

This sample non-exclusive license is provided for illustrative purposes only. Any actual agreement may be subject to change.

## LICENSE AGREEMENT

This License Agreement (this “Agreement”) is entered into as of this \_\_ day of \_\_\_\_\_, 20\_\_ (the “Effective Date”), by and between \_\_\_\_\_, a \_\_\_\_\_ existing under the laws of \_\_\_\_\_, 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 727, 1350 Massachusetts Avenue, Cambridge, Massachusetts 02138 (“Harvard”).

**WHEREAS**, the technology claimed in the Patent Rights (as defined below) was developed in research conducted by Harvard researcher Dr. \_\_\_\_\_;

**WHEREAS**, Licensee wishes to obtain a license under the Patent Rights;

**WHEREAS**, Harvard desires to have products based on the inventions described in the Patent Rights developed and commercialized to benefit the public; and

**WHEREAS**, Licensee has represented to Harvard, in order to induce Harvard to enter into this Agreement, that Licensee shall commit itself to commercially reasonable efforts to develop, obtain regulatory approval for and commercialize such products;

NOW, THEREFORE, the parties hereto, intending to be legally bound, 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, shall have the meanings specified below.

**1.1. “Affiliate”** means, with respect to a person, organization or entity, any person, organization or entity controlling, controlled by or under common control with, such person, organization or entity. For purposes of this definition only, “control” of another person, organization or entity will mean the possession, directly or indirectly, of the power to direct or cause the direction of the activities, management or policies of such person, organization or entity, whether through the ownership of voting securities, by contract or otherwise. Without limiting the foregoing, control will be presumed to exist when a person, organization or entity (a) owns or directly controls fifty percent (50%) or more of the outstanding voting stock or other ownership interest of the other organization or entity or (b) possesses, directly or indirectly, the power to elect or appoint fifty percent (50%) or more of the members of the governing body of the other organization or entity. The parties acknowledge that in the case of certain entities

organized under the laws of certain countries outside of the United States, the maximum percentage ownership permitted by law for a foreign investor may be less than fifty percent (50%), and that in such cases such lower percentage will be substituted in the preceding sentence.

**1.2. “Calendar Quarter”** means each of the periods of three (3) consecutive calendar months ending on March 31, June 30, September 30 and December 31 during the Term.

**1.3. “Development Milestones”** means the development and commercialization milestones set forth in Exhibit 1.3 hereto.

**1.4. “Development Plan”** means the plan for the development of Licensed Products attached hereto as Exhibit 1.4, as such plan may be adjusted from time to time pursuant to Section 3.2.

**1.5. “Field”** means \_\_\_\_\_.

**1.6. “Licensed Product”** means on a country-by-country basis, any product, the making, using, selling, offering for sale, importing or exporting in the country in question would (without the license granted hereunder) infringe directly, indirectly by inducement of infringement, or indirectly by contributory infringement, at least one pending Valid Claim (were it to have issued) or issued Valid Claim in that country.

**1.7. “Net Sales”** means the gross amount billed or invoiced by or on behalf of Licensee and its Affiliates (in each case, the “Invoicing Entity”) on sales, leases or other transfers of Licensed Products, less the following to the extent applicable with respect to such sales, leases or other transfers and not previously deducted from the gross invoice price: (a) customary trade, quantity or cash discounts to the extent actually allowed and taken; (b) amounts actually repaid or credited by reason of rejection or return of any previously sold, leased or otherwise transferred Licensed Products; (c) customer freight charges that are paid by or on behalf of the Invoicing Entity; and (d) to the extent separately stated on purchase orders, invoices or other documents of sale, any sales, value added or similar taxes, custom duties or other similar governmental charges levied directly on the production, sale, transportation, delivery or use of a Licensed Product that are paid by or on behalf of the Invoicing Entity, but not including any tax levied with respect to income; provided that:

**1.7.1** in any transfers of Licensed Products between an Invoicing Entity and an Affiliate of such Invoicing Entity not for the purpose of resale by such Affiliate, Net Sales will be equal to the fair market value of the Licensed Products so transferred, assuming an arm’s length transaction made in the ordinary course of business, and

**1.7.2.** in the event that an Invoicing Entity receives non-cash consideration for any Licensed Products or in the case of transactions not at arm’s length with a non-Affiliate of an Invoicing Entity, Net Sales will be calculated based on the fair market value of such

consideration or transaction, assuming an arm's length transaction made in the ordinary course of business.

