

For illustrative purposes only. This sample contains terms representative of a typical exclusive license agreement for copyrighted software, but any such agreement may be subject to change.

EXCLUSIVE SOFTWARE LICENSE AGREEMENT

This License Agreement (“**Agreement**”) is entered into as of this ___ day of [____], 201_ (the “**Effective Date**”), by and between [____], a [____] existing under the laws of Massachusetts, having a place of business at [____] (“**Licensee**”) and **President and Fellows of Harvard College**, an educational and charitable corporation existing under the laws and the constitution of the Commonwealth of Massachusetts, having a place of business at Richard A. and Susan F. Smith Campus Center, Suite 727E, 1350 Massachusetts Avenue, Cambridge, MA 02138 (“**Harvard**”).

WHEREAS, the Software (as defined below) was developed by Harvard researcher [____]; and

WHEREAS, Licensee wishes to obtain an exclusive license to the Software; and

WHEREAS, Harvard desires to have products and services based on the Software developed and commercialized to benefit the public; and

WHEREAS, Licensee has committed itself to commercially reasonable efforts to develop and commercialize such software;

NOW, THEREFORE, the parties hereby agree as follows:

1. Definitions.

Whenever used in this Agreement with an initial capital letter, the terms defined in this Article 1, whether used in the singular or the plural, will have the meanings specified below.

1.1 “Derivative Works” means any derivative works as determined under U.S. copyright law created by Licensee in accordance with the terms of this Agreement.

1.2 “Development Milestones” means the development and commercialization milestones set forth in Exhibit 1.2 hereto.

1.3 “End User License” means a non-exclusive, non-transferable license granted by Licensee to an end user to use a Licensed Product solely for such end user’s use and not for distribution or resale to third parties. All End User Licenses shall, at a minimum, include the notice and disclaimer language set forth in Article 5.

1.4 “Licensed Product” means any computer program product or service that incorporates or makes use of the Software or Derivative Works, in whole or in part.

1.5 “Software” means the original software program or programs known as “_____,” in both object code and source code form, as described in Harvard Case No. [____] and in Exhibit 1.5.

1.6 “Term” means the term of this Agreement as set forth in Section 8.1.

2. Ownership and License Grants.

2.1. Ownership of Software and Derivative Works. The parties agree and acknowledge that Harvard owns all right, title and interest in and to the Software, and Licensee shall own all right, title and interest in and to Derivative Works.

2.2. License Grant to Software. Subject to the terms and conditions set forth in this Agreement, Harvard hereby grants to Licensee an exclusive, royalty-free but consideration-bearing, worldwide license (without the right to sublicense, except under End User Licenses) to use, execute, reproduce, modify, display, perform, transmit, distribute internally or externally, sell, and prepare Derivative Works based upon the Software; provided, however, that any sale or transfer of a Licensed Product is pursuant to an End User License. Notwithstanding anything in this Section 2.2 to the contrary, Harvard retains the right, for itself and for other not-for-profit research organizations, to use, execute, reproduce, modify, display, perform, transmit, distribute internally and externally, and create derivative works of the Software solely for research, educational and scholarly purposes. In connection with the foregoing, Harvard will deliver to Licensee a copy of the Software within [] days following the execution of this Agreement by Licensee.

2.3. License Grant to Derivative Works. Licensee hereby grants to Harvard a non-exclusive, royalty-free license to use, execute, reproduce, modify, display, perform, transmit, distribute internally or externally and prepare derivative works of the Derivative Works solely for its research, educational and scholarly purposes. In connection with the foregoing, Licensee will deliver a copy of the Derivative Works to Harvard promptly after they become generally available.

3. Development and Commercialization.

3.1. Diligence. Licensee shall use commercially reasonable efforts to develop Licensed Products, and launch them into the commercial market through End User Licenses or any other means permitted by the terms of this Agreement. In addition, Licensee shall achieve each of the Development Milestones within the time periods specified in Exhibit 1.2.

3.2. Reporting. Annually, beginning on the anniversary of the Effective Date, Licensee shall furnish Harvard with a written report summarizing its efforts during the prior year to develop and commercialize Licensed Products.

