Illumina AB
Terms and Conditions of Sale – Research Use Products
January 2015

1. Definitions, Interpretation. “Consumable(s)” means Seller branded reagents and consumable items that are intended by Seller to be consumed through the use of Hardware. “Documentation” means Seller’s user manual, package insert, and similar documentation, for the Product in effect on the date that the Product ships from Seller. Documentation may be provided with the Product at time of shipment or provided electronically from Seller. “Hardware” means Seller branded instruments, accessories, or peripherals. “Product(s)” means the item(s) acquired hereunder. Products may be Hardware, Consumables, or Software. “Software” means any computer software that has been embedded in or installed on Hardware or provided separately. “Purchaser” means the person or entity acquiring the Product with the intent to use the Product, from (i) Seller; or (ii) Seller’s authorized distributor or reseller. “Seller” means the Illumina entity selling the Product. The Seller is identified on the quotation, order acknowledgment, or invoice, if any, and may be a sub-contractor or third party to Seller, or referred to as “Seller,” “Sw.” or “Swis.” “Software” means Seller branded software (e.g., Hardware operating software, data analysis software). All Software is licensed and not sold and may be subject to additional terms found in the Software’s end user license agreement. “Specifications” means Seller’s written technical specifications for the Product in effect on the date that the Product ships from Seller.

Sections, titles and headings in these terms and conditions are for convenience only and are not intended to affect the meaning or interpretation hereof. Whenever required by the context, the singular term shall include the plural, the plural term shall include the singular, and the gender of any pronoun shall include all genders. As used these terms and conditions except as the context may otherwise require, the word “and” means “or” (and vice versa). As mentioned in the definition of “such as”, “e.g.” or “example(s)” are deemed to be followed by “without limitation”, whether or not they are in fact followed by such words or words of like import, and “will” and “shall” are used synonymously. Except as expressly stated, any reference to “days” shall be to calendar days, and “business day” shall mean all days other than Saturdays, Sundays or a bank holiday recognised in Sweden.

2. Rights to Products upon Purchase. Subject to these terms and conditions, Purchaser is granted only a non-exclusive, non-transferable, perpetual, worldwide, non-sublicensable right under Seller’s Core IP to use the Product only in Purchaser’s facility for Purchaser’s Research Use (“Permitted Rights”). “Research Use” means use for internal research (which includes research services provided by Purchaser to third parties), specifically excluding any use that (a) is not in accordance with the Product’s Specifications or Documentation, (b) requires grants of rights or a license to Application Specific IP (or “Software” unless Purchaser erases or removes the Software prior to such action. For the avoidance of doubt, Purchaser understands that in the event of an Unauthorized Transfer, any rights to use the Software granted to Purchaser by Seller and the Permitted Rights immediately cease, and the third party transferee will have no rights to use the Software and no Permitted Rights. Additionally, in the event of an Unauthorized Transfer, any existing warranties for the Hardware or Software shall be void and of no effect, as of the date of such Unauthorized Transfer.

4. Regulatory. The Product is labeled For Research Use Only. Purchaser acknowledges that (i) the Product has not been subject to any conformity assessment or declaration of conformity (as defined or approved, cleared, or registered by any conformity assessment body or other regulatory entity or under any law or regulation whether foreign or domestic for any specific intended use, whether research, commercial, diagnostic, or otherwise, and (ii) Purchaser must ensure it has undertaken any assessments and made any declarations and has any regulatory certifications, approvals, clearances and registrations that are necessary for Purchaser’s intended uses of the Product. Purchaser further agrees to comply with all applicable laws and regulations when using, maintaining, and disposing of Product.

