



Minnesota Department of Administration
Office of State Procurement
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Phone: 651.201.2420

Nestlé HealthCare Nutrition, Inc.
MMCAP Infuse Agreement Number: MMS2100543
Prepared on June 15, 2021

Are attached and incorporated into the Agreement

Definitions

1. **Administrative Fee:** Means three percent (3%) of Contract Pricing for Products or as listed on **Attachment A**, which will supersede Prefix A.
2. **Agreement:** Means the resulting agreement that is reached between MMCAP Infuse and the Vendor.
3. **Authorized Wholesaler(s):** AmerisourceBergen Drug Corporation, Cardinal Health, and Morris & Dickson Co., LLC.
4. **Class of Trade:** All Members are eligible for contract pricing.
5. **Contract Pricing:** Means the price that the Vendor has agreed to provide the Products to MMCAP Infuse and its Membership as set forth on **Attachment A** and any subsequent amendment to this Agreement.
 - A. **Fixed Pricing:** Means Vendor cannot increase the Contract Pricing for the Products identified on **Attachment A** or any subsequent amendment to this Agreement during the Agreement Term. Vendor may increase Contract Pricing afterward per Paragraphs 1.2 and 1.4.
6. **Contract(ed) Items:**
 - A. **Products:** Means all products offered by the Vendor in this Agreement, which is identified in **Attachment A.**
7. **Days:** (Not required to be capitalized) Unless otherwise specified in this Agreement, all references to days will be calendar days.
8. **Government Unit:** Any entity as defined by Minnesota Statute 471.59.
9. **Member:** Means an approved MMCAP Infuse State or other Government Unit that has executed a membership application and Member agreement with MMCAP Infuse.
10. **Membership:** Means the joint power cooperative comprised of the MMCAP Infuse authorized States, Members, and other Government Units.
11. **Onboarding Date:** Means the first day of the month following receipt of the Onboarding Forms, provided it is received by Vendor by the 20th of the month.
12. **Onboarding Forms:** Means the Letter of Participation (“LOP”) required to be signed by new Members to access the Agreement.
13. **Order Form:** Means the document or electronic platform Member utilizes to obtain Contracted Items
14. **Products:** Means all products offered by the Vendor in this Agreement, which are identified in **Attachment A.**
15. **State:** Means one of the recognized fifty (50) states of the United States of America.
16. **Vendor Authorized Wholesaler:** Those wholesalers that Vendor has a contractual relationship with to sell Vendor Products.

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AGREEMENT FOR MMCAP INFUSE NO. MMS2100543

THIS Agreement is entered into as of the Effective Date by and between the State of Minnesota acting through its Commissioner of Administration (“**Minnesota**”) on behalf of MMCAP Infuse (“**MMCAP Infuse**”) and Nestlé HealthCare Nutrition, Inc., a corporation with an address of 11095 Viking Drive, Suite 420, Eden Prairie, MN 55344 (“**Vendor**”).

Agreement Term:

1. **Effective Date:** July 1, 2021, or the date MMCAP Infuse obtains all required signatures as required under Minnesota Statute, whichever is later.
2. **Expiration Date:** June 30, 2025.
3. The Agreement Term may be extended upon mutual agreement of MMCAP Infuse and Vendor.

AGREEMENT COMPONENTS

The following components are the Agreement; all referenced Prefix and Attachments, are attached and incorporated into this Agreement.

1. **Prefix A:** Definitions
2. **Attachment A:** Contract Pricing and Products
 - **Attachment A-1:** Products and Pricing – Non-Committed
 - **Attachment A-2:** Products and Pricing - \$50,000 Annual Commitment
 - **Attachment A-3:** Products and Pricing - \$150,000 Annual Commitment
 - **Attachment A-4:** Products and Pricing - \$800,000 Annual Commitment
3. **Attachment B:** Further Discounts (if applicable)
4. **Attachment C:** Letter of Participation
5. **Attachment D:** Required Reporting for Direct Sales (if applicable)
6. **Attachment E:** MN Statutory Language
7. **Attachment F:** Vendor Return of Goods Policy
8. **Attachment G:** Vendor General Ordering Instructions.

ARTICLE I
PRICING AND CHANGES

- 1.1 **Notices.** All notices under this Article must be sent to: MMCAP_Infuse.Contracts@state.mn.us.
- 1.2 **Fixed Pricing:** Pricing for Products are listed on **Attachment A** and will remain firm for the first four (4) years from the Effective Date. Thereafter, prices are subject to increase by Vendor in an amount up to the unadjusted percentage change for the previous twelve (12) month period for the quarter ending prior to the anniversary date of this Agreement, as published in the Consumer Price index for all Urban Consumers (“**CPIU**”), U.S. Department of Labor, Bureau of Labor Statistics.
- 1.3 **Pricing Structure:** Except as provided for in this Agreement, no fee, percentage, or other cost may be added to the products purchased under this Agreement unless the fee, percentage, or cost is defined and approved in writing by MMCAP Infuse.
- 1.4 **Non-Fixed Pricing.** After the completion of the fourth (4th) year of the Agreement, the Vendor may increase Contract Pricing per Paragraph 1.2 with a thirty (30) days’ notice to MMCAP Infuse before the requested increases may take effect. If Vendor fails to send price notification(s), Vendor agrees to honor all chargebacks at the lower Contract Pricing until such time the Authorized Wholesalers receive notice of and both parties mutually agree to the price change.
- 1.5 **Notice to MMCAP Infuse:** Vendor must provide justification for all price increases. In the event Vendor does not notify MMCAP Infuse of a price increase, Vendor must honor wholesalers’ chargebacks for the most recent previous Contract price until such time as MMCAP Infuse receives notice of and approves the price increase.
- 1.6 **Notice to Authorized Wholesalers.** The Vendor must notify any and all Authorized Wholesalers of price changes and product additions and discontinuations.
- 1.7 **Competitive Pricing.** If MMCAP Infuse is made aware and determines during the Agreement Term Vendor is offering better Contract Pricing and/or Products to another group purchasing organization or Government Unit with similar purchasing volumes, commitments, compliance and classes of trade, Vendor will work with MMCAP Infuse to amend this Agreement to provide MMCAP Infuse the same Contract Pricing and/or Products. If the Vendor does not match the lower price, MMCAP reserves the right to dual award or re-award the product.
- 1.8 **Member Fees.** In the event a Member requires a fee, assessment, and/or additional costs in addition to the Contract Pricing; those fee, assessment, and/or additional costs must be added on top of the Contract Pricing and/or an adjustment to the discounts must be made so Vendor the vendor does not absorb the fee. Vendor must not pay a

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Member levied fee without first collecting the fee through increased Contract Pricing for the applicable Member. The fees will be set aside and paid to the Member as detailed in a form provided and approved by MMCAP Infuse.

- 1.9 **Value-Added Programs.** Members must be offered any programs normally offered to the Vendor's general customer base (e.g., continuing education courses, marketing information, etc.) at the same or lower cost as that offered to the general customer base.
- 1.10 **Product Dating.** All Products supplied to Authorized Wholesalers, Vendor Authorized Wholesalers or directly to Member must have an expiration date of at least a six (6) month shelf life from the delivery date of the Product by the Vendor. For direct purchases, Products that have an expiration dates less than six (6) months, (A) Member must be notified and provided written consent before delivery; and (B) Products must be usable for at least fifteen (15) days on the date received by Member.
- 1.11 **Changes.** Any changes to this Agreement, including but not limited to Product additions/deletions, price changes, NDC changes, changes to terms and conditions, etc., must be made in writing as an amendment and must be fully executed by the effective date of the amendment. With the exception of changes to Contract Pricing which are subject to Paragraph 1.6, Vendor must send confirmation of amendment changes, including but not limited to additions/deletions, NDC changes, Product removals, etc., to the Authorized Wholesalers within ten (10) business days of the time that documentation of the change is received by the Vendor from MMCAP Infuse. Vendor-generated Product offers, and notifications may be used as amendments to **Attachment A** by submitting to MMCAP Infuse a letter on Vendor's letterhead with the following elements (**Offer Letter**):
- A. Offer Date
 - B. MMCAP Infuse Contract Number
 - C. Action (e.g., addition, deletion, price change, NDC conversion)
 - D. Any of the applicable: NDC Number, UPC Number, Item Number/SKU
 - E. Product Description
 - F. Packaging
 - G. Most recent previous Contract Price
 - H. New Contract Price
 - I. Pricing Type
 - J. Effective Date
 - K. Signature of an individual authorized to bind Vendor's change to contract.

Upon written acceptance by MMCAP Infuse, Offer Letter will automatically amend **Attachment A** of this Agreement. If MMCAP Infuse indicates that aspects of the Offer Letter conflict with Agreement at that time, Paragraph 11.5 will apply to any subsequent conflicts and/or issues that may arise subsequently. If MMCAP Infuse executes the Offer Letter and provides annotations, the Vendor has fifteen (15) days to object to MMCAP Infuse counter counters before they are deemed as accepted by Vendor. In the event the Vendor is unwilling or unable to provide offers in this format, MMCAP Infuse will draft all amendments. Vendor must countersign the amendments drafted by MMCAP Infuse to be incorporated into the Agreement. Amendments must be countersigned by the Vendor by the earlier of the following (A): fifteen (15) days of receipt of draft amendment; or (B) the Expiration Date.