3.3. Failure to Meet Development Milestone. If Licensee believes that it will not achieve a Development Milestone, it may notify Harvard in writing in advance of the relevant deadline. Licensee shall include with such notice (a) a reasonable explanation of the reasons for such failure; and (b) a reasonable, detailed, written plan for promptly achieving a reasonable extended and/or amended milestone ("Plan"). If Licensee provides Harvard with an acceptable Plan, then Exhibit 1.2 will be amended automatically to incorporate the extended and/or amended milestone set forth in the Plan. If Harvard informs Licensee that it has failed to provide an acceptable Plan, then Licensee shall have thirty (30) days from the date of Harvard's notice to provide a revised Plan for Harvard's approval. If such Plan is again not approved by Harvard, then Licensee's failure to achieve the Development Milestone shall constitute a material breach of this Agreement, and Harvard shall have the right to terminate this Agreement forthwith in accordance with Section 8.2.2.2, or convert the license grant set forth in Section 2.2 from exclusive to non-exclusive, at Harvard's discretion.

4. Consideration for Grant of License.

4.1. Issuance. As partial consideration for the license granted hereunder and pursuant to a mutually-agreeable stock purchase or subscription agreement, within thirty (30) days after the Effective Date, Licensee shall issue to Harvard a number of shares of Licensee's common stock representing two percent (2%) of Licensee's capital stock on a Fully Diluted Basis (as defined below) after giving effect to such issuance (the "Shares"). Licensee agrees that it shall grant Harvard the right to review and enter into any stockholders agreement (e.g., registration rights agreement) to the same extent that any other owner of a similar amount of common stock of Licensee has such rights regarding any such agreement.

4.2. Representations and Warranties. Licensee represents and warrants to Harvard that, upon issuance of the Shares, and upon issuance of any Anti-Dilution Shares:

4.2.1. the capitalization table as provided by Licensee upon issuance of the Shares or the Anti-Dilution Shares, as the case may be (the "Cap Table"), sets forth all of the capital stock of Licensee on a Fully-Diluted Basis as of the date of issuance of the Shares or the Anti-Dilution Shares.

4.2.2. other than as set forth in the Cap Table, as of the date of issuance of the Shares or Anti-Dilution Shares, as applicable, there are no outstanding shares of capital stock, convertible securities, outstanding warrants, options or other rights to subscribe for, purchase or acquire from Licensee any capital stock of Licensee and there are no contracts or binding commitments providing for the issuance of, or the granting of rights to acquire, any capital stock of Licensee or under which Licensee is, or may become, obligated to issue any of its securities; and

4.2.3. the Shares or the Anti-Dilution Shares, as the case may be, when issued pursuant to the terms hereof, shall, upon such issuance, be duly authorized, validly issued, fully paid and nonassessable.

4.3. Anti-Dilution. If, at any time until immediately after the achievement of the Initial Funding (as defined below), Licensee issues Additional Securities that would cause Harvard's shareholdings in Licensee to drop below two percent (2%) on a Fully-Diluted Basis, concurrently with the issuance of such Additional Securities, Licensee shall issue to Harvard for no additional consideration such additional number of shares of common stock of Licensee (the "Anti-Dilution Shares") such that Harvard's shareholdings in Licensee shall equal two percent (2%) of the capital stock of Licensee on a Fully Diluted Basis, as calculated after giving effect to the anti-dilutive issuance and the issuance of such Additional Securities through the Initial Funding, but not any issuances in consideration for investment amounts in excess of the Initial Funding. Such issuances shall continue only up to, and until such time as Licensee has achieved, the Initial Funding. Thereafter, no additional shares shall be due to Harvard.

4.4. Definitions. The following terms shall have the following meanings:

4.4.1. "Additional Securities" shall mean shares of capital stock, convertible securities, warrants, options or other rights to subscribe for, purchase or acquire from Licensee any capital stock of Licensee.

4.4.2. "Fully Diluted Basis" shall mean, as of a specified date, the number of shares of common stock of Licensee then-outstanding (assuming conversion of all outstanding stock other than common stock into common stock), plus the number of shares of common stock of Licensee issuable upon exercise or conversion of then-outstanding convertible securities, options, rights or warrants of Licensee (which shall be determined without regard to whether such securities are then vested, exercisable or convertible), plus the number of shares of common stock of Licensee that would be outstanding or acquirable, directly or indirectly, upon the issuance (and exercise, conversion or exchange, if applicable) of all securities reserved or otherwise intended for future issuance under any stock purchase, stock option or other compensatory benefit plan or arrangement of Licensee.

4.4.3. "Initial Funding" means a bona fide "Series A" investment or other bona fide preferred stock financing for an amount no less than [\$_____] pursuant to which the Licensee sells shares of preferred stock of Licensee having rights and preferences senior to the common stock of Licensee to one or more independent institutional investors.