5. Limited Liability. TO THE EXTENT PERMITTED BY LAW, IN NO EVENT SHALL SELLER OR ITS SUPPLIERS BE LIABLE TO PURCHASER OR ANY THIRD PARTY FOR COSTS OR PROCUREMENT OF SUBSTITUTE PRODUCTS OR SERVICES, LOST PROFITS, DATA OR BUSINESS, OR FOR ANY INDIRECT, SPECIAL, INCIDENTAL, EXEMPLARY OR CONSEQUENTIAL DAMAGES OF ANY KIND ARISING OUT OF OR IN CONNECTION WITH, WITHOUT LIMITATION, THE SALE OF THE PRODUCT, ITS USE, SELLER’S PERFORMANCE OR ANY OF THESE TERMS AND CONDITIONS, HOWEVER CAUSED, WHETHER IN CONTRACT, LAW (INCLUDING NEGLIGENCE AND STRICT LIABILITY) OR OTHERWISE.

TO THE EXTENT PERMITTED BY LAW AND EXCEPT IN CIRCUMSTANCES OF GROSS NEGLIGENCE OR WILFUL INTENT, SELLER’S TOTAL AND CUMULATIVE LIABILITY UNDER THESE TERMS AND CONDITIONS, SHALL IN NO EVENT EXCEED THE AMOUNT PAID TO SELLER FOR THE PARTICULAR PRODUCT CONTAINED IN THE PARTICULAR ORDER THAT DIRECTLY CAUSED THE LIABILITY.

6. Limitations on Warranties. TO THE EXTENT PERMITTED BY LAW AND SUBJECT TO THE EXPRESS PRODUCT WARRANTY MADE IN THESE TERMS AND CONDITIONS, THE SELLER DISCLAIMS ALL IMPLIED WARRANTIES, EXPRESS, IMPLIED OR STATUTORY, WITH RESPECT TO THE PRODUCT, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NONINFRINGEMENT, OR ARISING FROM COURSE OF PERFORMANCE, DEALING, USAGE OR TRADE. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, SELLER MAKES NO CLAIM, REPRESENTATION, OR WARRANTY OF ANY KIND AS TO THE UTILITY OF THE PRODUCT FOR PURCHASER’S INTENDED USES.
7. Product Warranty. All warranties are personal to the Purchaser and may not be transferred or assigned to a third-party, including a member of the same group (Sw. koncernföretag) and other affiliates of Purchaser. All warranties are facility specific and do not transfer if the Product is moved to another facility of Purchaser, unless Seller conducts such move. The warranties described in these terms and conditions exclude any stand-alone third-party goods that may be acquired or used with the Products.

a. Warranty for Consumables. Seller warrants that Consumables, other than custom Consumables, will conform to their Specifications until the later of (i) 3 months from the date of shipment from Seller, or (ii) any expiration date or the end of the shelf life pre-printed on such Consumable by Seller, but in either event no later than 12 months from the date of shipment. With respect to custom Consumables (i.e., Consumables made to specifications or designs made by Purchaser or provided to Seller by, or on behalf of, Purchaser), Seller only warrants that the custom Consumables will be made and tested in accordance with Seller’s standard manufacturing and quality control processes. Seller makes no warranty that custom Consumables will work as intended by Purchaser or for Purchaser’s intended uses.

b. Warranty for Hardware. Seller warrants that Hardware, other than Upgraded Components, will conform to its Specifications for a period of 12 months after its shipment date from Seller unless the Hardware includes Seller provided installation in which case the warranty period begins on the date of installation or 30 days after the date the Hardware was delivered, whichever occurs first ("Base Hardware Warranty"). "Upgraded Components" means Seller provided components, modifications, or enhancements to Hardware that was previously acquired by Purchaser. Seller warrants that Upgraded Components will conform to their Specifications for a period of 90 days from the date the Upgraded Components are provided by Seller. Upgraded Components do not extend the warranty for the Hardware unless the upgrade was conducted by Seller at Seller’s facilities in which case the upgraded Hardware shipped to Purchaser comes with a Base Hardware Warranty.

c. Exclusions from Warranty Coverage. The foregoing warranties do not apply to the extent a non-conformance is due to (i) abuse, misuse, neglect, negligence, accident, improper storage, or use contrary to the Documentation or Specifications, (ii) improper handling, repair, maintenance, or repair (other than if performed by Seller’s personnel), (iii) unauthorized alterations, (iv) Force Majeure events, or (v) use with a third-party’s good not provided by Seller (unless the Product’s Documentation or Specifications expressly state such use is good for use with the Product).