Sales of Licensed Products by an Invoicing Entity to its Affiliate for resale by such Affiliate will not be deemed Net Sales. Instead, Net Sales will be determined based on the gross amount billed or invoiced by such Affiliate upon resale of such Licensed Products to a third party purchaser.

**1.8. "Patent Rights"** means, in each case to the extent owned and controlled by Harvard: (a) the patents and patent applications listed in Exhibit 1.8 (including the PCT and/or U.S. utility application claiming priority to such application(s) that are filed on or before the one year conversion date of such application(s)); (b) any patent or patent application that claims priority to and is a divisional, continuation, reissue, renewal, reexamination, substitution or extension of any patent application identified in (a); (c) any patents issuing on any patent application identified in (a) or (b), including any reissues, renewals, reexaminations, substitutions or extensions thereof; (d) any claim of a continuation-in-part application or patent (including any reissues, renewals, reexaminations, substitutions or extensions thereof) that is entitled to the priority date of, and is directed specifically to subject matter specifically described in, at least one of the patents or patent applications identified in (a), (b) or (c); (e) any foreign counterpart (including PCTs) of any patent or patent application identified in (a), (b) or (c) or of the claims identified in (d); and (f) any supplementary protection certificates, pediatric exclusivity periods, any other patent term extensions and exclusivity periods and the like of any patents and patent applications identified in (a) through (e).

**1.9. "Valid Claim"** means: (a) a claim of an issued and unexpired patent within the Patent Rights that has not been (i) held permanently revoked, unenforceable, unpatentable or invalid by a decision of a court or governmental body of competent jurisdiction, unappealable or unappealed within the time allowed for appeal, (ii) rendered unenforceable through disclaimer or otherwise, (iii) abandoned or (iv) permanently lost through an interference or opposition proceeding without any right of appeal or review; or (b) a pending claim of a pending patent application within the Patent Rights that (i) has been asserted and continues to be prosecuted in good faith and (ii) has not been abandoned or finally rejected without the possibility of appeal or refiling.

## **2. License Grant.**

**2.1. License.** Subject to the terms and conditions set forth in this Agreement, Harvard hereby grants to Licensee a non-exclusive, worldwide, non-transferable, royalty-bearing license under the Patent Rights solely to develop, make, have made, use, market, offer for sale, sell and import Licensed Products in the Field.

**2.2. No Other Grant of Rights.** Except as expressly provided in this Agreement, nothing in this Agreement shall be construed to confer any ownership interest, license or other rights upon Licensee by implication, estoppel or otherwise as to any technology, intellectual

property rights, products or biological materials of Harvard or any other entity, regardless of whether such technology, intellectual property rights, products or biological materials are dominant, subordinate or otherwise related to any Patent Rights.

**2.3. Affiliates.** The licenses granted to Licensee under Section 2.1 shall include the right to have some or all of Licensee's rights or obligations under this Agreement exercised or performed by one or more of Licensee's Affiliates; provided that:

**2.3.1.** no such Affiliate shall be entitled to grant, directly or indirectly, to any third party any right of whatever nature under, or with respect to, or permitting any use or exploitation of, any of the Patent Rights, including any right to develop, manufacture, market or sell Licensed Products; and

**2.3.2.** any act or omission taken or made by an Affiliate of Licensee under this Agreement shall be deemed an act or omission by Licensee under this Agreement.

### **3. Development and Commercialization.**

**3.1. Diligence.** Licensee shall use commercially reasonable efforts (a) to develop Licensed Products in accordance with the Development Plan, (b) to introduce Licensed Products into the commercial market and (c) to market Licensed Products following such introduction into the market. In addition, Licensee, by itself or through its Affiliates, shall achieve each of the Development Milestones within the time periods specified in Exhibit 1.3.