ARTICLE II

SUPPLYING AND AVAILABILITY

- 2.1 **Authorized Wholesaler Requirements.** Vendor will notify the Authorized Wholesalers and Vendor Authorized Wholesalers of the initial Products and Contract Pricing and any subsequent changes.
- A. All sales of Products to Members must be either through the Vendor directly or through an Authorized Wholesaler or Vendor Authorized Wholesalers. If Members purchase Products through Vendor's Authorized Wholesalers, the Member may negotiate the final selling price with Vendor's Authorized Wholesaler. Direct sales to Members are further discussed in *Article III*.
 - B. Vendor must establish and maintain chargeback agreement(s) with the Authorized Wholesalers.
 - C. Vendor must notify MMCAP Infuse within forty-eight (48) hours of any issues (e.g., failure to negotiate terms, etc.) with Authorized Wholesalers that could affect the Contract Products' availability. Notices must be sent to: MMCAP_Infuse.Contracts@state.mn.us.
- 2.2 **Product Identification:**
- A. All prescription Products must have an 11-digit NDC code that is registered with First DataBank, Inc. All non-prescription Products that do not have an 11-digit NDC code registered with First DataBank, must have an NDC-like substitute code created as follows:
 - i. If NDC codes are not applicable, Vendor must use the product's UPC number to create an 11-digit number by adding a zero to the sixth position (e.g., 5-5 [99999-99999] becomes 5-4-2 [99999-0999-99]). If the Product does not have an NDC number or a UPC code, Vendor must use its product number with leading zeroes (e.g., product #90024 = 00000-0900-24).

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- B. Vendor is required to report Products to Authorized Wholesalers and Vendor Authorized Wholesalers using the same product identifier formats it provides MMCAP Infuse. The NDCs or NDC-like substitute codes must clearly identify the package size they are assigned to. For example, if a product has an NDC code for each individual container within a case and another NDC for the case, the Vendor must clearly provide that information to MMCAP Infuse and the Authorized Wholesalers.
- C. Vendor must provide MMCAP Infuse with any additional product identifiers that it provides to Authorized Wholesalers outside of NDC codes or NDC-like substitute codes, such as UPCs, GTINs, Item Numbers or SKUs.

2.3 **Product Outages.** It is the responsibility of the Vendor to maintain sufficient inventory levels for all Products to meet the foreseeable needs of the Members, whether it is direct sales to the Members or through Authorized Wholesalers or Vendor Authorized Wholesalers. Vendor will agree to achieve at least a 97% case fill rate. The Vendor agrees to utilize the following process in the event of a backorder situation due to a Vendor-created stock outage.

- A. **Immediate Notification:** Vendor or Vendor's ordering system will provide notice within twenty-four (24) hours to Members of any Products covered by this Agreement that the Vendor has placed on backorder. Vendor's backorder notification will include:
 - i. the Products placed on backorder status;
 - ii. the expected timeline of the backorder;
 - iii. the reason for the stock outage was caused; and
 - iv. how the Vendor intends to resolve the backorder situation.
- B. **Substitution:** If Members consents, Vendor may offer like-kind Products offered under this Agreement at the Product price indicated on **Attachment A**. If no acceptable substitution can be offered, the Member may purchase an equivalent Product from an alternative MMCAP Infuse vendor, or if unavailable through an alternative MMCAP Infuse vendor, Member may purchase an alternative equivalent Product on the open market, including retail, for the period in which the Vendor is unable to provide the Products. The Vendor will reimburse for any excess shipping costs over the Contract Pricing of this Agreement sustained by Member via a credit within thirty (30) days of receipt of the claim.

2.4 **Product Discontinuation.** With the exception of a recall, if the Vendor assigns, discontinues, or deletes a Product during the Agreement, Vendor must provide written notice to MMCAP Infuse, at least sixty (60) days prior. If the event Vendor removes a Product, the Vendor will honor Contract Pricing until the Authorized Wholesalers' or Vendor Authorized Wholesalers' inventories are depleted or a mutually agreed upon removal date. If inventory is depleted prior to the end of the sixty (60) day period, **Paragraph 2.3** will apply.

2.5 **Products Returned to the Vendor.** Vendor will accept returns in accordance with its then current returned goods policy, a current version which is attached as **Attachment F**.

2.6 **Product Recalls.** If any Product covered by this Agreement requires modification, is removed, or recalled by the Vendor, then Vendor will promptly notify MMCAP Infuse and the affected Members within the time period required by law. Vendor agrees to comply with any process mandated by the FDA, or any other regulatory body if applicable, and will address the recall with each Member, if required by law. Members will not incur costs for Product returns related to recalls and Vendor will issue credit for recalled Product.

2.7 **Backorders.** Vendor must provide written notice of all Product backorders expected to last longer than thirty (30) calendar days to MMCAP Infuse as soon as possible. Notices must include the reason(s) for and the expected duration of the issue. Notices must be sent to: MMCAP_Infuse.Contracts@state.mn.us.

ARTICLE III

PAYMENT, DIRECT ORDERS, AND DELIVERY

3.1 **Conditions of Payment.** All Contract Items provided by the Vendor under this Agreement must be performed to the satisfaction of MMCAP Infuse and the Member, and in accordance with all applicable federal, state, and local laws, ordinances, rules, and regulations. The Vendor will not receive payment for work found by MMCAP Infuse to be unsatisfactory or performed in violation of federal, state, or local law.

3.2 **Payment Method.** Vendor will accept Electronic Funds Transfer (EFT), credit card, or P-Card as a payment method and Member will initiate this process with its financial institution. Each Party is responsible for any fees it may incur by their banks or third parties or setting up their own systems to accommodate any electronic payment program.

3.3 **Federal Funds.** Payments under this Agreement may be made from federal funds. The Vendor is responsible for compliance with all federal requirements imposed on these funds and accepts full financial responsibility for any requirements imposed by the Vendor's failure to comply with federal requirements.

3.4 **Orders.** As a condition for purchasing under this Agreement, purchasers must be Members in good standing with MMCAP Infuse. Vendor may use their own Order Forms. To the extent that the terms of any Order Form(s) conflict with the terms of this Agreement, the terms of this Agreement supersede. Each Member will be responsible for payment for Contracted Items to the Vendor and MMCAP Infuse will not be liable for any unpaid invoice of any Member. Vendor agrees to invoice the Members as established in this Agreement.

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- A. The use of obtaining a Contracted Item from the Order Form constitutes a binding contract. All Products furnished will be subject to inspection and acceptance by the ordering entity after delivery. No substitutions or cancellations are permitted without written approval of the Member. Back orders, failure to meet delivery requirements, or failures to meet specifications in the Order Form and/or the Agreement authorizes the ordering entity to cancel the order, or any portion of it, purchase elsewhere, and charge the full increase in cost and administrative handling to the Vendor.
- B. Members may place orders direct from Vendor in writing, electronically, or by phone. Vendor's General Ordering Instructions are indicated on **Attachment G**. All direct orders are subject to acceptance by Vendor. If no delivery date is requested, the date will be determined by Vendor. Vendor will choose the method of shipment and pay freight for standard shipping.

3.5 Termination of Individual Orders. Members may terminate, immediately or as identified by Member, individual Order Forms, in whole or in part, upon written notice to Vendor upon the occurrence of any of the following events:

- A. The Member fails to receive funding, or appropriations, limitations or other expenditure authority at levels sufficient to pay for Contracted Items to be purchased under the Order Form;
- B. Federal or state laws, regulations, or guidelines are modified or interpreted in such a way that either the purchase of the Contract Items under the Order Form are prohibited, or the Member is prohibited from paying for the Contracted Items from the planned funding source; or
- C. Vendor commits any material breach of this Agreement or Order Form.

Upon receipt of written notice of termination, Vendor will stop performance under the Order Form as directed by the Member. If a standing Order Form is terminated, the Member must pay Vendor in accordance with the terms of this Agreement for goods delivered and accepted by the Member.

3.6 Jurisdiction and Venue of Orders. Upon completion of the Dispute Resolution process outlined in this Agreement, and solely with the prior written consent of MMCAP Infuse and the State of Minnesota Attorney General's Office, the Member may bring a claim, action, suit, or proceeding against Vendor. The Member's request to MMCAP Infuse to bring the claim, action, suit, or proceeding must identify the desired jurisdiction, venue, and governing law. As it applies to purchases made by a Member, nothing in the Agreement will be construed to deprive the Member of its sovereign immunity, or of any legal requirements, prohibitions, protections, exclusions, or limitations of liability applying to this Agreement or afforded by the Member's law.

3.7 Shipment for Products. Vendor must distribute and deliver the Products covered under this Agreement to all Members in the United States, including the states of Alaska and Hawaii and excluding Puerto Rico. If the Member account is in good standing, the Vendor will at no time, refuse to deliver to any Member without the prior written approval by the Member and MMCAP Infuse. Delivery for Products under this Agreement shall be FOB Destination, freight prepaid is allowed, unless otherwise agreed to by Vendor and Member. Vendor will not add any fuel surcharges to the purchase under this Agreement. Notwithstanding the foregoing, emergency orders, rush orders, orders for products not regularly stocked by Vendor's local servicing distribution center, products dropped shipped from Vendor's contracted supplier, and orders not regularly scheduled are subject to an added shipping and handling charge determined by Vendor and disclosed to Member before a purchase is made.

- A. Delivery Schedule: Upon request from Member, Vendor will work with Member to establish a routine delivery schedule. Delivery for stock items will occur within seven to ten (7-10) business days, from the date the Product is ordered. It is understood that deliveries to Alaska or Hawaii may take longer. All expedited deliveries will be made next day, or on the next scheduled delivery day (excluding Alaska and Hawaii), unless communicated otherwise.
- B. Hazardous Materials: Vendor will only ship hazardous materials as allowed by the appropriate government regulations.
- C. Damaged Products: All damaged Products will be reported to Vendor's customer service department and are subject to Vendor's ROG policy indicated on **Attachment F**.
- D. Lost Products: All lost Products will be reported to Vendor's customer service department and are subject to Vendor's ROG policy indicated **Attachment F**.
- E. Minimum Order Requirements: During the Agreement, there will be no minimum order requirements.
- F. Special Conditions for Products: If applicable to the Products offered under this Agreement, Vendor will maintain appropriate temperatures and environmental conditions in accordance with manufacturer requirements for delivery of the Products to the Members. All refrigerated Products will be shipped in returnable coolers or disposable coolers with appropriate packaging to maintain the required temperature range. Products requiring refrigeration will be clearly marked as such. Temperature monitors will be used if they are required by the manufacturer. If Member refuses Products that have been inadequately packaged, the Member will notify Vendor's customer service department to log the complaint. Any costs associated with the return of Product due to improper packaging or transport, will be at the expense of the Vendor.

