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ISO 9001:2015 Certified

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**Hyperform, Inc., dba SeaDek®, SwimDek® and EndeavourDek™  
Terms and Conditions of Sale**

## **1. ORDERS**

These terms and conditions of sale (the "Terms and Conditions") for Hyperform, Inc. ("Hyperform") apply to and form an integral part of all Orders for Hyperform goods and/or services, including but not limited to Hyperform's SeaDek®, SwimDek®, and EndeavourDek™\*products, accepted by Hyperform from the person, firm, company, or organization identified on the order ("Buyer"). All Buyer orders are subject to acceptance by Hyperform, and upon acceptance, shall be deemed "Orders" hereunder. No Buyer order shall be deemed accepted by Hyperform unless and until acknowledged in writing by Hyperform, whether by email or otherwise. An Order together with these Terms and Conditions constitutes the entire agreement ("Agreement") between Hyperform and Buyer relating to its subject matter and supersedes all prior agreements between the parties with respect to such subject matter, unless Buyer and Hyperform enter into a separate written agreement relating to such subject matter that is signed by an authorized representative of Buyer and Hyperform. There are no other oral or implied agreements, warranties or understandings between Hyperform and Buyer, and no amendments to this Agreement shall be effective unless in writing signed by Hyperform.

Any terms and conditions set forth on any document or documents issued by Buyer that are different or additional to these Terms and Conditions are hereby explicitly rejected by Hyperform, and any such terms shall be inapplicable to any sale made by Hyperform to Buyer and shall not be binding in any way on Hyperform.

## **2. PRICING**

All pricing will be as set out in the Agreement. Prices are in U.S. Dollars, unless agreed otherwise in writing between Buyer and Hyperform prior to acceptance of the order by Hyperform, and do not include any taxes, duties or similar levies, now or hereafter enacted, applicable to the Products or any other expenses. Hyperform will add taxes, duties and similar levies to the sales price where Hyperform is required by law to pay or collect them and these will be paid by Buyer together with the price.

## **3. PAYMENT**

**(a)** Payment is required in advance of shipping unless otherwise agreed by Hyperform in writing prior to acknowledgement. All payments shall be made to the designated Hyperform address or bank account, in U.S. Dollars.

**(b)** Any deliveries of Products that Hyperform agrees to perform on credit terms ("Credit Orders") shall at all times be subject to credit approval of Buyer by Hyperform. If, in Hyperform's sole judgment, Buyer's financial condition at any time does not justify production or delivery of Products on payment terms, Hyperform may require full or partial payment in advance or other payment terms as a condition to delivery, and Hyperform may suspend, delay or cancel any Order, credit, delivery or any other performance by Hyperform. No discount is allowed for early payment unless agreed to in writing by Hyperform. In addition to any other rights and remedies Hyperform may have under applicable law, interest may, in Hyperform's sole discretion, accrue on all late payments at the rate of eighteen percent

(18%) per annum or the applicable statutory rate, whichever is higher and to the extent permitted by applicable law, from the due date until payment in full.

**(c)** In the event of any failure by Buyer to timely pay any amounts due, or any other default by Buyer, Hyperform shall have the right to refuse performance and/or delivery of any Products or services until payments are brought current. Hyperform may suspend, delay or cancel any Order, credit, delivery or any other performance by Hyperform. Such right shall be in addition to, and not in lieu of, any other rights and remedies available under the Agreement or at law.

#### **4. DELIVERY, TITLE, AND RISK OF LOSS**

**(a)** Products shall be delivered to Buyer at Buyer's designated location Ex-Works (INCOTERMS current version of the date of order acknowledgment by Hyperform) Hyperform's place of shipment, as designated by Hyperform, unless otherwise agreed in writing. Hyperform agrees to use commercially reasonable efforts to meet delivery dates requested by Buyer or acknowledged by Hyperform, however, such dates are approximate only, and Hyperform shall not be liable for, nor shall Hyperform be in breach of its obligations to Buyer, for any failure to deliver by any such delivery date. Buyer may request expedited delivery ("Expedited Order") for an additional fee. The additional fee may be up to two (2) percent of the purchase order total.

**(b)** Title in the Products shall pass to Buyer only upon delivery and Hyperform's receipt of full and complete payment of the purchase price and any applicable taxes, fees, shipping, and other charges. Until such time, Buyer shall not assimilate, transfer or pledge any of the Products, or grant any right or title in the Products to any third party. Buyer shall ensure that the Products remain identifiable as Products obtained from Hyperform. Until such time as payment is complete, Buyer shall grant Hyperform (or its representative) free access to the location where Buyer has stored the Products. In the event of a partial payment by Buyer against a Hyperform invoice for a plurality of products, Hyperform shall retain a security interest in the totality of products delivered to Buyer.