**3.2. Adjustment of Development Plan.** Licensee will be entitled, from time to time, to make such adjustments to the then applicable Development Plan as Licensee believes, in its good faith judgment, are needed in order to improve Licensee's ability to meet its diligence obligations under Section 3.1. Licensee shall provide Harvard with copies of any such adjusted Development Plans.

**3.3. Reporting.** Within sixty (60) days after the end of each calendar year, Licensee shall furnish Harvard with a written report summarizing its and its Affiliates' efforts during the prior year to develop and commercialize Licensed Products, including without limitation: (a) research and development activities; (b) commercialization efforts; and (c) marketing efforts. Each report shall contain a sufficient level of detail for Harvard to assess whether Licensee is in compliance with its obligations under Section 3.1 and a discussion of intended efforts for the then current year. Together with each report, Licensee shall provide Harvard with a copy of the then current Development Plan.

**3.4. Failure to Meet Development Milestone; Opportunity to Cure.** 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 lack of finances will not constitute reasonable basis for such failure) ("Explanation") and (b) a reasonable, detailed, written plan for promptly

achieving a reasonable extended and/or amended milestone (“Plan”). If Licensee so notifies Harvard, but fails to provide Harvard with both an Explanation and Plan, then Licensee will have an additional thirty (30) days or until the original deadline of the relevant Development Milestone, whichever is later, to meet such milestone. Licensee’s failure to do so shall constitute a material breach of this Agreement and Harvard shall have the right to terminate this Agreement forthwith. If Licensee so notifies Harvard and provides Harvard with an Explanation and Plan, both of which are acceptable to Harvard in its reasonable discretion, then Exhibit 1.3 will be amended automatically to incorporate the extended and/or amended milestone set forth in the Plan. If Licensee so notifies Harvard and provides Harvard with an Explanation and Plan, but the Explanation is not acceptable to Harvard in its reasonable discretion (e.g., Licensee asserts lack of finances or development preference for a non-Licensed Product), then Licensee will have an additional thirty (30) days or until the original deadline of the relevant Development Milestone, whichever is later, to meet such milestone. Licensee’s failure to do so shall constitute a material breach of this Agreement and Harvard shall have the right to terminate this Agreement forthwith. If Licensee so notifies Harvard and provides Harvard with an Explanation and Plan, but the Plan is not acceptable to Harvard in its reasonable discretion, then Harvard will explain to Licensee why the Plan is not acceptable and provide Licensee with suggestions for an acceptable Plan. Licensee will have one opportunity to provide Harvard with an acceptable Plan within ninety (90) days, during which time Harvard agrees to work with Licensee in its effort to develop an acceptable Plan. If, within such ninety (90) days, Licensee provides Harvard with an acceptable Plan, then Exhibit 1.3 will be amended automatically to incorporate the extended and/or amended milestone set forth in the Plan. If, within such ninety (90) days, Licensee fails to provide an acceptable Plan, then Licensee will have an additional thirty (30) days or until the original deadline of the relevant Development Milestone, whichever is later, to meet such milestone. Licensee’s failure to do so shall constitute a material breach of this Agreement and Harvard shall have the right to terminate this Agreement forthwith. For clarity, if Licensee fails to achieve a Development Milestone and does not avail itself of the procedure set forth in this Section 3.4, such failure shall be a material breach that entitles Harvard to proceed under Section 9.2.2.1

**4. Consideration for Grant of License.**

**4.1. License Issuance Fee.** Licensee agrees to pay Harvard a non-refundable license fee of \_\_\_\_\_ U.S. Dollars (\$ \_\_\_\_\_), due and payable within \_\_\_\_\_ (\_\_\_\_) days after the Effective Date.

**4.2. Annual License Maintenance Fee.** Licensee agrees to pay Harvard annual license maintenance fee as follows:

**4.2.1.** \_\_\_\_\_ U.S. Dollars (\$ \_\_\_\_\_) for calendar years \_\_\_\_\_ and \_\_\_\_\_;

**4.2.2.** \_\_\_\_\_ U.S. Dollars (\$ \_\_\_\_\_) for calendar years \_\_\_\_\_ and \_\_\_\_\_;and

**4.2.3.** \_\_\_\_\_ U.S. Dollars (\$ \_\_\_\_\_) for calendar year \_\_\_\_ and each subsequent calendar year during the Term.

