

# MYRICOM, INC.

## TERMS AND CONDITIONS OF SALE

**THE TERMS AND CONDITIONS OF SALE CONTAINED HEREIN (“TERMS AND CONDITIONS”) SHALL APPLY TO ALL QUOTATIONS AND OFFERS MADE AND PURCHASE ORDERS ACCEPTED BY SELLER. SELLER'S ACCEPTANCE OF BUYER'S ORDER IS CONDITIONED UPON BUYER'S ACCEPTANCE OF THESE TERMS AND CONDITIONS REGARDLESS OF WHETHER THE BUYER ACCEPTS THEM IN WRITING, BY IMPLICATION OR BY ACCEPTANCE OF AND PAYMENT FOR PRODUCT SOLD HEREUNDER, AND REGARDLESS OF WHEN BUYER'S PURCHASE ORDER OR PROCUREMENT DOCUMENT IS ISSUED OR WHETHER IT PRECEDES OR FOLLOWS ISSUANCE OF THESE TERMS AND CONDITIONS. ALL ORDERS SUBMITTED BY BUYER SHALL BE DEEMED TO INCORPORATE AND BE SUBJECT TO THESE TERMS AND CONDITIONS, SUBJECT TO ANY EXISTING WRITTEN AGREEMENT BETWEEN THE PARTIES RESPECTING THE SUBJECT MATTER HEREOF. ALL OTHER TERMS AND CONDITIONS CONTAINED ON ANY ORDER FORM OR CORRESPONDENCE ORIGINATED BY BUYER ARE NULL AND VOID AND WITHOUT EFFECT NOTWITHSTANDING ACCEPTANCE OF THE ORDER BY SELLER. SELLER'S FAILURE TO OBJECT TO PROVISIONS CONTAINED IN ANY COMMUNICATION FROM BUYER SHALL NOT BE DEEMED A WAIVER OF THE PROVISIONS HEREIN.**

**1. DELIVERY** - Shipment will be made in a manner determined by Seller. Seller shall arrange for freight, and pay for it on Buyer's behalf, unless Buyer requires shipment using a carrier other than at Seller's selection. Buyer shall be responsible for all shipping and handling expenses, including freight charges, incurred by Seller including, but not limited to circumstances where, at Buyer's request, Seller ships or packs product in other than its normal manner.

**2. TITLE AND RISK OF LOSS** – Except as otherwise indicated on the face hereof, title and risk of loss or damage to the product shall pass to Buyer at the time Seller delivers possession of the product to a carrier at Seller's plant or warehouse or other facility without regard to notification of shipment or selection of carrier. Product held by Seller at Buyer's request beyond the scheduled delivery date or due to Buyer's refusal to accept delivery of an acknowledged order shall be at Buyer's risk and expense.

**3. RESCHEDULING OR TERMINATION OF ORDERS** - Orders may not be rescheduled unless agreed to in writing by Seller. In general, Seller will allow one reschedule for delivery within the same Fiscal Quarter of originally scheduled delivery date. Orders may not be terminated (ie, cancelled), unless agreed to in writing by the Seller. Any orders accepted in writing by Seller for termination shall be subject to a minimum 10% restocking fee.

Notwithstanding the forgoing, in no event (i) shall Buyer have the right to reschedule or terminate any order for any discontinued product (including any product in the process of being discontinued) or (ii) shall Seller be required to process any reschedule or termination request made after Product has been picked (i.e., begun the process for shipping). Buyer shall not refuse delivery of Product shipped pursuant to an acknowledged order, unless expressly agreed in writing by Seller pursuant to this Section 3.

