



## **Optomark GmbH – Terms and Conditions of Trade. 19. November 2014**

### **1. Definition and interpretation**

1.1 In these Terms and Conditions of Trade, the following words shall have the following meanings:-

(a) "Optomark " – Optomark GmbH whose registered office is at Karlstrasse 8, 83022 Rosenheim, Germany..

Registered in Germany number XXX.

(b) "Buyer" – the legal entity with whom Optomark makes a Contract and which expression shall include (jointly and severally) any principal on whose behalf the Buyer places an Order;

(c) "Contract" – any contract formed as a result of Optomark accepting in writing an Order placed by the Buyer for the purchase of Products or Services;

(d) "Delivery" – the delivery of the Products by Optomark whether by way of delivery by or for and on behalf of Optomark, direct delivery by a supplier of Optomark or another third party or otherwise;

(e) "Guarantor" – any legal entity who agrees to guarantee the payment by the Buyer of, or to be responsible for, any contractual amount due to Optomark;

(f) "Order" – any Order placed with Optomark by the Buyer for Products or Services;

(g) "Products" – the items and goods which are to be supplied by Optomark pursuant to any Contract; and

(h) "Services" – support and assistance whether of an advisory or other nature to be provided to the Buyer.

1.2 References in these Terms and Conditions of Trade are, unless otherwise stated, to conditions in these Terms and Conditions of Trade.

1.3 The headings are inserted for convenience only and have no legal effect.

1.4 Where relevant the singular shall include the plural and vice versa.

### **2. Basis of Sale**

2.1 All Contracts shall be made upon the basis of these Terms and Conditions of Trade together with any special conditions issued by Optomark to the Buyer at any time prior to a Contract being made. Variations and/or qualifications of such conditions can only be effected in writing signed by a Director of Optomark.

2.2 No terms or conditions submitted by any Buyer to Optomark, irrespective of their date, shall prevail over these conditions.

2.3 Any Order shall be deemed to be an offer by the Buyer to purchase Products or Services pursuant to these Terms and Conditions of Trade and acceptance of Delivery of those Products or Services shall be deemed conclusive evidence of the Buyer's acceptance of these Terms and Conditions of Trade.

2.4 A Contract between the parties shall not be deemed to exist unless and until Optomark has accepted an Order in writing.

2.5 Optomark's employees, agents or Suppliers are not authorised to make any representations concerning Products or Services on Optomark's behalf unless confirmed by Optomark in writing. In entering into a Contract the Buyer acknowledges that it does not rely upon and waives any claim for any breach of any such representations, which are not so confirmed.

### **3. Sales Quotations and Orders**

3.1 Sales Quotations are not offers and may be withdrawn or varied at any time prior to acceptance of an Order by Optomark.



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### **3.2 Orders**

may be

given by the Buyer in writing or orally. Oral Orders shall, upon their acceptance by Optomark, be binding notwithstanding any failure on the part of the Buyer to confirm the same in writing.

3.3 Orders may not be cancelled or varied either in whole or in part by the Buyer once accepted by Optomark save at Optomark's sole discretion. If Optomark agrees to a reduction in the quantity of Products ordered the Buyer shall pay the applicable unit price per Product for the quantity actually purchased and or a cancellation and restocking fee.

3.4 Where a sample of the Products is shown to and inspected by the Buyer the parties accept that such sample is shown and inspected for the sole purpose of enabling the Buyer to judge for itself the quality of the bulk and not so as to constitute a sale by sample.

3.5 Any description given or applied to Products is given by way of identification only and the use of such description shall not constitute a sale by description.

### **4. Price and payment**

4.1 The price of the Products that are the subject of any Contract shall be the price quoted in Optomark's Sales Quotation or where no Sales Quotation has been provided the prevailing price at the date of Contract.

4.2 Unless otherwise agreed the quoted price includes the cost of carriage.

4.3 All prices quoted are net and are payable subject to the addition of VAT and all other applicable taxes, levies and duties. Optomark reserves the right to charge an additional delivery charge on special or urgent deliveries or on those of a non-routine nature.

4.4 If additional charges arise from delivery by way of demurrage or otherwise all additional packing, transport, insurance demurrage and other costs, expenses or charges shall be added to the price of the

Products, and shall be the responsibility of and paid by the Buyer.

4.5 Optomark reserves the right to invoice the Buyer on an interim basis to cover any instalments of Products delivered.

4.6 Delivery of a lesser quantity than that ordered shall not relieve the Buyer of the obligation to accept Delivery and pay for the Products delivered.