3.8 Invoicing. Vendor will submit an invoice with each order.

- A. Invoice Fields: At a minimum, Vendor's invoice will contain the following fields:
 - i. Member name and Vendor-assigned account number for the Member;

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- ii. Invoice line number and Member's order number (Member must provide an order number at the time of order for this to appear on Vendor's invoice);
 - iii. Bill to and ship to address;
 - iv. Invoice date;
 - v. Vendor's SKU item number, Contracted Item name/description and packaging as associated with NDC/UNSPSC number (if applicable to this Agreement);
 - vi. Unit price, quantity ordered, quantity shipped, extension (unit price multiplied by the quantity shipped), and total invoice price; and
 - B. **Invoice Rounding:** Vendor agrees to round down if the third digit after the decimal is four (4) or less. Vendor agrees that any rounding will occur at the Member invoice unit price.
 - C. **Invoice Disputes:** Member will notify Vendor of any known dispute with an invoice within fifteen (15) days from receipt of the invoice. Claims not made within (90) days of such dispute shall be null and void. If all, or a portion of the disputed invoice is found to be in error, Vendor shall issue a credit and/or adjust the original invoice to the Member appropriately, and provide a corrected invoice. Where the above is prohibited by a Member state's applicable law(s), the Vendor shall comply with requirements of that state's law(s) related to disputed invoices. Vendor will make a good faith effort to resolve known disputes related to Agreement pricing within thirty (30) days of notice of the dispute. This clause will in no way be deemed a limitation on the parties, as it relates to the future auditing and/or correction of invoices. Member has no right of set off and may take no deductions, unless it is instructed to do so by Vendor through issuance of a credit memorandum.
 - i. In the event that applicable state law mandates set-off by a Member, such set-off rights shall be exercised only to the extent expressly set forth in the applicable statute.
- 3.9 **Payment Terms.** Invoices from Vendor are due and payable within thirty (30) days of the date of Vendor's invoice except that due date for payment is extended by five (5) days for payments made by financial electronic data interchange ("FEDI")
- 3.10 **Credits and Rebills.** Vendor will process credits and rebills as notifications are received from a Member. In the case of an invoice dispute, Vendor will promptly issue credits/rebills, after the Dispute Resolution process set forth in this Agreement.
- A. Vendor credits are valid until they are refunded or the account has used payment.
 - B. In the event of a facility closure, or other extreme event where the Member will not be making another purchase through Vendor, the Member may cash out its credit(s).
 - C. Vendor's credit memo will contain, but is not limited to the following information:
 - i. original order number and invoice number;
 - ii. itemized listing of the Contract Items affected;
 - iii. any new invoices associated with the credit; and
 - iv. Net credit amount available to the Member.
- 3.11 **Price Audits and Corrections.** In the event of a Contract Pricing error that is attributable to the Vendor, Vendor agrees to process credit/rebills for the past six (6) calendar months. When a Member or MMCAP Infuse discovers an error in pricing, they will notify Vendor.

ARTICLE IV

TERMINATION, CANCELLATION, AND REMEDIES

- 4.1 **Cancellation.** Either Party may cancel this Agreement any time, without cause, upon thirty (30) days' written notice to the other Party.
- 4.2 **Termination for Cause.** Either party may terminate this Agreement at any time on the basis the other party breached this Agreement. The moving party must provide written notice to the other party, which upon the receiving party has thirty (30) days to cure the defects. Upon thirty (30) days, the breaching party has not cured the defects, the moving party may terminate this Agreement after ten (10) subsequent days.
- 4.3 **Termination for Insufficient Funding.** MMCAP Infuse may immediately terminate this Agreement if it does not obtain funding from the Minnesota Legislature, or other funding source; or if funding cannot be continued at a level sufficient to allow for the payment of the Contracted Items covered here. Termination must be by written or electronic mail notice to the Vendor. MMCAP Infuse is not obligated to pay for any Contracted Items that are provided after notice and effective date of termination. However, the vendor will be entitled to payment, determined on a pro rata basis, for Contracted Items satisfactorily performed to the extent that funds are available. Minnesota will not be assessed any costs, fees, or other charges if the Agreement is terminated because of the decision of the Minnesota Legislature, or other funding source, not to appropriate funds. MMCAP Infuse must provide the Vendor notice of the lack of funding within a reasonable time of MMCAP Infuse receiving that notice.
 - A. For orders made by a Member, Vendor agrees to the applicable statutory terms of the applicable Member if the Member fails to receive funding, or appropriations, limitations or other expenditure authority at levels enough to pay for the Contracted Items. For Products already shipped, Member shall return Product to

Vendor per the terms of the Vendors Return of Goods Policy. Vendor shall be entitled to payment for any Products already shipped and accepted by Member.

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- 4.4 **Force Majeure.** Parties will not be considered in default in the performance of their obligations in the Agreement to the extent that performance of any such obligations is prevented or delayed by acts of God, war, riot or other catastrophes beyond the reasonable control of the party. Force majeure will not apply to the extent that the act or occurrence could have been reasonably foreseen and reasonable action could have been taken to prevent the delay or failure to perform. A party claiming excuse of performance under this provision must provide the other party prompt written notice of the failure to perform, take commercially reasonable efforts to mitigate the damages caused to all parties, and take all necessary steps to bring about performance as soon as practicable.
- 4.5 **Breach.** In the event of a breach of this Agreement, MMCAP Infuse and Members reserve the right to pursue any other remedy available by law. Vendors may be removed from the Vendors list; suspended; or debarred from receiving a contract for failure to comply with terms and conditions of the Agreement.
- 4.6 **Dispute Resolution.** Vendor and MMCAP Infuse will handle dispute resolution for unresolved issues using the following procedure.
- A. Notification. Parties shall promptly notify each other of any known dispute and work in good faith to resolve such dispute within thirty (30) days or jointly develop a short briefing document that describes the issue(s), relevant impact, and positions of both parties.
 - B. Escalation. If parties are unable to resolve the issue in a timely manner, as specified above, either MMCAP Infuse or Vendor may escalate the resolution of the issue to a higher level of management. When escalated a teleconference will be scheduled between MMCAP Infuse and the Vendor to review the dispute and develop a proposed resolution and plan of action.
 - C. Performance while Dispute is Pending. Notwithstanding the existence of a dispute, the Vendor must continue without delay to carry out all of their responsibilities under the Agreement that are not affected by the dispute. If the Vendor fails to continue without delay to perform its responsibilities under the Agreement, in the accomplishment of all undisputed work, any additional costs incurred by MMCAP Infuse and/or Members as a result of such failure to proceed shall be borne by the Vendor.
 - D. No Waiver. This clause shall in no way limit or waive either party's right to seek available legal or equitable remedies.
 - E. Rights. In the event the Parties cannot resolve the dispute, either Party may cancel this Agreement upon sixty (60) days' written notice to the other Party.

ARTICLE V MEMBERSHIP

- 5.1 **Onboard, Transition, and Implementation.** All Members will be required to sign and return to Vendor a Letter of Participation ("LOP"), set forth on **Attachment C**, to indicate their desired level of participation as well as designate whether they wish to purchase direct, through an MMCAP Authorized Wholesaler or through Vendor's Authorized Wholesaler. As new Members are added to MMCAP Infuse, Vendor will implement pricing as follows: the Member will become eligible for Contract Pricing effective on the 1st day of the month following acceptance and execution by an authorized representative of Nestlé of the LOP, provided it is received by the 20th of the month. Members who previously signed an LOP will not be required to sign such new document, unless the Member desires to change its purchasing commitment. Descriptions and terms of the pricing tiers offered under this Agreement are indicated on **Attachment C**. Vendor is responsible for making Authorized Wholesalers aware that the paperwork on **Attachment C** must be collected from Member prior to contract pricing being attached. Vendor must communicate back to MMCAP Infuse any inability or failure to agree on such a process with the Authorized Wholesaler.
- 5.2 **Membership Listing.** MMCAP Infuse will provide Vendor a complete listing of the Membership. MMCAP Infuse reserves the right to add and remove Members during the Agreement Term.
- A. New Members. The Vendor must allow new Members to access to the Agreement by the Onboarding Date. As new Members are added, MMCAP Infuse will provide Vendor with monthly e-mail notices announcing a new Membership list has been posted.
 - B. Removing Members. Vendor must provide MMCAP Infuse written notification at least thirty (30) days prior to removing any Member if Member is being removed at Vendor's request. If MMCAP Infuse does not receive notification that a Member has been removed from Contract Pricing, Vendor will honor Contract Pricing for the Member for thirty (30) days after MMCAP Infuse receives the written notice.
- 5.3 **Membership Eligibility.** Upon request, Vendor will send an electronic eligibility list identifying which Members are eligible for contract pricing to: MMCAP_Infuse.Contracts@state.mn.us.
- 5.4 **Member Attachment:** Vendor will ensure Members who have completed the LOP are attached to the Agreement for all Products purchases made by Member either direct from Vendor or through Authorized Wholesalers and

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Vendor Authorized Wholesalers. Upon request of MMCAP Infuse, Vendor must verify only the Membership has access to the Contract Pricing for Products. Failure to do so may result in immediate termination.