**4. PAYMENT TERMS** - The price for the Products is as specified in Seller's quotation and is subject to the conditions set out in such quotation. Buyer shall pay the invoiced amount within thirty (30) days from the date of Seller's invoice or shipment, whichever is earlier. Seller may exercise an option to assess an interest charge of up to one and one-half percent (1-1/2%) per month on all amounts which are not timely paid (but not to exceed the maximum lawful rate). Buyer hereby grants to Seller a purchase money security interest in the product to secure the purchase price of the product until the purchase price is paid in full. Buyer agrees to execute and deliver all documents requested by Seller to perfect and maintain Seller's security interest. Orders are subject to a maximum outstanding credit limit (measured counting all outstanding invoices, whether or not past due, combined with the value of all accepted orders) as reasonably determined by Seller. Seller may refuse to accept purchase orders, if such acceptance would result in Buyer exceeding such credit limit. The amount of credit or terms of payment may be changed or credit withdrawn by Seller at any time. Each shipment shall constitute an independent transaction and Buyer shall pay for same in accordance with the specified payment terms without deduction or setoff. Seller will invoice Buyer upon shipment. If Buyer delays shipments, Seller may invoice Buyer when Seller is prepared to ship. Seller may invoice Buyer immediately upon termination of any order. Prices shall be quoted and invoices shall be rendered and paid in United States currency.

**5. TAXES, DUTIES, LEVIES AND SIMILAR CHARGES.** - Any taxes, duties, levies or similar charges, however designated, that Seller shall be required to pay to or collect for any government upon or with respect to services rendered or the sale, use or delivery of products (except any net income tax imposed upon Seller by the United States or any governmental entity within the United States (the fifty (50) states and the District of Columbia)) shall be the responsibility of Buyer and shall be billed to Buyer as a separate item and paid by Buyer, unless a valid exemption certificate is furnished by Buyer to Seller

**6. WARRANTY** - Seller warrants the product as a production item ("Item"), but not related services or prototypes of any such Items, to be in conformance with the written specification furnished by or agreed to by Seller. If any failure to conform to such specification ("Defect") is determined in any such Items, Buyer, after obtaining a Returned Material Authorization number from Seller, shall ship suspected defective samples of the Items to Seller, following Seller's instructions regarding the return. No product will be accepted for repair, replacement, credit or refund without the written authorization of and in accordance with Seller's instructions. Seller shall analyze the failures, making use, when appropriate, of technical information provided by Buyer relating to the circumstances surrounding the failures. Seller will verify whether any Defect appears in the Items. Buyer will pay for freight for returns of Defective Items made at Seller's instruction. If Seller determines that the returned products are not Defective, Buyer shall pay Seller all costs of handling, inspection, repairs and transportation

at Seller's then prevailing rates for the Items to be reshipped to Buyer. Seller shall, at Seller's option, either repair or replace the Defective product with the same or equivalent product without charge at Seller's manufacturing or repair facility or credit or refund the purchase price provided: (i) Buyer notifies Seller in writing of the claimed Defect within ten (10) days after Buyer knows or reasonably should know of the claimed Defect, (ii) Seller's examination of the Items discloses that the claimed Defect actually exists and (iii) unless a different warranty period is specified otherwise on the face hereof, the defect appears within thirty-six (36) months from the date of shipment of a Myri-10G product, or within twenty-four (24) months from the date of shipment of a Myrinet-2000 product. In the event of a repair or replacement, Seller shall ship the repaired or replacing Items at Seller's reasonable expense. The method of disposition of any replaced Items will be as instructed by Seller. If Seller instructs Buyer to return the Items to be replaced, title and risk of loss or damage to the Items being returned shall pass to Seller at the time Buyer, at Seller's instruction, delivers possession of the Items to a carrier at Buyer's plant or warehouse or other facility.

In no event shall Seller be responsible for deinstallation or reinstallation of any Item or for the expenses thereof. Repairs and replacements covered by the above warranty are warranted to be free from Defects as set forth above except that the defect must appear (i) within three (3) months from the date of repair or replacement or (ii) prior to the expiration of the warranty period, whichever is later. Inspection and acceptance of Items by Buyer and/or payment therefor shall not relieve Seller of responsibilities hereunder.

