Waiver

**A. Governing Law.** These Terms of Sale and ANY CLAIM, DISPUTE, OR CONTROVERSY (WHETHER IN CONTRACT, TORT, OR OTHERWISE, INCLUDING STATUTORY, CONSUMER PROTECTION, COMMON LAW, INTENTIONAL TORT AND EQUITABLE CLAIMS) BETWEEN PHI AND BUYER, including their affiliates, contractors, and agents and each of their respective employees, directors, and officers (a “**Dispute**”) will be governed by the laws of the State of California, without regard to conflicts of law. The UN Convention for the International Sale of Goods shall not apply.

**B. Dispute Resolution.** PHI and Buyer will attempt to resolve any Dispute through negotiation or by utilizing a mediator agreed to by the parties, rather than through litigation. The mediator shall be located in the State of California. Negotiations and mediations will be treated as confidential. Unless otherwise agreed to by the parties, if the parties are unable to reach through mediation a resolution of the Dispute within sixty (60) days of notice of the Dispute to the other party, the parties may pursue all other courses of action available at law or in equity.

**C. Venue.** The parties agree that the venue for any Dispute shall be exclusively in the state or federal courts located in Ventura County, California. The Parties agree to submit to the personal jurisdiction of such courts.

**D. Waiver Of Trial By Jury.** AS PERMITTED BY APPLICABLE LAW, EACH PARTY WAIVES ITS RESPECTIVE RIGHTS TO A TRIAL BEFORE A JURY IN CONNECTION WITH ANY DISPUTE. A JUDGE SITTING WITHOUT A JURY SHALL RESOLVE DISPUTES. IF A COURT DETERMINES THAT THIS PROVISION IS NOT ENFORCEABLE FOR ANY REASON AND AT ANY TIME PRIOR TO TRIAL OF THE DISPUTE, BUT NOT LATER THAN THIRTY (30) DAYS AFTER ENTRY OF THE ORDER DETERMINING THIS PROVISION IS UNENFORCEABLE, EITHER PARTY SHALL BE ENTITLED TO MOVE THE COURT FOR AN ORDER COMPELLING ARBITRATION AND STAYING OR DISMISSING SUCH LITIGATION PENDING ARBITRATION. IF PERMITTED BY APPLICABLE LAW EACH PARTY ALSO WAIVES THE RIGHT TO LITIGATE IN COURT OR AN ARBITRATION PROCEEDING ANY DISPUTE AS A CLASS ACTION, EITHER AS A MEMBER OF A CLASS OR AS A REPRESENTATIVE, OR TO ACT AS A PRIVATE ATTORNEY GENERAL.

**E. If Waiver Of Trial By Jury Not Permitted.** If a claim, dispute, or controversy arises between the Parties with respect to a Product or Service delivered by PHI to Buyer, and only if a waiver of a trial by jury is not permitted by applicable law or a ruling by a court of competent jurisdiction, either Party may require that the Dispute be resolved by binding arbitration. By agreeing to arbitrate all Disputes, each Party gives up any right that the Party may have to a trial

by jury as well as other rights that the Party would have in a court that are not available or are more limited in arbitration, such as the rights to discovery and to appeal.

**19. Confidential Information.** Confidential Information may only be disclosed to the receiving party's personnel, profession advisors, agents, and subcontractors ("Representatives"), on a "need to know" basis in connection with the use of the Product. Representatives shall be bound to treat the confidential Information under terms at least as restrictive as those herein, and the receiving party shall be liable for unauthorized disclosures by its Representatives. Each party will use at least the same degree of care as it employees with respect to its own Confidential Information, but not less than a commercially reasonable standard of care. The foregoing shall not apply to information that (i) is independently developed without the use of the other party's confidential Information; (ii) has been obtained from a source which is not under a confidentiality obligation; or (iii) is or becomes publicly available without fault of the receiving party. If receiving party must disclose Confidential Information as required by law, it shall give reasonable prior notice to the disclosing party. These obligations shall continue for three (3) years from the initial date of disclosure, except that obligations related to information about a party's intellectual property shall never expire.

## **20. Miscellaneous.**

**A. Force Majeure Event/Contingencies.** PHI will not be in breach of a Contract and will not be liable for any non-performance or delay in performance of the Contract if such non-performance or delay is due to a Force Majeure Event. PHI shall be entitled to a reasonable extension of its obligations under the Contract if a Force Majeure Event. If, with respect to fulfilling a specific Contract, a delay arising out of a Force Majeure Event persists for a period of time that PHI considers unreasonable, PHI may, without liability on its part, terminate the Contract. In the event of a shortage of components due to a Force Majeure Event, PHI may, at its sole discretion allocate Product production and deliveries.

**B. Compliance With Laws.** In performing its obligations under these Terms of Sale, each party agrees to comply with all laws and regulations applicable to such party including the customs and export control laws and regulations of the United States and the country in which the Product(s) are delivered. Buyer is subject to and solely responsible for compliance with the export control and economic sanctions laws of the United States and other applicable jurisdictions. No Product may be used, sold, leased, exported, re-exported, or transferred except in compliance with such laws, including, without limitation, export licensing requirements, end-user, end-use, and end-destination restrictions, and prohibitions on dealing with sanctioned individuals and entities including but not limited to persons on the Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List or the U.S. Department of Commerce Denied Persons List. Buyer represents and warrants that Buyer is not subject or a target of, and that Buyer is not located in a country or territory that is the subject or target of, economic sanctions of the United States and other applicable jurisdictions.

**C. Relationship of Parties.** Nothing contained in these Terms of Sale shall be construed as establishing or implying any partnership or joint venture between the parties; and, nothing in these Terms of Sale shall be deemed to construe either of the parties as the agent of the other.

**D. Assignment.** Buyer may not assign its rights to purchase a Product to any third party unless previously consented to in writing by the PHI. No such assignment shall relieve Buyer from its obligations under these Terms of Sale.

**E. Waiver.** The failure by either party to enforce at any time or for any period any provision of these Terms of Sale shall not be a waiver of such provision or of the right at any time subsequent time to enforce such provision.

**F. Notices.** Any notice to PHI relating to a Product or these Terms of Sale must be in writing and sent by registered or certified mail (postage prepaid first-class mail and return receipt requested) by overnight delivery service or by electronic mail to the address below, and will be effective upon receipt.

If by registered or certified mail:

SimpliPhi Power, Inc.: Attention: Contracts Manager  
420 Bryant Circle, Ojai, California, 93023.

If by email:

[Orders@simpliphipower.com](mailto:Orders@simpliphipower.com)

**G. Entire Agreement.** These Terms of Sale shall apply to each purchase and sale of a Product. Each party is relying on its own judgment and due diligence and expressly disclaims reliance upon any representation or statements not expressly set forth in these Terms of Sale.

**H. Severability.** If any provision of these Terms of Sale is found to be void or unenforceable, such provision will be stricken or modified, but only to the extent necessary to comply with the law, and the remainder of the provisions of these Terms of Sale will remain in full force. No rights may arise by implication or estoppel, other than those expressly granted herein.

Terms of Sale (United States)  
Third Version  
Prepared On: 10/23/2018