Each such fee shall be due and payable on January 1<sup>st</sup> of the calendar year to which such fee applies.

**4.3. Milestone Payments.** Licensee shall pay Harvard the following milestone payments with respect to each Licensed Product to reach each milestone, regardless of whether such milestone is achieved by Licensee or Affiliate of Licensee:

**4.3.1.** \_\_\_\_\_ U.S. Dollars (\$ \_\_\_\_\_) upon \_\_\_\_\_;

**4.3.2.** \_\_\_\_\_ U.S. Dollars (\$ \_\_\_\_\_) upon \_\_\_\_\_; and

**4.3.3.** \_\_\_\_\_ U.S. Dollars (\$ \_\_\_\_\_) upon \_\_\_\_\_.

Licensee shall notify Harvard in writing within thirty (30) days following the achievement of each milestone described in this Section 4.3, and shall make the appropriate milestone payment within thirty (30) days after the achievement of such milestone.

The milestones set forth in Section 4.3 are intended to be successive. If a Licensed Product is not required to undergo the event associated with a particular milestone for a Licensed Product (“Skipped Milestone”), such Skipped Milestone will be deemed to have been achieved upon the achievement by such Licensed Product of the next successive milestone (“Achieved Milestone”). Payment for any Skipped Milestone that is owed in accordance with the provisions of this Section 4.3 shall be due within thirty (30) days after the achievement of the Achieved Milestone.

**4.4. Royalty Payments on Net Sales.**

**4.4.1.** Licensee shall pay Harvard an amount equal to \_\_\_\_\_ percent (\_\_\_\_%) of annual Net Sales. With respect to each Licensed Product, royalties will be payable on a country-by-country basis, for so long as the making, using or selling of the Licensed Product is covered by a Valid Claim in the country in which such Licensed Product is made, used or sold.

**4.4.2. Patent Challenge.** If Licensee or its Affiliate (“Challenging Party”) commences an action in which it challenges the validity, enforceability or scope of any of the Patent Rights (a “Challenge Proceeding”), the royalty rate specified in Section 4.4.1 will be doubled with respect to Net Sales of Licensed Products that are sold during the pendency of such Challenge Proceeding. If the outcome of such Challenge Proceeding is a determination against the Challenging Party, (a) the royalty rate specified in Section 4.4.1 with respect to Net Sales of Licensed Products that are covered by the Patent Rights that are the subject of such Challenge Proceeding shall remain at such doubled rate and (b) Licensee shall reimburse Harvard for all expenses incurred by Harvard (including reasonable attorneys’ fees) in connection with such

Challenge Proceeding. If the outcome of such Challenge Proceeding is a determination in favor of the Challenging Party, Licensee will have no right to recoup any royalties paid before or during the pendency of such Challenge Proceeding

## **5. Reports; Payments; Records.**

### **5.1. Reports and Payments.**

**5.1.1. Reports.** Within thirty (30) days after the conclusion of each Calendar Quarter commencing with the first Calendar Quarter in which Net Sales are generated, Licensee shall deliver to Harvard a report containing the following information (in each instance, with a Licensed Product-by-Licensed Product breakdown):

(a) the number of units of Licensed Products sold by Licensee and its Affiliates for the applicable Calendar Quarter;

(b) the gross amount billed for Licensed Products sold by Licensee and its Affiliates during the applicable Calendar Quarter;

(c) a calculation of Net Sales for the applicable Calendar Quarter, including an itemized listing of applicable deductions;

(d) the total amount payable to Harvard in U.S. Dollars on Net Sales for the applicable Calendar Quarter, together with the exchange rates used for conversion; and

(e) a list of Harvard Case numbers for all Patent Rights that have Valid Claims covering the Licensed Products.

Each such report shall be certified on behalf of Licensee as true, correct and complete in all material respects. If no amounts are due to Harvard for a particular Calendar Quarter, the report shall so state.

