



## EVALUATION TERMS

These Evaluation Terms apply to any quote, order, order acknowledgment, and invoice, and any provision of Lumentum products (including software) and/or services, for the purposes of evaluation by Customer (as defined below), by Lumentum Operations LLC, 1001 Ridder Park Drive, San Jose, California 95131 on behalf of itself and its Affiliates (collectively "Lumentum"). Lumentum does not accept, expressly or impliedly, and Lumentum hereby rejects and deems deleted, any additional or different terms or conditions that any potential or actual customer ("Customer") presents, including, but not limited to, any terms or conditions contained or referenced in any order, acceptance, acknowledgment, or other document, or established by trade usage or prior course of dealing, unless Lumentum expressly and unambiguously agrees to such terms and conditions in a duly signed writing. By ordering, accepting delivery, keeping, or using products and/or services for evaluation purposes, after receipt of the Agreement (as defined below) or after otherwise being notified that such transactions are subject to the Agreement, Customer agrees to the terms of the Agreement. If tender of these terms is deemed an offer, acceptance is expressly limited to the terms of the Agreement.

### 1. DEFINITIONS.

**"Affiliate"** means an entity that controls, is controlled by, or is under common control with a party. "Control" and its derivatives means the legal beneficial, or equitable ownership, directly or indirectly, of more than fifty percent (50%) of the capital stock (or other ownership interest, if not a corporation) of such entity ordinarily having voting rights.

**"Agreement"** means a contract between Lumentum and the Customer that is formed by reference to these Evaluation Terms.

**"Confidential Information"** means any technical or other information related to Products (including, but not limited to, the Evaluation Information, and any documentation, services offerings, training materials, and written, visual, and oral instructions) and any information that is marked or otherwise expressly identified as confidential in writing or that should have been reasonably understood as such due to its nature, regardless of whether in tangible, electronic, verbal, graphic, visual or other form, that Lumentum discloses to Customer. Confidential Information does not include material or information that (i) is generally known by third parties as a result of no act or omission of Customer; (ii) subsequent to disclosure hereunder was lawfully received without restriction on disclosure from a third party having the right to disseminate the information; (iii) was already known by Customer prior to receiving it from Lumentum and was not received from a third party in breach of that third party's obligations of confidentiality; or (iv) was independently developed by Customer without use of Confidential Information of Lumentum.

**"Documentation"** means Lumentum's information manuals that (i) contain operating instructions and performance specifications for the Products; (ii) Lumentum delivers to Customer with the Products; and (iii) Lumentum generally makes available to all users of its Products.

**"Effective Date"** means the earlier of the date on which (i) Lumentum puts a Product into the possession of a carrier for shipment, (ii) makes a service Product available to Customer, or (iii) Customer takes possession of a Product.

**"Evaluation Information"** means all Proprietary Rights to Intellectual Property embodied in evaluation reports provided by Customer in accordance with Section 4.2 (Evaluation Reports) of this Agreement, measurements, and other information regarding the evaluation of the Products furnished by Customer to Lumentum, and other Proprietary Rights arising from Customer's evaluation of the Products and/or Customer's access to Confidential Information regarding the Products. For greater clarity, the Evaluation Information shall be deemed Lumentum's Confidential Information.

**"Evaluation Period"** means ninety (90) days following the Effective Date, unless otherwise expressly provided, in writing, by Lumentum.

**"Intellectual Property"** means any computer program or routine (in object code, source code, or embedded format, regardless of the medium on which it resides), algorithms, know-how, firmware, hardware and/or software configurations, inventions, documentation, translations, text and other works of authorship, data, databases, information, mask works, designs, utility models, symbols, logos, marks, names, procedures, processes, methods, improvements and any other intangibles as well as the prototypes, samples, copies, and other materialized forms of the foregoing intangibles.

**"Product"** means any hardware, tangible product, software, documentation, information, service or other item that Lumentum makes available to Customer under this Agreement.

**"Proprietary Rights"** means any and all rights, title, ownership and interests in and to copyrights, mask work rights, industrial designs, trademarks, service marks, trade names, trade secrets, patents, and any other rights to Intellectual Property, recognized in any jurisdiction or country of the world, whether or not registered or perfected.

