

Activ Pharmaceuticals Pty Ltd

A.C.N. 081 432 411

Conditions of Sale

Effective 1st September 2014

1. DEFINITION

In these terms and conditions:

"Goods" means all equipment, products and services agreed to be supplied by Activ Pharmaceuticals to the Buyer under any contract, arrangement, understanding between Activ Pharmaceuticals and the Buyer (including pursuant to a quotation or letter of offer accepted by the Buyer);

"Buyer" means the person to whom any quotation is made, any person offering to contract with Activ Pharmaceuticals on these Conditions of Sale and any person who purchases Goods from Activ Pharmaceuticals;

"Consumer" means:

- (i) an individual acquiring Goods for personal, domestic or household use or consumption; or
- (ii) a Person acquiring Goods at a price not exceeding \$40,000; or
- (iii) a Person acquiring Goods of a kind ordinarily acquired for personal, domestic or household use or consumption.

But excludes a Person acquiring the Goods, or holding himself or herself out as acquiring the Goods for commercial purpose including for the purpose of:

- (i) resupply; or
- (ii) using them up or transforming them, in trade or commerce in the course of a production or manufacture or in the course of repairing or treating other goods or fixtures on land;

"Contract" means Activ Pharmaceuticals' pricing letter or letter of offer to which the supply of the Goods relates, as updated in writing by the mutual agreement of the parties, the attachments (if any) to that letter and these Conditions of Sale;

"Individual" means a Buyer who is a natural person;

"Activ Pharmaceuticals" means Activ Pharmaceuticals Pty Ltd;

"Person" means an Individual and a corporation; and

2. ENTIRE AGREEMENT

- (a) Clause 2(b) and (d) shall not apply to a Consumer.
- (b) Unless Activ Pharmaceuticals otherwise agrees in writing, the Contract contains the only terms and conditions of sale to which Activ Pharmaceuticals will be bound in connection with the supply of Goods to the Buyer.
- (c) The Buyer agrees that the Conditions of Sale contained in this Contract will in all circumstances prevail over the Buyer's terms and conditions of purchase or supply (if any).
- (d) These Conditions of Sale supersede and exclude all prior and other discussions, representations (contractual or otherwise) and arrangements relating to the supply of the Goods including, but not limited to, those relating to the performance of the Goods or the results that ought to be expected from using the Goods.
- (e) Without limiting any other mode of acceptance of this Contract exercised by the Buyer, the Buyer acknowledges that by accepting delivery of the Goods and/or the credit terms offered by Activ Pharmaceuticals, the Buyer by such conduct agrees to be bound by the Conditions of Sale of this Contract. Where the Buyer is not a Consumer, these Conditions of Sale will apply to the exclusion of all other terms and conditions of purchase or supply.
- (f) Activ Pharmaceuticals may change these Conditions of Sale from time to time. Any changes to the Conditions of Sale will be shown on the Activ Pharmaceuticals website together with the date on which the new Conditions of Sale become effective. It is your obligation to check the Activ Pharmaceuticals website or ask Activ Pharmaceuticals to provide a copy of the most up to date Conditions of Sale at the time you enter into a Contract. By entering into a Contract after the date upon which the new Conditions of Sale become effective the Buyer accepts and is bound by the changed Conditions of Sale for that Contract and future Contracts. If the Buyer does not accept the changes to the Conditions of Sale, it may notify Activ Pharmaceuticals to close its account. No amendment or variation of the Contract, other than amendment or variation to the Conditions of Sale as set out in this clause 2, is valid or binding on a party unless made in writing and executed by both parties.

