

PROTREE NURSERY, LLC - TERMS AND CONDITIONS

PAYMENT TERMS: Open accounts are to be paid in full within thirty (30) days of the date of invoice. Past due accounts are subject to a late charge of 1 percent (1%) per month (annual percentage rate of 12%) or the highest rate permissible by law, whichever is lower. ProTree Nursery, LCC (“ProTree Nursery”) reserves the right to change credit terms to cash upon order in the event that ProTree Nursery, in its reasonable discretion, determines Customer’s credit history or payment history with ProTree Nursery so warrants. Customer agrees to pay ProTree Nursery’s costs of collection, including reasonable attorneys’ fees and expenses (whether in negotiation, mediation, on appeal, or in any bankruptcy or similar action).

DEPOSIT REQUIRED: For customers who are entitled to credit terms as provided herein, a deposit of up to fifty percent (50%) per tree is required to confirm an order. If the applicable deposit is not fully paid on or before due date ProTree Nursery reserves the unilateral right to cancel an order.

CANCELLATION: Cancellation of an order by the Customer requires written approval by ProTree Nursery.

SIZING: Size indicated on order is Customer’s preferred size. Customer agrees to accept substitution of a different size selected by ProTree Nursery with any corresponding change of price, if Customer’s preferred size is not available due to prior sales or circumstances beyond the control of ProTree Nursery.

DELIVERY AND RISK OF LOSS: If Customer has not accepted delivery of stock by March 1 of the shipment year of the stock (the “Ship Year”), ProTree Nursery may place stock in cold storage at Customer’s sole expense. All risk of loss or damage, and title, to stock passes to Customer upon receipt by Customer or carrier, whichever occurs first, at ProTree Nursery’s facility.

RETURNED STOCK: Within fourteen (14) days of delivery, but no later than April 1 of the Ship Year, Customer may return to ProTree Nursery up to five percent (5%) of the total quantity purchased if the stock is returned in original unbroken bundles and in a condition acceptable for resale.

ASSESSMENTS, LICENSES AND ROYALTIES: Prices are based on delivery to Customer FOB ProTree Nursery’s facility, and do not include shipping. Prices quoted by ProTree Nursery are exclusive of sales, use or excise taxes, and/or other charges required to be paid or collected by ProTree Nursery by any government authority or pursuant to any license or royalty agreement with respect to the sale or end use of any stock sold to Customer. All such charges will be billed to and shall be paid by Customer in addition to the quoted purchase price of the stock. To the extent that purchase of any particular stock is subject to a trademark, patent, or other intellectual property license, Customer will so notify ProTree Nursery and will cooperate with ProTree Nursery to obtain and comply with all necessary licenses.

DISCLAIMER OF EXPRESS AND ALL IMPLIED WARRANTIES

THE DISCLAIMER OF EXPRESS AND ALL IMPLIED WARRANTIES STATED BELOW IS AN INTEGRAL PART OF THIS AGREEMENT AND AGREED TO BY THE CUSTOMER.

EXCEPT FOR PROTREE NURSERY’S LIMITED WARRANTY FOR UNTRUE STOCK OR GROWTH

FAILURE STATED HEREIN, PROTREE NURSERY MAKES NO EXPRESS OR IMPLIED WARRANTIES OF ANY KIND WITH RESPECT TO THE STOCK PURCHASED BY CUSTOMER INCLUDING WITHOUT LIMITATION, IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE. ALL STOCK IS SOLD "AS IS" AND WITH ALL FAULTS. PROTREE NURSERY MAKES NO WARRANTY OF PERFORMANCE AND/OR PRODUCTIVITY OF ANY STOCK AND PROTREE NURSERY IS NOT RESPONSIBLE FOR DISEASE, GENETIC DISORDER, OFF-TYPE, MISLABELING, OR OTHER DEFECT. LABELING OF STOCK AS "REGISTERED," "CERTIFIED," OR "INDEXED" MEANS ONLY THAT SUCH STOCK HAS BEEN PRODUCED IN ACCORDANCE WITH THE PARTICULAR PROGRAM ASSOCIATED WITH ITS LABEL; PROTREE NURSERY DOES NOT PROVIDE ANY EXPRESS OR IMPLIED WARRANTIES OF SUCH STOCK.

CUSTOMER'S DUTY TO DEFEND AND INDEMNIFY PROTREE NURSERY

Customer expressly agrees to defend, indemnify, protect and hold ProTree Nursery, its members, managers, officers, employees and agents (collectively, the "ProTree Indemnitees") harmless against any and all claims or liability of any kind, arising out of the use, possession, or resale of any stock sold or otherwise provided to Customer. Customer further agrees to defend, indemnify, protect, and hold the ProTree Indemnitees harmless against all claims or liability of any kind for injury or damage arising after Customer has resold or reconveyed any stock or sold its crop production to any third party, including, but not limited to, any action based in whole or in part upon any implied or express warranty which is disclaimed by ProTree Nursery.

