

All provisions contained in this document are expressly non-binding, are set out for discussion purposes only and are part of the ongoing negotiations between North Carolina State University and \_\_\_\_\_. There is no legal or other commitment by any party as to any of the provisions in this document unless and until the necessary internal approvals have been given and a formal written agreement has been signed by authorized signatories of both parties.

## **NORTH CAROLINA STATE UNIVERSITY NON-EXCLUSIVE LICENSE AGREEMENT**

This Agreement is made by and between **NORTH CAROLINA STATE UNIVERSITY** (hereinafter referred to as “NCSU”), a constituent institution of the University of North Carolina and an educational institution organized under the laws of North Carolina, and having its principal office at Campus Box 8210, Raleigh, North Carolina 27695-8210, and \_\_\_\_\_ (“hereinafter referred to as “LICENSEE”), a corporation organized under the laws of \_\_\_\_\_ and having its principal place of business at \_\_\_\_\_.

WHEREAS, \_\_\_\_\_ has discovered an invention entitled \_\_\_\_\_, and NCSU owns all rights, title, and interest in and to the invention; and

WHEREAS, NCSU owns certain Patent Rights (defined below) relating to an invention (“Invention”) described in NCSU Office of Technology Transfer File #\_\_\_\_\_, titled “\_\_\_\_\_,” which was invented by the Inventors (defined below) and has the right to grant licenses under the Patent Rights.

WHEREAS, LICENSEE desires to obtain a license under the Patent Rights upon the terms and conditions set forth in this Agreement.

WHEREAS, NCSU is willing to grant a license to LICENSEE subject to the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of the premises and the mutual covenants set forth herein, and for good and valuable consideration, the receipt and sufficiency of which is acknowledged, the parties hereto, intending to be legally bound, agree as follows:

### **ARTICLE 1 - DEFINITIONS**

1.01 - “Field” or “Field of Use” means \_\_\_\_\_.

1.02 “Patent Rights” means (a) the patents and patent applications listed in Appendix A (hereafter referred to as “Patent Applications”); (b) any patent issuing on any such Patent Applications; and (c) all divisions, continuations, continuations-in-part (but only to the extent that the subject matter of each such continuation-in-part application is described in and enabled by the disclosure of the Patent Applications), re-examinations, reissues, substitutions, or extensions thereof and patent issuing from those things described in (a) or (b) above. Notwithstanding the foregoing, Patent Rights does not include those patents and/or patent applications that, during the term of this Agreement, cease to be Patent Rights pursuant to Article 6.01 or 6.04. It is understood and agreed that subject matter that is patentably distinct from the subject matter described within the Patent Applications is not within the scope of the Patent Rights even though that patentably distinct subject matter may fall within the scope of one or more claims of the Patent Applications. For avoidance of doubt, patentably distinct

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improvements relating to the subject matter of the Patent Applications are not Patent Rights under this Agreement.

1.03 - “Licensed Product” means \_\_\_\_\_.

1.04 - “Net Sales” means LICENSEE’s gross receipts for the sale, use and transfer of Licensed Products, less the sum of the following:

- (a) Discounts allowed in amounts customary in the trade;
- (b) Sales, tariff duties and/or use taxes directly imposed and with reference to particular sales;
- (c) Outbound transportation prepaid or allowed; and
- (d) Amounts allowed or credited on returns.

No deductions may be made for commissions paid to individuals whether they be independent sales agents or regularly employed by LICENSEE and on its payroll, nor for the cost of collections. Licensed Products are considered “sold” when billed out or invoiced. Net Sales in the case of Licensed Products used or transferred by LICENSEE means the fair market value of Licensed Products as if they were sold to an unrelated third party in similar quantities.

1.05 - “Effective Date” means \_\_\_\_\_.