**5.1.2. Payment for Net Sales.** Within thirty (30) days after the end of each Calendar Quarter, Licensee shall pay Harvard all amounts due with respect to Net Sales for the applicable Calendar Quarter.

**5.2. Payment Currency.** All payments due under this Agreement will be paid in U.S. Dollars. Conversion of foreign currency to U.S. Dollars will be made at the conversion rate existing in the United States (as reported in the Wall Street Journal) on the last working day of the applicable Calendar Quarter. Such payments will be without deduction of exchange, collection, or other charges.

**5.3. Records.** Licensee shall maintain, and shall cause its Affiliates to maintain, complete and accurate records of Licensed Products that are made, used or sold under this

Agreement and any amounts payable to Harvard in relation to such Licensed Products, which records shall contain sufficient information to permit Harvard to confirm the accuracy of any reports or notifications delivered to Harvard under Section 5.1. Licensee and/or its Affiliates, as applicable, shall retain such records relating to a given Calendar Quarter for at least five (5) years after the conclusion of that Calendar Quarter, during which time Harvard will have the right, at its expense, to cause an independent, certified public accountant (or, in the event of a non-financial audit, other appropriate auditor) to inspect such records during normal business hours for the purposes of verifying the accuracy of any reports and payments delivered under this Agreement and Licensee's compliance with the terms hereof. Such accountant or other auditor, as applicable, shall not disclose to Harvard any information other than information relating to the accuracy of reports and payments delivered under this Agreement. The parties shall reconcile any underpayment or overpayment within thirty (30) days after the accountant delivers the results of the audit. If any audit performed under this Section 5.3 reveals an underpayment in excess of five percent (5%) in any calendar year, Licensee shall reimburse Harvard for all amounts incurred in connection with such audit. Harvard may exercise its rights under this Section 5.3 only once every year per audited entity and only with reasonable prior notice to the audited entity.

**5.4. Late Payments.** Any payments by Licensee that are not paid on or before the date such payments are due under this Agreement will bear interest at the lower of (a) one and one half percent (1.5%) per month and (b) the maximum rate allowed by law. Interest will accrue beginning on the first day following the due date for payment and will be compounded quarterly. Payment of such interest by Licensee will not limit, in any way, Harvard's right to exercise any other remedies Harvard may have as a consequence of the lateness of any payment.

**5.5. Payment Method.** Each payment due to Harvard under this Agreement shall be paid by check or wire transfer of funds to Harvard's account in accordance with written instructions provided by Harvard. If made by wire transfer, such payments shall be marked so as to refer to this Agreement.

**5.6. Withholding and Similar Taxes.** All amounts to be paid to Harvard pursuant to this Agreement shall be without deduction of exchange, collection, or other charges, and, specifically, without deduction of withholding or similar taxes or other government imposed fees or taxes, except as permitted in the definition of Net Sales.

## **6. Intellectual Property.**

**6.1. Responsibility.** Harvard shall have sole responsibility for and control over the preparation, filing, prosecution, protection and maintenance of all Patent Rights, and all decision-making authority with regard to Patent Rights shall vest in Harvard (including, without limitation, as to whether to maintain or abandon any patent, patent application or claim thereof within Patent Rights). Harvard shall keep Licensee informed with respect to the course and conduct of patent applications and prosecution matters.

## **6.2. Patent Expenses.**

**6.2.1. Past Expenses.** Licensee shall reimburse Harvard for all unreimbursed, documented, out-of-pocket expenses incurred by Harvard through the end of the last full calendar quarter before the Effective Date (the “Past Expense Period”) with respect to the preparation, filing, prosecution, protection and maintenance of the Patent Rights.

**6.2.2. Future Expenses.** Subject to Section 6.2.3 and 6.3 below, within thirty (30) days after its receipt of each invoice from Harvard, Licensee shall reimburse Harvard for all documented, out-of-pocket expenses incurred by Harvard pursuant to Section 6.1, including those incurred between the end of the Past Expense Period and the Effective Date. For purposes of this Section 6.2.2, expenses incurred for work or filing fees authorized prior to the end of the Past Expense Period for which Harvard has not yet received a bill from outside counsel shall be deemed incurred after the end of the Past Expense Period.

