

## FOUNDRY NETWORKS

### TERMS AND CONDITIONS OF SALE

THE TERMS AND CONDITIONS SET FORTH BELOW CONSTITUTE THE ENTIRE AGREEMENT BETWEEN SELLER AND PURCHASER. SELLER WILL NOT BE BOUND BY ANY TERMS OF PURCHASER'S ORDER THAT ARE INCONSISTENT WITH THE TERMS HEREIN. ALL ORDERS ARE SUBJECT TO ACCEPTANCE BY FOUNDRY NETWORKS, INC. ("SELLER") AT ITS CORPORATE HEADQUARTERS. NO FORM OF ACCEPTANCE EXCEPT SELLER'S WRITTEN ACKNOWLEDGMENT MAILED TO PURCHASER, OR SELLER'S COMMENCEMENT OF PERFORMANCE SHALL CONSTITUTE A VALID ACCEPTANCE OF A CUSTOMER'S ORDER. ANY SUCH ACCEPTANCE IS EXPRESSLY CONDITIONAL ON ASSENT TO THE TERMS HEREOF AND THE EXCLUSION OF ALL OTHER TERMS; PURCHASER SHALL BE DEEMED TO HAVE ASSENTED TO THE TERMS HEREOF, WHETHER OR NOT PREVIOUSLY RECEIVED, UPON ACCEPTING DELIVERY OF ANYTHING SHIPPED BY SELLER. IF TENDER OF THESE TERMS IS DEEMED AN OFFER, ACCEPTANCE IS EXPRESSLY LIMITED TO THE TERMS HEREOF.

#### 1. PRODUCTS.

1.1 "Products" shall mean any products identified on (i) Seller's then current price list, (ii) any of Seller's proposals or quotations, or (iii) any of Seller's invoices.

1.2 **Alterations.** Alterations to any Product which Seller deems necessary to comply with specifications, changed safety standards or governmental regulations or to make the Product not-infringing with respect to any patent, copyright or other proprietary interest, or alterations to any Product which will not materially affect overall product performance may be made at any time by Seller without prior notice to or consent of Purchaser and such altered Product shall be deemed fully conforming.

#### 2. ORDERS.

2.1 **Taxes and Duties.** All stated prices are exclusive of all federal, state, and local taxes, fees, charges or duties now in force or enacted in the future. Any such tax, fee or charge imposed by any governmental authority on, or measured by, the transaction between Seller and Purchaser will be paid by Purchaser in addition to the prices quoted or invoiced or Purchaser shall provide to Seller an exemption certificate acceptable to the taxing authorities. Applicable taxes shall be billed as a separate item on the invoice. In the event that Seller is required to pay any such tax, fee or charge at the time of sale or thereafter, Purchaser will reimburse Seller therefor.

2.2 **Payment Terms.** Upon credit approval by Seller, payment terms shall be net thirty (30) days from date of shipment. All payments shall be made in U.S. currency. If at any time Purchaser is delinquent in the payment of any invoice or is otherwise in breach of this agreement, Seller may, in its discretion, withhold shipment (including partial shipments) of any order or may, at its option, require Purchaser to pay C.O.D. or cash-with-order basis for further shipments. Accounts 30 days past due will be subject to a monthly charge at the rate of one and one-half percent (1.5%) per month to cover the costs of servicing these accounts.

#### 3. SHIPPING AND DELIVERY.

3.1 **Shipment Dates.** Shipping dates will be established by Seller upon receipt of purchase order(s) from Purchaser. Shipping dates will be assigned as close as practicable to the Purchaser's requested date. Seller will use its best effort to notify Purchaser of the actual scheduled shipping date within ten (10) working days after receipt of order.

3.2 **Rescheduling.** Purchaser has the right to defer Product shipment for no more than (30) days from the scheduled shipping date, provided written notice is received by Seller at least thirty (30) days before originally scheduled shipping date.