## **ARTICLE 2 - LICENSE**

2.01 - NCSU grants to LICENSEE and LICENSEE accepts from NCSU, upon the terms and conditions herein specified, an non-exclusive license to make, have made, use and sell Licensed Products, without the right to sublicense. Such license is worldwide and remains in effect, on a country by country basis for the life of the last to expire patent. The foregoing notwithstanding, LICENSEE’s rights and license are subject to the rights of the U.S. Government pursuant to any funding agreement between NCSU and the Government.

2.02 - LICENSEE may not grant sublicenses or extend any license granted to LICENSEE to its Affiliates.

2.03 - The license granted hereunder does not confer any rights upon LICENSEE by implication, estoppel or otherwise as to any rights other than those expressly granted herein.

2.04 - LICENSEE agrees that any products constituting Licensed Products or produced through the use of Licensed Products will be manufactured substantially in the United States to the extent required by 35 U.S.C. Sec. 204, if such statute is applicable.

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### **ARTICLE 3 - DUE DILIGENCE**

3.01 - LICENSEE must diligently pursue the development of Licensed Products. This will include manufacturing or producing a Licensed Product for testing, development, and sale, and also seeking required governmental approvals, if applicable, of such Licensed Product. In addition to this general commitment to diligence, LICENSEE agrees to the following diligence requirement:

Within twelve (12) months from the Effective Date of this Agreement, LICENSEE shall deliver to NCSU a report showing LICENSEE's plans for commercializing the Subject Technology and will provide a similar report on the anniversary date of such report each year until first commercial sale under the Patent Rights.

3.02 - LICENSEE will use its best efforts to have the Subject Technology cleared for marketing in those countries in which LICENSEE intends to sell Licensed Products by the responsible government agencies requiring such clearance. To accomplish such clearances at the earliest possible date, LICENSEE agrees to file, according to the usual practice of LICENSEE, any necessary data with such government agencies. Should LICENSEE terminate this Agreement, LICENSEE agrees to assign its full interest and title in such market clearance application, including all data relating thereto, to NCSU at no cost to NCSU.

3.03 - Failure by LICENSEE to comply with the provisions of this Article 3 results in NCSU having the right, at its option, to cancel the license upon thirty (30) days notice, and to require a reversion of rights to all relevant materials, research information and technology, including Patent Rights, transferred to LICENSEE by NCSU.

### **ARTICLE 4 - LICENSE FEE, ROYALTIES, RECORDS, AND REPORTS**

4.01 - In partial consideration for the license granted in this Agreement, LICENSEE must pay to NCSU a license fee of \_\_\_\_\_ (US) (\$) \_\_\_\_\_ which is due and payable to NCSU within thirty (30) days of the Effective Date of this Agreement. The license fee is non-refundable and is not creditable against any future payments or royalties.

4.02 - For as long as this license is in effect, LICENSEE must pay to NCSU a royalty of XX percent (XX%) of Net Sales of Licensed Products by LICENSEE.

4.03 - LICENSEE will render to NCSU on a quarterly basis a written account of the Net Sales of Licensed Products as of July 1, October 1, January 1, and April 1 of each calendar year. The reports of Net Sales and the royalty payment due NCSU thereon shall be due and payable within sixty (60) days following the applicable date. LICENSEE shall make such reports even if there have been no Net Sales or if no royalties are due to NCSU for a particular quarter. LICENSEE's reports shall include at least the following:

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- (a) All Licensed Products manufactured and sold.
- (b) Gross receipts for Licensed Products sold.
- (c) Deductions applicable as provided in section 1.05.
- (d) Total sales made to U.S. Government Agencies which may require no royalty payment.
- (e) Total royalties due to NCSU.
- (f) Names and addresses of all sub-licensees of LICENSEE.

4.04 - LICENSEE will keep full, true, and accurate books of accounts and other records containing all particulars which may be necessary to ascertain and verify properly such Net Sales. Upon NCSU's request, LICENSEE will permit an independent Certified Public Accountant selected by NCSU (except one to whom LICENSEE has some reasonable objection) to have access during ordinary business hours to such of LICENSEE's records as may be necessary to determine, in respect of any three (3) month period ending not more than five (5) years prior to the date of such request, the correctness of any report made under this Agreement. Nothing herein limits the authority of the State Auditor of North Carolina.