3. WARRANTIES, GUARANTEES & LIABILITY

- (a) Clause 3 shall not apply to a Consumer with the exception that clause 3(d) shall apply where the Goods are acquired at a price not exceeding \$40,000 and the Goods are not of a kind ordinarily acquired for personal, domestic or household use or consumption.
- (b) Activ Pharmaceuticals warrants that the Goods supplied accord with any relevant specification contained or referenced in the Contract and are of acceptable quality.
- (c) Apart from the warranties contained in clause 3(b), to the maximum extent permitted by law, all warranties and guarantees expressed or implied by statute, the common law, equity, trade, custom or usage or otherwise, in relation to the supply of the Goods, are expressly excluded. Where the exclusion of any of the warranties and guarantees referred to in this clause 3(c) would be illegal, Activ Pharmaceuticals' liability for breach of such warranty or guarantee is limited in the manner set out below in clause 3(d).
- (d) Activ Pharmaceuticals' liability for its breach of sub-clause 3(b) or a non-excludable consumer guarantee implied into this Contract by law is limited to any one of the following as determined by Activ Pharmaceuticals:
 - (i) the prompt retrieval of the non-compliant Goods at Activ Pharmaceuticals' cost and the replacement of the Goods or the supply of equivalent Goods;
 - (ii) the repair at Activ Pharmaceuticals' cost of the Goods or payment of the cost of having the Goods repaired; or
 - (iii) the payment by Activ Pharmaceuticals of the cost of replacing the Goods or of acquiring equivalent Goods.
- (e) The Buyer will examine the Goods for defects and shall notify Activ Pharmaceuticals of any defects in writing within 30 days of delivery. If the Buyer does not notify Activ Pharmaceuticals within 30 days of delivery the Buyer shall be deemed to have accepted the Goods and it shall no longer be entitled to exercise its rights in clause 3(d) in respect of those particular Goods.
- (f) To the extent permitted by law and notwithstanding anything else in the Contract, where the Buyer is not a Consumer, Activ Pharmaceuticals excludes all liability whatsoever to the Buyer arising out of or in any way connected with a Contract for any loss of profits, loss of business revenue, failure to realise expected profits or savings, overhead costs, loss of goodwill, loss of reputation, loss of value in any intellectual property, damages or liquidated sums payable pursuant to other agreements, other economic losses, or any consequential or indirect losses of any kind howsoever arising and whether caused by breach of statute, breach of contract, negligence or other tort.

4. ADVICES

- (a) Clause 4 shall not apply to a Consumer.
- (b) The Buyer hereby acknowledges that:
 - (i) it has not relied on any service involving skill or judgement, or on any advice, recommendation, information or assistance provided by Activ Pharmaceuticals in relation to the Goods or their use or application; and
 - (ii) it is responsible for ensuring that Goods that comply with the warranties in clause 3(b) are fit and suitable for its purposes, requirements, processes, plant and equipment.

5. DELIVERY & RESPONSIBILITY TO PURCHASE

- (a) Clause 5(c) shall not apply to a Consumer.
 - (b) Activ Pharmaceuticals will make all reasonable efforts to have the Goods delivered to the Buyer on or about the date or within the timeframe forming part of the Contract.
 - (c) Activ Pharmaceuticals shall not be liable for any failure to deliver or delay in delivery for any reason.
 - (d) The Buyer will be contractually obligated to take delivery of and pay for all Goods ordered by it from Activ Pharmaceuticals, and which Activ Pharmaceuticals supplies or makes available to the Buyer in accordance with the Contract.
- ### 6. RISK
- (a) Unless otherwise agreed in writing, all risk in and to the Goods purchased shall pass to the Buyer upon the unloading of the Goods at the Buyer's premises or such other delivery point agreed in writing by the parties.
 - (b) Without in any way limiting the operation of the foregoing, upon delivery of the Goods to the Buyer or his agent or to a carrier commissioned by the Buyer, the Buyer covenants and warrants to Activ Pharmaceuticals that, in the storage and handling of the Goods, the Buyer and his agents and carriers shall comply with all relevant environmental laws and regulations, and comply with all necessary and/or relevant permits or licences pertaining to the storing and handling of the Goods, and the Buyer shall ensure that the Buyer and his agents and carriers are familiar with and adhere to all the necessary and appropriate precautions and safety measures relating to the storing and handling of the Goods.
 - (c) If Activ Pharmaceuticals does not receive forwarding instructions sufficient to enable it to despatch the Goods within 14 days of notification to the Buyer that they are ready, the Buyer shall be deemed to have taken delivery of the Goods from such date. The Buyer shall thereafter be liable for reasonable storage charges payable monthly on demand.
 - (d) Where the Buyer re-sells or distributes the Goods to any third parties, it shall be responsible for ensuring that it provides detailed instructions to those third parties regarding the safe storage, handling and use of those Goods and any cylinders, drums or other packaging in which those Goods are stored.

