

plant maTerial testing AGREEMENT

**Regents of the University of Minnesota**

**and**

Office for Technology Commercialization

200 Oak Street, SE | Suite 280 | Minneapolis, MN 55455

OTC Agreement Number: **Insert Agreement Number**| OTC Case Number **:** **Insert OTC Case Number**

**PLANT MATERIAL TESTING AGREEMENT**

**THIS PLANT MATERIAL TESTING AGREEMENT** (this “Agreement”) is dated and effective as of the date of last signature (the “Effective Date”), and is made by and between Regents of the University of Minnesota, a constitutional corporation under the laws of the state of Minnesota, having a place of business at 200 Oak Street SE, Suite 280, Minneapolis, Minnesota 55455 (the “University”), and the Recipient identified below.

The Agreement consists of the **Business Terms**, **General Terms** and any attached and referenced exhibits or schedules.

**BUSINESS TERMS**

|  |  |  |
| --- | --- | --- |
| **1.** | **RECIPIENT/RECIPIENT ADDRESS FOR NOTICE** | Enter Recipient NameAttn: Enter Contact For Notice NameEnter Address Line 1Enter Address Line 2Enter City, State, Zip CodeEnter CountryPhone: Enter PhoneFax: Enter FaxEmail: Enter Email[ ]  Check here, if the above Address is the Address for Notice referenced in section 17 of the General Terms. If not, enter below:ADDRESS FOR NOTICE:Attn: Enter Contact For Notice NameEnter Address Line 1Enter Address Line 2Enter City, State, Zip CodeEnter CountryPhone: Enter PhoneFax: Enter FaxEmail: Enter Email |
| **2.** | **DESCRIPTION OF PLANT MATERIAL** | The term “Plant Material” includes the progeny, portions (including, without limitation, fruit, propagable clippings, etc.), sports, and derivatives of the material described in this section.Enter Description of Plant Material |
| **3.** | **RECIPIENT SHIPPING ADDRESS** | Enter Recipient Entity Name Attn: Enter Recipient Shipping Contact NameEnter Address Line 1Enter Address Line 2Enter City, State, Zip CodeEnter CountryPhone: Enter PhoneFax: Enter FaxEmail: Enter Email[ ]  Check here, if express shipping is desired. (University will ship via common carrier at its discretion, unless directed otherwise.) Indicate your Express Shipper and Account Number: Shipper: Account No.:  |
| **4.** | **QUARANTINE OFFICE INFORMATION** | [ ]  Check here, if the Plant Material needs to be shipped to a Quarantine Office prior to going to Recipient. Indicate the Quarantine Office shipping address:Enter Entity Name Attn: Enter Quarantine Contact NameEnter Address Line 1Enter Address Line 2Enter City, State, Zip CodeEnter CountryPhone: Enter PhoneFax: Enter FaxEmail: Enter Email[ ]  Check here, if express shipping is desired. (University will ship via common carrier at its discretion, unless directed otherwise.) Indicate your Express Shipper and Account Number: Shipper: Account No.: |
| **5.** | **REPORT INFORMATION** | University Recipient of the Recipient’s Reports:University of MinnesotaEnter the Primary Pincipal Investigator to receive Recipient's ReportsEnter Address Line 1Enter Address Line 2Enter City, State, Zip CodePhone: Enter PhoneFax: Enter FaxEmail: Enter Email@umn.edu**Additional Report Requirements:**Enter Additional Report Requirements or None |
| **6.** | **TERM** | This Agreement expires on the Enter number of years in words (Enter number of years in number) from the anniversary of the Effective Date. |
| **7.** | **PROPAGATION** | Allowed: Check one: [ ]  Yes [ ]  No Allowable Propagation Methods: Check One: [ ]  Enter allowable propagation method [ ]  NoneMaximum number of Enter Material Type (i.e. trees, vines, cuttings, pounds of seeds, etc.) that may be propagated: Enter Number or None. |
| **8.** | **PERMITTED USES OF THE PLANT MATERIAL** | [ ]  The Recipient may use the Plant Material to evaluate its potential for development and/or commercialization. This is not a license agreement. University and Recipient may enter into negotiations at a later date if Recipient desires to license the University’s rights in and to the Plant Material but the University is under no obligation to do so.[ ]  The Recipient may use the Plant Material for non-commercial, research, academic and/or educational purposes only.[ ]  Other:       |
| **9.** | **TERRITORY OR TEST SITES:** |       |
| **10.** | **OTHER TERMS:** | Recipient has no rights to sell, or offer to sell the Plant Material, and shall not purport to sell, or offer to sell the Plant Material.      |

