

# Orbea USA Dealer Documents

2011-12 DEALER AGREEMENT

**PLEASE NEATLY PRINT OR TYPE ALL INFORMATION, IN EACH SECTION AND RETURN WITH ATTACHMENTS BY E-FAX (501) 325-1142.**

This Dealer Agreement is entered into this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ by and between ORBEA, USA, LLC, a limited liability company organized under the laws of Delaware, with its principle office located at 600 North Broadway, North Little Rock, Arkansas 72114 (hereinafter referred to as ORBEA) and \_\_\_\_\_ with its principle place of business located at \_\_\_\_\_ (hereinafter referred to as the Dealer and collectively with ORBEA referred to as the Parties).

## RECITALS:

- A. ORBEA is a nation-wide distributor of bicycles and related accessories, and desires to market its products.
- B. Dealer has expressed its willingness to become an authorized ORBEA dealer for re-sale, in accordance with the terms and conditions set forth in this Agreement.
- C. Dealer has provided ORBEA with a Dealer Credit Application (hereinafter referred to as the Application) delivered with this Agreement.
- D. Dealer must provide Orbea a copy of the dealer's State Resale Certificate, if applicable
- E. ORBEA has offered to appoint Dealer as an authorized ORBEA dealer for certain products, in accordance with the terms and conditions set forth in this Agreement.
- F. For and in consideration of the matters described above, and of the mutual benefits and obligations set forth in this Agreement, the Parties agree as follows:

1. **Purpose.** The purpose of this Agreement is to set forth the terms and conditions under which a dealer may be appointed to sell ORBEA bicycles and other products distributed by ORBEA (collectively referred to as ORBEA Products) and the financial arrangement between the Parties, in accordance with the terms and conditions of this Agreement.
2. **Grant of Authority.** ORBEA hereby grants to Dealer the non-exclusive right to sell and service ORBEA Products in a retail establishment, and to use ORBEA's trademark, trade name and service mark in advertising and in the sale and service of ORBEA Products. Dealer is authorized to operate such retail establishment at the location set forth in the Application submitted with this Agreement to ORBEA to become a dealer (hereinafter referred to as the Approved Location). Dealer accepts such dealer appointment on the terms and conditions set forth herein.
3. **Ordering of ORBEA Products.** All orders for ORBEA Products placed by Dealer shall be by telephone, fax or e-mail. All orders shall be subject to acceptance by ORBEA at North Little Rock, Arkansas.
4. **Prices.** Dealer shall purchase ORBEA Products at the prices in effect at the time of the order. ORBEA may implement price changes at any time during the term of this Agreement upon thirty (30) days prior written or electronic (e-mail) notice thereof to Dealer. In addition to the purchase price, Dealer shall pay to ORBEA the amount of all taxes, excises or other governmental charges (except taxes on or measured by net income) that ORBEA may be required to pay on the sale or delivery of any ORBEA Products sold and delivered to Dealer, except where the law otherwise provides.
5. **Delivery.** All ORBEA Products shall be shipped FOB shipping point, with title and risk of loss passing at such point. The shipment destination must be Dealer's Approved Location or some other mutually agreed location. Any taxes, administrative or governmental charges incurred as a result of the purchase of ORBEA Products are the sole responsibility of Dealer.
6. **Purchase and Sales.** ORBEA may set discounts/rebates for ORBEA Products purchased by Dealer, based upon the volume of historical sales of a renewing dealer or volume of pre-season orders for a new dealer. The amount of the discount/rebate is set out in the 2011 Model Year Dealer Program.

Check one of the following:

- New Dealer. The New Dealer category for 2011-12 is \_\_\_\_\_
- Renewing Dealer. The actual sales for Dealer in the 2010-11 Model Year (July 1, 2010 – June 30, 2011) for ORBEA Products was \$\_\_\_\_\_. The 2010-11 model year categories by sales volume of ORBEA Products were as follows: Category 3: \$15,000 - \$29,999, Category 2: \$30,000 - \$59,999, Category 1: \$60,000 - \$99,999 and Special Category: \$100,000+. Therefore, the Initial Dealer category for 2011-12 model year is \_\_\_\_\_

If the Dealer purchases a sufficient volume of ORBEA Products to advance to the next category level as defined in the 2011-12 Model Year Dealer Program (the "Model Year Category Dollar Level"), then Dealer will be given a credit/rebate for the ORBEA Products purchased during the 2011-12 Model Year. The credit/rebate will be based upon the discounts set out in the 2011-12 Model Year Dealer Program. Any credit/rebate for the 2011-12 Model Year earned in 2011 will be applied on or before January 31, 2012 and any rebate/credit earned in 2012 will be applied on or before July 31, 2012. In order to receive the credit/rebate, the Dealer must be current with all amounts owed to ORBEA. If the Dealer has not purchased fifty percent (50%) of the purchase volume required for the initial Category Level by December 31<sup>st</sup>, then the Dealer will be reduced one Category Level, and prices for the ORBEA Products purchased by the Dealer for the remainder of the Model Year will receive the price for the lower Category Level as set out in the 2011-12 Model Year Dealer Program.