- 5.5 **Non-Solicitation.** During the term of this Agreement, Vendor will not solicit any Members or prospective Members to enter into or negotiate a separate contract or agreement for the same or substantially equivalent products and services offered in this Agreement without MMCAP Infuse's prior written consent. Vendor is not prohibited from responding to a request for proposals issued by a Member that may include Products and Services covered by this Agreement.
- 5.6 **DEA License/HIN.** Unless the Member purchases a controlled substance, the Vendor may not require that a Member have a Drug Enforcement Administration number assigned to it in order to be eligible for Contract Pricing. The Vendor may require a Health Industry Number from Member.
- 5.7 **Product Use.** All items acquired by Members under this Agreement are purchased for Member's own use in the provision of health services to its customers who consume or use the Products in the United States, excluding Puerto Rico ("Own Use") in traditional governmental functions and not for the purpose of competing against private enterprise. Own Use does not include resale via retail, downstream (e.g., resale to a downstream home care provider to assure continuity of care), or e-commerce channels, and Member shall not attempt to resell Products purchased hereunder via any of these channels. Without limiting the foregoing, prohibited resale includes, but it is not limited to, the resale of Products to any person (including but not limited to any employees or consultants of Members) who is not a patient of Member or to any other entity outside of the Own Use requirements defined herein.
- 5.8 **MPA.** In order to use this Agreement, some Members require jurisdiction-specific paperwork or contract language. Vendor may be required to review an MMCAP Infuse MPA, as an addendum to this Agreement to provide for laws specific to a state or local jurisdiction. If these circumstances exist, the Vendor will work with MMCAP Infuse and Member to prepare an MPA to set forth the additional or altered terms and conditions. An MPA must clearly apply only to the requesting location and will not affect the rights of the other Membership, nor will it modify, derogate, or otherwise diminish the rights and obligations set forth herein, except in regard to the applicable named Member. When the specific terms are agreeable to the Vendor and the Member, the MPA will be presented by MMCAP Infuse to each party for execution. No other mechanism of modifying or "attaching to" the Agreement is authorized. Vendor is not required to agree to any additional terms; however, by not agreeing to the MPA, Vendor may be precluded from doing business with that Member. No verbal or written instructions from Members, or any of their staff or officials, to change any provision of this Agreement will be accepted by Vendor without the prior written approval of MMCAP Infuse.

ARTICLE VI AGREEMENT MANAGEMENT

- 6.1 **Primary Account Representative.** Vendor will assign a primary account representative to MMCAP Infuse for this Agreement and must provide a minimum of seventy-two (72) hours advanced notice to MMCAP Infuse if that person is reassigned. In the event that the primary account representative is unresponsive or does not meet MMCAP Infuse's needs, the Vendor will assign another primary account representative upon MMCAP Infuse's request. The primary account representative will be responsible for:
- A. Proper maintenance and management of the Agreement, including timely execution of all amendments.
 - B. Timely response to all MMCAP Infuse inquiries
 - C. Performance of the business review as described in Paragraph 6.2.
 - D. Personnel Changes. Vendor will provide MMCAP Infuse with written advance notice of changes to the Primary Account Representative. In the event that an employee is removed pursuant to a written request from MMCAP Infuse, the Vendor will have ten (10) business days in which to fill the role with an acceptable employee.
- 6.2 **Business Reviews.** Vendor will perform at least one business review with MMCAP Infuse annually. The review will be at a time and location that is mutually agreeable to Vendor and MMCAP Infuse and at a minimum address: a review of sales to members, pricing and contract terms, administrative fees and reporting, supply issues, customer issues, and any other necessary information.

ARTICLE VII WARRANTS, COVENANTS, AND DUTIES OF VENDOR

- 7.1 **Covenant of Laws.** Vendor shall comply with all state and federal laws, as applicable to Vendor, MMCAP and each Member, in the performance of this Agreement.
- 7.2 **Required Licenses, Permits, and Registration.** Vendor and MMCAP Infuse shall have in place prior to the start of the Agreement, and must maintain for the life of the Agreement, all current licenses, permits and registrations required by state and federal agencies. Each Party must make such documentation available upon request by the other party.

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- 7.3 **FDA-Certified.** Vendor must comply with applicable FDA requirements for medical foods, including the Current Good Manufacturing Practice regulations (21 CFR part 110), Registration of Food Facilities regulations (21 CFR part 1 subpart H) and, if applicable, regulations specific to the product formulation, processing and labeling.
- 7.4 **cGMP** Vendor certifies that it is in compliance with the Food and Drug Administration's current "Good Manufacturing Practices" (cGMP) (as codified in 21 C.F.R. § 201-211) and the current United States Food, Drug, and Cosmetic Act. If the Vendor receives a 483 or similar type warning letter for any Product, it must be provided to MMCAP Infuse within the time period required by law.
- 7.5 **Debarment.** Vendor warrant and certifies that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from programs operated by the State of Minnesota, the United States federal government, or any Member; and has not been convicted of a criminal offense related to the subject of this Agreement. Vendor further warrants that it will provide immediate written notice to MMCAP Infuse if at any time it learns that this certification was erroneous when submitted or becomes erroneous by reason of changed circumstances.
- A. Certification regarding debarment, suspension, ineligibility, and voluntary exclusion: Federal money will be used or may potentially be used to pay for all or part of the work under the Agreement, therefore Vendor certifies that it is in compliance with federal requirements on debarment, suspension, ineligibility and voluntary exclusion specified in the solicitation document implementing Executive Order 12549.
- 7.6 **Indemnification.** Pursuant to the Minnesota Constitution Article XI Section 1, MMCAP Infuse cannot indemnify the Vendor. Except for causes due to MMCAP Infuse's or Members' sole negligence, Vendor will defend and hold harmless MMCAP Infuse, including MMCAP Infuse's, Members, agents, directors, employees, attorneys, and other representatives during and after this Agreement from and against all actual and potential third-party claims relating to loss, liability, damage, costs and expenses (including attorneys' fees and legal costs), causes of action, regulatory proceedings, suits, demands, or judgements relating to Vendor's:
- A. Intentional, willful, or negligent acts or omissions;
- B. Fraud and or deceit;
- C. Actions that give rise to strict liability;
- D. Breach of contract;
- E. Breach of warranty;
- F. Violations of federal, state, or local laws, orders, and/or policies;
- G. Employees or subcontractors' criminal and civil claims; and/or
- H. Failure to pay fees, charges, expenses, taxes, or other debts to third parties.
- 7.7 **Antitrust.** The Vendor hereby assigns to the State of Minnesota any and all claims for overcharges as to services provided in connection with this Agreement resulting from antitrust violations that arise under the antitrust laws of the United States and the antitrust laws of the State of Minnesota, and/or the antitrust laws of any Member unless otherwise assigned directly to that Member by Vendor with MMCAP Infuse approval.

ARTICLE VIII

ADMINISTRATIVE FEE AND REPORTING

- 8.1 **Administrative Fee.** In consideration for the administrative support and other services provided by MMCAP Infuse in connection to this Agreement, the Vendor agrees to pay an Administrative Fee on all purchases of Products made by Members with the Vendor or through an Authorized Wholesaler, a Vendor Authorized Wholesaler or a direct purchase by Member.
- A. The Administrative Fee must be paid as soon as is reasonable after the end of each calendar month, but no later than sixty (60) calendar days after the end of the calendar month. The Vendor will submit a check payable to:
- Financial Management & Reporting – MMCAP Infuse
50 Sherburne Avenue, Suite 309
St. Paul, MN 55155
- B. Vendor shall not be required to pay the Administrative Fees on tax amounts, returns, or other shipments for which Vendor did not collect payment.
- 8.2 **Reporting.** Vendor must provide Administrative Fee data to MMCAP Infuse within sixty (60) calendar days after the end of each calendar month. The Vendor must submit a monthly (A) Administrative Fee Data Report that includes both direct (sales made direct from Vendor to Member) and indirect purchases (sales made through an Authorized Wholesaler or Vendor Authorized Wholesaler). Sales made through Vendor Authorized Wholesalers should be marked as Direct (D) sales and the full name of the wholesalers should be given in the field MMCAP Infuse Assigned Authorized Wholesaler Number.

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The monthly administrative fee data report must contain the fields detailed below. Vendor agrees that for indirect sales, chargeback or sales data received from Authorized Wholesalers or Vendor Authorized Wholesalers will be utilized to create the Administration Fee Data Report and if additional reports are needed to support the creation of the Administration Fee Data Report, Vendor agrees to bear the cost of any special reporting that may be required by the Vendor in its relationship with the Authorized Wholesalers or Vendor Authorized Wholesalers. All administrative fee data reports must be sent to: mmcap.infuse@state.mn.us at the end of each month, but no later than sixty (60) days after the end of the month.

A. Administrative Fee Data Report fields:

- i. MMCAP Infuse Assigned Authorized Wholesaler Number (Cardinal Health=0301, AmerisourceBergen=0401, Morris & Dickson=0701, Vendor Authorized Wholesaler = use name)
- ii. MMCAP Infuse Assigned Manufacturer Number (Nestle Healthcare Nutrition = 6100)
- iii. Direct or Indirect Purchase Indicator (I=Indirect, D=Direct **and** Vendor Authorized Wholesaler)
- iv. Invoice Date (Point of Sale Date)
- v. Invoice Number
- vi. MMCAP Infuse Member Name
- vii. Vendor's Account Number for the MMCAP Infuse Member
- viii. MMCAP Infuse Member DEA Number, if applicable or MMCAP Infuse Member ID– or may be left blank
- ix. MMCAP Infuse Member HIN Number, if applicable – may be left blank
- x. MMCAP Infuse Member Address
- xi. MMCAP Infuse Member City
- xii. MMCAP Infuse Member State
- xiii. Product's NDC (Use all 11 digits (00076888888)) or NDC-like substitute, per Paragraph 2.2.
- xiv. Product Name (e.g. Acetaminophen with Codeine, Acticin Cream 5%)
- xv. Credit Indicator (C = credit)
- xvi. Contracted Units (The number of units purchased on contract.)
- xvii. MMCAP Infuse Contracted Unit Price
- xviii. Administrative Fee Decimal Percentage (The contracted administrative fee percentage for the NDC number. Report as a decimal (e.g. 0.030))
- xix. Vendor Contracted Sales (Contracted Units * Contracted Unit Price. Report in dollars)
Administrative Fee Payment Amount (Administrative Fee Decimal Percentage * Vendor Contracted Sales. Report in dollars)

B. Sales Data Usage Reports:

Vendor will supply to MMCAP Infuse monthly sales data on or before the tenth (10th) day of the subsequent calendar month. The report must include Contracted Item dollar spend amount sorted in descending order and grouped by the Contracted Item category. Also, the report MUST include the information set forth on **Attachment D**.