4.5. Participation Rights. If Licensee proposes to sell any equity securities or securities that are convertible into equity securities of Licensee, then Harvard and/or its Assignee (as defined below) will have the right to purchase up to [__] percent (__%) of the securities issued in each offering on the same terms and conditions as are offered to the other purchasers in each such financing. Licensee shall provide thirty days advanced written notice of each such financing, including reasonable detail regarding the terms and purchasers in the financing. The term "Assignee" means (a) any entity to which Harvard's participation rights under this section have been assigned either by Harvard or another entity, or (b) any entity that is controlled by Harvard. This paragraph shall survive the termination of this Agreement.

5. End User License Language; Copyright Notice.

Licensee shall include in all End User Licenses, in the same point font style and size as the related text, the following:

“Copyright Notice and Disclaimer.

The software [or “Portions of the software”] incorporated herein is Copyright © ____, President and Fellows of Harvard College (“Harvard”). All Rights Reserved.

The name “Harvard” (alone or as part of another name) or any logos, seals, insignia or other words, names, symbols or devices that identify Harvard or any Harvard school, unit, division or affiliate may not be used to endorse or promote products derived from this software without specific prior written permission.

IN NO EVENT SHALL HARVARD BE LIABLE TO ANY PARTY FOR DIRECT, INDIRECT, SPECIAL, INCIDENTAL, OR CONSEQUENTIAL DAMAGES, INCLUDING LOST PROFITS, ARISING OUT OF THE USE OF THIS SOFTWARE, EVEN IF HARVARD HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. HARVARD SPECIFICALLY DISCLAIMS ANY WARRANTIES, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE SOFTWARE PROVIDED HEREUNDER IS PROVIDED “AS IS”. HARVARD HAS NO OBLIGATION TO PROVIDE MAINTENANCE, SUPPORT, UPDATES, ENHANCEMENTS OR MODIFICATIONS.”

Licensee may adapt the foregoing language solely in order to conform to the copyright and other intellectual property laws and practices of any jurisdiction outside of the United States where Licensed Products are sold for purposes of ensuring maximum enforceability of such copyright protection in such jurisdiction.

6. Warranties; Limitation of Liability.

6.1. Compliance with Law. Licensee represents and warrants that it will comply in all material respects with all local, state, and international laws and regulations relating to its activities hereunder, including the development, use and sale of Licensed Products, and granting of End User Licenses. Without limiting the foregoing, Licensee represents and warrants that it shall comply with all United States laws and regulations controlling the export of certain commodities and technical data, including without limitation all Export Administration Regulations of the United States Department of Commerce. Among other things, these laws and regulations prohibit or require a license for the export of certain types of commodities and technical data to specified countries. Licensee hereby gives written assurance that it will comply with all United States export control laws and regulations, that it bears sole responsibility for any violation of such laws and regulations and that it will indemnify, defend, and hold Harvard harmless (in accordance with Section 7.1) for the consequences of any such violation.

6.2. No Warranty.

6.2.1. Nothing contained herein shall be deemed to be a warranty by Harvard that the rights granted in connection with the Software, including any and all copyrights, will afford adequate or commercially worthwhile protection.

6.2.2. HARVARD MAKES NO WARRANTIES WHATSOEVER AS TO THE COMMERCIAL OR SCIENTIFIC VALUE OF THE COPYRIGHTS OR SOFTWARE. THE SOFTWARE IS PROVIDED “AS-IS.” HARVARD MAKES NO REPRESENTATION THAT THE SOFTWARE OR THE DEVELOPMENT OR USE OF LICENSED PRODUCTS OR ANY SOFTWARE, OR GRANT OF ANY END USER LICENSE, OR ANY ELEMENT THEREOF, WILL NOT INFRINGE THE INTELLECTUAL PROPERTY OR PROPRIETARY RIGHTS OF ANY THIRD PARTY OR VIOLATE THE TERMS OF USE OF

ANY THIRD PARTY SOFTWARE INCLUDED IN THE SOFTWARE. HARVARD WILL HAVE NO OBLIGATION
HEREUNDER TO PROVIDE ANY SUPPORT OR MAINTENANCE FOR SOFTWARE TO LICENSEE.

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6.3. Limitation of Liability. Except with respect to matters for which Licensee is obligated to indemnify Harvard under Article 7, neither party will be liable to the other with respect to any subject matter of this Agreement under any contract, negligence, strict liability or other legal or equitable theory for (a) any indirect, incidental, consequential or punitive damages or lost profits or (b) cost of procurement of substitute goods, technology or services. Harvard's aggregate liability for all damages of any kind arising out of or relating to this Agreement or its subject matter under any contract, negligence, strict liability or other legal or equitable theory shall not exceed the amounts paid to Harvard under this Agreement.

