

Terms & Conditions

EFFECTIVE BEGINNING NOVEMBER, 1, 2006

The following Terms and Conditions, as referenced in and incorporated by the Contract Documents of VAN WELL NURSERY, INC. apply to the contractual relationship between VAN WELL NURSERY, INC. as Seller and all Buyers of its products.

NOTE: These terms and conditions are in addition to those contained in the Contract Documents and are not intended to modify or contradict any of the Terms and Conditions contained in the Contract Documents. In the event that any of these Terms or Conditions modifies, or is determined to be in conflict with any of the Terms and Conditions in the Contract Documents, the Terms and Conditions contained in the Contract Documents shall govern and the conflicting Term(s) or Condition(s) contained herein shall be invalid and of no force or effect without affecting the validity of the remaining Terms and Conditions herein or in the Contract Documents.

(1) Disclaimer of Warranties

With the exception of the Limited Warranty set forth in the Contract Documents,

VAN WELL NURSERY, INC., disclaims all warranties of any kind, express or implied, specifically including but not limited to the Warranty of Merchantability and the Warranty of Fitness for a Particular Purpose. VAN WELL NURSERY, INC. cannot warrant either the productivity (either in terms of the yield, size, quality, and color) or the marketability of the potential crops due to factors beyond its control after the delivery of the products into the hands of the Buyer. The factors which introduce variables that can affect productivity and marketability include but are not limited to (a) environmental conditions such as the growing year's weather conditions, local "microclimates," draught, cold, heat, wind, and maturity rate variables such as elevation and geographic location of the orchard; (b) horticultural conditions and farming practices such as soil type, soil nutrient levels, the pH of the soil, soil drainage, irrigation practices, planting density, pruning practices, the nature of the canopy and canopy development, trellis configuration, fertilization practices (such as nitrogen levels), the tree's vigor (and whether the tree is being "pushed", age of the trees, prior use of the farmland, the tree's uptake of nutrients (including nitrogen) and water, the type of rootstock, the thinning practices and the location of apples on the tree, and the timing of the harvest; and (c) market conditions including but not limited to the timing of harvest, crop size, variety, demand and carry-over inventory.

(2) Latent Defects

Unless the product is sold as "certified" or "virus indexed" VAN WELL NURSERY, INC., does not warrant against any potentially latent defect(s), and Buyer assumes all risks of loss and/or economic damage resulting from claimed defects that are latent at the time of the sale. As set forth elsewhere herein, if the product is sold as "certified" or "virus indexed" there is an associated warranty that the product will be free of those viruses listed (or "indexed") but there is no warranty as to any other non-indexed viruses. The sale price of the product reflects, in part, the transfer of the risk of potential loss and/or damages from latent defects from VAN WELL NURSERY, INC. to the Buyer and Buyer hereby expressly assumes those risks.

(3) Marketing Materials

Like many other nurseries, VAN WELL NURSERY, INC. publishes marketing materials and may also run advertisements promoting its products. The pictures and descriptions of the fruit in these publications are intended to be examples of ideal fruit under ideal conditions, and are not intended to be representative examples of all of the fruit that will be produced by the fruit trees. The variables set forth elsewhere herein can and do affect the fruit, and the pictures and

descriptions of the fruit in the above-referenced publications are not intended to be a warranty (either express or implied) as to the quality or characteristics of the fruit under any and all combinations of potential variables. Buyer should not rely on those pictures or descriptions of fruit in those marketing materials or advertisements as a basis for its decision to purchase the product as those pictures and descriptions do not necessarily depict the resulting crop for any of a number of reasons beyond our control.

(4) Other Orchards / Blocks as Examples

Buyer may have toured or viewed other orchards or blocks of similar fruit trees as part of

Buyer's decision-making process, either on its own initiative or at the suggestion of VAN WELL NURSERY, INC. or a third party. Those inspections may include viewing "mother-blocks" owned and operated by VAN WELL NURSERY, INC. or other orchards, or blocks owned and farmed by others. Due to the environmental and horticultural variables listed elsewhere, those blocks cannot and do not rise to the level of a "sample or model" and do not create an express warranty that the product Buyer is purchasing will conform to that orchard or block. Buyer's inspection of any orchard or block does not create an express warranty under RCW 62A.2-313. Those orchards or blocks are only representative of that year's crops under the environmental conditions, and horticultural practices and variables unique to that year and that site. There is no representation or warranty that the product purchased shall perform in a similar fashion when planted under different environmental and horticultural variables at different locations in different years.