**6.2.3. Additional Licensees.** In the event that, after the Effective Date, Harvard enters into a license with a third party with respect to any of the Patent Rights, Harvard shall proportionately reduce Licensee’s pro rata share of the expenses described in Section 6.2.2. Furthermore, Harvard shall use reasonable efforts to cause each new licensee of the Patent Rights to agree to pay an appropriate portion of the expenses described in Sections 6.2.1 and 6.2.2, taking into consideration the scope and type (i.e., exclusive or non-exclusive) of such new license. In the event that Harvard is able to collect such amounts, Harvard shall reimburse Licensee for a pro rata share of such expenses already paid by Licensee.

**6.3. Abandonment.** If Licensee decides that it does not wish to continue to pay the future patent expenses described in Section 6.2.2 with respect to Patent Rights in a country (“Abandoned Patent Rights”), Licensee shall provide Harvard with prompt written notice of such election. Ninety (90) days after receipt of such notice by Harvard, Licensee shall be released from its obligation to reimburse Harvard for the expenses incurred thereafter as to such Abandoned Patent Rights; provided, however, that expenses incurred prior to the end of such 90-day period for which Harvard has not yet received a bill from outside counsel shall be deemed incurred after the end of such period. In the event of Licensee’s abandonment of any Patent Rights, Harvard may terminate (at any time upon written notice) the license granted to Licensee hereunder with respect to such Abandoned Patent Rights. In such case, Licensee will have no rights whatsoever to exploit such Abandoned Patent Rights and the claims of such Abandoned Patent Rights shall cease to constitute Valid Claims.

**6.4. Small Entity Designation.** If Licensee does not qualify, or at any point during the term of this Agreement ceases to qualify, as a “small entity” as provided by the United States Patent and Trademark Office (USPTO), Licensee shall so notify Harvard immediately, in order to enable Harvard to comply with USPTO regulations regarding payment of fees with respect to Patent Rights. **[ALTERNATIVELY – Large Entity Designation.** The Parties agree that, commencing on the Effective Date, in all instances, Harvard shall pay the fees prescribed for large entities to the USPTO.]

**6.5. Enforcement.** Harvard shall have the right, acting in its sole discretion, to prosecute in its own name and at its own expense any possible or actual infringement of patents related to the Patent Rights. Licensee agrees to notify Harvard of each suspected or confirmed infringement of such patents of which it is or becomes aware. Licensee agrees to cooperate fully in any action under this Section 6.5, provided that Harvard will reimburse Licensee for any reasonable costs and expenses incurred by Licensee in connection with providing such assistance.

**6.6. Marking.** Licensee and its Affiliates shall mark all Licensed Products sold or otherwise disposed of by it in the United States with the word "Patent" and the number of all patents included within the Patent Rights that cover such Licensed Products. All License Products shipped or sold in other countries shall be marked in such a manner as to conform with the patent laws and practice of the country to which such products are shipped or in which such products are sold.

## **7. Warranties; Limitation of Liability.**

**7.1. Compliance with Law.** Licensee represents and warrants that it will comply, and will ensure that its Affiliates comply, with all local, state, federal and international laws and regulations relating to the development, manufacture, use, sale and importation of Licensed Products. Without limiting the foregoing, Licensee represents and warrants that it will comply, and will ensure that its Affiliates comply, with all United States export control laws and regulations.

### **7.2. No Warranty.**

**7.2.1.** NOTHING CONTAINED HEREIN SHALL BE DEEMED TO BE A WARRANTY BY HARVARD THAT IT CAN OR WILL BE ABLE TO OBTAIN PATENTS ON PATENT APPLICATIONS INCLUDED IN THE PATENT RIGHTS, OR THAT ANY OF THE PATENT RIGHTS WILL AFFORD ADEQUATE OR COMMERCIALY WORTHWHILE PROTECTION.