4.7 The Buyer shall pay the price of the Products and any costs incurred by Optomark without any deduction within the agreed number of days after the date of Optomark's invoice. Where applicable, the Guarantor irrevocably and unconditionally guarantees to Optomark the due and punctual performance by the Buyer of its obligations contained in these Conditions and agrees that Optomark shall not be obliged to take steps against the Buyer to enforce any rights or remedy before enforcing the terms of the guarantee of the Guarantor pursuant to this Condition. Punctual payment of the price and/or such costs (whether by the Buyer or the Guarantor) shall be of the essence of the Contract.

4.8 All payments shall be made in the currency stipulated in the original invoice.

4.9 In the event of any payment becoming overdue then without prejudice to any other right or remedy available to it notwithstanding any credit terms agreed with the Buyer the price in respect of each and all Contracts shall forthwith become

immediately due and payable and Optomark may:-

(a) Terminate the Contract; or

(b) Suspend performance of its remaining obligations under the Contract until payment is received in full; and

(c) Charge interest on the unpaid amount at the rate of 3% per calendar month from the date that payment fell due after as well as before commencement of proceedings for recovery of the same.

4.10 Each Contract shall be subject to Optomark being satisfied as to the Buyer's credit status. If Optomark becomes dissatisfied with the Buyer's credit status it shall be entitled to suspend



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performance of any Contract until it is satisfied as to the Buyer's creditworthiness or is given such security for the price as Optomark shall deem appropriate.

### **5. Contract Price variation**

5.1 Optomark shall be entitled in its discretion to pass on to the Buyer any increase in the cost of Products, Services and delivery charges incurred by Optomark subsequent to the date of the Contract up to an amount equivalent to but not greater than the amount of the increase incurred.

5.2 Optomark shall be entitled to vary the Contract price if matters not divulged at or before the time of Contract by the Buyer in relation to the supply of Products or Services will, do or are likely to increase the cost to Optomark of performing its contractual obligations.

5.3 Optomark reserves the right to automatically substitute any Products that are unavailable at the time of despatch with goods of similar specification and performance. The price for the substitute goods will be the prevailing price at the date of despatch and not the price of the replaced Product. The Buyer must notify Optomark before despatch if automatic substitution is unacceptable.

5.4 Currency variation. Optomark trading currency is USD. Should the exchange rate of the invoicing currency to USD vary at time of payment vary more than 5% from the exchange rate at time of order confirmation then Optomark reserves the right to adjust the invoice in line with the prevailing USD/ currency rate.

### **6. Delivery**

6.1 Delivery of the Products shall be made to the address nominated by the Buyer in its Purchase Order or, if the Products are to be collected by the Buyer, upon collection from Optomark's address at any time after Optomark has notified the Buyer that the Products are ready for collection.

6.2 Any dates quoted for Delivery are approximate only and time for Delivery shall not be of the essence of the Contract.

6.3 Optomark may effect Delivery by instalments in which case these Terms and Conditions of Trade shall apply to each instalment as though each such instalment were a separate Contract and any failure or defect in any one Delivery will not entitle the Buyer to either refuse delivery of the remaining Products ordered or repudiate the Contract as a whole.

6.4 If Optomark fails to deliver the Products for any reason other than a cause beyond Optomark's reasonable

control or the Buyer's fault Optomark's liability shall be strictly limited to the excess if any of the cost to the Buyer in the cheapest available market of similar goods to replace those not delivered. Optomark shall not under any circumstances be liable for any consequential loss or other damage incurred by the Buyer or any third party that arises from any such non-delivery.

6.5 If the Buyer fails to take Delivery of the Products or fails to give Optomark timely and adequate Delivery instructions, Optomark may, at its option:-

(a) Store the Products until actual Delivery or sale and charge the Buyer for the reasonable costs of storage; and/or

(b) Sell the Products at the best price, if any, readily obtainable and charge the Buyer for any shortfall below the Contract price.

6.6 The Buyer shall fully indemnify and keep indemnified Optomark from and against all costs, claims, damages, losses, liabilities and expenses incurred or suffered by Optomark by reason of the failure by the Buyer to take Delivery or to give Optomark adequate Delivery instructions.

6.7 The Buyer is deemed to have inspected the Products within 24 hours after Delivery or collection as the case may be and shall inform Optomark in writing within 48 hours after Delivery or collection of any shortage, loss or damage. In the absence of such written report being received by Optomark the correct quantity and quality of Products will be deemed to have been delivered.