#### **5. CANCELLATION AND MODIFICATION**

Buyer may cancel any non-expedited Order without penalty at any time within three (3) business days after acknowledgement by Hyperform. Expedited Orders may not be cancelled without penalty (see below), unless agreed by Hyperform in writing. To request any modification, Buyer must cancel the original Order and submit a new order for acceptance by Hyperform. A modification includes any change to a Purchase Order that: 1) changes a previously agreed delivery date; 2) changes quantity of items ordered; or 3) requires separate shipping for ordered items.

The penalty for cancellation of any non-custom order outside of the permitted timeframe may be subject to a cancellation fee of up to two (2) percent of the purchase order total. Cancellation of any custom order shall result in a cancellation fee of twenty-five (25) percent of the purchase order total.

##### **5.1 HYPERFIT CANCELLATION AND MODIFICATION**

Custom Installation Project order placed with HyperFit requires a \$250.00 non-refundable deposit. Payment in full is rendered once the drawing is approved. Once production starts, material changes will result in a 25% change fee each time a change is requested. Cancelling a Custom Installation order will result in a \$250.00 Cancellation Fee. The \$250.00 Deposit will be used to cover \$250.00 Cancellation Fee.

## **6. INSPECTION AND ACCEPTANCE**

All Products will be deemed accepted by Buyer unless Buyer notifies Hyperform in writing of any defect within thirty (30) days of delivery.

## **7. FORCE MAJEURE**

Hyperform shall not be liable for any failure or delay in performance if:

(i) such failure or delay results from interruptions in the Product manufacturing process; or

(ii) such failure or delay is caused by Force Majeure as defined below and/or by (case) law.

In case of such a failure as set forth above, the performance of the relevant part(s) of the Agreement will be suspended for the period such failure continues, without Hyperform being responsible or liable to Buyer for any damage resulting therefrom.

The expression "Force Majeure" shall mean and include any circumstances or occurrences beyond Hyperform's reasonable control - whether or not foreseeable at the time of the Agreement - as a result of which Hyperform cannot reasonably be required to execute its obligations, including force majeure and/or default by one of Hyperform's suppliers. As non-limiting examples, "Force Majeure" shall include within its meaning floods, tornados, hurricanes and tropical storms, acts of terror, acts of war, interruptions in power or transportation services, and interruptions in Hyperform's supply chain. In the event that the Force Majeure extends for a period of three (3) consecutive months (or in the event that the delay is reasonably expected by Hyperform to extend for a period of three (3) consecutive months), Hyperform shall be entitled to cancel all or any part of the Agreement without any liability to Buyer.

## **8. LIMITED WARRANTY AND DISCLAIMER**

Hyperform provides the Products subject to the applicable Hyperform Limited Warranty for the Product available at [www.seadek.com](http://www.seadek.com), [www.swimdek.com](http://www.swimdek.com), and [www.endeavourdek.com](http://www.endeavourdek.com). EXCEPT FOR THE WARRANTIES EXPRESSLY SET FORTH THEREIN, HYPERFORM AND EACH OF ITS SUPPLIERS EXPRESSLY DISCLAIMS ALL OTHER WARRANTIES AND CONDITIONS OF ANY KIND, WHETHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, THE WARRANTIES OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, QUIET ENJOYMENT, AND NONINFRINGEMENT. HYPERFORM AND ITS SUPPLIERS MAKE NO WARRANTY THAT THE PRODUCTS WILL MEET BUYER'S REQUIREMENTS. HYPERFORM SHALL NOT BE LIABLE FOR, AND BUYER ASSUMES ALL RISK OF, ANY ADVICE OR FAILURE TO PROVIDE ADVICE BY HYPERFORM TO BUYER REGARDING THE PRODUCTS.