4.05 - All payments made as a result of this Agreement will be paid in United States dollars in Raleigh, North Carolina, or at such other place as NCSU may reasonably designate consistent with the laws and regulations controlling in any foreign country. If any currency conversion shall be required in connection with the payment of royalties hereunder, such conversion shall be made by using the exchange rate prevailing at the Chase Manhattan Bank (N.A.) on the last business day of the calendar quarterly reporting period to which such royalty payments relate.

4.06 - The royalty payments set forth in this Agreement, if overdue, will bear interest until payment at a per annum rate of four percent (4%) above the prime rate in effect at the Chase Manhattan Bank (N.A.) on the due date. However, in no event shall any penalties hereunder exceed eighteen percent (18%) per annum (or 1.5 % per month).

## **ARTICLE 5 - GOVERNMENT CLEARANCE, PUBLICATION, OTHER USE, EXPORT, DUTIES**

5.01 - LICENSEE agrees that the right of publication resides in the inventor and other staff of NCSU.

5.02 - It is agreed that, notwithstanding any provisions herein, NCSU is free to use the Invention for its educational, teaching, and research purposes without restriction and without payment of royalties or other fees.

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5.03 - This Agreement is subject to, and LICENSEE will comply with, all of the United States laws and regulations controlling the export of technical data, computer software, laboratory prototypes, and other commodities and technology which may be applicable.

5.04 - LICENSEE is solely responsible for the payment and discharge of any taxes or duties relating to any transaction of LICENSEE, its employees, contractors, agents, or sub-licensees, in connection with the manufacture, use, or sale in any country of Licensed Product(s).

## ARTICLE 6 - PATENTS

6.01 NCSU must apply for, prosecute, and maintain during the term of this Agreement, the Patent Rights in the United States and in the foreign countries listed in Appendix A hereto. Licensee must inform NCSU in writing which foreign countries, if any, in which Licensee desires patent protection and Appendix A will be amended in writing to reflect those designations. NCSU and/or its other licensees of Patent Rights may elect to seek patent protection in countries not so designated by Licensee, in which case NCSU and/or such other licensees of Patent Rights are responsible for all expenses attendant thereto. However, in such instances, such patent applications will not be Patent Rights (Appendix A shall be deemed to be so amended accordingly, if necessary) and Licensee forfeits all rights under this Agreement to such patent applications and resulting patents.

6.02 Licensee will be given reasonable opportunities to advise NCSU in the filing, prosecution, and maintenance of Patent Rights and will cooperate with NCSU in such filing, prosecution, and maintenance. At Licensee's request and expense, Licensee shall be provided with copies of all prosecution documents relating to Patent Rights so that Licensee may have the opportunity to offer comments and remarks thereon, such comments and remarks to be given due consideration by NCSU. However, notwithstanding anything to the contrary in this Agreement, all decisions with respect to the filing, prosecution, and maintenance of Patent Rights are reserved solely to NCSU.

6.03 During the term of this Agreement, payment of all fees and costs relating to the filing, prosecution, and maintenance of the Patent Rights are the responsibility of Licensee, whether such fees and costs were incurred before or after the Effective Date. Licensee must pay all such fees and costs within 30 days of receipt of an invoice for the same, and failure pay such invoice within such 30-day period is a default hereunder for which NCSU may terminate this Agreement in accordance with Article 10.03. Notwithstanding the foregoing, in the event that there are multiple licensees of the Patent Rights, the patent costs shall be shared *pro rata* among the licensees, with such sharing to reflect the scope of the license, field of use, and territory for each licensee.

