



## TERMS AND CONDITIONS OF SALE

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### 1. APPLICATION

These terms and conditions (these "Terms") apply to all sales of services and new or replacement spare parts manufactured and/or supplied directly by Progress Rail Locomotive Inc. or one of its subsidiaries ("PRL") in accordance with PRL's Original Equipment Manufacturer ("OEM") Engineering Specifications for use on PRL's products. This is an offer to sell to the customer ("Customer") by PRL. PRL may revoke this offer at any point up to, and including, acceptance of the services or parts by the Customer. CUSTOMER'S RIGHT TO ACCEPT THIS OFFER IS LIMITED TO THESE TERMS AND ANY PRINTED ON PRL'S SALES ORDER OR INVOICE. NO TERMS OR CONDITIONS ISSUED BY CUSTOMER ARE BINDING ON PRL AND PRL REJECTS ANY SUCH TERMS OR CONDITIONS (OTHER THAN PRODUCT DESCRIPTION, QUANTITY AND DELIVERY INFORMATION), UNLESS SPECIFICALLY AGREED TO IN WRITING AND SIGNED BY PRL. THERE ARE NO UNDERSTANDINGS, TERMS, CONDITIONS OR WARRANTIES NOT FULLY EXPRESSED HEREIN. ACCEPTANCE OF THESE TERMS SHALL BE EVIDENCED BY A PURCHASE ORDER OR OTHER ORDER ("ORDER") PLACED BY CUSTOMER. An Order together with these Terms shall be referred to herein as a "Contract".

### 2. PRICES

Prices for services and parts will be based on the price identified in PRL's Established List Price ("ELP") that is in effect at the time of Order acceptance. PRL reserves the right to change its ELP at any time and without prior notice. Unless otherwise agreed to by PRL in writing, all prices are stated in U.S. dollars. For Unit Exchange ("UTEX") parts, see Section 7 for additional conditions.

### 3. PAYMENT OF PURCHASE PRICE

(a) PRL will not deliver parts or provide services until Customer specifies in writing its method of payment, which method will be subject to PRL's acceptance. Customer will make payment of the full purchase price for parts purchased within thirty (30) calendar days (i) after delivery of the parts, or (ii) of the date of PRL's invoice for services. Unless otherwise agreed to by PRL in writing, all payments shall be made in U.S. Dollars. Any invoice amount not paid when due shall be subject to a late payment charge equal to one and one-half percent (1.5%) of the delinquent amount per month or the maximum amount permitted by law, whichever is less, prorated on a daily basis for each day that such amount

remains unpaid. Payment of any late charge will not excuse Customer's obligation to pay any principal amount. If Customer fails to pay PRL on a timely manner as described herein, Customer will also reimburse PRL, within ten (10) days of PRL's demand, for any collection costs or expenses incurred by PRL.

(b) PRL may, at any time, suspend performance of any Order or require payment in cash, security, or other adequate assurance satisfactory to PRL, when in PRL's reasonable opinion, the financial condition of Customer or other reasonable grounds warrant such action.

### 4. USE

All parts purchased under this Contract are intended for use on Customer's owned, operated or serviced equipment. Customer agrees that parts or any other goods purchased under this Contract may not be resold without the prior written approval of PRL, which approval may be withheld at PRL's sole and absolute discretion.

From time to time, parts purchased by Customer hereunder may contain software that requires a license for Customer's use. In the event such a license is required, Customer will, in addition to the terms of this Contract, be subject to PRL's End User Software License Agreement ("EULA") in effect on the date of the applicable Order placed by Customer, which may be updated from time to time and is available upon request.

### 5. PACKAGED UNIT QUANTITIES AND MINIMUM ORDER QUANTITIES

Prices for parts identified in the ELP may apply for a Packaged Unit Quantity ("PUQ") or a Minimum Order Quantity ("MOQ").

(a) Packaged Unit Quantities. Certain parts in the ELP that are listed in PUQs must be ordered in multiples of the PUQ. Orders for quantities that are not whole multiples of the PUQ will be furnished to the next whole multiple.

(b) Minimum Order Quantities. Certain parts in the ELP that are listed in MOQs must be ordered in an amount at least equal to the MOQ. PRL will not accept Orders for any quantity that is less than the MOQ.