ARTICLE IX INTELLECTUAL PROPERTY

- 9.1 **MMCAP Infuse Ownership.** MMCAP Infuse owns all rights, title, and interest in MMCAP Infuse customer data, sales transaction data, DEA/HIN information (subject to third-party rights), Contract Pricing, EDI transaction data, reverse distribution data, and payment data, including copyrights and trade secrets contained therein. MMCAP Infuse grants to Vendor an unlimited, non-revocable, nontransferable, fully paid license, for the term of this Agreement, to: (A) release state specific data to a Member's primary contact; (B) release any of the above data to product manufacturers, Authorized Wholesalers, or Vendor Authorized Wholesalers, when necessary for the performance of this Agreement or as required by Vendor's agreements with such wholesalers and related third parties; (C) to release any of the above data to other MMCAP Infuse approved third parties, when necessary for the performance of this Agreement; (D) to provide Member purchase data to aggregators, including IQVIA and NDC Health, subject to Vendor's reasonable efforts to require such data aggregators to protect any identifiable data from discovery by another third party; and (E) to provide Member purchase data to other group purchasing organizations of which the Member is also a member, provided such data will not include MMCAP Infuse-identifiable data. Any MMCAP Infuse identifiable data provided hereunder to a third party must identify the data as MMCAP Infuse data and subject to Minnesota Statutes, Chapter 13. To the extent permitted by law, Vendor hereby agrees that in the event that MMCAP Infuse or a Member requests in writing that its purchase data be kept confidential, such data will not be provided to third party aggregators.
- 9.2 **Vendor Ownership.** Vendor owns all rights, title, and interest to any aggregated data not identifiable as arising from this Agreement and any other intellectual property created for or presented to MMCAP Infuse. Vendor grants to MMCAP Infuse an revocable, non-transferable, fully paid, license, to use all intellectual property created for or

presented to MMCAP Infuse under this Agreement during the term of this Agreement and for the purposes contemplated by this Agreement.

<http://www.mnmd.admin.state.mn.us/MMCAP/Contracts/Default.aspx>

- 9.3 **Pre-Existing Intellectual Property.** MMCAP Infuse and Vendor will each retain ownership of, and all right and title and interest in and to, their respective pre-existing intellectual property. Vendor grants MMCAP Infuse and its Members a nonexclusive, nontransferable, and revocable limited permission to use the trademarks, service marks and trade names (collectively the “Trademarks” that are used by Vendor in connection with the Products during the term of this Agreement to the extent necessary and for the sole purpose of promoting and marketing the Products to its Members or customers. The use of the Trademarks will be made in a manner so as to ensure that the protection of the Trademarks will not be affected and that the benefit of any goodwill therein will accrue to Nestlé S.A. and/or its affiliates, or the trademark owner. Upon any termination or expiration of this Agreement, Vendor will cease use of the Trademarks and will not use any trademarks similar thereto.
- 9.4 **Vendor Obligations.** The Vendor must perform all acts, and take all steps necessary to ensure that all rights in any intellectual property created specifically for MMCAP Infuse or Member are the sole property of MMCAP Infuse or Member, and that neither Vendor nor its employees, agents, or subcontractors retain any interest in and to the works and documents. The Vendor represents and warrants that the works and documents do not and will not infringe upon any intellectual property rights of other persons or entities.
- 9.5 **Intellectual Property Indemnification.** The Vendor will indemnify; defend, to the extent permitted by the Attorney General; and hold harmless MMCAP Infuse, at the Vendor's expense, from any action or claim brought against MMCAP Infuse to the extent that it is based on a claim that the Products infringe the intellectual property rights of others. The Vendor will be responsible for payment of any and all such claims, demands, obligations, liabilities, costs, and damages, including but not limited to, attorney fees. If such a claim or action arises, or in the Vendor's or MMCAP Infuse's opinion is likely to arise, the Vendor must, at MMCAP Infuse's discretion, either procure for MMCAP Infuse the right or license to use the intellectual property rights at issue or replace or modify the allegedly infringing works or documents as necessary and appropriate to obviate the infringement claim. This remedy of MMCAP Infuse will be in addition to and not exclusive of other remedies provided by law.
- 9.6 **Publicity and Endorsement.** Any publicity regarding the subject matter of this Agreement must identify MMCAP Infuse as a sponsoring or endorsing agency and must not be released without prior written approval from MMCAP Infuse. For purposes of this provision, publicity includes notices, informational pamphlets, press releases, research, reports, signs, and similar public notices prepared by or for the Vendor individually or jointly with others, or any subcontractors, with respect to the program, publications, or services provided resulting from this Agreement.
- A. **Marketing.** Any direct advertising, marketing, or direct offers with Members must be approved by MMCAP Infuse. Violation of this may be cause for immediate cancellation of this Agreement and/or MMCAP Infuse may reject any proposal submitted by the Vendor in any subsequent solicitations for awards.
 - B. **Endorsement.** The Vendor must not claim that MMCAP Infuse, the State of Minnesota, or any Member State endorses its products or services.

ARTICLE X INSURANCE

- 10.1 **Notice.** The Vendor is required to submit Certificates of Insurance acceptable to MMCAP Infuse as evidence of insurance coverage requirements prior to commencing work under the Agreement. Vendor will not commence work under the Agreement until they have obtained all the insurance described below and MMCAP Infuse has approved such insurance. Vendor shall maintain such insurance in force and effect throughout the term of the Agreement. The failure of MMCAP Infuse to obtain a Certificate of Insurance, for the policies required under this Agreement or renewals thereof, or failure of the insurance company to notify MMCAP Infuse of the cancellation of policies required under this Agreement shall not constitute a waiver by MMCAP Infuse to the Vendor to provide such insurance. MMCAP Infuse reserves the right to immediately terminate the Agreement if the Vendor is not in compliance with the insurance requirements and retains all rights to pursue any legal remedies against the Vendor. All insurance policies must be open to inspection by MMCAP Infuse and copies of policies must be submitted to MMCAP Infuse. The Vendor's insurance company(ies) waives its right to assert the immunity of the State as a defense to any claims made under said insurance.
- 10.2 **Additional Insurance Conditions.**
- A. Vendor's policy(ies) shall be primary insurance to any other valid and collectible insurance available to MMCAP Infuse with respect to any claim arising out of Vendor's performance under this Agreement;
 - B. If Vendor receives a cancellation notice from an insurance carrier affording coverage herein, Vendor agrees to notify MMCAP Infuse within five (5) business days with a copy of the cancellation notice, unless Vendor's policy(ies) contain a provision that coverage afforded under the policy(ies) will not be cancelled without at least thirty (30) days advance written notice to MMCAP Infuse;
 - C. Vendor is responsible for payment of Agreement related insurance premiums and deductibles;
 - D. If Vendor is self-insured, a Certificate of Self-Insurance must be attached;

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- E. Vendor's policy(ies) shall include legal defense fees in addition to its liability policy limits;
- F. Vendor's insurance companies must either (1) have an AM Best rating of A- (minus) and a Financial Size Category of VII or better, and be authorized to do business in the State of Minnesota or (2) be domiciled in the State of Minnesota and have a Certificate of Authority/Compliance from the Minnesota Department of Commerce if they are not rated by AM Best; and
- G. An Umbrella or Excess Liability insurance policy may be used to supplement the Vendor's policy limits to satisfy the full policy limits required by the Agreement.

10.3 **Coverage.** Vendor is required to maintain and furnish satisfactory evidence of the following insurance policies:

- A. Workers' Compensation Insurance: Except as provided below, Vendor must provide Workers' Compensation insurance for all its employees and, in case any work is subcontracted, Vendor will require the subcontractor to provide Workers' Compensation insurance in accordance with the statutory requirements of the State of Minnesota, including Coverage B, Employer's Liability. Insurance minimum limits are as follows:

- i. \$100,000 – Bodily Injury by Disease per employee
- ii. \$500,000 – Bodily Injury by Disease aggregate
- iii. \$100,000 – Bodily Injury by Accident

If Minnesota Statute 176.041 exempts Vendor from Workers' Compensation insurance or if the Vendor has no employees in the State of Minnesota, Vendor must provide a written statement, signed by an authorized representative, indicating the qualifying exemption that excludes Vendor from the Minnesota Workers' Compensation requirements. If during the course of the Agreement the Vendor becomes eligible for Workers' Compensation, the Vendor must comply with the Workers' Compensation Insurance requirements herein and provide MMCAP Infuse with a certificate of insurance.