The above warranty does not apply to, and Seller makes no warranties with respect to samples, drawings, descriptive matter, and advertising issued by Seller and any descriptions or illustrations contained in Seller's catalogues or brochures, or products that are software programs, experimental products, prototypes or units from risk lots (all of which are provided "AS IS") or to Items which have been subjected to misuse, neglect, accident or abuse or operating or environmental conditions that deviate from the parameters established in applicable specifications; or have been improperly installed, stored, maintained, repaired or altered by anyone other than Seller; or have had their serial numbers or month and year of manufacture or shipment removed, defaced or altered. This warranty does not extend to any system into which a product is incorporated. This warranty applies only to Buyer and may not be assigned or extended by Buyer to any of its customers or other users of the Items. Seller will not accept any returns from Buyer's customers or users of Buyer's products. As used herein "risk lots" refers to production units of Custom Product ordered by Buyer prior to formal production approval. Seller does not recommend the use of any of its products for medical or life support applications wherein a failure or malfunction of the product may directly threaten life or cause injury and Seller will not knowingly sell its products for such use except pursuant to a written exception to this policy granted on a case-by-case basis. No warranty is made with respect to any such medical or life support use of any product. **EXCEPT AS STATED IN THIS SECTION, SELLER, ITS SUBSIDIARIES AND AFFILIATES, SUBCONTRACTORS AND SUPPLIERS MAKE NO WARRANTIES, EXPRESS OR IMPLIED, AND SPECIFICALLY DISCLAIM ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. BUYER'S SOLE AND EXCLUSIVE REMEDY SHALL BE SELLER'S OBLIGATION TO REPAIR OR REPLACE OR CREDIT OR REFUND AS SET FORTH ABOVE.**

**7. RIGHTS IN INTELLECTUAL PROPERTY** - Seller exclusively shall own all right, title and interest in and to any inventions, discoveries, improvements, methods, ideas, software (excluding software licensed from third parties ("Third Party Software")), computer and other apparatus programs and related documentation, other works of authorship fixed in any tangible medium of expression, mask works or other forms of intellectual property, whether or not patentable, copyrightable or subject to mask work rights or other forms of protection, which are made, created, developed, written, conceived or first reduced to practice by Seller solely, jointly or on its behalf, in the course of, arising out of or as a result of work done under these Terms and Conditions. Notwithstanding the foregoing, with respect to Custom Product, unless otherwise agreed in writing, Buyer-supplied design information relating to the Custom Product, as incorporated in circuit design information, test vectors, test tapes, special requirements specifications, and/or netlists, shall remain the property of Buyer. Seller shall use such information and results exclusively for the design, manufacture and sale of the Custom Product to Buyer and in providing related production services. Seller retains all rights in Seller's processing information, mask works, mask sets, macro cells, and the like used in design, production or in filling orders placed by Buyer hereunder. Buyer has no rights in or to such processing information, mask works, mask sets, macro cells, and the like. No title or other ownership rights in any software or licensed products or any copies thereof shall pass to Buyer hereunder or any performance hereunder. Buyer agrees that it will not alter any notices on, prepare derivative works based on, or reproduce, reverse engineer, disassemble or decompile any software embodied in licensed products or recorded in the purchased products furnished hereunder. The sale of any product by Seller shall not in any way confer upon Buyer, or upon anyone claiming under Buyer, any license (expressly, by implication, by estoppel or otherwise) under any patent claim of Seller or others covering or relating to any combination, machine or process in which such product is or might be used, or to any process or method of making such product.

**8. INTELLECTUAL PROPERTY INDEMNITY** - Seller will: (i) defend or settle, at its option and expense, any claim of infringement against Buyer (other than claims for infringement that relate to Third Party Software) alleging that any product supplied hereunder directly infringes any patent, copyright or trademark; (ii) reimburse Buyer for any reasonable costs incurred at Seller's written request relating to such claim; and (iii) pay damages and costs assessed by final judgment against Buyer and attributable to such claim, up to an amount not exceeding the aggregate purchase price of affected product. In addition, in connection with satisfying its obligations under this Section 9, Seller shall have the right, at any time and at its option and expense to: (i) procure for Buyer the right to continue using such product; (ii) replace or modify any such product provided or to be provided so that it is free of this infringement; or (iii) require return of such product and shall refund the purchase price paid by Buyer. Seller's obligations hereunder are conditioned upon: (i) Buyer giving Seller written notice within thirty (30) days of any such claim; (ii) Seller having complete control of the defense and settlement thereof; (iii) Buyer cooperating fully with Seller to facilitate the defense or settlement of such claim; and (iv) Buyer's substantial compliance with these Terms and Conditions. Notwithstanding the foregoing, Seller shall have no obligation to defend or settle any claim, and Buyer shall indemnify and save harmless Seller and its suppliers and affiliates from all costs, damages, expenses, liabilities and claims, for any such claim: (i) arising from Seller's compliance with Buyer's specifications, designs or instructions; or (ii) relating to any product furnished hereunder in combination with item(s), whether or not furnished by Seller, even if such