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7. **Payment.** ORBEA will invoice Dealer for the ORBEA Products at the time of shipment and Dealer will pay such invoices on a net thirty (30) days from the invoice date unless otherwise approved by ORBEA, in writing, prior to shipment. If Dealer fails to pay the invoice by the due date(s) set out in the invoice, then the Dealer will be charged an interest rate of 1.5% per month (or maximum allowed by law) calculated on simple basis on the amount of the invoice.

(a) All returned checks and disallowed ACH payments will be assessed an administrative fee of \$50.00 (USD) per occurrence.

(b) Incentives will not be allowed if dealer is making payments by Credit Card.

8. **Reservation of Rights by ORBEA.** ORBEA reserves the right to take the following actions: (i) to appoint or be represented by other dealers; (ii) to make sales directly to any or all customers it deems appropriate, regardless of the location of the purchaser; (iii) any and all rights not otherwise expressly granted to Dealer by the terms of this Agreement.

9. **Discontinuance and Modification of ORBEA Products.** ORBEA will have the right at any time to introduce new ORBEA Products, discontinue the sale of any of its ORBEA Products without incurring any obligation or liability whatsoever.

10. **Promotional Materials.** During the term of this Agreement, ORBEA will take reasonable action, in its sole business judgement, to assist Dealer in Dealer's efforts to promote and sell ORBEA Products, including providing reasonable quantities of support materials such as product information, sales promotional literature, displays, store fixtures, and service tools which ORBEA determines, in its sole business judgement, are appropriate to offer to Dealer.

11. **Advertising.** ORBEA and Dealer agree to promote the ORBEA brand and products. Dealer agrees to use the ORBEA trademark only as permitted by the terms of this Agreement. Dealer will, at all times, display a sign identifying the store as a dealer of Orbea Products. Dealer will use reasonable efforts to promote service and sell ORBEA Products.

12. **Dealer's Requirements.**

(a) Dealer agrees to maintain a retail store (the Store) for the sale of ORBEA Products at the Approved Location.

(b) Dealer agrees to use its best efforts to vigorously and actively promote the sale of ORBEA Products at the Store.

(c) The Store will have adequate facilities for the display, sales, and service of ORBEA Products.

(d) Dealer will sell all ORBEA Products, especially bicycles, fully assembled and adjusted.

(e) Dealer will continuously maintain, to the satisfaction of ORBEA, a general reputation for honesty, integrity and good credit standing, and shall maintain the highest quality of standards.

(f) Dealer will comply with all laws, ordinances, and regulations, both state and federal, applicable to Dealer's business.

(g) Dealer shall pay and discharge, and ORBEA will have no obligation to pay for, any expenses or costs of any kind or nature incurred by Dealer in connection with its sale of ORBEA Products, including, without limitation, any expenses or costs involved in marketing ORBEA Products.

(h) Dealer will keep orderly and timely records of each sale of ORBEA Products, including the purchaser's name and address, and to otherwise provide such records to ORBEA on a not-less-than monthly basis.

(i) Dealer will provide each purchaser of an ORBEA bicycle with an owner's manual and any other consumer documents that accompany the ORBEA bicycle.

(j) Dealer will provide and perform all repairs covered by warranty, to ORBEA Products.

(k) Dealer agrees to notify ORBEA of any personal injury involving an ORBEA Products within ten (10) days of the occurrence or Dealer's receipt of information of such injury.

13. **Restrictions.** Dealer agrees that it will not engage in any illegal activity, including but not limited to, activity involving any illegal, deceptive, misleading, or unethical business conduct. Dealer may only sell Orbea Products at the Approved Location and at a retail price no lower than the Orbea minimum suggested retail price. Dealer further agrees that it will not engage in any telephone, mail order, or internet sales of ORBEA Products without prior written consent of Orbea.

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14. Dealer's Remedies. If ORBEA, for any reason whatsoever, fails or is unable to deliver any ORBEA Products ordered by Dealer, the Dealer's sole and exclusive remedy will be the recovery of the purchase price, if any, paid by Dealer to ORBEA for such ORBEA Products. ORBEA will not incur any liability whatsoever for any delay in the delivery to the designated delivery location of the ORBEA Products. In no event will ORBEA be liable for any incidental, consequential, or other damages arising out of any failure to deliver any ORBEA Products to Dealer or any delay in the delivery thereof.