3.3 **Change Order Charge.** Canceled orders, rescheduled deliveries or Product configuration changes made by Purchaser within thirty (30) days of the original shipping date will be subject to (i) acceptance by Seller, and (ii) a charge of 15% of the total invoice amount. Seller reserves the right to reschedule delivery in cases of configuration changes made within thirty (30) days of scheduled shipment.

3.4 **Shipment Terms.** In the absence of specific shipping instructions, Seller will ship by the method it deems most advantageous. Purchaser shall be responsible for all freight, handling and insurance charges. Unless otherwise specified, the goods will be shipped in standard commercial packaging. Unless given written instructions by Purchaser, Seller shall select the carrier. When special or export packaging is requested or, in the opinion of Seller, required under the circumstances, the cost of the same, if not set forth on the invoice, will be separately invoiced. In no event shall Seller have any liability in connection with shipment, nor shall the carrier be considered an agent of Seller. Seller shall not be liable for damage or penalty for delay in delivery or for failure to give notice of any delay.

3.5 **Title, Risk of Loss and Security Interest.** Risk of loss shall pass from Seller to Purchaser upon delivery to the common carrier or Purchaser's representative at the F.O.B. point. Delivery shall be deemed made upon transfer of possession to the carrier. Seller reserves a purchase money security interest in goods sold and the proceeds thereof, in the amount of the purchase price. In the event of default by Purchaser in any of its obligations to Seller, Seller will have the right to repossess the goods sold hereunder without liability to Purchaser. These security interests will be satisfied by payment in full. A copy of the invoice may be filed with appropriate authorities at any time as a financing statement and/or chattel mortgage to perfect Seller's security interest. On request of Seller, Purchaser will execute financing statements and other instruments that Seller may request to perfect Seller's security interest.

4. **WARRANTY.** Foundry warrants that products purchased under this Agreement will be free from hardware defects in material and workmanship for a period of one year from shipping date. In addition, Foundry warrants that products purchased under this Agreement shall substantially conform to the descriptions contained in its user manual and Foundry's sole obligation and End User's exclusive remedy during the ninety day period as measured from the purchase date is replacement of the media. During the warranty period, Foundry will make all necessary adjustments, repairs and parts replacement free of charge provided (1) the Customer has given Foundry immediate written notice of such defect within the warranty period and (2) the materials is returned to Foundry in the manner prescribed below. Products purchased under this Agreement may have been reconditioned, reclaimed or refurbished or may include components which have been reconditioned, reclaimed or refurbished in accordance with industry-standard practices.

The above warranties do not apply to any product which (1) has been altered by Buyer, except as authorized by Foundry, or (2) has not been installed, operated, repaired, or maintained in accordance with any installation, handling, maintenance or operating instructions supplied by Foundry, or (3) has been subjected to unusual physical or electrical stress, misuse, negligence or accident. These remedies are not available outside the United States. Seller will make the final determination as to the existence and cause of any alleged defect. No warranty is made with respect to custom equipment or goods produced to Purchaser's specifications except as specifically stated in writing by Seller in the contract for such custom goods.

THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING THOSE OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, OR ARISING FROM A COURSE OF DEALING, USAGE OR TRADE PRACTICE. NO DEALER OR RESELLER IS AUTHORIZED TO MAKE ANY MODIFICATIONS, EXTENSIONS, OR ADDITION TO THIS WARRANTY.

Return Material Authorization: In all cases where a product is returned to Foundry, Customer shall call and obtain a Return Material Authorization (RMA) number from Foundry's customer service department AT 1.888.TURBOLAN (1.888.887.2652).

Customer shall return all RMA products in the original or equivalent shipping container, freight and insurance prepaid. The RMA number must appear on the outside of the carton when shipped to Foundry. Customer shall return RMA material within ten (10) days of receipt of the replacement part. In the event Customer fails to return the RMA product within such period, Customer agrees to purchase the RMA product and pay Foundry the list price for the product.