- B. Commercial General Liability Insurance: Vendor is required to maintain insurance protecting it from claims for damages for bodily injury, including sickness or disease, death, and for care and loss of services as well as from claims for property damage, including loss of use which may arise from operations under the Agreement whether the operations are by the Vendor or by a subcontractor or by anyone directly or indirectly employed by the Vendor under the Agreement. Insurance minimum limits are as follows:

- i. \$5,000,000 – per occurrence
- ii. \$5,000,000 – annual aggregate
- iii. \$5,000,000 – annual aggregate – Products/Completed Operations
- iv. The following coverages shall be included:
 - a. Premises and Operations Bodily Injury and Property Damage
 - b. Personal and Advertising Injury
 - c. Blanket Contractual Liability
 - d. Products and Completed Operations Liability
 - e. MMCAP Infuse named as an Additional Insured, to the extent permitted by law

ARTICLE XI GENERAL TERMS

- 11.1 **Notices.** If one party is required to provide legal notice or notice under the terms of the Agreement to the other, such notice will be in writing and will be effective upon receipt. Delivery shall be by certified United States mail, or by email transmission provided the receipt of the transmission is confirmed by the receiving party. Either party must notify the other of a change in address for notification purposes.
- 11.2 **Audits.** Under Minn. Stat. § 16C.05, subd. 5, the Vendor's books, records, documents, and accounting procedures and practices relevant to this Agreement are subject to examination by the State of Minnesota, MMCAP Infuse, and/or the Minnesota Auditor or Legislative Auditor, as appropriate, for a minimum of six (6) years from the end of this Agreement. This clause extends to the Membership as it relates to business conducted with and sales a Member.
 - A. Invoice and Pricing Audit. MMCAP Infuse and Members served by this Agreement may periodically audit validity of invoice pricing. Such audits may be conducted only during ordinary business hours and upon reasonable notice.
 - B. Costs. Vendor, MMCAP Infuse, and Members shall each be responsible for its own costs associated with any audit, including costs related to the production of records and/or other documents requested by the other party.
- 11.3 **Assignment.** Unless to an affiliate neither Vendor or MMCAP Infuse may assign nor transfer any rights or obligations under this Agreement without the prior consent of the other Party and a fully executed assignment agreement, such consent not to be reasonably withheld.
- 11.4 **Amendments.** Any amendment to this Agreement must be in writing and will not be effective until it has been executed and approved by the Parties.

Accurate as of June 22, 2021

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ATTACHMENT B
Further Discounts or Adjustments

None

**ATTACHMENT C
MMCAP Infuse****Clinical Products: Member Letter of Participation Form**

For the purchase of Nestlé HealthCare Nutrition (“Nestlé”) nutritional food and related products (the “Products”) listed in Attachment A under the Purchase Agreement (the “Agreement”) between MMCAP Infuse (“MMCAP Infuse”) and Nestlé, Member agrees to the following.

MMCAP Infuse Member Name*:			
Member Address:			
Phone Number:		MMCAP Infuse Member ID	
Annual Nestlé Nutrition Sales:		GLN (if available):	
Member Contact e-mail Address:			

*If more than one facility, please attach a list of all eligible facilities with the information above (Microsoft Excel preferred).

Please select a contract(s) below:

Pricing Type:	Contract Election <input checked="" type="checkbox"/> Please Check the Appropriate Box(es)	Method of Purchase
		<input checked="" type="checkbox"/> Please Check the Appropriate Box
Clinical: (Choose One)	<input type="checkbox"/> 68258 – Tier 1 - Non-Committed <input type="checkbox"/> 2485797 – Tier 2 - \$50,000 Committed <input type="checkbox"/> 2485798 – Tier 3 - \$150,000 Committed <input type="checkbox"/> 2485799 – Tier 4 - \$800,000 Committed	<input type="checkbox"/> Direct <input type="checkbox"/> Distribution

Committed Tier Requirements.

- Tier 2 - \$50,000 Annual Purchase Commitment - Members that elect this commitment level are eligible to access the pricing on Attachment A-2 of the MMCAP Infuse Agreement (“Committed Pricing”). During each 12-month period that each Member buys Products pursuant to this Agreement, Member will commit that a minimum of \$50,000 in aggregate of its total purchase of nutritional food and related products will be Products purchased under this MMCAP Infuse Agreement.
- Tier 3 - \$150,000 Annual Purchase Commitment - Members that elect this commitment level are eligible to access the pricing indicated on Attachment A-3 of the MMCAP Infuse Agreement (“Committed Pricing”). During each 12-month period that each Member buys Products pursuant to this Agreement, each Member will commit that a minimum of \$150,000 in aggregate of its total purchase of nutritional food and related products will be Products purchased under this MMCAP Infuse Agreement.
- Tier 4 - \$800,000 Annual Purchase Commitment - Members that elect this commitment level are eligible to access the pricing indicated on Attachment A-3 of the MMCAP Infuse Agreement (“Committed Pricing”). During each 12-month period that each Member buys Products pursuant to this Agreement, each Member will commit that a minimum of \$800,000 in aggregate of its total purchase of nutritional food and related products will be Products purchased under this MMCAP Infuse Agreement.

Should Member elect to change its commitment during the term of this Agreement, a new LOP must be signed and submitted. For purposes of measuring compliance, only the Products listed in Attachment A be taken into consideration. In exchange for fulfilling this purchasing commitment, Member acknowledges that it is given prices that are less than the non-committed prices that would otherwise be available to it. Member will keep complete and accurate records and books of account, so that Nestlé and its authorized representatives can determine Member’s compliance with any purchasing commitment it makes. Member will preserve such books and records for at least two (2) years after the end of the contract year to which the books and records relate and will give Nestlé and its authorized representatives access to such books and records from time to time during normal business hours and upon reasonable notice to verify compliance. On a quarterly basis, Nestlé shall have the right to review Member’s compliance with its purchase commitment and if member fails to achieve such commitments, Nestlé shall have the right to move Member to the appropriate pricing tier on the MMCAP Infuse Agreement.

Member may withdraw or re-establish its purchasing commitment provided Nestlé receives at least thirty (30) days advance written notice of such election through the execution and delivery of a new LOP. The change becomes effective the first day of the month following

expiration of the thirty (30)-day notice period. Upon the effective date of any withdrawal of a purchasing commitment, Product prices will revert to the non-committed level.

Method of Purchase:

Direct from Nestlé. All orders are subject to acceptance by Nestlé and the return of Products is governed by Nestlé's standard return of goods policy. Invoices from Nestlé are due and payable within thirty (30) days of the invoice date, except that due date for payment is extended by five (5) days for payments made by financial electronic data interchange ("FEDI"). If Nestlé does not receive payment in full by the date due, Nestlé may deny or revoke credit to Member and may refuse to make further shipments until payments are made in full. Member has no right of set off and may take no deductions, unless it is instructed to do so by Nestlé through issuance of a credit memorandum, except as required by law. Deductions, credits or payments and notice of any incorrect charges must be given to Nestlé in writing within ninety (90) days of the Nestlé invoice to which the claim relates. Claims made after the ninety (90)-day period are null and void.

From Distributor/Wholesaler. The Products are subject to a distributor mark-up and are available through an MMCAP Infuse Authorized Wholesaler or a Nestlé Authorized Wholesaler. Please indicate your primary and secondary distributors below.

MMCAP Infuse Authorized Wholesalers:	Other Nestlé Authorized Wholesaler:
<input type="checkbox"/> AmerisourceBergen	Wholesaler Type: <input type="checkbox"/> Medical Surgical <input type="checkbox"/> Drug/Pharmaceutical <input type="checkbox"/> Food Service
<input type="checkbox"/> Cardinal Health (Pharmaceutical)	
<input type="checkbox"/> Morris & Dickson	
Name of Wholesaler: _____	

Effective Date. This agreement becomes effective on the 1st day of the month following acceptance and execution by an authorized representative of Nestlé, provided it is received by the 20th of the month.

Termination. Any party may terminate this Agreement on thirty (30) days prior written notice to the other parties.

Nondisclosure. To the extent permitted by law, the price terms are confidential and proprietary to Nestlé and may not be disclosed without Nestlé's prior written consent.

In signing this LOP, Member represents that it is buying the Products for its own use in the provision of health services by government facilities to its customers who consume or use the Products and that it has designated MMCAP Infuse as the only group purchasing organization through which it will buy the Products ("Own Use"). Member shall not engage in the sale of the Products to anyone who, in turn, engages in resale of the Products. Own Use does not include the purchase of Products for retail or e-commerce purposes and Member shall not attempt to resell Products purchased hereunder via retail or e-commerce channels, including, but not limited to the resale of products to any person, employees of Member or any other entity outside of the Own Use requirements defined herein. Member hereby acknowledges that violation of the Own Use provisions under the Agreement will subject Member to possible removal of eligibility to purchase under this Agreement.

Member/End User:

By: _____
Authorized Signature

Printed Name

Title

Date

Facility/Parent Group Name

Nestlé HealthCare Nutrition, Inc.

By: _____
Signature

Printed Name

Date

Nestlé HealthCare Nutrition, Inc.
Company

Please send this completed form by e-mail to:

hcncontracts@us.nestle.com

Thank you.