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| **THE PARTIES HEREBY EXECUTE THIS AGREEMENT**  |
| **Regents of the University of Minnesota** | **Insert Name of Recipient**  |
|  |  |
| **By:**  | **By:**  |
|  **Insert name of signatory** Its: **Insert title of signatory** Office for Technology Commercialization |  **Insert name of signatory** Its: **Insert title of signatory** |
| **Date:**  | **Date:**  |
| The signatory warrants that they are authorized to execute this agreement on behalf of the Regents of the University of Minnesota. | The signatory warrants that they are authorized to execute this agreement on behalf of the Recipient |

**GENERAL TERMS**

PURPOSE

The University possesses, and is willing to deliver to the Recipient, certain plant material on the terms and conditions set forth below. In addition and in connection with the delivery of the plant material, the Recipient desires to, and the University shall allow, the Recipient and its agents to conduct evaluations of the plant material.

The University possesses the plant material described in section 2 of the Business Terms (the “Plant Material”), which resulted from research conducted at the University. The University shall provide the Recipient with a sample of the Plant Material so as to permit the Recipient to evaluate the Plant Material. The University also desires to protect its proprietary rights in and to the Plant Material and in any proprietary information that may be disclosed between the parties concerning the Plant Material. The University is willing to provide the Plant Material and such information to the Recipient on the terms and conditions set forth below.

# TERM AND TERMINATION

The term of this Agreement shall commence on the Effective Date and, unless terminated earlier as provided in section 8 of this Agreement, shall expire on the anniversary of the Effective Date specified in section 6 of the Business Terms.

# DELIVERY OF THE PLANT MATERIAL

Subject to the terms of this Agreement, the University shall deliver the Plant Material or cause the Plant Material to be delivered, to the Recipient at the Recipient’s address described in section 3 of the Business terms

# THE RECIPIENT’S USE OF THE PLANT MATERIAL AND THE CONFIDENTIAL INFORMATION

## Recipient Permitted Uses

### Except as permitted in this subsection below, the Recipient shall not use for breeding (including the use of pollen), alter (genetically or otherwise), propagate, divide, or reproduce the Plant Material, in any form.

### The Recipient shall only use the Plant Material for the purposes set forth in section 8 of the Business Terms.

### Solely in connection with its use of the Plant Material as permitted under this subsection, the Recipient may evaluate the individual plant specimens of the Plant Material only in the territory, territories or defined test sites as specified in section 9 of the Business Terms.

### If allowed to do so by section 7 of the Business Terms, Recipient may propagate the Plant Material only in the territory, territories or defined test sites as specified in section 9 of the Business Terms, and only by the method or means described in section 7 of the Business Terms.

### The Recipient shall abide by the University’s written instructions concerning the Recipient’s use of the Plant Material as described in sections 8 and 10 of the Business Terms.

### In no event shall the Recipient provide access to, give, deliver, or otherwise transfer any of the Plant Material to a third party except as may be provided for in section 8 and/or 9 of the Business Terms.

### The Recipient shall use the Confidential Information, as that term is defined below in this Agreement, only in connection with its evaluation of the Plant Material.

## Reports

No later than thirty (30) days after each anniversary of the Effective Date during the term of this Agreement, the Recipient shall deliver to the University contact identified in section 5 of the Business Terms, a true, correct, and complete copy/ies of all of the Recipient’s records of the propagation and planting of the Plant Material along with a statement of the results of the evaluation since the last such report. Each report shall include the Recipient’s data and observations on the performance of the Plant Material and any further information as may be required in section 5 of the Business Terms, and each report shall be Confidential Information of the University.