### 2. DELIVERY.

Lumentum may, at its sole discretion, deliver the Products, and such delivery shall be FCA Lumentum's facility (Incoterms 2010), as designated by Lumentum. Delivery shall be deemed complete on the Effective Date. Lumentum selects the carrier, unless Customer provides written instructions. The carrier shall not be considered Lumentum's agent. Customer bears the risk of loss and is liable for all shipping costs from the FCA point of shipment. Lumentum does not transfer ownership or title to any Products or copies thereof; Lumentum only grants limited, non-exclusive licenses as set forth in Section 3.2 (Grant of Rights) below. Partial and installment shipments are authorized. Immediately upon receipt, Customer shall visually inspect the shipment and notify Lumentum in writing of any deficiencies. Customer shall be deemed to have waived its rights to claim incorrect or incomplete delivery or packaging, unless Lumentum receives Customer's detailed written notice within ten (10) days following delivery of the Product(s). Performance and shipping dates specified or communicated by Lumentum to the Customer are approximate dates only and (i) the failure to perform or ship on such dates shall not be considered a breach by Lumentum, and/or (ii) Lumentum is permitted to deliver, and Customer will accept, shipments, in whole or in part, in advance of any dates communicated by Lumentum and/or requested by Customer. Lumentum is not obligated to customize or install any Product(s), unless Lumentum expressly agrees otherwise in a signed writing, in which case (a) Lumentum's Installation Services Terms shall apply additionally, and (b) Lumentum's obligations with respect to such services shall be separate and independent of Lumentum's obligations with respect to the delivery of Product(s).

### 3. EVALUATION RIGHTS.

**3.1 All Rights Reserved.** Lumentum and its licensors own, retain, and reserve ownership, title, and all rights and interest, including, but not limited to, all Proprietary Rights, in and to the Products and Documentation, subject only to the limited rights that Lumentum expressly grants in Section 3.2 (Grant of Rights) of this Agreement. Without limiting the foregoing, Customer acknowledges that nothing herein shall constitute a sale of any Products (or any Intellectual Property in and to Products) including any copies and portions thereof. The use of a copyright notice on any Product or accompanying materials shall not be taken to indicate that they have been published.

**3.2 Grant of Rights.** Subject to the terms of this Agreement, Lumentum grants Customer a personal, non-sublicensable, non-exclusive, non-transferable, limited and restricted right to use the Products solely (i) at the site designated by Lumentum for Customer's evaluation of the Products; (ii) for Customer's internal activities related to the evaluation of generally available versions of the Products in contemplating future acquisitions by Customer or in helping Lumentum in the development or improvement of pre-production versions of Products (*i.e.*, Products that have not been released for general commercial use); (iii) in accordance with the applicable Documentation; (iv) during the Evaluation Period; (v) within lab/test environment, outside any live/production environment; and (vi) subject to any other terms and conditions otherwise communicated by Lumentum. Lumentum grants Customer a personal, non-sublicensable, non-exclusive, non-transferable, limited right to use the printed versions of the Documentation that Lumentum provides for Customer's internal business purposes solely in support of Customer's use of the Products in accordance with the Agreement. Customer's rights are conditioned on Customer's continuous compliance with all limitations and restrictions described in the Agreement and if Customer violates any of these limitations or restrictions or any other term of this Agreement, Customer's rights will automatically and immediately expire. Customer acknowledges that this Section 3 (Evaluation Rights) defines the scope of rights that Lumentum grants to Customer and that any usages of the Products or Documentation outside the scope of that grant and the scope of any statutory rights constitutes an infringement of Lumentum's Proprietary Rights as well as a material breach of the Agreement.

**3.3 Restrictions.** To the extent permitted by applicable law, Customer agrees not to (i) reverse engineer, decompile, separate, or disassemble the Products or portions thereof; (ii) translate or create any derivative works based on any Product or modify or alter any Product in any manner whatsoever; (iii) sell, sublicense, lease, rent, loan, assign, convey, distribute or otherwise transfer the Products or Documentation to any third parties; (iv) copy or use the Products or Documentation for any purpose or in any manner not expressly permitted by this Agreement; (v) use the Products or Documentation outside the permitted scope of its rights; (vi) use the Products or Documentation in any format, for or in the interest of any third party; (vii) disclose the results of any benchmark test of the Product to any third party; or (viii) permit or encourage any third party to do any of the foregoing. Customer acknowledges that the structure, organization and codes of any software Product are the confidential trade secrets of Lumentum and its licensors. Customer shall cooperate with Lumentum, and shall render all reasonable assistance requested by Lumentum, to assist Lumentum in preventing and identifying any use of, or access to, the Products and Documentation by anyone in violation of these Evaluation Terms.

**3.4 Proprietary Notices.** Customer acknowledges the goodwill associated with Lumentum's trademarks. Customer shall not remove, alter or obscure any product identification, any copyright, patent, trademark notice or any other legal notice or legend that appears on the Products or the Documentation and shall completely and accurately reproduce the same on any permitted copies of the Products and Documentation made hereunder.

