

FungoMan FM-DPM Dual Pitching Machine **Maintenance Agreement**

1. Disclaimers and Maintenance Agreement.

- (a) FungoMan warrants to the original purchaser of Equipment that, for the Maintenance Agreement Period (as defined below), the Equipment will be free from material defects in materials and workmanship. The foregoing maintenance agreement is subject to the proper installation, operation and maintenance of the Equipment in accordance with installation instructions and the operating manual supplied to Customer. Maintenance Agreement claims must be submitted and documented by Customer within 60 days of the manifestation of a problem. FungoMan's sole obligation under the foregoing maintenance agreement is, at FungoMan's option, to repair, replace or correct any such defect that was present at the time of delivery, or to remove the Equipment and to refund the purchase price to Customer.
- (b) The Maintenance Agreement begins on the date of purchase and continues for 12 months.
- (c) Any repairs under this MAINTENANCE must be conducted and/or assisted by an authorized FungoMan service representative.
- (d) Excluded from the maintenance agreement are problems due to accidents, misuse, misapplication, storage damage, negligence, weather, acts of god, force majeure, external objects or modification of the Equipment or its components.
- (e) FungoMan does not authorize any person or party to assume or create for it any other obligation or liability in connection with the Equipment except as set forth herein.
- (f) THE MAINTENANCE AGREEMENT IN SECTION 1(a) ABOVE IS EXCLUSIVE AND IN LIEU OF ALL OTHER INDEMNITIES OR WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

2. Nondisclosure. By virtue of this Agreement, Customer may have access to information that is confidential to FungoMan ("Confidential Information"). Confidential Information shall include, but not be limited to, the terms and pricing under this Agreement, the technical and other specifications for the Equipment and all information clearly identified as confidential. Confidential Information shall not include information that: (a) is or becomes a part of the public domain through no act or omission of Customer; (b) was in the Customer's lawful possession prior to the disclosure and had not been obtained by Customer either directly or indirectly from the disclosing party; (c) is lawfully disclosed to the Customer by a third party without restriction on disclosure; or (d) is independently developed by Customer. Customer agrees to hold Confidential Information in confidence during the term of this Agreement and for a period of five years after termination of this Agreement. Customer agrees that, unless required by law, it shall not make Confidential Information available in any form to any third party, nor shall Customer use Confidential Information for any purpose other than the implementation of this Agreement. Customer agrees to take all reasonable steps to ensure that Confidential Information is not disclosed or distributed by its employees, representatives or agents in violation of the terms of this Agreement.

3. Limitation of Liability. IN NO EVENT SHALL FUNGOMAN BE LIABLE FOR ANY INDIRECT, INCIDENTAL, PUNITIVE, SPECIAL OR CONSEQUENTIAL DAMAGES, OR DAMAGES FOR LOSS OF PROFITS, REVENUE, OR USE INCURRED BY CUSTOMER OR ANY THIRD PARTY, WHETHER IN AN ACTION IN CONTRACT, OR TORT, OR OTHERWISE EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. FUNGOMAN'S LIABILITY FOR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT SHALL IN NO EVENT EXCEED THE PURCHASE PRICE OF THE DEFECTIVE EQUIPMENT. THE PROVISIONS OF THIS AGREEMENT ALLOCATE THE RISKS BETWEEN FUNGOMAN AND CUSTOMER. FUNGOMAN'S PRICING REFLECTS THIS ALLOCATION OF RISK AND FOR THIS ALLOCATION AND LIMITATION OF LIABILITY, CUSTOMER ACKNOWLEDGES THAT FUNGOMAN WOULD NOT HAVE ENTERED INTO THIS AGREEMENT.