**7.2.2.** HARVARD MAKES NO WARRANTIES WHATSOEVER AS TO THE COMMERCIAL OR SCIENTIFIC VALUE OF THE PATENT RIGHTS. HARVARD MAKES NO REPRESENTATION THAT THE PRACTICE OF THE PATENT RIGHTS OR THE DEVELOPMENT, MANUFACTURE, USE, SALE OR IMPORTATION OF ANY LICENSED PRODUCT, OR ANY ELEMENT THEREOF, WILL NOT INFRINGE ANY PATENT OR PROPRIETARY RIGHTS.

**7.2.3.** EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THIS AGREEMENT, NEITHER PARTY MAKES ANY WARRANTY WITH RESPECT TO ANY TECHNOLOGY, PATENTS, GOODS, SERVICES, RIGHTS OR OTHER SUBJECT MATTER OF THIS AGREEMENT AND EACH PARTY HEREBY DISCLAIMS

WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE AND NON-INFRINGEMENT WITH RESPECT TO ANY AND ALL OF THE FOREGOING.

**7.3. Limitation of Liability.**

**7.3.1.** Except with respect to matters for which Licensee is obligated to indemnify Harvard under Article 8, 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.

**7.3.2.** 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.

**8. Indemnification and Insurance.**

**8.1. Indemnity.**

**8.1.1.** 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, students and agents and their respective successors, heirs and assigns (the "Indemnitees") from and against any claim, 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 this Agreement, including any cause of action relating to product liability concerning any product, process or service made, used, sold or performed pursuant to any right or license granted under this Agreement (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.

**8.1.2.** Licensee shall, at its own expense, provide attorneys reasonably acceptable to Harvard to defend against any actions brought or filed against any Indemnitee hereunder with respect to the subject of indemnity contained herein, whether or not such actions are rightfully brought.

**8.2. Insurance.**

**8.2.1.** Beginning at the time any Licensed Product is being commercially distributed or sold (other than for the purpose of obtaining regulatory approvals) by Licensee, or by an Affiliate or agent of Licensee, Licensee shall, at its sole cost and expense, procure and maintain commercial general liability insurance in amounts not less than \$5,000,000 per incident and \$5,000,000 annual aggregate and naming the Indemnitees as additional insureds. During clinical trials of any such Licensed Product, Licensee shall, at its sole cost and expense, procure

and maintain commercial general liability insurance in such equal or lesser amount as Harvard shall require, 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.

**8.2.2.** If Licensee elects to self-insure all or part of the limits described above in Section 8.2.1 (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.

**8.2.3.** 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.

**8.2.4.** 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 being commercially distributed or sold by Licensee or an Affiliate or agent of Licensee and (b) a reasonable period after the period referred to in (a) above, which in no event shall be less than fifteen (15) years.

## **9. Term and Termination.**

**9.1. Term.** The term of this Agreement shall commence on the Effective Date and, unless earlier terminated as provided in this Article 9, shall continue in full force and effect until the expiration of the last to expire Valid Claim (the "Term").

### **9.2. Termination.**

**9.2.1. Termination Without Cause.** Licensee may terminate this Agreement upon sixty (60) days prior written notice to Harvard.

#### **9.2.2. Termination for Default.**

**9.2.2.1.** In the event that 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.

**9.2.2.2.** If Licensee defaults in its obligations under Section 8.2 to procure and maintain insurance or, if Licensee has in any event failed to comply with the notice requirements contained therein, then Harvard may terminate this Agreement immediately without notice or additional waiting period.

**9.2.2.3.** Harvard shall be entitled to terminate this Agreement in accordance with the provisions of Section 3.4

**9.2.3. Bankruptcy.** Harvard may terminate this Agreement upon notice to Licensee if Licensee becomes insolvent, is adjudged bankrupt, applies for judicial or extra-judicial settlement with its creditors, makes an assignment for the benefit of its creditors, voluntarily files for bankruptcy or has a receiver or trustee (or the like) in bankruptcy appointed by reason of its insolvency, or in the event an involuntary bankruptcy action is filed against Licensee and not dismissed within ninety (90) days, or if the other party becomes the subject of liquidation or dissolution proceedings or otherwise discontinues business.