15. Use of Trademark. Dealer is granted the non-exclusive right, only for the limited term of this Agreement, to use ORBEA's trademarks as identified by ORBEA from time to time to identify the Dealer's retail Store as an ORBEA dealership. Dealer agrees and acknowledges that ORBEA's trademarks, trade names, and service marks are owned exclusively by ORBEA, and nothing in this Agreement is meant to create any ownership interest in or by Dealer in such trademarks, trade names, or service marks. Dealer otherwise acknowledges that it has no ownership rights, title, or interest in any ORBEA trademark, trade name or service mark, nor does Dealer have any right or interest to use any such mark as a part of Dealer internet domain, as a part of Dealer's business name, or for any other purpose not expressly set forth and identified herein. ORBEA agrees to hold Dealer harmless from any claim that Dealer's proper use of such trademark infringes upon the rights of any third party. Any other use by Dealer of a trademark owned by ORBEA must be in a form and format approved by ORBEA in advance of such usage.

16. Location. Dealer may only sell and/or service ORBEA Products at the Approved Location, unless otherwise permitted by prior written consent. The Approved Location may not be moved without the prior written consent of ORBEA, even if Dealer intends to open a temporary display.

17. Warranty. ORBEA warrants ORBEA Products for the period of time set out in the warranty that accompanies ORBEA Products. ORBEA makes no warranty beyond the warranty that accompanies ORBEA Products. If defects occur within the warranty period, Dealer will notify ORBEA immediately and, upon confirmation by an authorized ORBEA sales representative of the defects, ORBEA's sole responsibility shall be to replace the defective item if it cannot be repaired. This warranty does not apply to defects not caused by ORBEA (for example, accidents or abuse while in Dealer's possession). ORBEA shall not have any liability of any kind under this warranty unless Dealer gives ORBEA notice of its claim within thirty (30) days after the Dealer knows, or should know, of its claim. EXCEPT AS SET FORTH HEREIN, THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, WITH RESPECT TO ORBEA PRODUCTS. ORBEA EXPRESSLY EXCLUDES AND DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY AND ANY WARRANTIES OF FITNESS FOR A PARTICULAR PURPOSE, APPLICATION OR USE. UNDER NO CIRCUMSTANCES WILL ORBEA BE LIABLE FOR SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, WHETHER SUCH DAMAGES ARE SOUGHT IN CONTRACT, IN TORT (INCLUDING BUT NOT LIMITED TO NEGLIGENCE AND STRICT LIABILITY) OR OTHERWISE, AND ORBEA'S LIABILITY SHALL IN NO EVENT EXCEED THE PURCHASE PRICE OF THE ORBEA PRODUCT ON WHICH SUCH LIABILITY IS BASED.

18. Repairs under Warranty. Dealer agrees to perform all warranty work for all ORBEA Products sold by such Dealer. Dealer is not otherwise obligated to, but may, provide warranty service, if such Dealer decides to do so, for ORBEA Products which were not sold by Dealer.

19. Terms of Agreement.

(a) The term of this agreement shall begin on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and end on the 30th day of June 2012. In the absence of the execution of new agreement, the terms will be month-to-month.

(b) This Agreement does not automatically renew. ORBEA may condition its renewal upon Dealer entering into ORBEA's then-current Dealer Agreement.

(c) Either party may terminate this Agreement at any time by providing the other with not less than thirty (30) days written notice of its election to terminate. The Parties may also mutually consent to terminate this Agreement at any time.

(d) ORBEA may terminate this Agreement by written notice to Dealer under any of the following circumstances:

- (i) If Dealer breaches the terms and conditions of this Agreement;
- (ii) Immediately upon the sale, transfer, or liquidation of Dealer's business not in accord with terms of this Agreement; or upon the sale of all or substantially all of Dealer's assets; or upon Dealer's loss of right to occupy the Approved Location; or if Dealer moves to a new location without ORBEA's prior authorization;
- (iii) Immediately upon the filing of a petition of bankruptcy against Dealer which is not dismissed within sixty (60) days, or if Dealer files a petition of bankruptcy, or upon the insolvency of Dealer's business;
- (iv) Immediately if Dealer fails to pay any sums due to ORBEA and does not cure such failure within (20) days upon receipt of written notice of such nonpayment;
- (v) If Dealer fails to sell the minimum quantity of ORBEA Products according to Dealer Level, ORBEA has the option of terminating the Agreement on a date that is not less than thirty (30) days from the date of written notice sent by ORBEA to Dealer.

(e) Upon the effective date of termination of this Agreement, all outstanding orders from Dealer to ORBEA will be deemed cancelled, to the extent ORBEA's Products have not yet been shipped by ORBEA.