**3.5 Specific Licenses.** To the extent that Customer acquires from Lumentum any software that is accompanied by or made available subject to end-user license terms and/or other terms (in shrink-wrap, click-through or other format), either from Lumentum or originating from third party licensors ("Specific Licenses") (i) Customer shall agree to such Specific Licenses vis-à-vis the licensor specified in such Specific Licenses; (ii) to the extent such Specific Licenses conflict with the other licenses herein, the Specific Licenses shall take precedence with respect to such software (or portion thereof) subject to such Specific Licenses; and (iii) Customer's right to use such software (or portion thereof) subject to such Specific Licenses will be defined and restricted in such Specific Licenses.

### 4. EVALUATION BY CUSTOMER.

**4.1 Evaluation of Products.** Customer will run and evaluate the Products in accordance with the evaluation plan provided or signed by Lumentum, where applicable.

**4.2 Evaluation Reports.** Customer shall use its best efforts to provide written technical reports to Lumentum describing product performance, including, but not limited to, problems, deficiencies and recommended improvements, as requested by Lumentum. In addition to the technical reports, Customer shall, at Lumentum's request, provide a final written report summarizing Customer's concerns and recommended enhancements relative to the Products.

**4.3 Rights in Reports and other Evaluation Information.** Evaluation Information shall initially vest in and be solely owned by Lumentum. If and to the extent that under mandatory law, Lumentum is unable to be initially vested with ownership of such Proprietary Rights, Customer hereby assigns to Lumentum ownership, title and all rights and interest in and to such Proprietary Rights regarding the Evaluation Information and any tangible material or software copy relating to the Evaluation Information. To the extent that under mandatory law, rights can only be assigned after creation, Customer hereby irrevocably agrees to assign, immediately following the creation, such Proprietary Rights to Lumentum. To the extent that under mandatory law, Proprietary Rights may not be assigned, Customer hereby agrees to grant an unlimited, exclusive, irrevocable, perpetual, royalty-free, worldwide and unconditional license to such rights to Lumentum. To the extent such license grant is invalid or not fully enforceable under mandatory law, Customer irrevocably agrees to grant and hereby grants such rights to Lumentum as Lumentum reasonably requests in order to acquire a legal position as close as possible to the legal position that Lumentum would hold if it could acquire the Proprietary Rights to Intellectual Property embodied in the Evaluation Information, but in no case less than an unlimited, non-exclusive, irrevocable, perpetual, royalty-free, worldwide and unconditional license.

**4.4 Protection, Insurance.** Customer will keep the Products in good operating condition, use the highest standards of care to protect Products from any harm and undue wear and tear, and insure Products against loss or damage during the Evaluation Period. Customer shall be solely responsible for any damage that may occur while any Products are in Customer's possession.

**4.5 No Duty to Release Products.** Lumentum shall have no duty to make available any Products delivered under this Agreement for permanent use.

### 5. ACTIONS UNDER MANDATORY LAW.

If and to the extent that Customer is expressly permitted by applicable mandatory law to take any actions that are prohibited under this Agreement or any other terms of the Agreement, including, but not limited to, reverse engineering, Customer agrees to refrain from exercising such rights unless and until Customer has given Lumentum three (3) weeks' prior written notice of Customer's intent to exercise any such

rights and Lumentum has not offered reasonable alternatives to Customer's exercise of the mandatory rights within such three (3) week period.

## **6. CONFIDENTIAL INFORMATION.**

Customer will protect the secrecy of Confidential Information with due care. Customer will not (i) disclose Confidential Information to anyone, except to persons in its own organization who have a need to know in order to fulfill Customer's obligations or exercise Customer's express rights under the Agreement and who are bound by non-disclosure obligations requiring them to keep the Confidential Information secret; and (ii) use Confidential Information except as necessary for the performance of Customer's obligations or the exercise of Customer's express rights under the Agreement.

## **7. WARRANTY DISCLAIMER AND LIMITATION OF LIABILITY.**

**7.1 Warranty Disclaimer.** ALL PRODUCTS ARE PROVIDED "AS IS." LUMENTUM MAKES NO WARRANTIES OR REPRESENTATIONS OF ANY KIND. LUMENTUM DISCLAIMS ALL IMPLIED WARRANTIES, CONDITIONS, AND REPRESENTATIONS, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OR CONDITIONS OF MERCHANTABILITY, SATISFACTORY QUALITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT, REGARDLESS OF THE LEGAL THEORY ON WHICH SUCH IMPLIED WARRANTY MAY BE BASED, INCLUDING, WITHOUT LIMITATION, CONTRACT, COURSE OF DEALING, USAGE, OR TRADE PRACTICE AND, WITHOUT LIMITING THE FOREGOING, MAKES NO WARRANTY THAT THE PRODUCTS ARE ERROR FREE, WILL PERFORM ACCORDING TO ANY SPECIFICATIONS, OR THAT THEIR PERFORMANCE OR OPERATION WILL BE UNINTERRUPTED.