## Sports

The Recipient shall deliver to the University written notice within thirty (30) days of the discovery or propagation of a sport or mutation of the Plant Material. The Recipient hereby grants and assigns to the University all rights, titles, and interests, including all patent and other intellectual property rights in and to any such sport or mutation. Further, the Recipient shall cooperate with the University as may be needed to file patents or other intellectual property protections.

## Inspections

Upon Recipient’s receipt of 24 hours prior written notice from the University, the Recipient shall permit the University (including its agents and contractors) to enter the site(s) on which the Recipient is growing or propagating, or any locations to which the Recipient is having grown or having propagated on its behalf, the Plant Material, to inspect the Plant Material and to confirm the Recipient’s compliance with the terms of this Agreement.

## The Recipient Permitted Uses of Confidential Information

The Recipient shall furnish the Plant Material and the Confidential Information only to its employees, other persons within its organization, or to those additionally authorized by the University in writing. The Recipient shall only furnish the Plant Material and the Confidential Information to those for whose actions are required by the Recipient, who, strictly defined, “need to know” for purposes of the Recipient’s evaluation of the Plant Material. The Recipient shall inform each employee or such person using or having access to the Plant Material and/or the Confidential Information of the restrictions set forth in this Agreement regarding the use and disclosure of the Plant Material and the Confidential Information and it shall be the Recipient’s obligation to ensure compliance with this Agreement.

## No Grant of any Rights to Use for Commercial Purposes

The Recipient acknowledges and agrees that no provision of this Agreement grants it any right under any existing or future patent or other intellectual property right to make or use any products or processes derived from or with Plant Material for any profit-making or commercial purposes. The Recipient shall obtain a license from the University prior to making any profit-making or commercial use of any product or process derived from or with the Plant Material. The University shall have no obligation to grant any such a license to the Recipient.

# THE UNIVERSITY’S USE OF THE PLANT MATERIAL AND CONFIDENTIAL INFORMATION

 The parties acknowledge and agree that no provision of this Agreement limits, conditions or otherwise affects the University’s right to (a) use the Plant Material or the Confidential Information, (b) deliver the Plant Material or the Confidential Information to a third party, or (c) grant a third party an exclusive or non-exclusive license or other right to the Plant Material.

# THIRD PARTY’S RIGHTS IN THE PLANT MATERIAL AND CONFIDENTIAL INFORMATION.

The parties acknowledge and agree that no provision of this Agreement alters, limits, conditions or otherwise affects the federal government of the United States of America or any other third-party’s rights and interests which may exist in and to the Plant Material or the Confidential Information.

# CONFIDENTIALITY AND THE CONFIDENTIAL INFORMATION

## Confidential Information Defined

For purposes of this Agreement, the term “Confidential Information” refers to any non-public, proprietary information, data, and materials (including, but not limited to variety name, attributes of the variety, and pictures of the variety), delivered by the University to the Recipient in connection with this Agreement. The parties acknowledge and agree that the Plant Material is “Confidential Information” as defined herein.

## Exceptions to Confidential Information

The term “Confidential Information” shall not include, and the restrictions in section 6.3 of this Agreement shall not apply to, any information that:

### was generally available in the public domain or after the University’s disclosure of it to the Recipient, was placed in the public domain through no act or fault of the Recipient or its employees, agents or representatives; or,

### the Recipient had actual knowledge of such Confidential Information as evidenced by written records, provided the Recipient acquired such knowledge in conformance with all applicable laws and not as the recipient, directly or indirectly, of such information in violation of a valid and enforceable confidentiality agreement; or,

### that Recipient obtains in good faith from a third party not bound by confidentiality obligations to University; or,

### that Recipient develops independently, for which Recipient can demonstrate by written records that independent development occurred without knowledge or use of Confidential Information.

### that which is required by applicable law, including disclosures under the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13, regulation, or court order to be disclosed, in which case the disclosing party shall be notified promptly. The University shall not be required to commence or defend any action to prohibit the inspection and copying of Confidential Information.