PROTREE NURSERY'S LIMITED WARRANTY FOR UNTRUE STOCK OR GROWTH FAILURE

TRUENESS OF VARIETY. In the event stock purchased by Customer is proven by Customer to be of a different variety than identified, ProTree Nursery will replace said untrue stock or, at ProTree Nursery's option, refund the purchase price for the untrue stock. ProTree Nursery must be notified in writing of any untrue stock within thirty (30) days of the earlier of the discovery of untrue stock or the first harvest of fruit or nuts from the stock purchased by Customer.

GROWTH FAILURE. Any stock purchased and paid for within terms that fails to exhibit signs of growth on or before June 1 of the Ship Year will be replaced free of charge, provided the stock received proper care from Customer. Customer must notify ProTree Nursery in writing of the growth failure by June 1 of the Ship Year. If Customer gives such notice after June 1, but before December 1, of the Ship Year, stock will be replaced at one-half of the then current price.

CONDITIONS AND LIMITATIONS OF WARRANTY. ProTree Nursery's limited warranty is subject to availability of stock at the time of notification and total replacement shall not exceed two percent (2%) of the total quantity of the original order of the particular stock which failed to grow. This limited warranty shall extend only to first year planting of new orchards. It shall not apply to stock purchased for replants within an existing orchard or to any replacement stock furnished under this limited warranty.

Customer acknowledges that the Limited Warranty for Untrue Stock or Growth Failure provided hereunder is a result of negotiations between the parties, is material to the price at which ProTree Nursery has agreed to sell the stock to Customer, is conscionable, and will not fail of its essential purpose.

LIMITATIONS OF LIABILITY AND REMEDIES

THE MAXIMUM LIABILITY OF PROTREE NURSERY FOR ANY CLAIM OR PROCEEDING RELATED TO A SALE AGREEMENT AND/OR GOODS SOLD THEREUNDER, SHALL BE THE PURCHASE PRICE OF THE STOCK SOLD WHICH GIVES RISE TO THE CLAIM. IN NO EVENT WILL PROTREE NURSERY BE LIABLE FOR ANY INCIDENTAL, INDIRECT, AND/OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, PROSPECTIVE PROFITS, INSPECTION, TRANSPORTATION, AND OTHER SERVICES AND EXPENSES RELATED TO THE STOCK SOLD, COSTS OF CAPITAL, SUBSTITUTION OF STOCK, OR CLAIMS OF THIRD PARTIES.

CUSTOMER ACKNOWLEDGES THAT THIS LIMITATION OF LIABILITY AND EXCLUSIVE REMEDIES PROVISION IS A DIRECT RESULT OF NEGOTIATIONS BETWEEN THE PARTIES, IS MATERIAL TO THE PRICE AT WHICH PROTREE NURSERY HAS AGREED TO SELL THE STOCK TO CUSTOMER, IS CONSCIONABLE, AND WILL NOT FAIL OF ITS ESSENTIAL PURPOSE.

Liability of ProTree Nursery for non-delivery of stock shall be limited to replacing the stock within a reasonable time or adjusting the price respecting such stock to reflect the actual quantity delivered. Notwithstanding any other provision of this agreement, ProTree Nursery shall not be liable for failure or delay in releasing stock due to any cause beyond its control, including without limitation, acts of god, acts of war, acts of civil or military authority, fires, floods, sabotage, accidents, strikes or other labor disputes, shortages, third party delays, laws, ordinances, rules and regulations (whether valid or invalid), or inability for whatever reason to obtain (i) stock from growers, (ii) transportation, or (iii) other necessary services.

OTHER TERMS

SEVERABILITY. In the event that any portion of this agreement is deemed to be invalid or found to have been changed, waived, or modified the parties expressly agree that such shall not affect in any way the remaining portions of this agreement.

NO WAIVER OF RIGHTS AND REMEDIES. In the event that Customer breaches its obligations to accept delivery and pay for stock pursuant to the terms of sale, ProTree Nursery shall have all rights and remedies at law or in equity against Customer. The failure of ProTree Nursery to insist in any one or more instances upon performance of any terms shall not be construed as a waiver of future performance of any such term, covenant or condition, and Customer's obligation to ProTree Nursery with respect thereto shall continue in full force and effect.

TIME OF ESSENCE. Time is of the essence of this agreement.

JURISDICTION AND VENUE. This agreement is governed by the internal laws of the State of California, including the Uniform Commercial Code but not including its choice of law rules or the United Nations Convention on International Sale of Goods, and Customer submits to the jurisdiction of and agrees that venue will lie in courts having jurisdiction in Contra Costa County, California.