(5) Sample Pack-out Reports

If Buyer has been provided with or reviewed one or more pack-out reports for similar

products by anyone, including VAN WELL NURSERY, INC., those pack-out reports do not form the basis for an express warranty under RCW 62A.2-313. As with the observation of a block of similar fruit trees, a pack-out report is merely representative of what that block's performance was under the weather conditions of that year, the horticultural practices and environmental conditions unique to that site at that time, and subject to the various parameters employed by the packing house. Pack-out reports are not intended to be representative of an expected pack-out under all potential conditions and are not to be relied upon by Buyer.

(6) Collection of Budwood / Scionwood From "Off-Site" Orchards / Blocks.

While VAN WELL NURSERY, INC. maintains a certain number of its own orchards (aka "mother blocks") from which it collects budwood and scionwood, circumstances such as the variety or cultivar requested and/or the volume of product requested may dictate that the budwood or scionwood be collected "off-site" from orchards that are not owned and operated by VAN WELL NURSERY, INC. Unless otherwise agreed in writing in advance, there is no warranty that the budwood or scionwood collected to propagate the end product will come from a "mother block" owned and operated by VAN WELL NURSERY, INC.

(7) Selection of the Source(s) of Scionwood / Budwood

VAN WELL NURSERY, INC. makes every attempt to select the best-available source(s) of budwood and scionwood for the propagation of its products, be it from "mother-blocks" or off-site orchards. VAN WELL NURSERY, INC. uses its best judgment in selecting the sources of these materials; however, unless the product is sold as "certified" or "virus-indexed"

there is no warranty that the source of bud wood or scionwood selected by VAN WELL NURSERY, INC. is free from viruses, diseases and/or pests. Buyer expressly agrees that these business decisions made by VAN WELL NURSERY, INC. are undertaken as part of an effort to minimize the costs of the raw materials and thus the end price of the products, and in consideration for this the Buyer expressly waives and relinquishes any claims and all causes of action sounding in both contract and negligence against VAN WELL NURSERY, INC. for its selection of the source(s) of the scionwood or budwood.

(8) Harvesting the Scionwood / Budwood

VAN WELL NURSERY, INC. makes every attempt to harvest the budwood and scionwood in an effort to produce a quality product based on its beliefs regarding the best harvesting methodology on a case-by-case basis. While every effort is made to harvest what is believed to be the best available scionwood and budwood, VAN WELL NURSERY, INC. cannot warrant that the end product will be either exactly uniform or without some normal level of instability or reversion. While the goal is overall quality, the harvesting techniques employed may result in certain variations in the fruit's quality, characteristics, size, and color on a tree-by-tree, branch-by-branch, or fruit-by-fruit basis

due to the potential manifestation of an inherent but generally acceptable level of genetic

instability. VAN WELL NURSERY, INC. cannot economically provide a warranty that the end products will be entirely free from variations (especially in color) due to an inherent but generally acceptable level of instability, and as consideration for this economic concern the Buyer waives and relinquishes any claims and all causes of action sounding in both contract and negligence against VAN WELL NURSERY, INC. for its methodologies and techniques employed in harvesting of budwood and scionwood.

(9) Integration Clause - Prior / Contemporaneous Representations.

The Contract Documents contain an integration clause. By signing the contract, the

Buyer agrees that he is not relying upon any representation made at the time of the sale or prior to the sale (regardless of whether the claimed representation was in writing or oral) unless that representation is contained within the Terms and Conditions of the Contract Documents, or these Terms and Conditions incorporated thereby.

(10) Certified Virus Indexed

Certification of nursery stock grown and sold in Washington State is governed by the

Washington Administrative Code, Chapter 16-350. (WAC Chpt. 16-350) Unless the product is expressly sold as "certified," "virus-indexed," or "certified virus-indexed" with the appropriate Washington State certification tag, stamp or other qualifying document, the product is not "certified." If the product is not "certified" there is no warranty that the tree is free from harmful viruses and virus-like diseases, or other diseases caused by viroids and phytoplasmas. If the product is sold as "certified," "virus-indexed," or "certified virus-indexed" it is only warranted to be free from the viruses and virus-like diseases for which it was tested. "Certification" under WAC Chpt. 16-350 does not mean that the product is free of any and all viruses and virus-like diseases; it is only a warranty that the product is free of those viruses and virus-like diseases for which it was tested under the guidelines established by the various Research Stations involved at the time of its testing. Even if the material is "certified" there may be certain viruses which the then-existing testing methods and

protocols did not detect. Consequently, those products cannot be warranted to be free of those viruses and virus-like diseases which cannot be tested or detected under the testing methodologies and protocol at the time of certification.