7. Indemnification and Insurance.

7.1. Indemnity.

7.1.1. Licensee shall indemnify, defend and hold harmless Harvard and its current and former directors, governing board members, trustees, officers, faculty, medical and professional staff, employees, and agents and their respective successors, heirs and assigns (collectively, the "Indemnitees") from and against any liability, cost, expense, damage, deficiency, loss or obligation of any kind or nature (including reasonable attorneys' fees and other costs and expenses of litigation), based upon, arising out of, or otherwise relating to any claim arising out of this Agreement, any End User License, including any cause of action relating to product liability concerning any product or service made, used, sold or performed pursuant to any right or license granted under this Agreement, except to the extent that such liability is caused by the gross negligence or willful misconduct by an Indemnitee (collectively, "Claims"). Neither Licensee nor Harvard shall settle any Claim without the prior written consent of the other, which consent shall not be unreasonably withheld.

7.1.2. The Indemnitees shall provide Licensee with prompt written notice of any Claim for which indemnification is sought hereunder. Licensee shall, at its own expense, provide attorneys reasonably acceptable to Harvard to defend against such Claim. The Indemnitees shall cooperate fully with Licensee in such defense and shall permit Licensee to conduct and control such defense and the disposition of such Claim (including all actions relative to litigation, appeal and settlement). Licensee shall not be responsible to any Indemnitee on account of any settlement or other voluntary disposition of a Claim without the Indemnitee's consent. Licensee shall not settle any Claim without the prior written consent of Harvard, which consent shall not be unreasonably withheld or delayed.

7.2. Insurance.

7.2.1. Beginning at the time any Licensed Product is sold, or any End User License is granted, Licensee shall, at its sole cost and expense, procure and maintain commercial general liability insurance in amounts not less than [_____] per incident and [_____] annual aggregate and naming the Indemnitees as additional insureds. Such commercial general liability insurance shall provide: (a) product liability coverage and (b) broad form contractual liability coverage for Licensee's indemnification obligations under this Agreement.

7.2.2. If Licensee elects to self-insure all or part of the limits described above in Section 7.2.1 (including deductibles or retentions that are in excess of \$250,000 annual aggregate) such self-insurance program must be acceptable to Harvard and CRICO/RMF (Harvard's insurer) in their sole discretion. The minimum amounts of insurance coverage required shall not be construed to create a limit of Licensee's liability with respect to its indemnification obligations under this Agreement.

7.2.3. Licensee shall provide Harvard with written evidence of such insurance upon request of Harvard. Licensee shall provide Harvard with written notice at least fifteen (15) days prior to the cancellation, non-renewal or material change in such insurance. If Licensee does not obtain replacement insurance providing

comparable coverage within such fifteen (15) day period, Harvard shall have the right to terminate this Agreement effective at the end of such fifteen (15) day period without notice or any additional waiting periods.

7.2.4. Licensee shall maintain such commercial general liability insurance beyond the expiration or termination of this Agreement during: (a) the period that any Licensed Product is sold, or any End User License is granted; and (b) a reasonable period after the period referred to in (a) above, which in no event shall be less than [] years.

8. Term and Termination.

8.1. Term. The term of this Agreement shall commence on the Effective Date and shall continue for ten (10) years unless terminated as provided in this Article 8 (the "Term").

8.2. Termination.

8.2.1. Termination Without Cause. Licensee may terminate this Agreement, for any reason, upon sixty (60) days prior written notice to Harvard.

8.2.2. Termination for Default.

8.2.2.1. If either party commits a material breach of its obligations under this Agreement and fails to cure that breach within thirty (30) days after receiving written notice thereof, the other party may terminate this Agreement immediately upon written notice to the party in breach.

8.2.2.2. Harvard shall be entitled to terminate this Agreement in accordance with the provisions of Section 3.3.

8.3. Effect of Termination.

8.3.1. Termination of Rights. Upon any expiration or termination of this Agreement, the rights and licenses granted to Licensee under Article 2 shall terminate, all rights to the Software will revert to Harvard and Licensee may not make any further use or exploitation of the Software.

8.3.2. Accruing Obligations. Termination or expiration of this Agreement shall not relieve the parties of obligations accruing prior to such termination or expiration, including obligations to issue equity under Article 4 to Harvard, up to the date of termination or expiration.