combination results from the product's necessary or inherent use or the use for which the product is purchased. **THE FOREGOING STATES THE SOLE AND EXCLUSIVE REMEDY AND OBLIGATION OF THE PARTIES HERETO FOR INFRINGEMENT OR OTHER VIOLATION OF ANY INTELLECTUAL PROPERTY RIGHTS ARISING HEREUNDER AND IS IN LIEU OF ALL WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, IN REGARD THERETO.**

**9. EXPORT CONTROL** - The parties acknowledge that any products, software, and technical information (including, but not limited to, services and training) provided hereunder are subject to U.S. export laws and regulations and any proposed use or transfer outside the United States of such products, software, and technical information must be authorized under those laws and regulations. The parties agree that they will not use, distribute, transfer, or transmit the products, software, or technical information (even if incorporated into other products) except in compliance with U.S. export regulations. If requested by Seller, Buyer also agrees to sign written assurances and other export-related documents as may be required for Seller to comply with U.S. export regulations.

**10. EXCLUSIVE REMEDIES AND LIMITATIONS OF LIABILITY -**

- A. Seller's entire liability and Buyer's exclusive remedies against Seller for any damages caused by any product defect or failure, or arising from the performance or non-performance of any work, regardless of the form of action, whether in contract, tort including negligence, strict liability or otherwise shall be:
- 1) For infringement, the remedies set forth in the section entitled Intellectual Property Indemnity;
  - 2) For failure of product or work performed, the remedies stated in the section entitled Warranty;
  - 3) For failure to deliver or for delays in delivery of production quantities, Seller shall have no liability unless the delivery is delayed by more than thirty (30) days by causes not attributable either to Buyer or to conditions beyond Seller's reasonable control, in which case Buyer shall have the right, as its sole remedy, to terminate the order without incurring termination charges;
  - 4) For bodily injury or death to any person proximately caused by Seller, Buyer's right to proven direct damages; and
  - 5) For claims other than set forth above, Seller's liability shall be limited to direct damages that are proven, in an amount not to exceed the value of the order times the gross margin for the quarter in which the order is shipped to Buyer.

Notwithstanding any other provision of these Terms and Conditions, Seller shall not be liable for incidental, indirect, special, exemplary or consequential damages, including but not limited to lost profits, savings or revenues of any kind, whether

or not Seller has been advised of the possibility of such damages. This provision shall survive failure of an exclusive remedy.

- 11. PRODUCT CHANGES** - Seller may at any time make changes in the products (i) that do not materially affect physical or functional interchangeability or performance or (ii) when required for purposes of safety.
- 12. ASSIGNMENT** - Buyer shall not assign these Terms and Conditions or any rights or obligations hereunder without the prior written consent of the Seller. Any attempted assignment without the Seller's consent shall be void and ineffective.
- 13. EXCUSE OF PERFORMANCE** - Except with respect to Buyer's obligation to make timely payments when due, neither party shall be held responsible for any delay or failure in performance of any part of these Terms and Conditions to the extent such delay or failure is caused by fire, flood, earthquake, explosion, war, strike, embargo, governmental action, civil or military authority, act of God, nature or the public enemy, inability to secure material or transportation facilities, inadequate yield of products despite Seller's reasonable efforts, act or omission of carriers or any other causes beyond its reasonable control. Seller may, in the event of any such circumstance, allocate in a fair and reasonable manner, taking into account Seller's contractual commitments, its available production output among itself and its other customers, including at Seller's option those not under contract.
- 14. CHOICE OF LAW** - The parties expressly intend and agree that the construction, interpretation, and performance of these Terms and Conditions and all transactions under it shall be governed by the laws of the State of California, excluding its choice of law rules.