4. Miscellaneous.

- (a)** This Agreement, and all matters arising out of or relating to this Agreement, shall be governed by the laws of the State of Louisiana (exclusive of conflict of laws principles), and shall be deemed to be executed in Shreveport, Louisiana.
- (b)** Any legal action or proceeding relating to this Agreement shall be instituted solely in a state or federal court in Shreveport, Louisiana. FungoMan and Customer agree to submit to the jurisdiction of, and agree that venue is proper in, these courts in any such legal action or proceeding.
- (c)** All notices, including notices of address change, required to be sent hereunder shall be in writing and shall be deemed to have been given when mailed by first class mail or by fax to the address listed below.
- (d)** Prices for Equipment specified herein are exclusive of all city, parish or county, state and federal taxes, including, without limitation, taxes on manufacture, sales, receipts, gross income, occupation, use and similar taxes. Customer agrees to pay such taxes directly or to reimburse FungoMan for all such taxes, whether imposed on Customer and required to be collected by FungoMan, or imposed on Equipment or on Customer in connection with this sale or the use of Equipment. Wherever applicable, such tax or taxes shall be added to the invoice as a separate charge or invoiced separately. Customer agrees to pay all personal property taxes that may be levied against Equipment after the date of delivery. Notwithstanding any statutory period of limitation, prescription or peremption with respect to the time within which either party may assert a claim against the other under this Agreement, and notwithstanding any other provision of this Agreement to the contrary with respect to the time within which any such claim may be asserted, Customer's obligation to pay or reimburse FungoMan for any taxes described in this Section 9(d) shall be enforceable by FungoMan at any time within one year immediately following the date on which FungoMan notifies Customer that such taxes are due.
- (e)** To secure payment and performance of all Customers' obligations hereunder, FungoMan hereby retains title to Equipment and a security interest therein until payment in full and performance by Customer of all said obligations. When requested by FungoMan, Customer shall duly acknowledge this Agreement and execute, acknowledge and deliver to FungoMan, in FungoMan's usual form, a supplement hereto, security agreement, financing statement and/or other appropriate instruments to constitute Equipment as the unencumbered security for the obligations of Customer hereunder, or to enable FungoMan to comply with all applicable filing or recording laws with respect to its security interest in the Equipment.
- (f)** In the event any provision of this Agreement is held to be invalid or unenforceable, the remaining provisions of this Agreement will remain in full force.
- (g)** The waiver by either party of any default or breach of this Agreement shall not constitute a waiver of any other or subsequent default or breach. Except for actions for reimbursement of taxes as provided in Section 4(d), non-payment, or breach of FungoMan's proprietary rights, no action, regardless of form, arising out of or in connection with this Agreement may be brought by either party more than one year after the cause of action has accrued.
- (h)** Customer agrees to comply fully with all relevant export laws and regulations of the United States ("Export Laws") to assure that the Equipment is not (1) exported, directly or indirectly, in violation of Export Laws; or (2) intended to be used for any purposes prohibited by the Export Laws. Customer agrees that the Equipment will only be used or operated in the United States and other territories approved in writing by FungoMan.
- (i)** FungoMan is an independent contractor; nothing in this Agreement shall be construed to create a partnership, joint venture or agency relationship between the parties.
- (j)** This Agreement constitutes the complete agreement between the parties with respect to its subject matter and supersedes all prior or contemporaneous agreements, understandings, representations, discussions, proposals, literature, and the like, written or oral. This Agreement may not be modified or amended except in a writing signed by a duly authorized representative of each party; no other act, document, usage or custom shall be deemed to amend or modify this Agreement. It is expressly agreed that the terms of this Agreement shall supersede the terms in any Customer purchase order or other ordering document, if any.

- (k) It is the intention of FungoMan and Customer that no dispute under this Agreement will be the subject of any court action or litigation in the local, state, or federal judicial system. FungoMan and Customer recognize that the problem resolution processes of mediation and arbitration are appropriate and preferable to resolve issues between the parties. If any party hereto wishes to resolve an issue under or relating to this Agreement, then such party must give notice of a request for mediation to the other party, which notice shall set forth the names of not less than three mediators from Shreveport, Louisiana. The party receiving such notice shall agree upon one or more such mediators with ten days of receipt of such notice and a mediation will be scheduled as soon as feasible between the parties and their respective advisors, and the parties and their advisors will cooperate fully with respect to sharing of information and attendance at meetings in order to seek resolution. The parties will share mediation expenses with the party requesting the mediation paying one-half of such expenses and the other party paying the other one-half of such expenses. If resolution of the matters between the parties cannot be resolved in mediation within twenty days of the selection of a mediator by the party receiving such notice, then the matter shall be presented to formal arbitration pursuant to the rules utilized by the alternative dispute resolution service selected by the mediator agreed upon by the parties, and employing a panel of arbitrators selected by such mediator. Arbitration shall take place in the venue in which the mediation shall have occurred as soon as possible and the decision of the arbitrator panel shall be binding upon the parties for all purposes. The party which does not prevail in such proceeding or in any judicial proceeding shall pay all reasonable fees and costs, including attorneys and expert witness fees, incurred by the prevailing party relating to such proceeding, except that the arbitrator shall have discretion to reduce or eliminate such award of costs and fees if such award would be inequitable or unreasonable under the circumstances. It is the intention of the parties that this Agreement shall be construed and interpreted in a fair and equitable manner based upon the facts and circumstances of the parties taking into account the present intention of the parties to have a fair and equitable agreement under the terms and conditions set forth in this Agreement.
- (l) This Agreement shall be construed as to its fair meaning and not strictly for or against either party.
- (m) FungoMan shall not be deemed to be in default of any provision of this Agreement, nor shall FungoMan be liable for any failure in performance resulting from acts or events beyond its reasonable control. Such acts shall include but not be limited to: acts of God, force majeure, civil or military authority, civil disturbance, war, strikes, fires, other catastrophes, labor disputes, parts shortages, or other events beyond FungoMan's reasonable control.
- (n) This Agreement is not assignable, directly or indirectly, by Customer.