6.8 Optomark undertakes to replace, correct or at its option credit the value of all Products and Services supplied which are defective or otherwise not in conformity with the Contract specification.



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Optomark  
will not

replace, correct or give credit for any products which in its opinion have been the subject of undue wear and tear, modification, inappropriate storage, improper installation maintenance or use, accident or neglect. The Buyer shall not be entitled to reject any Products due to minor defects that do not adversely affect their installation, operation or performance. Optomark's decision on such matters shall be final.

### **7. Title**

7.1 Risk of damage to or loss of the Products shall pass to the Buyer upon despatch from Optomark or, where goods are shipped direct to the Buyer from an Optomark supplier, despatch from such supplier.

7.2 ownership of and title to the Products shall pass to the Buyer on the later of payment in full of the price of the Products and payment in full of every other sum whatsoever which is due from the Buyer to Optomark whether under any Contract or otherwise and until the happening of the last such event. Until such time the whole right, title and interest both legal and equitable in and to the Products shall remain with Optomark and the Buyer shall keep the Products as Optomark's fiduciary agent and bailee properly stored, protected and fully insured in such a way that they are identifiable as the property of Optomark and separate from all other goods of the Buyer. Until that event the Buyer shall be entitled to use or re-sell the Products in the ordinary course of business but shall account to Optomark for the proceeds of sale or otherwise of the Products and shall hold such proceeds on trust for Optomark.

7.3 The right to use or re-sell the Products granted to the Buyer under the terms of this condition:-

(a) may be terminated by Optomark immediately upon written notice to the Buyer if the Buyer defaults in payment of any sum for more than 7 days after such sum fell due; or

(b) shall automatically cease if a receiver is appointed over any of the assets of the Buyer or a petition is presented for an administration order in respect of the Buyer or a petition is presented or notice is given of a resolution to wind-up the Buyer or if the Buyer is deemed to be unable to pay its debts or, if the Buyer is a sole trader or partnership, a petition is presented for the bankruptcy of the Buyer or any partner of the Buyer or if the Buyer shall make any composition with its creditors or if any distress, execution or other process is levied or enforced upon or sued against all or any of the assets of the Buyer.

7.4 Upon the Buyer ceasing to have any right of use or re-sale, Optomark and its servants or agents shall be entitled at any time without notice and at the Buyer's expense to enter the premises of the Buyer, its servants or agents to repossess the Products.

### **8. Intellectual Property**

If a Product includes software or other intellectual property such software or other intellectual property is supplied by Optomark subject to the relevant copyright and user license. The Buyer shall not use the software or other intellectual property in any manner or for any purpose not expressly permitted by such license.

### **9. Warranties**

9.1 Optomark does not hold or warrant any Products or Services as being fit for any particular purpose, whether made known to Optomark or not, and the Buyer shall rely solely on its own skill and judgment to evaluate the fitness and suitability of products or Services for any purpose. Services provided by Optomark, whether paid for or unpaid, either in whole or in part, are for the Buyer only and the Buyer shall indemnify Optomark from any liability whatsoever arising from the Buyer acting or relying upon or otherwise utilising the outputs of any such Services.

9.2 Optomark excludes all warranties relating to the Products and Services so far as permitted by applicable law.



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9.3 Except  
in respect of

death or personal injury caused by Optomark's negligence Optomark shall not be liable to the Buyer by reason of any misrepresentation or breach of any implied warranty condition or other term or breach of any duty howsoever arising or under the express terms of the Contract for any direct loss or expense or any indirect loss or expense suffered by the Buyer or liability to third parties incurred by the Buyer or for any consequential loss or damage which arises out of or in connection with the supply of the Products or Services or their use or re-sale by the Buyer except as expressly provided in these Conditions of Trade.

9.4 Subject to clauses 9.1 to 9.3 above, Products are sold to the Buyer with the benefit of any transferrable warranties received by Optomark from the suppliers and manufacturers of the said Products.

### **10. Force Majeure**

Optomark shall not be liable for delays in delivery or for failure to perform its obligations due to causes beyond its reasonable control including, but not limited to, materials shortages, labour disputes, transportation delays, unforeseen circumstances, acts of God, acts or omissions of other parties, acts or omissions of Government civil or military authorities, fires, strikes, floods, severe weather conditions, computer or telecommunications interruptions, terrorism, epidemics, riots or war. If any such delay persists for such time as Optomark considers unreasonable it may, without liability to the Buyer, terminate the Contract.