d. Procedure for Warranty Coverage. In order to be eligible for repair or replacement under this warranty Purchaser must (i) promptly contact Seller’s support department to report the non-conformance, (ii) cooperate with Seller in confirming or diagnosing the non-conformance, and (iii) return the Product, transportation charges prepaid, to Seller following Seller’s instructions or, if agreed by Seller and Purchaser, grant Seller’s authorized repair personnel access to the Product in order to confirm the non-conformance and make repairs.

e. Sole Remedy under Warranty. Seller will, at its option, repair or replace non-conforming Product that is covered by this warranty provided that Seller can reasonably identify and confirm such non-conformance. The warranty period for repaired or replaced Consumables is 90 days from the date of shipment, or the remaining period on the original Consumables warranty, whichever is later. Hardware may be repaired or replaced with functionally equivalent, reconditioned, or new Hardware or components (if only a component of Hardware is non-conforming). If the Hardware is replaced in its entirety, the warranty period for the replacement is 90 days from the date of shipment or the remaining period on the original Hardware warranty, whichever is later. If only a component is repaired or replaced, the warranty period for such component is 90 days from the date of shipment or the remaining period on the original Hardware warranty, whichever ends later. The preceding states Purchaser’s sole remedy and Seller’s sole obligations under the warranty.

8. Indemnification

a. Infringement Indemnification by Seller. Subject to these terms and conditions, including without limitation, the Exclusions to Seller’s Indemnification Obligations (Section 8(b) below), the Conditions to Indemnification Obligations (Section 8(d) below), Seller shall (i) defend, indemnify and hold harmless Purchaser against any third-party claim or action alleging that the Product when used for Research Use, in accordance with these terms and conditions, and in accordance with the Product’s Documentation and Specifications infringes the valid and enforceable intellectual property rights of a third party, and (ii) pay all settlements entered into, and all final judgments and costs (including reasonable attorneys’ fees) of such third-party claim or action. If the Product or any part thereof, becomes, or in Seller’s opinion may become, the subject of an infringement claim, Seller shall have the right, at its option, to (A) procure for Purchaser the right to continue using the Product, (B) modify or replace the Product with a substantially equivalent non-infringing substitute, or (C) require the return of the Product and terminate the rights, license, and any other permissions provided to Purchaser with respect to the Product and refund to Purchaser the depreciated value (as shown in Purchaser’s official records) of the returned Product at the time of such return; provided that, no refund will be given for used-up or expired Consumables. This Section states the entire liability of Seller for any infringement of third party intellectual property rights.

b. Infringement Indemnification by Purchaser. For the avoidance of doubt, Seller has no obligation to defend, indemnify or hold harmless Purchaser for any infringement to the extent such infringement arises from: (i) use of the Product in any manner or for any purpose other than Research Use, (ii) use of the Product in any manner not in accordance with its Specifications, its Documentation, or the rights expressly granted to Purchaser under these terms and conditions, (iii) use of the Product in combination with any other products, materials, or services not supplied by Seller, (iv) use of the Product to perform any assay or other process not supplied by Seller, (v) Seller’s compliance with specifications or instructions for such Product furnished by, or on behalf of, Purchaser, (vi) Purchaser’s breach of any of these terms and conditions, (vii) use of stand-alone third party goods that may be acquired or used with the Products, or (viii) use of the Products in any manner or for any purpose that requires rights to Other IP (each of (i) – (viii), is referred to as an “Excluded Claim”).

c. Indemnification by Purchaser. Purchaser shall defend, indemnify and hold harmless Seller, its Affiliates, their non-affiliate collaborators and development partners that contributed to the development of the Product, and their respective officers, directors, representatives and employees against any claims, liabilities, damages, fines, penalties, causes of action, and losses of any and every kind, including without limitation, personal injury or death claims, and infringement of a third party’s intellectual property rights, resulting from, relating to, or arising out of (i) Purchaser’s breach of any of these terms and conditions or (ii) any Excluded Claims.