## **9. LIMITATION OF LIABILITY**

(a) HYPERFORM SHALL NOT BE LIABLE FOR ANY LOST PROFITS, LOST SAVINGS, LOSS OF REPUTATION, LOSS OF GOODWILL, INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL

DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE SALE OF ANY PRODUCTS OR SERVICES BY HYPERFORM OR THE USE THEREOF WHETHER OR NOT SUCH DAMAGES ARE BASED ON TORT, WARRANTY, CONTRACT OR ANY OTHER LEGAL THEORY – EVEN IF HYPERFORM HAS BEEN ADVISED, OR IS AWARE, OF THE POSSIBILITY OF SUCH DAMAGES AND EVEN IF BUYER'S REMEDIES FAIL OF THEIR ESSENTIAL PURPOSE. HYPERFORM'S AGGREGATE AND CUMULATIVE LIABILITY TOWARDS BUYER SHALL NOT EXCEED THE PRICE PAID BY BUYER FOR THE PRODUCTS INVOLVED IN THE LOSS.

(b) Any lawsuit by Buyer for damages must be brought by Buyer within one (1) year of the date the claim was or reasonably should have been discovered. Any claims that have been brought or filed not in accordance with the preceding sentence are null and void.

(c) The limitations and exclusions set forth above in this Section 9 shall apply only to the extent permitted by applicable mandatory law.

## **10. INDEMNIFICATION**

(a) BUYER AGREES TO RELEASE, PROTECT, INDEMNIFY, DEFEND AND HOLD HARMLESS HYPERFORM AND HYPERFORM'S SUPPLIERS AND THEIR RESPECTIVE DIRECTORS, OFFICERS, AGENTS, EMPLOYEES, INSURERS, ASSIGNS, SUBSIDIARIES AND AFFILIATED (INCLUDING PARENT) COMPANIES, AND THEIR DIRECTORS, OFFICERS, AGENTS AND EMPLOYEES (COLLECTIVELY, THE "INDEMNIFIED PARTIES") FROM AND AGAINST ANY AND ALL LIABILITY, CLAIMS, ACTIONS, LOSSES, DAMAGES, DEMANDS, SUITS, (INCLUDING DAMAGE TO PROPERTY AND PERSONAL INJURY) AND EXPENSES (INCLUDING LOSSES FROM SETTLEMENT AND REASONABLE COURTS COSTS AND ATTORNEY'S FEES) ARISING OUT OF OR RELATING IN ANY WAY OR ALLEGED TO BE CAUSED BY ANY OF THE FOLLOWING: (I) BUYER'S USE OR MISUSE OF THE PRODUCTS; (II) INSTALLATION, MAINTENANCE AND/OR REMOVAL OF PRODUCTS; (III) BUYER'S BREACH OF THESE TERMS AND CONDITIONS; (IV) ANY CLAIMS OR ACTIONS FOR INFRINGEMENT OF ANY INTELLECTUAL PROPERTY RIGHTS; (V) BUYER'S NEGLIGENCE OR WILLFUL MISCONDUCT; (VI) BUYER'S VIOLATION OR ALLEGED VIOLATION OF ANY FEDERAL, STATE, COUNTY OR LOCAL LAWS OR REGULATION, INCLUDING WITHOUT LIMITATION, THE LAWS AND REGULATIONS GOVERNING PRODUCT SAFETY, LABELING, PACKAGING AND LABOR PRACTICES.

(b) BUYER HEREBY WAIVES AND RELEASES HYPERFORM FROM ALL RIGHTS OF CONTRIBUTION OR INDEMNITY TO WHICH IT MAY OTHERWISE BE ENTITLED.

## **11. CONFIDENTIALITY**

Buyer acknowledges that all technical, commercial, customer, business planning, supply chain and financial data disclosed to Buyer by Hyperform is the confidential information of Hyperform ("Hyperform Confidential Information") and shall consist of information that is either marked "Confidential", "Proprietary" or equivalent, or is the kind of information which, by its nature, would be understood to be confidential. Buyer shall not disclose any Hyperform Confidential Information to any third party and shall not use any such confidential information for any purpose other than as agreed by the parties and in conformance with the purchase transaction contemplated herein. "Confidential Information" shall not include information that is publicly known prior to disclosure to Buyer by Hyperform; becomes publicly available through no breach of this agreement by Buyer, or can be demonstrated by credible documentary evidence to have been in the possession of Buyer prior to

disclosure by Hyperform. If the parties have executed a non-disclosure agreement or other confidentiality agreement containing more restrictive terms, the terms of such agreement shall supersede the confidentiality terms in this Section.