6.04 If Licensee provides NCSU with written notification that it will no longer support the filing, prosecution, or maintenance of specified patent(s) and/or patent application(s) within Patent Rights, then Licensee has no further responsibility for fees and costs relating to the filing,

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prosecution, and maintenance of such subject Patent Rights that are incurred following NCSU's receipt of such written notification. However, in such instances, from the date of NCSU's receipt of such written notification such patents and/or patent applications are not Patent Rights (and Appendix A is deemed to be so amended accordingly), and Licensee surrenders all rights under this Agreement to such patents, patent applications, and patent arising from such patent applications.

6.05 To the extent reasonably practical, Licensee must mark any Licensed Product, and/or Licensed Service sold in the United States and/or their containers, labels, and/or other packaging with all applicable United States patent numbers. All Licensed Products or Licensed Services shipped to or sold in other countries must be marked in such a manner as to conform with the patent laws and practices of the country of manufacture or sale.

## **ARTICLE 7 - DURATION AND TERMINATION**

7.01 - This Agreement becomes effective upon the Effective Date and, unless sooner terminated in accordance with any of the provisions herein, remains in full force for a period corresponding to the expiration of the last to expire patent.

7.02 - In the event an order for relief is entered against LICENSEE under the Federal Bankruptcy Code, or an order appointing a receiver for substantially all of LICENSEE's assets is entered by a court of competent jurisdiction, or LICENSEE makes an assignment for the benefit of creditors, or a levy of execution is made upon substantially all of the assets of LICENSEE and such levy is not quashed or dismissed within thirty (30) days, this Agreement automatically terminates effective on the date of such order or assignment or, in the case of such levy, the expiration of such thirty day period; provided, however, that such termination will not impair or prejudice any right of remedy that NCSU might have under this Agreement.

7.03 - LICENSEE may terminate this Agreement by giving NCSU written notice at least ninety (90) days prior to such termination, and thereupon terminate the manufacture, use, or sale of Licensed Products.

7.04 - Should LICENSEE fail to pay NCSU royalties and/or fees, due and payable hereunder, NCSU may terminate this Agreement on thirty (30) days' notice, unless LICENSEE pays NCSU, within the thirty (30) day period, all such royalties, fees, and interest due and payable. Upon the expiration of the thirty (30) day period, if LICENSEE has not paid all such royalties and interest due and payable, the rights, privileges and license granted hereunder shall terminate.

7.05 - Either party may immediately terminate this Agreement for fraud, willful misconduct, or illegal conduct of the other party upon written notice of same to that other party. Except as provided above, if either party fails to fulfill any of its obligations under this Agreement, the non-breaching party may terminate this Agreement by providing written notice to the breaching party, as provided below. Such notice must contain a full description of the event or occurrence constituting a breach of the Agreement. The party receiving notice of the breach

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will have the opportunity to cure that breach within thirty (30) days of receipt of notice. If the breach is not cured within that time, the termination will be effective as of the thirtieth (30th) day after receipt of notice. A party's ability to cure a breach will apply only to the first two (2) breaches properly noticed under the terms of this Agreement, regardless of the nature of those breaches. Any subsequent breach by that party will entitle the other party to terminate this Agreement upon proper notice, with no opportunity to cure.

7.06 - If at any time prior to the first commercial sale of a Licensed Product under this Agreement LICENSEE ceases to pursue commercial development of Licensed Products or ceases practicing under the Patent Rights as contemplated herein, this Agreement automatically terminates without obligation on the part of NCSU to refund any of the fees or royalties which may have been paid by LICENSEE prior to such termination. LICENSEE must notify NCSU immediately if LICENSEE ceases to pursue commercial development of Licensed Product or ceases practicing under the Patent Rights granted herein.

7.07 - Upon the termination of this Agreement pursuant to Article 7.03, LICENSEE may notify NCSU of the amount of Licensed Products that LICENSEE has on hand and LICENSEE may then sell that amount of Licensed Products, but no more; provided, however, that LICENSEE pay NCSU any fees, royalties or other financial consideration as provided for in this Agreement.