(11) Mandatory Assessment

Washington State law requires all licensed nurseries, including VAN WELL NURSERY, INC., to charge and collect an assessment amounting to a percentage of the sales price of certain designated nursery stock. (RCW 15.13.310 & WAC 16-401-050) This assessment is collected by the nurseries and remitted to the planting stock certification account within the agricultural local fund to be used only for the Washington grapevine and fruit tree certification, and nursery improvement programs as set forth in RCW Chpt. 15.13 and RCW Chpt. 15.14. (RCW 15.13.470(2)) Assessment and collection of this State-mandated fee by VAN WELL NURSERY, INC.) is not a warranty that the product is "certified virus-indexed" or came from either "registered planting stock," "foundation planting stock," or "certified planting stock," as those terms are defined at RCW 15.14.010.

(12) Replacement and Replacement Price of the Product.

The Contract Documents provide the Buyer with the option of recovering the purchase

price of the product, or replacement of the product, as its limited exclusive remedies in the event the Buyer establishes a breach of contract. In the event that the Buyer elects to recover the price of the product, the dollar value shall be the actual purchase price paid by the Buyer for the product, plus any associated tax(es), shipping, assessment, or handling at the time of the original contract. It shall not be the price of a new product at any subsequent period of time, and it shall not be the dollar value of a matured producing tree at any subsequent period of time. If the Buyer having established a breach of the contract elects as a remedy the replacement of the product, it shall be replaced with a product of like kind as of the original date of delivery of the product to the Buyer. This shall be deemed completely satisfied by delivery of a qualifying replacement to the Buyer. However, if the Seller is unable to locate replacement material, then the parties may agree upon a substitution upon agreeable terms and conditions. If the materials are not available and the parties are not able to come to an agreement on substitution, then the Buyer must elect the refund of the purchase price. VAN WELL NURSERY, INC. shall not be responsible for the costs (if any) of actually removing the old product or replacing it with the new product.

(13) Variety, Cultivar, Trademarks & Trade Names

Fruit Trees are generally categorized by variety, such as Red Delicious, Golden

Delicious, Gala, Fuji, or Braeburn. Within each variety, sport mutations may be discovered, which may result in new cultivars of that variety. These cultivars have individual characteristics making them unique in some respects from other cultivars within the same variety. Sometimes new varieties or cultivars are patented and sometimes they are not. Often a nursery will market a cultivar using a trademark or brand name separate from the cultivar name or varietal name. The same cultivar may be sold under different trademarks or brand names by different nurseries. Buyers should be alert to the fact that a fruit tree product sold by VAN WELL NURSERY, INC. under one trademark may be the same cultivar marketed by another nursery under a different trademark. The use of a trademark or brand name to market a cultivar does not necessarily mean that the product is a cultivar sold exclusively by VAN WELL NURSERY, INC.

(14) VAN WELL NURSERY ,INC. is Not Making Any Recommendations as to Variety or Quantity - Those Decisions are Solely the Buyer's

VAN WELL NURSERY, INC. offers several different varieties of products for sale. VAN WELL NURSERY, INC. is not in the business of providing consulting services or recommendations to Buyers regarding what varieties of fruit trees they should purchase, planting locations and densities. Those decisions are beyond the ability of VAN WELL NURSERY, INC. to make given all of the variables and thus those decisions are solely the Buyer's. Buyer shall make no claim against VAN WELL NURSERY, INC. based on an allegation that VAN WELL NURSERY, INC. made a recommendation that was either incorrect or negligent, and Buyer hereby disclaims, waives and relinquishes any such right or cause of action.

(15) Non-Consolidation of Claims

As part of the Terms and Conditions of this Agreement, the Buyer agrees that in the event

he/she brings a claim against VAN WELL NURSERY, INC., the Buyer herein expressly agrees that its claim(s) cannot be consolidated with the claim or claims of any other entity or entities in the same action. Absent written consent of all of the parties, including VAN WELL NURSERY, INC., the parties agree that no consolidation of claims shall be allowed in any action against VAN WELL NURSERY, INC.

NO CANCELLATIONS ACCEPTED AFTER FEBRUARY 1ST