**7.2 Limitations of Liability.** IN NO EVENT SHALL LUMENTUM HAVE ANY LIABILITY FOR ANY INCIDENTAL, SPECIAL, INDIRECT, OR CONSEQUENTIAL DAMAGES, LOSS OF PROFITS, REVENUE, OR DATA, INSTALLATION OR REMOVAL COSTS, OR COST OF COVER. THE LIABILITY OF LUMENTUM FOR ANY AND ALL CLAIMS ARISING OUT OF OR IN CONNECTION WITH ANY PRODUCT OR SERVICE SHALL NOT EXCEED A TOTAL AGGREGATE AMOUNT EQUAL TO ONE THOUSAND U.S. DOLLARS (US\$1,000).

**7.3 Scope.** THE LIMITATIONS OF LIABILITY IN SECTION 7.2 (LIMITATIONS OF LIABILITY) OF THIS AGREEMENT SHALL APPLY TO ANY DAMAGES, HOWEVER CAUSED AND REGARDLESS OF THE THEORY OF LIABILITY, WHETHER DERIVED FROM CONTRACT, TORT (INCLUDING, BUT NOT LIMITED TO, NEGLIGENCE), OR ANY OTHER LEGAL THEORY, EVEN IF LUMENTUM HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES AND REGARDLESS OF WHETHER THE LIMITED REMEDIES AVAILABLE UNDER THE AGREEMENT FAIL OF THEIR ESSENTIAL PURPOSE.

## **8. TERMINATION.**

Either party may terminate this Agreement by giving written notice, effective immediately for any or no reason. Upon any termination or expiration of the Evaluation Period, Customer shall at its sole cost and expense immediately return all Products, Documentation, and Lumentum's Confidential Information in Customer's possession, without retaining any copies thereof, and all evaluation rights granted to Customer under these Evaluation Terms for Products and Documentation shall be automatically revoked. All terms of this Agreement, except Section 3.2 (Grant of Rights), shall survive the termination of any rights granted hereunder or the expiration of the Evaluation Period.

## **9. RIGHT TO INSPECT.**

Lumentum shall have the right, after reasonable prior written notice, to enter Customer's premises and inspect Customer's use of the Products from time to time for the purpose of ensuring Customer's compliance with its rights and obligations under the Agreement.

## **10 COMPLIANCE.**

Customer shall obtain all licenses, permits and approvals required by any government and shall comply with all applicable laws, rules, policies and procedures of the applicable government and other competent authorities. Customer will indemnify and hold Lumentum harmless for any violation or alleged violation by Customer of such laws, rules, policies or procedures. Customer shall not transmit, export or re-export, directly or indirectly, separately or as part of any system, the Products or any technical data (including processes and services) received from Lumentum, without first obtaining any license required by the applicable government, including without limitation, the United States Government and/or any other applicable competent authority. Customer also certifies that (i) none of the products or technical data supplied by Lumentum will be sold or otherwise transferred to, or made available for use by or for, any entity that is: (a) located in an "embargoed" country in accordance with any applicable government list(s) including without limitation, those of the United States, (b) a 'denied' or 'restricted' party on any applicable government list(s) including without limitation, those of the United States, and/or (c) engaged in the design, development, production or use of nuclear, biological or chemical weapons or missile technology; (ii) no relevant agency or authority has suspended, revoked or denied Customer's export and/or import privileges; and/or (iii) Customer is not located in or under the control of a national or resident of, a jurisdiction where this transaction is prohibited.