d. Conditions to Indemnification Obligations. The parties’ indemnification obligations are conditioned upon the party seeking indemnification (i) promptly notifying the other party of the claim or action, (ii) giving the other party exclusive control over the defense and settlement of such claim or action, (iii) not admitting infringement or any intellectual property right without prior written consent of the other party, (iv) not entering into any settlement or compromise of any such claim or action without the prior written consent of the other party, and (v) not providing reasonable assistance to the other party in the defense of the claim or action; provided that, the party reimburses the indemnified party for its reasonable out-of-pocket expenses incurred in providing such assistance.

9. Payment Terms. The price of the Product will be the price set out in the Seller’s quotation or, if no price is quoted, the price set out in the Seller’s published price list in force as at the date of shipment. Seller will invoice upon shipment. All payments are due 30 days from the date of the invoice. All amounts due shall be paid in the currency found on the invoice. If payment is made by wire or other electronic funds transfer, Purchaser is solely responsible for any bank or other fees charged, and will reimburse Seller for any such fees. If any payment is not made by the due date Seller may exercise all rights and remedies available by law, including without limitation, suspending performance. Purchaser shall pay for all costs (including reasonable attorneys’ fees) incurred by Seller in connection with the collection of late payments. Each purchase order is a separate, independent transaction, and Purchaser has no right of set-off against other purchase orders or other transactions with Seller. Seller will determine payment terms on a per-order basis and may modify credit terms in its discretion. Any amounts not paid when due will accrue interest at the rate of 1.5% per month, or the maximum amount allowed by law, if lower.

10. Shipping Terms; Title and Risk of Loss. Unless otherwise set forth in writing by Seller or otherwise agreed between the parties, all shipments are made FAS (Incoterms 2010) at the address designated by Purchaser at the time of ordering. In all cases, title to the Products passes to Purchaser upon delivery by Seller. Title and the risk of loss of the Product is transferred to Purchaser upon delivery to the common carrier, freight prepaid. In the event Seller is required by law or regulation to pay any such tax, duty or charge, such amount will be added to the purchase price or subsequently invoiced to Purchaser. In the event Purchaser is required by law or regulation to deduct any such tax, duty, tariff or charge the Purchaser shall gross up any payment to the Seller.

11. Taxes. Purchaser agrees that any applicable sales, use, excise, VAT (value added tax), GST (goods and services tax), withholding and other taxes will be calculated based on both the tax rates in effect on the date of shipment and the ship to address for the Product. Any amounts for tax listed on a quotation, if any, are for reference purposes only and are not binding on Seller. All prices and other amounts payable to Seller are exclusive of and are payable without deduction for any taxes, customs duties, tariffs or charges otherwise claimed by or imposed by any governmental authority upon the sale of Product, all of which will be paid by Purchaser. In the event Seller is required by law or regulation to pay any such tax, duty or charge, such amount will be added to the purchase price or subsequently invoiced to the Purchaser. In the event Purchaser is required by law or regulation to deduct any such tax, duty, tariff or charge the Purchaser shall gross up any payment to the Seller.

12. General

a. Applicability of Terms and Conditions. Including any terms in the Documentation, exclusively govern the ordering, purchase, supply, and use of Product, and prevail over any conflicting, amending and/or additional terms contained in any purchase orders, invoices, or similar documents all of which are hereby rejected and are null and void. Seller’s failure to object to any such terms shall not constitute a waiver by Seller, nor constitute acceptance by Seller of such terms and conditions.

b. Order Changes/Cancellations. Orders for Products may not be changed or cancelled once placed. If Purchaser cancels an order, Purchaser forfeits to Seller any deposit paid related to such order.
c. Governing Law. These terms and conditions, their interpretation, and the performance of the parties shall be governed by the laws of Sweden. Seller and Purchaser agree that the United Nations Convention on Contracts for the International Sale of Goods shall not apply to these terms and conditions, including any terms in the Documentation.