## Term of Confidentiality Obligation

## Except as permitted under section 3 of this Agreement or by the University in a separate written consent, during the term of this Agreement and for three (3) years following the termination or expiration of this agreement, the Recipient shall maintain the Confidential Information in confidence, and shall not use or disclose, and shall not permit its employees or other persons within its organization for whose actions the Recipient is responsible, to use or disclose the Confidential Information.

# LIMITED RIGHTS.

## Except for the right to use the Plant Material and the Confidential Information as described in section 3 of this Agreement, the Recipient shall have no right to use or disclose the Plant Material or the Confidential Information. The Recipient acknowledges and agrees that no provision of this Agreement grants it (a) any right or interest in the patent, copyright, trademark, or equivalent rights in the Plant Material or the Confidential Information or (b) any license, right, or option to commercially utilize the Plant Material under such patent, copyright, trademark, or equivalent right.

## The Recipient acknowledges and agrees

##  that the Plant Material and the Confidential Information shall remain the property of the University,

## that Recipient has no rights to sell or offer to sell the Plant Material as Plant Material is property of the University and shall not purport to sell or offer to sell the Plant Material, and

1. that, upon the University’s written request, the Recipient shall destroy or return to the University at the address listed in section 5 in the Business Terms, (a) the Plant Material and (b) all documents, papers, samples, and other tangible goods and property delivered to the Recipient that contain or reflect the Confidential Information or other information accumulated about the Plant Material by the Recipient provided, however, the Recipient may retain one (1) copy of any documents and papers containing or reflecting the Confidential Information for the sole purpose of determining Recipient's obligations under this Agreement.

## As provided for in section 3.3 above, the University shall own all rights, titles, and interests, including all patent and other intellectual property rights in and to any sports discovered or propagated in connection with the use of the Plant Material.

# TERMINATION

## Either party may unilaterally terminate this Agreement at any time by giving the other party prior written notice.

## If Recipient fails to perform, when due, a material obligation under this Agreement, University may deliver a notice of default to Recipient, and such notice shall describe the unperformed obligation. If the obligation remains unperformed at the end of the thirty (30)-day period that began three (3) days from the date on which the notice of default was sent, the University may deliver a notice of termination, and this Agreement shall terminate on the date on which the notice of termination was sent. All notices to be sent under this section shall be sent as described in Section 17 of this Agreement.

## Upon the termination or expiration of this Agreement, unless the University otherwise agrees in writing, the Recipient shall destroy all Plant Material and Confidential Information then in its possession and, within ten (10) days of such destruction, shall deliver to the University written confirmation of the destruction to the person identified in Section 3of the Business Terms..

# NO WARRANTIES OR LIABILITY

The recipient acknowledges its understanding that the plant material is experimental in nature. **THE RECIPIENT ACCEPTS THE PLANT MATERIAL AND CONFIDENTIAL INFORMATION “AS IS, WITH ALL FAULTS.” THE RECIPIENT ACKNOWLEDGES THAT IT HAS NOT RELIED UPON ANY STATEMENTS MADE BY THE UNIVERSITY CONCERNING THE PLANT MATERIAL OR THE CONFIDENTIAL INFORMATION. THE UNIVERSITY DISCLAIMS ALL WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND THAT THE USE OF THE PLANT MATERIAL OR THE CONFIDENTIAL INFORMATION WILL NOT INFRINGE ANY THIRD PARTY’S PATENT, COPYRIGHT, TRADEMARK, OR OTHER RIGHTS. IN NO EVENT SHALL THE UNIVERSITY BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, PECUNIARY, EXPECTANCY, OR COMPENSATORY DAMAGES, INCLUDING (A) PERSONAL INJURY, PROPERTY DAMAGES OR (B) LOST PROFITS, LOST BUSINESS OPPORTUNITY, INVENTORY LOSS, WORK STOPPAGE, LOST DATA OR ANY OTHER RELIANCE OR EXPECTANCY, DIRECT OR INDIRECT, SPECIAL, INCIDENTIAL OR CONSEQUENTIAL DAMAGES OF ANY KIND. EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, IN NO EVENT SHALL THE UNIVERSITY’S TOTAL LIABILITY FOR THE BREACH OR NON-PERFORMANCE OF THIS AGREEMENT EXCEED THE AMOUNT OF PAYMENTS PAID TO THE UNIVERSITY UNDER THIS AGREEMENT IN THE SIX MONTHS IMMEDIATELY PRECEDING THE BREACH OR NONPERFORMANCE OF THIS AGREEMENT. THIS LIMITATION SHALL APPLY TO CONTRACT, TORT AND ANY OTHER CLAIM OF WHATEVER NATURE**.