ATTACHMENT D**Reporting Requirements****Table 1: Required Data Field for Sales Data Report (Direct sales)**

Excel Column	Required Data Field Full Name for Sales Data Report
A	MMCAP Infuse-assigned Member ID
B	MMCAP Infuse Member Name
C	Vendor Distribution Center Code
D	Vendor-assigned Account number for MMCAP Infuse Member (this should be the ship-to account number)
E	Invoice Number
F	Invoice Line Number
G	Purchase Order Number
H	Invoice date (MMDDYYYY)
I	Buyer name or equivalent of buyer ID for person submitting the invoices (if available)
J	Vendor's SKU item number
K	NDC or NDC-like substitute of purchased Product as may be stored in First DataBank, Inc.
L	Label Name/Product Description
M	Unit Dose (Required for pharmaceutical Products)
N	Pack Size
O	Unit
P	Case Size
Q	Dose (Required for pharmaceutical Products).
R	Strength (Required for pharmaceutical Products).
S	Route (Required for pharmaceutical Products).
T	Unit Price (99999.9999)
U	Quantity Ordered (not Vendor repackaged or re-bundled quantity)(99999.9999)
V	Quantity Shipped (not Vendor repackaged or re-bundled quantity)(99999.9999)
W	Extension (unit price multiplied by the quantity shipped) EXTENDED PRICE (99999.9999)
X	Type of transaction (MMCAP contract purchase, other contract purchase (340B, PHS), not on contract purchase) 1=contract item, 2=other contract, 3=not on contract

Accurate as of June 22, 2021

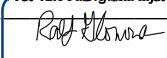
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- 11.5 **Order of Precedence.** Vendor agrees that applicable federal and state law will supersede this Agreement, however this Agreement will take precedence over all other the terms, covenants, conditions, commitments, stipulations, Order Forms, website use of terms, Offer Letters, and other legal documents MMCAP Infuse, Vendor, and/or Member may use in the performance of this Agreement. If the provisions of this Agreement are inconsistent, or are modified, diminished, or derogated with any of the terms and provisions of the aforementioned legal documents in this section, this Agreement will supersede and govern. If there is a conflict between the Articles and Attachments of this Agreement, the Articles will supersede and govern. MMCAP Infuse does not agree to or bound by any additional terms and conditions between the Vendor and Member.
- 11.6 **Counterparts and Electronic Signature.** The Agreement cannot be executed in counterparts and will not be enforceable until MMCAP Infuse has obtained all required signatures. If requested by MMCAP Infuse, MMCAP Infuse and Vendor expressly agree to conduct transactions under the Agreement by electronic means (including, without limitation, with respect to execution, delivery, storage, and transfer of this Agreement by electronic means and to the enforceability of this electronic agreement).
- 11.7 **Severability.** If any provision of the Agreement, including items incorporated by reference, is found to be illegal, unenforceable, or void, then both MMCAP Infuse and the Vendor will be relieved of all obligations arising under such provisions. If the remainder of the Agreement is capable of performance, it will not be affected by such declaration or finding, and will be fully performed.
- 11.8 **Waiver.** If either party fails to enforce any provision of this Agreement, that failure does not waive the provision or its right to enforce it.
- 11.9 **Governing Law, Jurisdiction, and Venue.** Minnesota law, without regard to its choice-of-law provisions, governs this Agreement. Venue for all legal proceedings out of this Agreement, or its breach, must be in the appropriate state or federal court with competent jurisdiction in Ramsey County, Minnesota.
- 11.10 **GPO Status:** MMCAP Infuse may be a group purchasing organization as defined in 42 U.S.C. § 1320a-7b(b)(3)(c) and as applicable, maintains that it is structured to comply with the requirements of the Safe Harbor regulations regarding payments to group purchasing organizations set forth in 42 C.F.R. § 1001.952(j). MMCAP Infuse consists of government-run health care facilities and contracts for pharmaceuticals and certain health care products for its Members' use; participation in MMCAP Infuse is limited to government facilities such as state agencies, counties, cities, townships, and school districts, as well as other statutorily authorized facilities.

VENDOR: Nestlé HealthCare Nutrition, Inc.

The Vendor certified that the appropriate person(s) have executed this Agreement on behalf of the Vendor as required and by applicable articles, bylaws, resolutions, or ordinances.

Name: Ralph Gilman
 Signature: 
 Title: Director, Sales operations
 Date: 16-Jun-2021 | 08:07:12 PDT

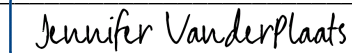
STATE OF MINNESOTA FOR MMCAP INFUSE

In accordance with Minn. Stat. § 16C.03, subd. 3

Name: Michelle Korpela
 Signature: 
 Date: 6/17/2021

COMMISSIONER OF ADMINISTRATION

In accordance with Minn. Stat. § 16C.05, subd. 2

Name: Jennifer Vanderplaats
 Signature: 
 Date: 6/17/2021

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Excel Column	Required Data Field Full Name for Sales Data Report
Y	Bill to Address 1
Z	Bill to City
AA	Bill to State (2 alpha postal code)
AB	Bill to Zip (standard 5-4 format, no dash necessary)
AC	Ship to Address 1
AD	Ship to City
AE	Ship to State (2 alpha postal code)
AF	Ship to Zip (standard 5-4 format, no dash necessary)
AG	
AH	MMCAP Infuse Contract Number (MMS2100543)
AI	Admin Fee
AJ	Credit Indicator (C for credit)
AK	MMCAP- Infuse Assigned Wholesaler Code (Cardinal Health=0301, AmerisourceBergen=0401, Morris & Dickson=0701, Vendor Authorized Wholesaler = use name)
AL	Manufacturer Name (MFG Name)
AM	Class of Trade
AN	340b Purchase – may be left blank
AO	Category = Nutritional or may be left blank
AP	Manufacturer Part Number/ SKU
AQ	List Price
AR	UNSPSC Code (XXXXXXXX)
AS	UNSPSC Description
AT	GLN
AU	GTIN

1. **Government Data Practices.** Parties to this Agreement must comply with the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13 (Data Practices Act), as it applies to all data created, collected, received, stored, used, maintained, or disseminated by the Vendor under this Agreement. The civil remedies of Minn. Stat. § 13.08 apply to the release of the data governed by the Minnesota Government Practices Act, Minn. Stat. Ch. 13, by either the Vendor or MMCAP Infuse.
 - A. Notification. If the Vendor receives a request to release the data referred to in statute, the Vendor must immediately notify and consult with MMCAP Infuse as to how the Vendor should respond to the request.
 - B. Indemnification. Vendor agrees to indemnify, save, and hold Minnesota, its agent and employees, harmless from all claims arising out of, resulting from, or in any manner attributable to any violation of any provision of the Data Practices Act, including legal fees and disbursements paid or incurred to enforce this provision of the Agreement.
 - C. Release of MMCAP Infuse Data. Except as may be required by Data Practices Act, Vendor will not release to any third party any MMCAP Infuse customer data, sales transaction data, DEA/HIN information, contract pricing, EDI transaction data, reverse distribution data, or payment data.
2. **Data Disclosure.** Under Minn. Stat. § 270C.65, subd. 3 and other applicable law, the Vendor consents to disclosure of its social security number, federal employer tax identification number, and Minnesota tax identification number, already provided to the MMCAP Infuse, to federal and state agencies, and state personnel involved in the payment of state obligations. These identification numbers may be used in the enforcement of federal and state laws which could result in action requiring the Vendor to file state tax returns, pay delinquent state tax liabilities, if any, or pay other state liabilities.
3. **Non-discrimination.** The Vendor will comply with the provisions of Minn. Stat. § 181.59.
4. **Affirmative Action Requirements.**
 - A. Covered contracts and vendors. If the Agreement exceeds \$100,000 and the Vendor employed more than forty (40) full-time employees on a single working day during the previous twelve (12) months in Minnesota or in the state where it has its principal place of business, then the Vendor must comply with the requirements of Minn. Stat. § 363A.36 and Minn. R. 5000.3400-5000.3600. A contractor covered by Minn. Stat. § 363A.36 because it employed more than forty (40) full-time employees in another state and does not have a certificate of compliance, must certify that it is in compliance with federal affirmative action requirements.
 - B. Minn. Stat. § 363A.36. Minn. Stat. § 363A.36 requires the Vendor to have an affirmative action plan for the employment of minority persons, women, and qualified disabled individuals approved by the Minnesota Commissioner of Human Rights (**Commissioner**) as indicated by a certificate of compliance. The law addresses suspension or revocation of a certificate of compliance and contract consequences in that event. A contract awarded without a certificate of compliance may be voided.
 - C. Minn. R. 5000.3400-5000.3600.
 - i. General. Minn. R. 5000.3400-5000.3600 implements Minn. Stat. § 363A.36. These rules include, but are not limited to, criteria for contents, approval, and implementation of affirmative action plans; procedures for issuing certificates of compliance and criteria for determining a Vendor's compliance status; procedures for addressing deficiencies, sanctions, and notice and hearing; annual compliance reports; procedures for compliance review; and contract consequences for non-compliance. The specific criteria for approval or rejection of an affirmative action plan are contained in various provisions of Minn. R. 5000.3400-5000.3600 including, but not limited to, Minn. R. 5000.3420-5000.3500 and 5000.3552-5000.3559.
 - ii. Disabled Workers. The Vendor must comply with the following affirmative action requirements for disabled workers.
 - a. The Vendor must not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The Vendor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified disabled persons without discrimination based upon their physical or mental disability in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.
 - b. The Vendor agrees to comply with the rules and relevant orders of the Minnesota Department of Human Rights issued pursuant to the Minnesota Human Rights Act.
 - c. In the event of the Vendor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with Minn. Stat. § 363A.36, and the rules

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and relevant orders of the Minnesota Department of Human Rights issued pursuant to the Minnesota Human Rights Act.