8.3.3. Survival. The parties' respective rights, obligations and duties under Articles 6, 7 and 9 and Sections 4.1, 4.2, 4.3, 8.3, as well as any rights, obligations and duties which by their nature extend beyond the expiration or termination of this Agreement, shall survive any expiration or termination of this Agreement.

9. Miscellaneous.

9.1. Use of Name. Licensee shall not use or register the name "Harvard" (alone or as part of another name) or any logos, seals, insignia or other words, names, symbols or devices that identify Harvard or any Harvard school, unit, division or affiliate ("Harvard Names") for any purpose except with the prior written approval of, and in accordance with restrictions required by, Harvard. Without limiting the foregoing, Licensee shall cease all use of Harvard Names on the termination or expiration of this Agreement except as otherwise

approved by Harvard. This restriction shall not apply to any information required by law to be disclosed to any governmental entity.

9.2. Entire Agreement. This Agreement is the sole agreement with respect to the subject matter hereof and except as expressly set forth herein, supersedes all other agreements and understandings between the parties with respect to the same.

9.3. Notices. Unless otherwise specifically provided, all notices required or permitted by this Agreement shall be in writing and may be delivered personally, or may be sent by facsimile, overnight delivery or certified mail, return receipt requested, to the following addresses, unless the parties are subsequently notified of any change of address in accordance with this Section:

If to Licensee:

If to Harvard:

Office of Technology Development
Harvard University
Richard A. and Susan F. Smith Campus Center, Suite 727E
1350 Massachusetts Avenue
Cambridge, Massachusetts 02138
Telephone: (617) 495-3067
Email: otd@harvard.edu
Attn.: Chief Technology Development Officer

Any notice shall be deemed to have been received as follows: (a) by personal delivery, upon receipt; (b) by facsimile or overnight delivery, one business day after transmission or dispatch; (c) by certified mail, as evidenced by the return receipt. If notice is sent by facsimile, a confirming copy of the same shall be sent by mail to the same address.

9.4. Governing Law and Jurisdiction. This Agreement will be governed by, and construed in accordance with, the substantive laws of the Commonwealth of Massachusetts, without giving effect to any choice or conflict of law provision. Any action, suit or other proceeding arising under or relating to this Agreement (a "Suit") shall be brought in a court of competent jurisdiction in the Commonwealth of Massachusetts, and the parties hereby consent to the sole jurisdiction of the state and federal courts sitting in the Commonwealth of Massachusetts.

9.5. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties and their respective legal representatives, successors and permitted assigns.

9.6. Counterparts. The parties may execute this Agreement in two or more counterparts, each of which shall be deemed an original.

9.7. Amendment; Waiver. This Agreement may be amended, modified, superseded or canceled, and any of the terms may be waived, only by a written instrument executed by each party or, in the case of waiver, by the party waiving compliance. The delay or failure of either party at any time or times to require performance of any provisions hereof shall in no manner affect the rights at a later time to enforce the same.

No waiver by either party of any condition or of the breach of any term contained in this Agreement, whether by conduct, or otherwise, in any one or more instances, shall be deemed to be, or considered as, a further or continuing waiver of any such condition or of the breach of such term or any other term of this Agreement.

9.8. No Agency or Partnership. Nothing contained in this Agreement shall give either party the right to bind the other, or be deemed to constitute either party as agent for or partner of the other or any third party.

9.9. Assignment and Successors. This Agreement may not be assigned by either party without the consent of the other, except that each party may assign this Agreement and the rights, obligations and interests of such party to any purchaser of all or substantially all of its assets to which the subject matter of this Agreement relates, or to any successor corporation resulting from any merger or consolidation of such party with or into such corporation; provided, in each case, that the assignee agrees in writing to be bound by all of the terms of this Agreement. Any assignment purported or attempted to be made in violation of the terms of this Section 9.9 shall be null and void and of no legal effect.

9.10. Force Majeure. Neither party will be responsible for delays resulting from causes beyond the reasonable control of such party, including fire, explosion, flood, war, strike, or riot, provided that the nonperforming party uses commercially reasonable efforts to avoid or remove such causes of nonperformance and continues performance under this Agreement with reasonable dispatch whenever such causes are removed.

9.11. Severability. If any provision of this Agreement is or becomes invalid or is ruled invalid by any court of competent jurisdiction or is deemed unenforceable, it is the intention of the parties that the remainder of this Agreement shall not be affected.

[Signature page follows]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives as of the date first written above.

President and Fellows of Harvard College

[Licensee]

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

SAMPLE

Exhibit 1.2
Development Milestones
{insert}

Exhibit 1.5
Software
{insert description}

SAMPLE