#### 5. PATENT AND COPYRIGHT INDEMNITY.

5.1 Seller will defend any claim, suit or proceed brought against Purchaser so far as it is based on a claim that any product supplied hereunder infringes a patent or copyright in the United States, provided that Purchaser (i) gives immediate written notice to Seller of the institution of the suit or proceedings and (ii) permits Seller through its counsel to defend the same and gives Seller all needed information, assistance, and authority to

enable Seller to do so. If such claim has occurred, or in Seller's opinion is likely to occur, Purchaser agrees to permit Seller, at its option and expense, either to procure for Purchaser the right to continue using the Product or to replace or modify the same so that it becomes non-infringing, or, if neither of the foregoing alternatives is reasonably available, remove the Product and refund Purchaser the price thereof as depreciated or amortized by an equal annual amount over the lifetime of the Product as established by Seller.

5.2 Seller has no liability for any claim based upon the combination, operation or use of any Product supplied hereunder with equipment, devices or software not supplied by Seller. Seller has no liability for any claim based upon alteration or modification of any Product supplied hereunder.

5.3 Purchaser shall defend and hold Seller harmless against any expense, judgment or loss for alleged infringement of any patents copyrights or trademarks which result from Seller's compliance with Purchaser's designs, specifications or instructions.

5.4 Notwithstanding any other provisions hereof, Seller shall not be liable for any claim based on Purchaser's use of the Products as shipped after Seller has informed the Purchaser of modifications or changes in the Products required to avoid such claims and offered to implement those modifications or changes, if such claim would have been avoided by implementation of Seller's suggestions.

5.5 THE FOREGOING STATES THE ENTIRE OBLIGATION OF SELLER WITH RESPECT TO INTELLECTUAL PROPERTY INFRINGEMENT OR CLAIMS THEREFORE (EXPRESS, STATUTORY, IMPLIED OR OTHERWISE). THE FOREGOING IS GIVEN TO PURCHASER SOLELY FOR ITS BENEFIT AND SELLER DISCLAIMS ALL OTHER WARRANTIES OF NONINFRINGEMENT WITH RESPECT TO THE PRODUCTS.

6. **LIMITATION OF LIABILITY.** NOTWITHSTANDING ANYTHING ELSE HEREIN, ALL LIABILITY OF SELLER UNDER THIS AGREEMENT OR OTHERWISE SHALL BE LIMITED TO MONEY PAID TO SELLER UNDER THIS AGREEMENT DURING THE SIX (6) MONTH PERIOD PRECEDING THE EVENT OR CIRCUMSTANCES GIVING RISE TO SUCH LIABILITY AND IN THE CASE OF DAMAGES RELATING TO ANY ALLEGEDLY DEFECTIVE OR INFRINGING PRODUCT, SHALL, UNDER ANY LEGAL OR EQUITABLE THEORY, BE FURTHER LIMITED TO THE PURCHASE PRICE PAID BY PURCHASER FOR SUCH PRODUCT. IN NO EVENT WILL SELLER BE LIABLE FOR COSTS OF PROCUREMENT OF SUBSTITUTE GOODS BY PURCHASER. IN NO EVENT WILL SELLER BE LIABLE FOR ANY SPECIAL, CONSEQUENTIAL, INCIDENTAL OR INDIRECT DAMAGES (INCLUDING WITHOUT LIMITATION LOSS OF PROFIT) WHETHER OR NOT SELLER HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSS, HOWEVER CAUSED AND ON ANY THEORY OF LIABILITY ARISING OUT OF THIS AGREEMENT. THIS EXCLUSION INCLUDES ANY LIABILITY THAT MAY ARISE OUT OF THIRD-PARTY CLAIMS AGAINST PURCHASER. THESE LIMITATIONS SHALL APPLY NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY. SELLER WILL NOT BE LIABLE FOR ANY LOSS, DAMAGES OR PENALTY RESULTING FROM DELAY IN DELIVERY WHEN SUCH DELAY IS DUE TO CAUSES BEYOND THE REASONABLE CONTROL OF SELLER, INCLUDING BUT NOT LIMITED TO SUPPLIER DELAY, FORCE MAJEURE, ACT OF GOD, LABOR UNREST, FIRE, EXPLOSION OR EARTHQUAKE. IN ANY SUCH EVENT, THE DELIVERY DATE WILL BE DEEMED EXTENDED FOR A PERIOD EQUAL TO THE DELAY.