### **11. Termination**

The Buyer shall not be entitled to terminate any Contract although Optomark shall be entitled (save as provided for in Clause 4.9 herein) to terminate any Contract with the Buyer forthwith by notice without prejudice to any of its other rights:-

- (a) if the Buyer commits any breach of Contract which is incapable of remedy or which if the same is capable of remedy it fails to remedy within 7 calendar days of Optomark's written notice so to do; or
- (b) if any distress or execution shall be levied on the Buyer's assets or if the Buyer shall make or offer to make any arrangement or composition with creditors or commit any act of bankruptcy or if any petition or receiving order in bankruptcy or administration order shall be presented or made against the Buyer or if the Buyer is the subject of any resolution or petition to wind-up the Buyer (other than for the purposes of solvent reconstruction or amalgamation) or if a receiver or administrator is appointed over the assets of the Buyer or any part thereof; or
- (c) if in the opinion of Optomark serious doubts arise as to the solvency of the Buyer; or
- (d) if the results of any credit rating obtained against the Buyer by Optomark fall below any threshold from time to time in place by Optomark; or
- (e) if the Buyer fails to take Delivery of Products or fails to give Optomark adequate delivery instructions prior to the time stated for Delivery.

### **12. Termination Consequences**

12.1 In the event of any Contract being terminated in accordance with these conditions the Buyer shall immediately pay to Optomark at the Contract rate for all Products ordered (whether under this Contract or any other contract with Optomark) prior to termination and shall indemnify Optomark against any resulting loss (including loss of profits and other consequential loss) damage or expense incurred by Optomark in connection with the non-performance of this Contract and all other such contracts with the Buyer.

12.2 Termination of the Contract shall not adversely affect or prejudice any rights and remedies of Optomark under the Contract and the Buyer shall be and remain liable to perform all outstanding



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liabilities  
under any  
Contract notwithstanding that Optomark may have exercised one or more of the rights or remedies  
against the Buyer.

### **13. Confidential Information**

The Buyer agrees with Optomark to maintain secret and confidential all the information of a confidential nature (including, without limitation, any price sensitive information) obtained from Optomark pursuant to the Contract and agrees to procure that its employees servants and agents who have access to any such information be made aware of and comply with these obligations.

### **14. General**

14.1 The Buyer acknowledges that in entering into any Contract it does not do so on the basis of or in reliance upon any representation, warranty or other provision except as expressly provided in these conditions.

14.2 Each party acknowledges that any Contract together with any variations and/or qualifications made pursuant to these Terms and Conditions of Trade contains the whole agreement between the parties and supersedes all previous agreements between the parties with respect to its subject matter.

14.3 The Buyer agrees with Optomark that Optomark shall be entitled to set off against any sums due or payable by the Buyer for the time being to Optomark any sums (or part thereof) due or payable by Optomark for the time being to the Buyer howsoever arising.

14.4 Each Contract is personal to the parties and neither of them may, without the written consent of the other, assign, mortgage, charge or dispose of any of its rights hereunder.

14.5 No failure of or delay or forbearance by Optomark (whether express or implied) in asserting or exercising any rights or remedies under any Contract shall affect its rights to do so in the future.

14.6 Any notice to be served under any Contract shall be delivered by hand or sent by recorded delivery post to the most recent correspondence address used by the intended recipient in connection with the Contract or by email to the last known email address of the chief executive officer or equivalent of the intended recipient. Notice shall be deemed served on delivery if delivered by hand, on the recorded date of delivery where delivery is by recorded post and 24 hours after despatch by email (weekends and public holidays excepted). In the event of non-delivery by email delivery shall be made by hand or by recorded delivery post.

14.7 These Terms and Conditions of Trade and each and every Contract shall be governed by German law and subject to the exclusive jurisdiction of the German courts save where the Buyer is either incorporated or domiciled in the United Kingdom in which case each and every Contract shall be governed by English law and subject to the exclusive jurisdiction of the English courts.

14.8 If any term or provision of these Terms and Conditions is held invalid, illegal or unenforceable for any reason by any court of competent jurisdiction such provision shall be severed and the remainder of the provisions shall continue in full force and effect as if these Terms and Conditions had been agreed with the invalid, illegal or unenforceable provision eliminated.

14.9 Nothing contained in these Terms and Conditions shall be construed as establishing or implying any partnership or joint venture between the parties or authorising either party to act as the agent of the other.