d. Arbitration. Either party may refer any dispute, controversy or claim (i) arising out of or in connection with this contract, or the breach, termination or invalidity thereof, to be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal shall be composed of a sole arbitrator. The place of arbitration shall be Stockholm. The language to be used in the arbitral proceedings shall be English. In all cases of arbitration hereunder each party shall bear its own costs and expenses and an equal share of the arbitrator’s and administrator’s fees of arbitration; neither party nor an arbitrator may disclose the existence, content, or results of any arbitration without the prior written consent of both parties, unless required by law; the decision of the arbitrator shall be final and binding on the parties, provided that, the arbitrator shall not have the authority to alter any explicit provision of these terms and conditions; judgment on the award may be entered in any court having jurisdiction. This clause shall not preclude the parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction. Notwithstanding anything herein to the contrary, any claims or causes of action involving infringement, validity, or enforceability of a party’s or member’s of the same group (Sw. konserföretag) or other affiliate’s intellectual property rights are not subject to this arbitration clause.

e. Representations and Warranties. Purchaser is not an authorized dealer, representative, reseller, or distributor of any of Seller’s, or its Affiliates’, products or services. Purchaser agrees and represents and warrants that (i) it is not purchasing the Product on behalf of a third party, (ii) is not purchasing the Product in order to resell or distribute the Product to a third party, (iii) is not purchasing the Product in order to export the Product from the country in which Seller shipped the Product pursuant to the ship-to address designated by Purchaser at the time of ordering (“Ship-to Country”), and (iv) will not export the Product out of the Ship-To Country.

f. Remedies for Breach. In addition to any remedies specified elsewhere under these terms and conditions, and any remedies available to Seller under law or in equity, Seller may, immediately upon notice to the Purchaser, do any, all, or any combination of the following in the event Purchaser breaches any of these terms and conditions: (i) cease performance, including without limitation, cease further shipments of Product, (ii) terminate the rights granted to Purchaser pursuant to Section 9 (Rights to Product Upon Purchase), (iii) terminate any service contracts then in effect for affected Product, or (iv) terminate any remaining product warranty for the affected Product.

g. Facility Requirements and Installation of Hardware. Purchaser acknowledges that it is responsible for ensuring that at Purchaser’s sole cost that its facility meets the site requirements for the Hardware. If the purchase of Hardware includes installation it will be completed within 30 days of delivery of all components of the Hardware and the facility meeting such requirements, including Purchaser’s reasonable cooperation.

h. Service Contracts. If a Seller extended service contract for Hardware is being provided then Seller’s standard terms and conditions for such service contract shall exclusively govern such extended service contract. Purchaser agrees that all service contracts are both personal to Purchaser and facility specific: services contracts cannot be transferred to a third party and may not be transferred to a new facility if the Hardware is relocated.

i. Future Products. Any future products and/or services (“Unreleased Products”) are subject to new part numbers, pricing, and specifications and the acquisition of Product hereunder is not in reliance on the availability of any Unreleased Products.

j. Seller Affiliates. Any actions or rights that may be performed or exercised by Seller may be performed or exercised by Seller itself or by any of its Affiliates. By way of non-limiting example, Seller’s Affiliates may carry out shipment, servicing, invoicing and receipt of payment.

k. Force Majeure. Seller shall not be in breach of these terms and conditions nor liable for any failure to perform or delay attributable in whole or in part to any cause beyond its reasonable control, including but not limited to acts of God, fire, flood, tornado, earthquake, hurricane, lightning, any action taken by a government or regulatory authority, actual or threatened acts of war, terrorism, civil disturbance or insurrection, sabotage, labor shortages or disputes, failure or delay in delivery by Seller’s suppliers or subcontractors, transportation difficulties, interruption or failure of any utility service, raw materials or equipment, or Purchaser’s fault or negligence. In the event of any such delay the delivery date shall be deferred for a period equal to the time lost by reason of the delay.

l. Notices. Any notice required or permitted shall be in writing and shall be deemed received (i) upon delivery if given in person or by certified mail, return receipt requested, postage prepaid (or 10 days for international mail); or (ii) 1 day after deposit with a commercial express courier that provides written verification of receipt.