### **9.3. Effect of Termination or Expiration.**

**9.3.1. Termination of Rights.** Upon expiration or termination of this Agreement by either party pursuant to any of the provisions of Section 9.2 the rights and licenses granted to Licensee under Article 2 shall terminate, all rights in and to and under the Patent Rights will revert to Harvard and neither Licensee nor its Affiliates may make any further use or exploitation of the Patent Rights.

**9.3.2. 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 pay amounts accruing hereunder up to the date of termination or expiration. After the date of termination or expiration (except in the case of termination by Harvard pursuant to Section 9.2), Licensee and its Affiliates (a) may sell Licensed Products then in stock and (b) may complete the production of Licensed Products then in the process of production and sell the same; provided in the case of both (a) and (b) Licensee shall pay the applicable royalties and payments to Harvard in accordance with Article 4, provide reports and audit rights to Harvard pursuant to Article 5 and maintain insurance in accordance with the requirements of Section 8.2.

**9.4. Survival.** The parties' respective rights, obligations and duties under Articles 5, 8, 9 and 10 and Sections 7.2 and 7.3, 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.

## **10. Miscellaneous.**

**10.1. No Security Interest.** Licensee shall not enter into any agreement under which Licensee grants to or otherwise creates in any third party a security interest in this Agreement or any of the rights granted to Licensee herein. Any grant or creation of a security interest

purported or attempted to be made in violation of the terms of this Section 10.1 shall be null and void and of no legal effect.

**10.2. Use of Name.** Except as provided below, Licensee shall not, and shall ensure that its Affiliates 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, and shall ensure that its Affiliates 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.

**10.3. 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.

**10.4. 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, expedited 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 10.4:

If to Licensee:

If to Harvard:

Office of Technology Development  
Harvard University  
Richard A. and Susan F. Smith Campus Center, Suite 727  
1350 Massachusetts Avenue  
Cambridge, Massachusetts 02138  
Attn.: Chief Technology Development Officer

Any notice shall be deemed to have been received as follows: (a) by personal delivery or expedited delivery, upon receipt; (b) by facsimile, 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.

**10.5. 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, except that questions affecting the construction and effect of any patent shall be determined by the law of the country in which the patent shall have been granted. 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. Each party agrees not to raise any objection at any time to the laying or maintaining of the venue of any Suit in any of the specified courts, irrevocably waives any claim that Suit has been brought in any inconvenient forum and further irrevocably waives the right to object, with respect to any Suit, that such court does not have any jurisdiction over such party.

**10.6. 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.

**10.7. Headings.** Section and subsection headings are inserted for convenience of reference only and do not form a part of this Agreement.

**10.8. Counterparts.** The parties may execute this Agreement in two or more counterparts, each of which shall be deemed an original, but both of which together shall constitute one and the same instrument. Transmission by facsimile or electronic mail of an executed counterpart of this Agreement shall be deemed to constitute due and sufficient delivery of such counterpart. If by electronic mail, the executed Agreement must be delivered in a .pdf format.

**10.9. 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.

**10.10. 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.

**10.11. Assignment and Successors.** This Agreement may not be assigned by either party without the consent of the other, which consent shall not be unreasonably withheld, except that each party may, without such consent, assign this Agreement and the rights, obligations and interests of such party to any of its Affiliates, 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 the terms of this Agreement. Any assignment purported or attempted to be made in violation of the terms of this Section 10.11 shall be null and void and of no legal effect.

**10.12. Force Majeure.** Except for monetary obligations hereunder, 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.

**10.13. Interpretation.** Each party hereto acknowledges and agrees that: (a) it and/or its counsel reviewed and negotiated the terms and provisions of this Agreement and has contributed to its revision; (b) the rule of construction to the effect that any ambiguities are resolved against the drafting party shall not be employed in the interpretation of this Agreement; (c) the terms and provisions of this Agreement shall be construed fairly as to both parties hereto and not in favor of or against either party, regardless of which party was generally responsible for the preparation of this Agreement and (d) the use of “include,” “includes,” or “including” herein shall not be limiting and “or” shall not be exclusive.

**10.14. 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.

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 \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_