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(f) Upon termination of this Agreement, for any reason, ORBEA shall have the option, within sixty (60) days after the effective date of such termination, to purchase Dealer's inventory which was purchased by Dealer within the past twelve (12) months prior to the date of termination. If ORBEA exercises such option, Dealer will sell and release to ORBEA such inventory at a price equal to the price initially paid by Dealer for the ORBEA Products, provided the ORBEA Products have been properly stored and are in good and saleable condition.

(g) Upon termination of this Agreement for any reason, Dealer will promptly return to ORBEA any property of ORBEA, including without limitation, all sales and marketing documents, manuals and other records and proprietary of ORBEA. Dealer agrees that it will not make or retain any copy of, or extract from, such property or materials. ORBEA agrees to compensate Dealer for the cost of any returned sales materials that were authorized by ORBEA and purchased by Dealer within twelve (12) months of the date of termination.

20. Dealer Credit Application. Dealer shall submit a completed Orbea Dealer Application and Guaranty, which shall be incorporated and become a part of this Agreement as though set forth herein word for word. Dealer represents and warrants that all information provided in such Dealer Application and Guaranty is true and correct.

21. Governing Law: This Contract shall be governed by the laws of the State of Arkansas.

22. Force Majeure. ORBEA shall be excused from delay or non-performance in the delivery of an order and Dealer shall have no claim for damage if and to the extent such delay or failure is caused by occurrences beyond the control of ORBEA including, but not limited to, market conditions; acts of God; war, acts of terrorism, riots and civil disturbances; expropriation or confiscation of facilities or compliance with any order or request of governmental authority; strikes, labor or employment difficulties whether direct or indirect; or any cause whatsoever which is not within the reasonable control of ORBEA. ORBEA will immediately notify Dealer of the existence of any such force majeure condition and the anticipated extent of the delay or non-delivery. ORBEA will, in such event, have the right to allocate available ORBEA Products among its customers and dealers in its sole discretion.

23. Entire Agreement: This Dealer Agreement, when executed by both ORBEA and Dealer, shall contain the entire understanding and agreement between ORBEA and Dealer with respect to all matters referred to herein, and shall supersede all prior or contemporaneous agreements, representations, discussions, and understandings, oral or written, with respect to such matters.

24. Relationship of Parties.

(a) The relationship of the Parties established by this Agreement is that of vendor and vendee, and all work and duties to be performed by the Dealer as contemplated by this Agreement will be performed by it as an independent contractor.

(b) Nothing in this Agreement or otherwise shall be construed as constituting an appointment of Dealer as an agent, legal representative, joint venture, partner, employee or servant of ORBEA for any purpose whatsoever. Dealer is not authorized to transact business, incur obligations, sell goods, solicit orders, or assign or create any obligation of any kind, express or implied, on behalf of ORBEA, or to bind ORBEA in any way, or to make any contract, promise, warranty or representation on ORBEA's behalf with respect to ORBEA Products or any other matter, or to accept any service of process upon ORBEA or receive any notice of any nature whatsoever on ORBEA's behalf.

(c) Under no circumstances will ORBEA be liable for any act, omission, contract, debt or other obligation of any kind of Dealer or any salesman, employee, agent, or other person acting for or on behalf of Dealer. Dealer will indemnify and hold ORBEA harmless from any and all claims, liabilities, losses, damages, or expenses (including reasonable attorneys, fees and costs) arising directly or indirectly from, as a result of, or in connection with, Dealer's operation of Dealer's business. The terms of this indemnity shall survive the termination of this Agreement.

25. Assignment: This Dealer Agreement may not be assigned by Dealer unless the consent of ORBEA is obtained, and such consent is not to be unreasonably withheld. It shall not be considered unreasonable for ORBEA to withhold consent if ORBEA is to provide financing for Dealer in any amount.

26. Time: ORBEA and Dealer agree time is expressly of the essence with regard to all times and dates set forth in this Dealer Agreement. Further, all times and dates set forth in this Dealer Agreement.

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27. Attorney Fees : Should ORBEA or Dealer initiate any type of administrative proceeding, arbitration, mediation, or litigation against the other (or against an agent for the initiating party or agent for the non-initiating party), it is agreed by ORBEA and Dealer that all prevailing parties shall be entitled to an award of their respective attorney's fees and costs incurred in defense of such initiated action against the non-prevailing party.

28. Notices. Except as specifically set out in this Agreement, any notice or other communication related to this Agreement shall be effective if sent by first class mail. Postage prepaid, to the address set forth in this Agreement or Dealer Application, or to such other address as may be designated in writing to the other party.

29. Counterparts : This Dealer Agreement may be executed in multiple counterparts, each of which shall be regarded as an original hereof, but all of which together shall constitute one in the same.

IN WITNESS WHEREOF, the Parties have hereunto set this hands this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

ORBEA USA, LLC:

By: \_\_\_\_\_  
Managing Member

DEALER:

By: \_\_\_\_\_

Title: \_\_\_\_\_