- d. The Vendor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Commissioner. Such notices must state the Vendor's obligation under the law to take affirmative action to employ and advance in employment qualified disabled employees and applicants for employment, and the rights of applicants and employees.
 - e. The Vendor must notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the Vendor is bound by the terms of Minn. Stat. § 363A.36, of the Minnesota Human Rights Act and is committed to take affirmative action to employ and advance in employment physically and mentally disabled persons.
 - iii. Consequences. The consequences for the Vendor's failure to implement its affirmative action plan or make a good faith effort to do so include, but are not limited to, suspension or revocation of a certificate of compliance by the Commissioner, refusal by the Commissioner to approve subsequent plans, and termination of all or part of this Agreement by the Commissioner or Minnesota.
 - iv. Certification. The Vendor hereby certifies that it is in compliance with the requirements of Minn. Stat. § 363A.36 and Minn. R. 5000.3400-5000.3600 and is aware of the consequences for noncompliance.
5. **E-Verify certification (In accordance with Minn. Stat. § 16C.075)**. For services valued in excess of \$50,000, Vendor certifies that as of the date of services performed on behalf of Minnesota, Vendor and all its subcontractors will have implemented or be in the process of implementing the federal E-Verify Program for all newly hired employees in the United States who will perform work on behalf of Minnesota. Vendor is responsible for collecting all subcontractor certifications and may do so utilizing the E-Verify Subcontractor Certification Form available at <http://www.mmd.admin.state.mn.us/doc/VerifySubCertForm.doc>. All subcontractor certifications must be kept on file with Vendor and made available to Minnesota upon request.
 6. **Certification of Nondiscrimination (In accordance with Minn. Stat. § 16C.053)**. The following term applies to any contract for which the value, including all extensions, is \$50,000 or more: Vendor certifies it does not engage in and has no present plans to engage in discrimination against Israel, or against persons or entities doing business in Israel, when making decisions related to the operation of the Vendor's business. For purposes of this section, "discrimination" includes but is not limited to engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel, when such actions are taken in a manner that in any way discriminates on the basis of nationality or national origin and is not based on a valid business reason.
 7. **Contingency Fees Prohibited**. Pursuant to Minn. Statute § 10A.06, no person may act as or employ a lobbyist for compensation that is dependent upon the result or outcome of any legislation or administrative action.
 8. **Diverse Spend Reporting**. If the total value of this Agreement may exceed \$500,000 in Minnesota, including all extension options, the Vendor must track and report, on a quarterly basis, the amount paid to diverse businesses both: (A) directly to subcontractors performing under the Agreement, and (B) indirectly to diverse businesses that provide supplies/services to your company (in proportion to the revenue from this Agreement compared to your company's overall revenue). When this applies, you will be set up in a free portal to help report the Tier 2 diverse spend, and the requirement continues as long as the Agreement is in effect.
 9. **Retainage for Minnesota Government Units**. Under Minn. Stat. § 16C.08, subd. 2 (10), no more than ninety percent (90%) of the amount due under this Agreement may be paid until the final product of this Agreement has been reviewed by a Minnesota agency head. The balance due will be paid when the Minnesota agency head determines that the Vendor has satisfactorily fulfilled all the terms of this Agreement.
 10. **Payment to Subcontractors**. To the extent applicable, pursuant to Minn. Stat. § 16A.1245, the Vendor must pay all subcontractors, less any retainage, within ten (10) calendar days of the Vendor's receipt of payment from a Member for undisputed services provided by the subcontractor(s) and must pay interest at the rate of one and one-half percent (1.5%) per month or any part of a month to the subcontractor(s) on any undisputed amount not paid on time to the subcontractor(s).

NESTLÉ HEALTHCARE NUTRITION, INC. RETURN OF GOODS POLICY

This Return of Goods Policy (“**Policy**”) sets forth the sole and exclusive terms and conditions governing the return of Products to Nestlé Healthcare Nutrition, Inc. (“**Nestlé**”) and claims for credit. This Policy is effective November 1, 2020 and supersedes all previous return of goods policies or versions thereof.

1) Condition of Returns/Claims - for Direct Purchases Only

Member (“**Buyer**”) has the right to inspect all Products upon receipt and to reject for return or credit Products that are defective, damaged, short-shipped or contaminated, subject always to Buyer’s compliance with the terms and conditions of this Policy.

2) Products Not Eligible for Return or Credit

The following Products are **not** eligible for return or credit:

- a) Sell-off Products or Products sold on a no-return basis;
- b) Promotional sales Products;
- c) Partial or open cases;
- d) Products that are damaged or in unsaleable condition through no fault of Nestlé;
- e) Products that have expired;
- f) Products that were not purchased directly from Nestlé.
 - i) Indirect accounts must work through the re-distributor from whom the Products were originally purchased.

3) Products Eligible for 100% Credit

Nestlé will provide 100% credit for all claims for shortage and/or damage or returns for any other reason; provided, however, the Products are not excluded in Paragraph 2 above, and provided that Buyer satisfies the following criteria:

- a) Buyer must sign the Proof of Delivery or Bill of Lading, identifying the item(s) and quantity of shortage or damage, with carrier signature, at the time of delivery.
- b) If Buyer does not do so, Buyer must notify Nestlé, within three (3) business days of receipt, of any damage or shortage in shipment by item and quantity.
 - i) If notification is provided more than three (3) business days after Buyer’s receipt, the return is only eligible for 80% credit.
- c) In order to verify the Product was purchased directly from Nestlé, Buyer must provide reference to the original PO number, invoice number, or order number.
- d) Buyer must send the above documentation to the appropriate email box (see below).

Shortages	USNHNOSD@US.NESTLE.COM
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4) Damaged and/or Short-dated Products Eligible for 80% Credit

Nestlé will provide 80% credit for all damaged and/or short-dated returns after three (3) business days; provided, however, the Products are not excluded in Paragraph 2 above, and provided that Buyer satisfies the following criteria:

- a) Any purchases made through a re-distributor must be returned through the re-distributor.
- b) Buyer must complete a Certificate of Destruction form.
- c) Buyer must provide all of the following information:
 - (1) Quantity of Product by product code and lot/batch number;
 - (2) Reason for the return request;
 - (3) Include pictures of:
 - (a) Close up of the batch/lot # and expiration date, and
 - (b) Full quantity of Products from different angles to support verification of quantity listed in COD
 - (4) Authorized signature of Buyer;
 - (5) Completed forms must be sent to the appropriate email box (see below).

Damages & Short-Dated Product	NHNCOD@US.NESTLE.COM
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- d) For all returns >\$3,000, additional approval is needed and will require any of the following:
 - i) Physical inspection
 - ii) “FaceTime” or live communication platform with Nestlé sales support team
 - iii) Additional photographs
- e) Within thirty (30) days of receipt of the above required information, Nestlé Claims:
 - (1) Will validate the documentation and approve credits per policy, and
 - (2) Will request a credit to be issued and applied to Buyer’s account.
- f) Buyer must deduct from a future remittance.
- g) Credit will be issued off of the Buyer’s current acquisition cost.
- h) Under no circumstances may Buyer re-sell or donate any unsaleable Products.

5) Destruction of Product by Nestlé

In the event that Buyer would prefer Nestlé to manage the disposal of Products, Nestlé will do so at a rate of 75% credit. For such returns, Nestlé will pay for any shipping and other costs associated with the disposal of the Product. If requested by Buyer, Nestlé will provide instructions as to how to complete such disposal.

- 6) Nestlé reserves the right to evaluate all returns and claims, to administer this Policy on an individual basis, and to alter or amend this Policy at any time.

Nestlé HealthCare Nutrition, Inc.
General Ordering Information for Direct Purchases
Effective 9/1/08

ORDER PLACEMENT

Nestlé HealthCare Nutrition, Inc. Customer Service Representatives will take your order, answer your questions regarding product availability, provide status of your order, and handle product returns and shipping disputes.

Orders should be phoned, faxed or e-mailed to:

Call (877) 463-7853

Fax orders to (877) 563-7853

Email orders to nhncustomerservice@us.nestle.com

M-F, 8:00am to 4:30pm Central

PURCHASE ORDER FORM

Only the products, description, quantity, specific shipping instructions and information requested by the customer shall be acknowledged by Nestlé HealthCare Nutrition. Any modifications regarding pricing, terms of sale, or general ordering information shall not be effective unless accepted in writing by an authorized representative of Nestlé HealthCare Nutrition, Inc.

SHIPPING

F.O.B. Destination: Where Nestlé HealthCare Nutrition, Inc. designates the carrier and means of shipment, orders are shipped PREPAID F.O.B. destination via a transportation mode selected by Nestlé HealthCare Nutrition, Inc.

If a customer specifically requests expedited transportation or specialized service, or if a customer orders in a manner which is not consistent with efficient distribution practices, an additional service charge may be added to the invoice and shipping may be F.O.B. shipping point as determined by Nestlé HealthCare Nutrition, Inc.

Customer requests for palletized deliveries will be accommodated by Nestlé HealthCare Nutrition, Inc. whenever possible. Customers receiving palletized deliveries are required to exchange the same number of usable pallets received upon delivery. Pallets returned must have the same dimensions as pallets received.

RUSH ORDER CHARGES

Any orders that are shipped on a rush/emergency basis may be assessed a handling charge and freight charge at time of order placement.

TAXES

Quoted prices are exclusive of all taxes. Purchaser shall be responsible for payment of all applicable state/ local sales tax, use and/or gross receipts tax resulting from transactions with Nestlé HealthCare Nutrition, Inc.

PRICING

Nestlé HealthCare Nutrition, Inc. products will be invoiced at the CASE PRICE. For specific pricing information, contact your Nestlé HealthCare Nutrition Sales Representative.

DISPUTES

Amounts in dispute may be withheld pending resolution. Any portion of the invoice which is not in dispute must be remitted promptly.

Any portion of an invoice in dispute must be explained to enable our Customer Operations Department to determine whether or not credit is due. To expedite resolution of your dispute, please enclose a copy of your disputed invoice along with your remittance.

LATE PAYMENT CHARGE

Invoices that are not paid according to our terms of sale are subject to a LATE PAYMENT CHARGE of 1-1/2% per month or the highest amount allowed by law, if lower.

PROOF OF DELIVERY

Nestlé HealthCare Nutrition will provide proof of delivery under the following conditions:

The request must be received within thirty (30) days from the date of shipment.

PRODUCT DELIVERY/FORCE MAJEURE

Nestlé HealthCare Nutrition, Inc. will use its best efforts to fill orders, but shall not be liable for non-performance or delays caused by a shortage of raw materials, manufacturing problems, delivery or labor problems, acts of regulatory agencies, discontinuation of a product line, Acts of God or causes beyond its control. Customer agrees that in such events, Nestlé HealthCare Nutrition, Inc. may allocate products among all customers without liability.

DAMAGES

Due to the nature of our products, the contents are subject to damage in transit to the customer. In an effort to minimize delays in resolution of a damage or shortage claim, all orders should be counted and inspected prior to acceptance of delivery from the carrier. Any exception should be noted on the copy of the carrier freight bill and the driver should countersign the document. This document should be forwarded to the Customer Service Department along with a copy of the packing list.