PRL reserves the right to add, delete or modify the quantities for PUQs or MOQs without notice. Where



multiple PUQs or MOQs are being delivered, whether for the same part or different parts, the prices reflected on an invoice is the per unit price.

#### **6. MATERIAL AVAILABILITY AND SERVICE**

PRL cannot guarantee the availability of stock items at the time of Customer's desired delivery date. Available stock is subject to prior sale. Availability of items ordered with quantities exceeding PRL's inventory may subject any Order to delayed delivery without penalty to PRL.

#### **7. UNIT EXCHANGE REBUILT PARTS PROGRAM**

The purchase of UTEX parts shall be subject to the core return requirements set forth in PRL's UTEX Service Program Manual in effect on the date of the applicable Order placed by Customer, which may be updated from time to time and is available upon request.

The price for any UTEX part does not include any charges related to the used core for which Customer is purchasing a UTEX part, and the price of the UTEX part is conditioned on the Customer returning a used core that is acceptable to PRL.

At Customer's sole cost and expense, Customer must return the core to PRL to the location specified in the Material Return Instructions of PRL's UTEX Service Program Manual within 60 calendar days of PRL's delivery of the UTEX part to Customer; provided, however if the core is located outside of Canada, Mexico, or the contiguous United States of America, the core must be returned within 120 calendar days.

#### **8. SHIPPING, TITLE AND RISK OF LOSS**

Parts purchased by Customer shall be delivered FCA (*Incoterms 2010*) PRL facility at Hodgkins, Illinois, or FCA (*Incoterms 2010*) PRL facility at LaGrange, Illinois or other PRL or affiliate location as designated by PRL. Notwithstanding the foregoing, title to any such parts will not pass from PRL to Customer until the first to occur of: (1) full payment therefore; or (2) the precise point during the delivery thereof which is immediately prior to that point where the parts pass, for the last time, from being on or over international waters to being within the territorial waters of any country. Customer grants PRL a security interest in all such parts until PRL receives payment of the total purchase price and fees for such parts. Customer shall, at the request of PRL, promptly execute and deliver to PRL any instruments (including Uniform Commercial Code financing statements) that PRL may deem necessary to protect its security interest in such parts.

#### **9. TAXES**

All parts and services sold under this Contract are exclusive of all applicable taxes. In addition to the purchase price, Customer will assume and pay all applicable taxes, including sales and use or excise taxes and/or receipts or gross income taxes in the nature of sales taxes (other than U.S. state or federal income taxes), import or export duties, special financing fees, value added taxes, royalty taxes, consular fees, special permits or licenses or similar charges levied or imposed and arising out of the sale, use or delivery of the parts or services purchased by Customer hereunder.

#### **10. WARRANTY**

PRL's standard warranty for parts and services shall be as set forth in Exhibit A attached hereto. Administration of warranty applications and PRL's performance of its warranty obligations hereunder shall be according to PRL's Warranty Procedure Handbook in effect on the date of the applicable Order placed by Customer, which may be updated from time to time and is available upon request.

THIS WARRANTY IS EXPRESSLY IN LIEU OF ANY OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND OF ANY NON-CONTRACTUAL LIABILITIES INCLUDING PRODUCT LIABILITIES BASED UPON NEGLIGENCE OR STRICT LIABILITY.

#### **11. DEFECTIVE PARTS WARRANTY RETURN PROCEDURE**

If Customer returns any parts reported to be defective under the provisions of the warranty, Customer will comply with the guidelines for the return of defective parts set forth in PRL's Warranty Procedure Handbook in effect on the date that Customer returns such part, which is available upon request. Any warranty claims that are not made in accordance with the foregoing will be denied.