7. TITLE

- (a) Title in and to the Goods shall not pass to the Buyer until payment in full for all Goods is made.
- (b) The Buyer acknowledges that until title in and to the Goods passes to the Buyer in accordance with this clause, the Buyer holds the Goods as bailee of Activ Pharmaceuticals and that a fiduciary relationship exists between the Buyer and Activ Pharmaceuticals.
- (c) Until title in and to the Goods passes to the Buyer in accordance with this clause the Buyer shall store the Goods separately and in such a manner that they are clearly identified as the property of Activ Pharmaceuticals. In addition to any rights Activ Pharmaceuticals may have under Chapter 4 of the PPS Act, Activ Pharmaceuticals shall be entitled at any time until title in and to the Goods passes to the Buyer to demand the return of the Goods and, except where the Buyer is an Individual, shall be entitled without notice to the Buyer and without liability to the Buyer to enter (or have its representatives enter) any premises occupied by the Buyer in order to search for and remove the Goods. The Buyer and its representatives shall provide all reasonable assistance to Activ Pharmaceuticals and its representatives for this purpose.
- (d) The Buyer acknowledges that if it sells, leases or otherwise deals with the Goods or products incorporating the Goods before title in and to the Goods has passed to the Buyer in accordance with this clause, it shall hold the proceeds of sale, lease or such dealing on trust for Activ Pharmaceuticals in a separate account.
- (e) If title in and to the Goods has not passed to the Buyer in accordance with this clause, the Buyer's implied right to sell, use or consume the Goods in its operations shall immediately terminate upon the happening of any of the events stipulated in paragraph 10(b)(i)-(v) hereof.

8. PRICE

Unless otherwise agreed in writing, the price charged for the Goods shall be determined and adjusted in accordance with Activ Pharmaceuticals' final pricing letter or offer forming part of the Contract. Without limiting its rights in clause 10, Activ Pharmaceuticals may in its sole discretion charge interest on overdue invoiced amounts at the rate of 1.5% per calendar month (pro-rated to part of a month), compounding monthly and commencing from the date on which the invoiced amount becomes overdue.

9. FORCE MAJEURE

Deliveries may be totally or partially suspended by Activ Pharmaceuticals during any period in which Activ Pharmaceuticals may be prevented or hindered from manufacture, delivery or supply through any circumstances outside Activ Pharmaceuticals' reasonable control or where such manufacture, delivery or supply is rendered materially more expensive by such circumstances. Circumstances beyond Activ Pharmaceuticals' reasonable control shall include, without limitation, strikes, lockouts or other labour difficulty, inability to obtain any necessary materials, inputs, equipment, facilities or services on usual terms, power or water shortage, accidents or breakdowns of plant, machinery, software, hardware or communication network. Activ Pharmaceuticals shall not incur any liability to the Buyer in respect of such suspension.