## **12. EXPORT/IMPORT CONTROLS**

Buyer understands that certain transactions of Hyperform may be subject to export control laws and regulations ("Export Regulations"), which prohibit export or diversion of certain products and technology to certain countries. Any and all obligations of Hyperform to export, re-export or transfer Products as well as any technical assistance, training, investments, financial assistance, financing and brokering will be subject in all respects to such Export Regulations that will from time to time govern the license and delivery of Products and technology abroad by persons subject to the jurisdiction of the relevant authorities responsible for such Export Regulations. If the delivery of products, services and/or documentation by Hyperform is subject to the granting of an export or import license by certain governmental authorities or otherwise restricted or prohibited due to export/import control regulations, Hyperform may suspend its obligations and the Buyer's/end-user's rights until such license is granted or for the duration of such restrictions or prohibitions, without any penalty to Hyperform. Furthermore, Hyperform may terminate the relevant Order in all cases without incurring any liability towards the Buyer or end-user.

Buyer warrants and agrees that it will comply in all respects with the export, re-export and transfer restrictions set forth in such Export Regulations or in export licenses (if any) for every Product supplied to Buyer. Buyer accepts the responsibility to impose all export control restrictions on any third party if the items are transferred or re-exported to third parties. Buyer shall take all actions that may be reasonably necessary to ensure that no customer/purchaser or end-user contravenes such Export Regulations. Buyer shall and hereby does indemnify Hyperform from and against any and all direct, indirect and punitive damages, loss, costs (including attorney's fees and costs) and other liability arising from claims resulting from Buyer's or its customer's breach or non-compliance with this article.

Buyer acknowledges that these obligations shall survive the termination of any agreement of other arrangement under which the products, software or technology were provided to Buyer. In addition, in the event of any conflict between these terms and any other Agreement entered into between Buyer and Hyperform, Buyer understands that the terms of this Agreement shall control and be binding upon Buyer.

## **13. ASSIGNMENT AND SETOFF**

Buyer shall not assign any rights or obligations under this Agreement without the prior written consent of Hyperform. Buyer shall have no right to withhold or reduce any payments or to offset existing and future claims against any payments due for Products sold under this Agreement or under any other agreement that Buyer may have with Hyperform or any of its affiliates may have and agrees to pay the amounts hereunder regardless of any claimed offset which may be asserted by Buyer or on its behalf.

## **14. DISPUTE RESOLUTION**

This Agreement shall be governed by and construed under the laws of the State of Florida, United States, excluding any choice of law rule thereof that would direct the application of the laws of another jurisdiction. Any action based upon or arising out of this Agreement shall lie exclusively in the courts

serving Brevard County, Florida, U.S.A., and the parties each hereby irrevocably submit to the exclusive personal jurisdiction of such courts. In the event a dispute arises between the parties, they shall first confer together in an attempt to resolve such dispute prior to the filing of any lawsuit. Such conference shall include a discussion as to whether mediation or arbitration would be likely to resolve the dispute, and if all parties hereto agree this to be the case, mediation or arbitration before a mutually agreed mediator or arbitrator shall be attempted prior to the filing of any lawsuit. Any such mediation or arbitration shall be conducted in Brevard County, Florida.

#### **15. ATTORNEY FEES**

In the event of a legal action or other proceeding arising under this Agreement or a dispute regarding any alleged breach, default, claim, or misrepresentation arising out of this Agreement, whether or not a lawsuit or other proceeding is filed, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs, whether incurred before suit, during suit, or at the appellate level. The prevailing party shall also be entitled to recover any attorneys' fees and costs incurred in litigating the entitlement to attorneys' fees and costs, as well as in determining or quantifying the amount of attorneys' fees and costs due to it.

#### **16. ACCEPTANCE**

Buyer unconditionally accepts these Terms and Conditions by placing an order for the Product with Hyperform. If Buyer does not fully agree with these Terms and Conditions, they shall not place an order with Hyperform unless and until alternate terms and conditions are agreed between Hyperform and Buyer, in writing. In such situations, these Terms and Conditions shall remain in full force and effect unless they are in conflict with the alternative terms and conditions.

#### **17. SEVERABILITY**

If any provision of this Agreement is declared invalid, illegal or unenforceable by a court or regulatory agency of competent jurisdiction, the validity, legality and enforceability of the remaining provisions will not in any way be affected or impaired thereby. In the event that any such provision is declared invalid, illegal or unenforceable due to its scope, breadth or duration, then it will be modified to the scope, breadth or duration permitted by law and will continue to be fully enforceable as so modified.

#### **18. WAIVER**

The waiver or failure of either party to enforce any provision of this Agreement or to exercise any right or privilege hereunder, will not be construed as a waiver of any subsequent breach or default of a similar nature, or as a waiver of any provisions, rights or privileges hereunder.

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