# RELEASE

 The Recipient, for itself and its employees and agents, releases the University and its employees and agents from any claim, suit, action, or liability arising out of this Agreement, including, without limitation, the Recipient’s use of the Plant Material or Confidential Information. In no event shall the University be liable for any use of such Plant Material or Confidential Information.

# INDEMNIFICATION

The Recipient shall defend, indemnify, and hold the University harmless from any loss, claim, damage, or liability, of whatsoever kind or nature that may arise from or in connection with this Agreement or the use of such Plant Material or Confidential Information.

# ENTIRE AGREEMENT

This Agreement shall constitute the entire understanding of the parties with respect to the subject matter of this Agreement, and shall supersede all prior agreements and understandings of the parties on such subject matter.

# AMENDMENT AND WAIVER

The Agreement may be amended from time to time only in a writing signed by both parties (or through an exchange of emails as provided in section 19) in which each party has assented to the amended terms. No term or provision of this Agreement may be waived and no breach excused unless such waiver or consent is in writing and signed by the party claimed to have waived or consented. No waiver of a breach is to be deemed a waiver of a different or subsequent breach.

# ASSIGNMENT

Recipient shall not assign its interest under this Agreement. Any assignment attempted to be made in violation of this section is void. Absent the consent of all the parties, an assignment or delegation will not release the assigning or delegating party from its obligation.

# GOVERNING LAW AND VENUE

The internal laws of the state of Minnesota, without giving effect to its conflict of laws principles, govern the validity, construction, and enforceability of this Agreement. A suit, claim, or other action to enforce the terms of this Agreement may be brought only in the state courts of Hennepin County, Minnesota. The Recipient hereby submits to the jurisdiction of that court and waives any objections it may have to that court asserting jurisdiction over the Recipient or its assets and property and to venue in that jurisdiction.

# EXPORT CONTROLS AND SANCTIONS

The parties shall comply with export controls and sanctions statutes and regulations, including the Export Administration Regulations (EAR, 15 C.F.R. pts. 730-774), the International Traffic in Arms Regulations (22 C.F.R. pts. 120-130), and the Foreign Assets Control Regulations (31 C.F.R. pts. 500-599), to the extent such statutes and regulations are applicable to the parties' activities. Recipient shall not use any material, technology, technical data, or software relating to this Agreement contrary to the requirements in Part 744 of the EAR, Control Policy: End-Use and End-User Based (15 C.F.R. pt. 744).

# NOTICES

In order to be effective, all notices, requests, and other communications that a party is required or elects to deliver must be in writing and must be delivered personally, or by facsimile or electronic mail (provided such delivery is confirmed), or by a recognized overnight courier service or by United States mail, first-class, certified or registered, postage prepaid, return receipt requested, to the other party at its address set forth below or to such other address as such party may designate by notice given under this Section:

**If to the University:**

University of Minnesota

Office for Technology Commercialization

Attn: Contracts Manager

200 Oak Street, SE, Suite 280

Minneapolis, MN 55455

Phone: 612.624.0550

Fax: 612.624.6554

E-mail: otcagree@umn.edu

**If to the Recipient:**

As indicated in section 1 of the Business Terms of this Agreement.

# SECTIONS OF THE AGREEMENT SURVIVING TERMINATION

Surviving any termination or expiration are the provisions of sections 6, 9, 10, 11, 15, of this Agreement and any other provision that by its nature is intended to survive.

# EXECUTION IN COUNTERPARTS

This Agreement may be executed in counterparts and by facsimile or electronic transmission.