#### **12. LIMITATION OF LIABILITY**

**(a) NOTWITHSTANDING ANY OTHER PROVISIONS CONTAINED IN THIS CONTRACT, AND TO THE MAXIMUM EXTENT PERMITTED BY LAW, NEITHER PARTY OR THEIR RESPECTIVE PARENTS, AFFILIATES, SUBCONTRACTORS, AGENTS AND/OR EMPLOYEES SHALL BE LIABLE FOR ANY LOSS OF USE, LOSS OF PROFIT, LOSSES RESULTING FROM OR RELATED TO DOWNTIME OF THE GOODS, NOR ANY SPECIAL, INDIRECT, PUNITIVE, EXEMPLARY, INCIDENTAL, OR CONSEQUENTIAL LOSS OR DAMAGES OF ANY NATURE, HOWSOEVER CAUSED, AND WHETHER BASED ON WARRANTY, CONTRACT, TORT (INCLUDING**

**NEGLIGENCE), STRICT LIABILITY, OR ANY OTHER THEORY OF LAW, REGARDLESS OF WHETHER A PARTY HAD ADVANCE NOTICE OF THE POTENTIAL OF ANY SUCH DAMAGES.**

(b) The total liability of PRL, its affiliates, subcontractors, agents and employees arising out of this Contract, including, without limitation, those arising out of the performance or nonperformance of any services or any of its obligations in providing parts (including, without limitation, obligations under the EULA, or in connection with the design, manufacture, sale, delivery, storage, or use of the parts), whether based on warranty, contract, tort (including negligence), strict liability or any other theory of the law, shall not exceed in the aggregate a sum equal to either, as applicable, one times: (i) the price of the discrete part involved in the applicable claim, or (ii) the price of the services performed. Customer may not institute any suit or action against PRL or any of PRL's subsidiaries, agents or employees regarding any part or service sold by PRL hereunder, unless filed within one (1) year of the event giving rise to the claim.

(c) The limitations of liability set forth in this Section 12 shall prevail over any conflicting or inconsistent provisions contained in any documents or Orders relating to Customer's purchase of parts or services under this Contract.

### **13. THIRD PARTY INTELLECTUAL PROPERTY**

PRL will defend any lawsuit or proceeding brought against Customer so far as based on a claim that the parts manufactured by PRL and furnished under this Contract constitute an infringement of any patent, if notified promptly in writing and given authority, information and assistance (at PRL's expense) for the defense of same, and PRL will pay all damages and costs awarded therein against Customer.

If any such part is held to constitute infringement and the use of such part is enjoined, PRL will at its option and at its own expense, either procure for Customer the right to continue using such part, or replace such part with a non-infringing part, or modify such part so it becomes non-infringing, or remove the entire part and refund the purchase price and the transportation and installation costs for such part.

PRL will not assume liability for patent infringement by reason of purchase, manufacture, sale, or use of parts not included in and covered by its specification.

The foregoing states the entire liability of PRL for patent infringement by any such part.

The foregoing indemnity will not apply to any infringement or alleged infringement that is due to: (i) the use of the parts in a manner or for a purpose for which such parts are not intended; (ii) Customer's combination of the parts with its own materials or materials of third parties when it is such combination, as opposed to the parts alone, that gives rise to such infringement or alleged infringement; or (iii) PRL's production of parts built to specifications dictated by Customer.

Customer will be responsible for any infringement or alleged infringement of any patent, registered design or otherwise protected right and the consequences thereof, arising out of the circumstances described in clauses (i) through (iii) of the previous paragraph of this Section, and will indemnify PRL against all actions, claims, costs, damages, and expenses brought against or suffered by PRL in regard to any of the aforesaid matters.

### **14. FORCE MAJEURE**

PRL shall not be liable for any delay in performance, any nonperformance, or any other deviation in the performance of PRL's obligations, nor for any loss or damage to the parts supplied hereunder, when occasioned directly or indirectly by any event or occurrence beyond the reasonable control of PRL or its suppliers or subcontractors of any tier, such as, by way of example and not by way of limitation, acts of God; actions by any governmental authority (whether valid or invalid); fires; floods; windstorms; explosions; riots; natural disasters; wars; sabotage; labor problems (including lockouts, strikes, and slowdowns) at PRL's facility or its plants (or the facilities or plants of its suppliers or subcontractors); inability to obtain power, material, equipment, or transportation; or court injunction or order. PRL shall have a reasonable extension of the time for performance when delayed by any such cause.

### **15. CLAIM MATERIAL**

PRL must receive notice of claim for overages, shortages, or unused damaged or incorrect parts within thirty calendar (30) days from date of delivery. Notice of claim for warranty material must be made in accordance with the conditions set forth in Section 10..