## **11. CHOICE OF LAW AND JURISDICTION.**

The Agreement and its validity, interpretation and performance, and any related dispute between the parties ("Disputes") shall be governed by the laws of the State of California, U.S.A., as if performed wholly within the State of California, and without giving effect to any principles of conflict of laws. The parties specifically disclaim the application of (i) the United Nations Convention on Contracts for the International Sale of Goods and/or its implementing and/or successor legislation and/or regulations; and/or (ii) principles of conflicts of law and that body of law applicable to choice of law. Lumentum and Customer hereby irrevocably and unconditionally submit to the jurisdiction of the courts in the State of California and all courts competent to hear appeal therefrom and such courts shall have exclusive jurisdiction over any Disputes. Customer waives its right to a jury trial. Notwithstanding the foregoing, either party may, at its sole discretion, seek injunctive relief in any court of competent jurisdiction (including, but not limited to, preliminary injunctive relief). The prevailing party in any legal proceeding brought by one party against the other party in a Dispute shall be entitled to recover its legal expenses, including, but not limited to, the costs of any court or arbitration proceeding and reasonable attorneys' fees.

## **12. MISCELLANEOUS.**

**12.1 Assignment and Delegation.** Customer may not assign any of its rights against Lumentum, and any (purported) assignment, either voluntarily or by operation of law, is invalid. Lumentum may assign its rights and delegate its obligations.

**12.2 Severability.** If and to the extent that any of the terms of the Agreement, including those included in this Agreement, become or are declared to be illegal by any court of competent jurisdiction, such terms shall be null and void and shall be deemed deleted from the Agreement, but only to the extent that such term is illegal, it being the intent and agreement of the parties that the Agreement shall be deemed amended

by modifying such term to the extent necessary to make it legal while preserving its intent or, if that is not possible, by substituting therefore another term that is legal and achieves the same objective. All remaining terms of the Agreement shall remain in full force and effect.

**12.3 Written Form.** Any notices and any modifications of, or amendments to, the Agreement shall be invalid, unless (i) notices are in writing and sent by fax or by registered or certified mail, postage prepaid, or via email; and (ii) modifications and amendments are in writing and signed by duly authorized officers of both parties. Representations made by sales or technical personnel of Lumentum shall have no legal effect, unless confirmed by a senior executive of Lumentum (senior vice president or above) in writing. Furthermore, notices to Lumentum are invalid, unless and until received at Lumentum Operations LLC, Attn. Legal Department, 1001 Ridder Park Drive, San Jose, California 95131 or at such other address(es) as may be specified by Lumentum to Customer in writing as the appropriate address for notices.

**12.4 Dates and Timelines.** All references to days shall be to calendar days, except as expressly noted otherwise. All scheduled shipment dates, delivery dates, and other dates are non-binding estimates, unless a senior executive of Lumentum (vice president and above) expressly agrees in a duly signed writing that a certain date shall be legally binding.

**12.5 No Waiver.** The failure or delay of either party to exercise or enforce any right or claim does not constitute a waiver of such right or claim and shall in no way affect that party's right to later enforce or exercise it, unless such party issues an express written waiver, signed by a duly authorized representative.

**12.6 Entire Agreement.** This Agreement contains the entire agreement between Lumentum and Customer concerning the subject matter of this Agreement, and apart from any existing non-disclosure agreements, this Agreement supersedes any previous communications, representations or agreements between the parties, whether oral or written, regarding transactions hereunder.

**12.7 Force Majeure.** Any non-performance or late performance – except of payment obligations - of either party shall be excused to the extent that performance is rendered impossible or delayed by strike, fire, flood, governmental acts or orders or restrictions, failure of suppliers, or any other reason where failure to perform is beyond the reasonable control of the non-performing or late-performing party whether or not similar to the foregoing. If by reason of any such force majeure event, Lumentum's supplies of Products are limited, Lumentum shall have the right to prorate the available supply in such a manner as it, in its sole discretion, determines appropriate.

**12.8 No Authority.** The parties to this Agreement are independent contractors. No relationship of principal to agent, master or servant, employer to employee or franchiser to franchisee is established hereby between the parties. Neither party has the right or authority to, and shall not, assume or create any obligation of any nature whatsoever on behalf of the other party or bind the other party in any respect whatsoever. Lumentum neither assumes nor authorizes any third party, person or entity to assume or accept any liability or obligation, or to make any commitment for Lumentum with regard to the Products.

**12.9 Interpretation.** In this Agreement, unless a contrary intention appears: (i) the terms, "hereof", "hereunder" and similar expressions refer to this Agreement and not to any particular portion hereof and include any agreement supplemental hereto; (ii) words importing a singular number only shall include the plural and vice versa; (iii) the term "including" means "including without limitation"; (iv) other grammatical forms of defined words or expressions have corresponding meanings; (v) a reference to a section, document or agreement, including this Agreement, includes a reference to that section, document or agreement as amended from time to time, as permitted hereunder; and (vi) the division of this Agreement into sections and the insertion of headings are for convenient reference only, and shall affect neither the construction nor the interpretation of this Agreement.