## **ARTICLE 8 - INFRINGEMENT OF THIRD-PARTY RIGHTS**

8.01 - In the event that NCSU or LICENSEE is charged with infringement of a patent by a third party or is made a party in a civil action as a result of LICENSEE's or a sub-licensee's practice of the Patent Rights under this Agreement, LICENSEE:

- (a) must defend and/or settle any such claim of infringement or civil action;
- (b) must assume all costs, expenses, damages, and other obligations for payments incurred as a consequence of such charges of infringement and/or civil action;
- (c) must indemnify and hold NCSU harmless from any and all damages, losses, liability, and costs resulting from a charge of infringement or civil action which shall be brought against NCSU and attributable to technology added to, incorporated into or sold with a Licensed Product by LICENSEE or a sub-licensee or to manufacturing processes utilized by LICENSEE or a sub-licensee; and
- (d) may, if such claim of infringement or civil action shall be based on patent claims contained in any pending or issued patent included in the Patent Rights, terminate this Agreement effective immediately upon NCSU's receipt of written notice of termination, and LICENSEE shall have no further liability for claims and/or damages arising subsequent to said date of termination unless LICENSEE is exercising its license under Section 7.07, in which case LICENSEE's liability and obligations under this Article shall continue as long as license granted in Section 7.07 is in effect.

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8.02 - NCSU will give LICENSEE assistance, at LICENSEE's expense, in the defense of any such infringement charge or lawsuit, as may be reasonably required.

## **ARTICLE 9 - INDEMNITY, INSURANCE, REPRESENTATIONS**

9.01 - LICENSEE must indemnify, defend and hold NCSU, its trustees, officers, employees and affiliates, harmless against all claims and expenses, including legal expenses and reasonable attorneys' fees, arising out of the death or injury to any person or persons or out of any damage to property and against any other claim, proceeding, demand, expense and liability of any kind whatsoever resulting from utilization of the Patent Rights in the production, manufacture, sales, use, lease, consumption or advertisement of the Licensed Products by LICENSEE, its Affiliates and its sub-licensees or arising from any obligations of LICENSEE hereunder, except for any claims or expenses arising out of the negligence or willful misconduct of NCSU or its officers, agents or employees. The parties acknowledge that NCSU's liability under this paragraph shall be subject to the limitations of the North Carolina Tort Claims Act (N.C. General Statutes Section 143-291 *et. seq.*).

9.02 - LICENSEE must maintain reasonable levels of product liability insurance as soon as it has commercialized Licensed Products. NCSU shall have the right to require such insurance policies or certificates of insurance, at NCSU's discretion, to be made available for NCSU's inspection.

9.03 - NCSU MAKES NO REPRESENTATIONS AND EXTENDS NO WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND VALIDITY OF PATENT RIGHTS CLAIMS ISSUED OR PENDING. FURTHER, NCSU MAKES NO REPRESENTATIONS AND EXTENDS NO WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, THAT THE USE OF INVENTION WILL NOT INFRINGE ANY PATENT OR OTHER PROPRIETARY RIGHT OF A THIRD PARTY.

## **ARTICLE 10 - GOVERNING LAW**

10.01 - This Agreement is entered into in the State of North Carolina and must be interpreted in accordance with and its performance governed by the laws of the State of North Carolina, without reference to its conflicts of laws provisions. Any and all litigation relating to this Agreement or the parties' performance hereunder must be in the State Courts of North Carolina with the venue being Wake County. The parties consent to the jurisdiction of those courts.

## **ARTICLE 11 - NON-ASSIGNABILITY**

11.01 - This Agreement may not be assigned by LICENSEE except in connection with the sale or other transfer of LICENSEE's entire business or that part of LICENSEE's business to which this license relates. LICENSEE shall give NCSU thirty (30) days prior written notice of such

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assignment or transfer. Any other assignment of this Agreement without the prior written consent of NCSU shall be void.