m. Assignment. Purchaser shall not assign or transfer these terms and conditions or any rights or obligations, whether voluntary, by operation of law or otherwise, without the prior written consent of Seller; provided that, only notice to Seller and no consent shall be required for any assignment in connection with any merger, acquisition or the sale of all or substantially all of the stock or assets of Purchaser to a party that (i) agrees in writing to be bound by these terms and conditions, and (ii) is not a competitor of Seller or any of Seller’s business units or Seller’s Affiliates. Seller may assign all or part of the right to payments. Any assignment or transfer made in contravention of the terms hereof shall be null and void. Subject to the foregoing, these terms and conditions shall binding on and inure to the benefit of the parties’ respective successors and permitted assigns.

n. Seller Information. Seller may maintain and use a database of orders and account information pertaining to Purchaser for purposes of order processing, maintaining records, assisting with future orders of Purchaser or any other order outstanding, defending any applicable laws and regulations. Purchaser shall not disclose any terms of this transaction to any third party without the prior written consent of the Seller, except as (and only to the extent) required by securities or other applicable law. Purchaser grants to Seller a non-exclusive, fully paid-up, royalty-free, worldwide, irrevocable, perpetual right and licence, with the right to sublicense, to use in any manner suggestions, ideas or comments provided by Purchaser to Seller related to the Products.

o. Export Compliance. The Products, any related technology, or information provided to Purchaser may be subject to restrictions and controls imposed by the United States Export Administration Act and the regulations thereunder (or the export regulations and laws of another country). Notwithstanding anything to the contrary in these terms and conditions, Purchaser agrees not to use the Products in, or export or re-export the Products, any related technology, or information provided to Purchaser into any country or to any person or entity, or in any manner, in violation of such controls or any other laws, rules or regulations of any country, state or jurisdiction.

p. Healthcare Law Compliance. Purchaser acknowledges and agrees that as a healthcare company, Seller, and Seller’s Affiliates, may be required by applicable law and regulation (including codes of practice enforceable by law) (“Healthcare Laws”) to disclose the existence of these terms and conditions, the terms of these terms and conditions including financial terms, and the subject matter. Seller agrees it, and its Affiliates, will disclose the least amount of information as possible in order to comply with such Healthcare Laws.

q. Waste Electrical and Electronic Equipment (WEEE) and Waste Industrial Batteries and Accumulators (WIBA) Compliance. The Purchaser shall exclusively finance the collection and delivery of waste WEEE and WIBA to the recycler's address specified by the Seller, as required by the Directive 2002/96/EC and applicable national law. The provisions require any respective rights or obligations, such as right to a refund of the purchase price, to the Purchaser if Purchaser becomes the subject of a voluntary or involuntary application for bankruptcy, or insolvency proceedings, except as (and only to the extent) required by law. To the extent permitted by law, Seller may cease performance (including cancellation of any order outstanding) immediately without liability to Purchaser if Purchaser becomes the subject of a voluntary or involuntary application for bankruptcy (Sw. konkurs) or any proceeding relating to insolvency, receivership, liquidation or composition for the benefit of creditors. These terms and conditions, including any terms, and conditions in the Documentation, represent the entire agreement between the parties regarding the subject matter hereof and supersede all prior discussions, communications, agreements, and understandings of any kind between the parties. No amendment to these terms or waiver of any right, condition, or breach will be effective unless made in a writing signed by both parties. If any provision is held invalid or unenforceable, such provision shall be enforced to the maximum extent permissible so as to give effect to the intent of the parties, and the remaining terms will continue in full force and effect. The failure of either party to enforce any rights or require any performance under any of these terms or conditions by the other party will not be deemed a waiver by either party of any breach shall not prevent a subsequent exercise or enforcement of, or be deemed a waiver of any subsequent breach of, the same or any other term. Nothing within herein shall constitute or create a joint venture, partnership, or any other similar arrangement between the parties.