#### **(a) Customer Error**

If Customer desires to return material ordered in error, Customer must make such request in writing to PRL and forward to PRL's Customer Service Department, within thirty calendar (30) days from date of delivery for parts delivered to the United States, Canada, or Mexico ("**North**



America”) (and ninety (90) calendar days for all parts delivered outside of North America).

PRL will advise Customer in writing of the conditions of return, including, but not limited to, a restocking charge of twenty percent (20%) of the invoiced purchase price. All parts returned for credit must be in the as-shipped condition, properly identified, in original PRL packaging, and subject to PRL’s acceptance, provided, however, that PRL reserves the right to decline any extension of credit or alter the manner in which credit is extended in the event that doing so would expose PRL to unwarranted tax liability within any territories or countries in which a Customer office is located or in which Customer operates (the “Territory”).

**(b) PRL Error**

If Customer receives any parts not ordered, in excess of an Order, or short of Order, or that are damaged, or otherwise inconsistent with an applicable Order, arising through no fault, act or omission of Customer, and the Customer files a claim in writing with PRL’s Customer Service Department within thirty (30) calendar days from the date of delivery for parts delivered within North America (and ninety (90) calendar days for all parts delivered outside of North America), then based on the error, PRL will investigate Customer’s claim and if confirmed by PRL:

- (i) For a shortage, PRL will deliver the shorted material free of charge, provided that Customer may be required to serve as the importer of record in the event that the applicable laws of the Territory so require or it is commercially unreasonable for PRL to do so.
- (ii) For material that is in excess, damaged, or otherwise inconsistent with an Order, PRL will notify the Customer in writing, either to scrap the material or return the material that is in excess, damaged, or otherwise inconsistent with an Order. If the material is to be scrapped, then the Customer must certify in writing that the material has been scrapped. If the material is to be returned, then PRL will issue a Return Material Authorization (“RMA”). PRL reserves the right to decline any extension of credit or alter the manner in which credit is extended in the event that doing so would expose PRL to unwarranted tax liability within the Territory.

**16. AMENDMENTS**

This Contract is the entire agreement and supersedes all previous agreements, oral or written, between Customer and PRL with respect to the subject matter hereof. Customer understands and agrees that PRL may modify this Contract from time to time, and Customer agrees that the version of

this Contract in effect as of the date of Order receipt by PRL will be the terms and conditions of sale that apply to such purchase by Customer.

**17. SEVERABILITY**

If any provision of this Contract will be held to be invalid, illegal, or unenforceable under any statute, regulation, ordinance, executive order, or other rule of law, that provision will be deemed severed to the extent necessary to comply with such statute, regulation, ordinance, order or rule, or the Parties will replace the invalid provision with valid provisions which best meet the Parties’ original intent. The remaining provisions hereof will remain unaffected and in full force and effect.

**18. TERMINATION**

In the event an Order is terminated for any reason other than default by PRL, Customer must provide at least thirty (30) calendar days written notice prior to delivery date to PRL specifying such termination, and Customer will pay to PRL the following:

- (a) The price in effect at time of delivery for any such parts that PRL has shipped or the price in effect at time of termination for such parts ready for delivery pursuant to a firm Order.
- (b) The actual costs of work-in-process and raw materials incurred by PRL, its subcontractors or suppliers, plus 20% of the sum of such actual costs.
- (c) The costs associated with development and engineering of the new replacement spare part, including, but not limited to, tooling, foreign exchange, and interest, to the extent such costs are properly allocable or apportionable under generally accepted accounting principles.
- (d) The restocking fee for parts not previously shipped, 20% of the sale price of such part.
- (e) The price for all services that have been completed in accordance with an applicable Order and not previously paid for.
- (f) The applicable sales/use tax.

For custom parts (i.e., PRL manufactures, prepares or develops specifically for an Order and not off-the-shelf), Customer may not cancel any such Orders. Examples of custom parts include, but are not limited to, engines,



turbochargers, generators, alternators, traction motors, and any made-to-order material.

#### **19. LANGUAGE**

This Contract is prepared in the English language. Any translation of this Contract into another language will be strictly for convenience, and the English language will govern any question with respect to interpretation.