## **ARTICLE 12 - NOTICES**

12.01 - It shall be a sufficient giving of any notice, payment, request, report, statement, disclosure or other communication hereunder, if the party giving the same shall deposit a copy thereof in the Post Office in certified mail, postage prepaid, addressed to the other party at its address hereinafter set forth or at such other address as the other party shall have theretofore in writing designated:

NCSU

LICENSEE

Director  
Office of Technology Transfer  
North Carolina State University  
Corporate Research I  
1021 Main Campus Dr.  
Raleigh, NC 27606

The date of giving any such notice, request, report, statement, disclosure or other communication, and the date of making any payment hereunder required (provided such payment is received), shall be the date of the U.S. postmark of such envelope if marked or actual date of receipt if delivered otherwise.

## **ARTICLE 13 - NON-USE OF NAMES**

13.01 - LICENSEE may not use the name of NCSU, or any trademark, trade device, service mark, symbol, or any abbreviation, contraction, or simulation thereof, owned by NCSU, nor the names of any of its employees, or any adaptation thereof, in any advertising, promotional, or sales literature without prior written consent obtained from an authorized officer of NCSU in each case, except that LICENSEE may state that it is licensed by NCSU under one or more of the patents and/or patent applications comprising the Patent Rights. Failure by LICENSEE to comply with this restriction shall be deemed a material breach of this Agreement pursuant to section 7.05. Such material breach shall be deemed cured if the offending use is terminated within ninety (90) days of LICENSEE's receipt of a written notice from NCSU.

## **ARTICLE 14 - SEVERANCE**

14.01 - Each clause of this Agreement is a distinct and severable clause and if any clause is deemed illegal, void, or unenforceable, the validity, legality, or enforceability of any other clause or portion of this Agreement will not be affected thereby.

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### **ARTICLE 15 - ENTIRE AGREEMENT**

15.01 - This Agreement, including any schedules or other attachments which are incorporated herein by reference, contain the entire agreement between the parties as to its subject matter. This Agreement merges all prior discussions between the parties and neither party shall be bound by conditions, definitions, warranties, understanding, or representations concerning such subject matter except as provided in this Agreement or as may be specified later in writing and signed by the properly authorized representatives of the parties. This Agreement can be modified or amended only by written agreement duly signed by persons authorized to sign agreements on behalf of the parties.

### **ARTICLE 16 – SEVERANCE AND WAIVER**

16.01 Each clause of this Agreement is a distinct and severable clause and if any clause is deemed illegal, void or unenforceable, the validity, legality or enforceability of any other clause or portion of this Agreement will not be affected.

16.02 The failure of a party in any instance to insist upon the strict performance of the terms of this Agreement is not a waiver or relinquishment of any of the terms of this Agreement, either at the time of the party's failure to insist upon strict performance or at any time in the future, and such terms will continue in full force and effect.

### **ARTICLE 17 - TITLES**

17.01 - All titles and article headings contained in this Agreement are inserted only as a matter of convenience and reference. They do not define, limit, extend, or describe the scope of this Agreement or the intent of any of its provisions.

### **ARTICLE 18 - SURVIVAL OF TERMS**

18.01 - The provisions of Articles 1, 4, 6, 9, 10, 12, 13, 18 and 19 shall survive the expiration or termination of this Agreement.

### **ARTICLE 19 – ELECTRONIC COPY**

19.01 - The parties to this document agree that a copy of the original signature (including an electronic copy) may be used for any and all purposes for which the original signature may have been used. The parties further waive any right to challenge the admissibility or authenticity of this document in a court of law based solely on the absence of an original signature.

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the dates set forth below.

**NORTH CAROLINA STATE UNIVERSITY**

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

**Billy B. Houghteling**

**Director**

**Office of Technology Transfer**

Date: \_\_\_\_\_

**LICENSEE**

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

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

Date: \_\_\_\_\_

Read and Understood:

\_\_\_\_\_  
Principal Investigator at NCSU

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

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

Date: \_\_\_\_\_

*[Revised September 10, 2009]*