7. **FORCE MAJEURE.** Except for the obligation to pay money properly due and owing, neither party shall be liable for any delay or failure in performance due to such acts of God, earthquake, labor disputes, riots, war, fire, epidemics, or transportation difficulties. The obligations and rights of the excused party shall be extended on a day-to-day basis for the time period equal to the period of the excusable delay.

8. **ASSIGNMENT TRANSFER OF ASSETS.** Neither this agreement nor any right under this agreement, other than monies due or to become due, shall be assigned or otherwise transferred by either party without the prior written consent of the other party; nor shall Seller delegate any of its obligations, hereunder, without the prior written consent of the Purchaser. This agreement may be transferred or otherwise assigned to any company or other entity which acquires all or substantially all of the assets of such party.

9. **SALE CONVEYS NO LICENSE.** The goods are offered for sale and are sold by Seller subject in every case to the condition that such sale does not convey any license, expressly or by implication, estoppel or otherwise, under any patent claim with respect to which Seller can grant licenses covering complete equipment, or any assembly, circuit combination, method or process in which any such goods are used as components. Seller expressly reserves all its rights under such patent claims. Seller retains for itself all proprietary rights in and to all designs, engineering details, and other data pertaining to any goods sold except where rights are assigned under written agreement by a corporate officer of Seller.

10. **CANCELLATION.** This contract may be canceled by Purchaser only upon the payment of reasonable cancellation charges, which will include but not be limited to expenses already incurred for labor and material costs, overhead, commitments made by Seller, and a reasonable profit. In the event of cancellation, Purchaser will have no rights in partially completed goods. If Purchaser (i) becomes bankrupt or insolvent, (ii) compounds with his creditors, (iii) commences to be wound up, or (iv) suffers a receiver to be appointed, Seller will be at liberty by notice in writing to cancel this contract without judicial intervention or declaration of default of Purchaser and without prejudice to any right or remedy which may have accrued or may accrue thereafter to Seller.

11. **WAIVER.** No waiver of rights under this agreement by either party shall constitute a subsequent waiver of this or any other right under this agreement.

12. **SEVERABILITY.** In the event that any of the terms of this agreement become or are declared to be illegal by any Court or tribunal of competent jurisdiction, such term or terms shall be null or void and shall be deemed deleted from this agreement. All the remaining terms of this agreement shall remain in full force and effect provided, however, that if this agreement to either party, then the affected party may terminate this agreement by written notice to the other.

13. **APPLICABLE LAW.** This agreement shall be interpreted and construed and legal relations created shall be determined in accordance with the Laws of the State of California.

14. **JURISDICTION AND VENUE.** The California state courts of Santa Clara County, California (or, if there is exclusive federal jurisdiction, the United States District Court for the Northern District of California) will have exclusive jurisdiction and venue over any dispute arising out of this agreement and sale, and Purchaser hereby consents to the jurisdiction of such courts.

15. **ATTORNEYS' FEES AND COSTS.** In the event of a breach, the breaching party will pay to the other party any reasonable attorneys' fees and other costs and expenses incurred by such other party in connection with the enforcement of any provisions of this agreement.

16. **ENTIRE AGREEMENT; AMENDMENT.** This agreement constitutes the entire agreement between the parties hereto concerning the subject matter of this agreement; and there are no conditions, understanding, agreements, representation, or warranties, expressed or implied, which are not specified herein. This agreement may only be modified by a written document executed by the parties thereto.

17. **SUCCESSORS.** This agreement shall bind and inure to the benefit of the successors and permitted assigns of the parties.

18. **EXPORT RESTRICTIONS.** Customer shall not transmit, directly or indirectly, the Product or any technical data received from Foundry, nor the direct product thereof, outside the United States without Foundry's prior written consent and in accordance with all export laws and regulations of the United States.

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