#### **20. APPLICABLE LAW & DISPUTE RESOLUTION**

##### **(a) Notice of Dispute & Negotiation (U.S. & International Customers)**

PRL and Customer shall use their best efforts to resolve any dispute or claim that may arise under this Contract or any Order arising thereunder in an amicable manner. Except for PRL's claim for non-payment by Customer hereunder, in the event either Party believes the other Party is in breach of or is noncompliant with any of the provisions of this Contract or any Order, such Party shall promptly notify the other in writing of such claim and the receiving Party shall take reasonable measures to remedy such breach or noncompliance within thirty (30) days after receipt of notice. If the dispute is not resolved within such time, then the Party initiating the claim shall demand a meeting of the Parties, which (unless otherwise agreed) shall be held in LaGrange, Illinois, United States of America. Persons attending such meeting shall have decision-making authority regarding the dispute to attempt, in good faith, to negotiate a resolution of the dispute. The Parties agree to participate in such negotiations and, if agreeable, mediation related thereto, for a period of 30 days.

##### **(b) Binding Arbitration (International Customers)**

If PRL and the Non-U.S. Customer are not successful in resolving the dispute through negotiations set forth in Section 21(a), or mediation, if used, then the dispute shall be submitted to binding arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce, and judgment upon the arbitral award may be entered in any court having jurisdiction. The request for arbitration shall be made within a reasonable time after the dispute or claim arises, and in no event after it would be barred by any applicable statute of limitations. Three arbitrators shall be appointed in accordance with said Rules: one arbitrator selected by each Party with the third arbitrator selected by the two appointed arbitrators. The cost of such arbitration shall be borne as determined by the arbitrator(s). Unless otherwise mutually agreed, arbitration hearings shall be conducted in the English language and held in one of the following cities, dependent upon which is closest in proximity to the sites where the parts will be used: Brussels, Belgium; Geneva, Switzerland; London, England; Chicago, Illinois; Hong Kong, People's Republic of China; or Singapore.

The Contract and any Order, shall be governed by the laws of the State of Illinois, United States of America, without regard to conflicts of law principles, and expressly excluding application of the United Nations Convention on Contracts for the International Sale of Goods.

##### **(c) Litigation (United States Customer)**

If PRL and the U.S. Customer are not successful in resolving the dispute through negotiations set forth in Section 21(a), or mediation, if used, then any Party bringing a legal action or proceeding against any other Party arising out or relating to this Contract must bring the legal action or proceeding within the federal or state courts within the State of Illinois. Each party further, to the fullest extent of the law, knowingly, voluntarily and intentionally waives its right to a jury trial in any action or other legal proceeding among the Parties arising out of relating to this Contract.

#### **21. EXPORT CONTROL & COMPLIANCE**

Customer understands and acknowledges that the parts or services acquired under this Contract may be subject to United States export laws, including but not limited to the Export Administration Act and the Export Administration Regulations promulgated thereunder, and the Arms Export Control and the International Traffic in Arms Regulations of the United States Government relating to the export of technical data and products. This Contract is subject to, and Customer Agrees to comply with, any laws, regulations, orders or other restrictions on the export, re-export, transfer or distribution of the parts from the United States which may be imposed by the United States Government or agencies thereof.

For deliveries of products sourced in the United States to a destination outside of the United States, where the terms of sale are ex works, Customer hereby expressly assumes responsibility (a) for filing the electronic reporting of export information ("EEI") in the United States, (b) for determining United States licensing requirements, and (c) for obtaining any licenses from the United States Government for the export and re-export of the parts. In the event that the Customer is a Foreign Principal Party in Interest without a United States presence, Customer shall designate its own freight forwarder or other agent in the United States ("**Authorized Agent**") to perform the export functions on behalf of the Customer, including, but not limited to, (1) preparing the filing of the EEI, (2) determining and satisfying all export license, authorization, notification, approval, and reporting requirements, and (3) carrying out any customs formalities related to the export of the parts in the United States in routed transaction, as set forth in the United States



Foreign Trade Regulations. Customer shall provide PRL with a copy of the valid Power of Attorney or written authorization to the Authorized Agent's authority in such routed writing of any change regarding the status of the Authorized Agent. Upon PRL's request, Customer shall provide Seller with certain information in the EEI filings.