<p>10. PAYMENT AND DEFAULT</p> <p>(a) Subject to sub-clause 10(c) hereof, and unless otherwise agreed in writing all accounts shall be payable on or before delivery, or as otherwise identified on any statement of account issued by Activ Pharmaceuticals.</p> <p>(b) If any of the events set out in (i) to (v) below occur, Activ Pharmaceuticals may at its option and absolute discretion withhold further deliveries or cancel the Contract without notice to the Buyer and without prejudice to any other action or remedy which Activ Pharmaceuticals has or might otherwise have had, and/or open a new trading account for the Buyer with cash on delivery payment terms.</p> <p>(i) The Buyer makes default in any payments or is unable or states that it is unable to pay its debts as and when they fall due.</p> <p>(ii) The Buyer being an individual commits an act of bankruptcy or has a controller or trustee appointed in respect of the Buyer's estate or any part of the Buyer's property or assets.</p> <p>(iii) The Buyer being a company passes a resolution for its winding up or enters into liquidation or has an application for winding up filed against it.</p> <p>(iv) A receiver, receiver and manager, controller or voluntary administrator is appointed over any part of the property or assets of the Buyer.</p> <p>(v) The Buyer experiences any analogous event having substantially similar effect to any of the events specified above.</p> <p>In such circumstances all moneys owing and outstanding to Activ Pharmaceuticals on any account whatsoever and irrespective of whether the due date on any statement of account has occurred or passed shall become immediately due and payable. The Buyer shall indemnify Activ Pharmaceuticals from and against all costs and disbursements incurred by Activ Pharmaceuticals in pursuing payment of any overdue debt owed by the Buyer to Activ Pharmaceuticals (including enforcing any security interest arising under this Contract), including without limitation legal costs on a solicitor and own client basis and the costs charged to Activ Pharmaceuticals by a debt collection agency and/or bailiff.</p> <p>(c) Notwithstanding sub-clause 10(a) hereof Activ Pharmaceuticals may at all times in its sole and unfettered discretion and without being under any duty or obligation to assign reasons therefore review, alter or terminate the Buyer's credit limit or payment terms without notice. Without limiting the generality of the foregoing, the decision of Activ Pharmaceuticals shall be final and Activ Pharmaceuticals accepts no liability or responsibility for any loss, howsoever arising, incurred by the Buyer due to the operation of this condition.</p> <p>11. GENERAL LIEN</p> <p>In addition to any right of lien to which Activ Pharmaceuticals may be entitled under the common law, Activ Pharmaceuticals shall be entitled to exercise a general lien over all items in its possession belonging to the Buyer until the Buyer has paid in full for all Goods supplied by Activ Pharmaceuticals to the Buyer. Activ Pharmaceuticals may in its sole discretion sell any item that is subject to the said lien, provided that Activ Pharmaceuticals shall pay to the Buyer any surplus proceeds that are realised by it from a sale of any such items after discharging in full all monies outstanding to Activ Pharmaceuticals in respect of Goods that have been delivered by it to the Buyer and all reasonable costs of sale incurred by Activ Pharmaceuticals.</p>	<p>12. WAIVER</p> <p>No failure to exercise nor any delay or omission in exercising any right, power or remedy by Activ Pharmaceuticals operates as or constitutes a waiver. A single or partial exercise by Activ Pharmaceuticals of any right, power or remedy does not preclude any other or further exercise by it of that or any other right, power or remedy. A waiver is not valid or binding on Activ Pharmaceuticals unless made in writing. No failure by Activ Pharmaceuticals to exercise, nor any delay or omission by Activ Pharmaceuticals in exercising, any right, power or remedy, nor any representation made or conduct carried out by Activ Pharmaceuticals under the Contract or in connection with the supply of the Goods or any of them shall constitute or provide grounds for a common law or equitable estoppel.</p> <p>13. SEVERANCE</p> <p>If any provision of these Conditions of Sale or its application to any person or circumstance is or becomes invalid, illegal or unenforceable the provision shall so far as possible be read down to such extent as may be necessary to ensure that it is not invalid, illegal or unenforceable. If any provision or part of it cannot be so read down the provision or part of it shall be deemed to be void and severable and the remaining provisions of these Conditions of Sale shall not in any way be affected or impaired.</p> <p>14. GOVERNING LAW</p> <p>The supply of Goods under these Conditions of Sale is governed by the law of the State of New South Wales and Activ Pharmaceuticals and the Buyer submit to the non-exclusive jurisdiction of the courts of the State of New South Wales.</p> <p>15. TRANSACTION TAX</p> <p>Where a transaction tax, including a goods and services tax ("GST") and any transaction taxes that come into existence after the date of these Conditions of Sale, applies to any supply made under these Conditions of Sale, Activ Pharmaceuticals may recover from the Buyer an additional amount on account of that transaction tax in accordance with clause 10.</p> <p>16. CHANGE OF LAWS</p> <p>Without limiting clause 17, if any of Activ Pharmaceuticals' costs of:</p> <p>(a) manufacturing, importing, supplying or transporting the Goods; or</p> <p>(b) procuring raw materials, services or inputs directly related to the activities in (a), increase as a result of compliance by Activ Pharmaceuticals, Activ Pharmaceuticals' affiliates and related bodies corporate, or third parties, with:</p> <p>(c) the introduction of or any change (including a change in interpretation) in any federal, state, local or other law or regulation or order, including any introduction of or a change in a tax; or</p> <p>(d) any introduction of or change in of a scheme for management or reduction of greenhouse gas emissions or concentrations, or water use conservation or management,</p> <p>then Activ Pharmaceuticals may, by notice to the Buyer, increase the Price for the Goods to the extent required to pass through such increased costs (which may include, without limitation costs of acquiring permits or credits or costs of required plant modifications or additions). Such cost increase shall take effect immediately from the date such notice is provided.</p> <p>17. MISCELLANEOUS</p> <p>Additional terms relating to price, delivery date/time frame, place(s) of delivery, delivery quantities, purchasing deadlines Incoterms, documents and Goods specifications and other commercial matters are as indicated in the pricing letter or letter of offer to which the supply of the Goods relates, as updated in writing by the mutual agreement of the parties.</p>
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