Customer warrants to PRL that it will comply with all laws and regulations affecting the Customers use or sale of parts which are in force within the Territory as of the Effective Date. Without limiting the generality of the foregoing, Customer shall (a) at its own expense, maintain all certifications, credentials, licenses and permits necessary to conduct its business relating to the purchase or use of the parts, and (b) not engage in any activity or transaction involving the parts that violates any law.

## EXHIBIT A

# STATEMENT OF WARRANTY AFTERMARKET PARTS

PRL warrants that it will correct any defect or defects in material or workmanship in new or remanufactured parts or components sold separately by Seller that may develop under normal use and service for the period ending on the earlier of:

- (a) Within (1) year after being placed in service by original purchaser; 2 years for utex turbochargers;
- (b) Within 100,000 miles/160,000 KM of operation if installed as a replacement item; or
- (c) Within 4200 megawatt hours after application

Notwithstanding the foregoing, the original purchaser may place the part or component in storage in a secure, dry warehouse for up to two (2) years after shipment from Seller's warehouse.

Seller agrees to correct such defects, which examination shall disclose to Seller's satisfaction to be defective, by repair, UTEX or new part replacement at Seller's option, and such correction shall constitute fulfillment of all Seller's obligations and liability with respect to any defective part or component thereof covered under this warranty. Seller will deliver repaired, unit exchanged or new part replacement material to Customer as follows: (1) for North American Customers, shipped prepaid by Seller to Customer; (2) for non-North American Customers, CIP (*Incoterms 2010*) Port (standard freight).

This warranty shall not apply to any part or component thereof (1) that is not placed in service by the original purchaser within two years after shipment from Seller's warehouse; (2) used for purposes for which it is not designed or intended; (3) which has been repaired or altered without Seller's prior written consent; (4) which has been subjected to misuse, negligence, accident, improper storage, improper installation or improper operation; (5) which has not been maintained according to Seller's maintenance instructions applicable to the component; or (6) which, based on Seller's examination, discloses that the part or component conforms to the warranty.

If upon analysis by Seller, the Customer is found to be responsible for the failure or defect, or if the original part is found to be free of a reported defect, following return of the part according to the procedures outlined below, then Seller shall invoice Customer for all charges incurred by Seller with respect to any replacement or repaired parts supplied to Customer. Customer shall be responsible for all charges incurred by Seller in the event Customer orders new replacement parts under its warranty parts order, where Seller has determined that it shall fulfill its warranty obligations hereunder by either performing a warranty repair or by providing UTEX parts/material.

THIS WARRANTY IS EXPRESSLY IN LIEU OF ANY OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND OF ANY NON-CONTRACTUAL LIABILITIES INCLUDING PRODUCT LIABILITIES BASED UPON NEGLIGENCE OR STRICT LIABILITY

### Warranty Applications Deadline

All warranty requests must be submitted to and received by PRL no later than:

- For parts or components placed into service:
  - For North American Customers: sixty calendar (60) days after the date upon which the original part or component is reported to be defective
  - For non-North American Customers: six (6) months after the date upon which the original part or component is reported to be defective
- For parts and components not placed into service:
  - The earlier of: (a) thirty calendar (30) days after the date upon which the original part or component is reported to be defective; or (b) within two (2) years after shipment of the original part from Seller's warehouse.

Warranty applications submitted after these dates will be denied.

### Administration of Warranty Applications

Administration of warranty applications and PRL's performance of its warranty obligations hereunder shall be according to PRL's Warranty Procedure Handbook in effect on the date of the applicable Order placed by Customer, which may be updated from time to time and is available upon request.

### LIMITATION OF LIABILITY

IN NO EVENT SHALL SELLER BE LIABLE FOR SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING, BUT NOT LIMITED TO LOSS OF PROFITS, LOSS OF REVENUE, LOSS OF USE OF THE PRODUCTS OR OTHER EQUIPMENT, DOWNTIME COSTS, OR CLAIM OF BUYER'S CUSTOMERS, WHETHER BASED ON CONTRACT, TORT (INCLUDING STRICT LIABILITY OR NEGLIGENCE), OR OTHERWISE, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.