



Studio Legale SMAF & Associates [S.T.A. - S.A.S]

Società Multiprofessionale Avvocati Fiscalisti

Roma - Milano - Bologna

Law Firm in Italy

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**ROMA
MILANO
BOLOGNA**

PATENT AND TECHNOLOGY LICENSE AGREEMENT

THIS thirteen (13) page AGREEMENT ("AGREEMENT") is made on this
by and between the BOARD OF REGENTS ("BOARD") of THE OF
..... YYY ("YYY"), an agency of the State of, whose address is 201
West 7th Street,, 78701, THE OF M. D. ANDERSON
CANCER CENTER ("MDA"), a component Institution of the YYY and XYZ, Inc.,
a Houston, corporation having a principal place of business located at 333
N. Sam Houston Pkwy, Suite 1150, Houston, 77060 ("LICENSEE").

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RECITALS

A. BOARD owns certain PATENT RIGHTS and TECHNOLOGY RIGHTS related to LICENSED SUBJECT MATTER, which were developed at MDA, a component institution of YYY.

B. BOARD desires to have the LICENSED SUBJECT MATTER developed in the LICENSED FIELD and used for the benefit of LICENSEE, the inventor, BOARD, and the public as outlined in the Intellectual Property Policy promulgated by the BOARD.

C. LICENSEE wishes to obtain a license from BOARD to practice LICENSED SUBJECT MATTER.

NOW, THEREFORE, in consideration of the mutual covenants and premises herein contained, the parties hereto agree as follows:

I. EFFECTIVE DATE

1.1 Subject to approval by BOARD, this AGREEMENT shall be effective as of the date written herein above ("EFFECTIVE DATE").

II. DEFINITIONS

As used in this AGREEMENT, the following terms shall have the meanings indicated:

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2.1 AFFILIATE shall mean any business entity more than 50% owned by LICENSEE, any business entity which owns more than 50% of LICENSEE, or any business entity that is more than 50% owned by a business entity that owns more than 50% of LICENSEE.

2.2 LICENSED FIELD shall mean all fields of use within the LICENSED SUBJECT MATTER.

2.3 LICENSED PRODUCTS shall mean any product or service SOLD by LICENSEE comprising LICENSED SUBJECT MATTER pursuant to this AGREEMENT.

2.4 LICENSED SUBJECT MATTER shall mean inventions and discoveries defined herein as PATENT RIGHTS or as TECHNOLOGY RIGHTS.

2.5 LICENSED TERRITORY shall mean all national and international political jurisdiction in which LICENSED PRODUCTS are sold.

2.6 NET SALES shall mean the gross revenues received by LICENSEE from the SALE of LICENSED PRODUCTS less sales and/or use taxes actually paid, import and/or export duties actually paid, outbound transportation prepaid or allowed, and amounts allowed or credited due to returns (not to exceed the original billing or invoice amount).

2.7 PATENT RIGHTS shall only mean any and all of BOARD'S rights in information

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discoveries claimed in invention disclosures, patents, and/or patent applications, whether domestic or foreign, and all divisionals, continuations, continuations-in-part, reissues, reexaminations or extensions thereof, and any letters patent that issue thereon as defined in Exhibit I hereto subject to the limitations, if any, set forth therein.

2.8 SALE or SOLD shall mean the transfer or disposition of a LICENSED PRODUCT for value to a party other than LICENSEE or an AFFILIATE.

2.9 Subject to the limitations, if any, set forth in Exhibit I hereto, TECHNOLOGY RIGHTS shall mean BOARD'S rights in any technical information, know-how, process, procedure, composition, device, method, formula, protocol, technique, software, design, drawing or data created by the inventors listed in Exhibit I hereto and relating to LICENSED SUBJECT MATTER which is not claimed in PATENT RIGHTS but which is necessary for practicing PATENT RIGHTS regardless of whether any patent is actually issued during the term of this AGREEMENT.

III. LICENSE

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3.1 BOARD hereby grants to LICENSEE a royalty-bearing, exclusive license under LICENSED SUBJECT MATTER to manufacture, have manufactured, use and/or sell LICENSED PRODUCTS within LICENSED TERRITORY for use within LICENSED FIELD and, subject to Paragraph 4.5 herein, shall extend to BOARD's undivided interest in any LICENSED SUBJECT MATTER developed during the term of this AGREEMENT and jointly owned by BOARD and LICENSEE. This grant shall be subject to Paragraph 14.2 and 14.3, hereinbelow, the payment by LICENSEE to BOARD of all consideration as provided in Paragraph 4.1 of this AGREEMENT, (as well as the timely payment of all amounts due under any Sponsored Research Agreement between MDA and LICENSEE in effect during the term of this AGREEMENT) and shall be further subject to rights retained by BOARD and MDA to:

(a) Publish the general scientific findings from research related to LICENSED SUBJECT MATTER; AND

(b) Subject to the provisions of ARTICLE XI herein below, use any information contained in LICENSED SUBJECT MATTER for research, teaching, patient care, and other educationally-related purposes.

3.2 LICENSEE shall have the right to extend the license granted herein to any AFFILIATE provided that such AFFILIATE consents to be bound by all of the terms and conditions of this AGREEMENT.



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3.3 Subject to the Paragraph 3.4 herein below, LICENSEE shall have the right to grant sublicenses under LICENSED SUBJECT MATTER consistent with the terms of this AGREEMENT provided that LICENSEE shall be responsible for its sublicenses relevant to this AGREEMENT, and for diligently collecting all amounts due LICENSEE from sublicenses. In the event a sublicensee pursuant hereto becomes bankrupt, insolvent or is placed in the hands of a receiver or trustee, LICENSEE, to the extent allowed under applicable law and in a timely manner, agrees to use its best reasonable efforts to collect any and all consideration owed to LICENSEE and to have the sublicense agreement confirmed or rejected by a court of proper jurisdiction.

3.4 LICENSEE agrees to deliver to BOARD a true and correct copy of each sublicense granted by LICENSEE, and any modification or termination thereof, within thirty (30) days after execution, modification, or termination.

3.5 Upon termination of this AGREEMENT, BOARD agrees to accept as successors to LICENSEE, existing sublicenses in good standing at the date of termination provided that such sublicenses consent to be bound by all of the terms and conditions of this AGREEMENT.

IV. CONSIDERATION, PAYMENTS AND REPORTS

4.1 In consideration of rights granted by BOARD to LICENSEE under this

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AGREEMENT, LICENSEE agrees to pay MDA the following:

(a) Reimbursement for all out-of-pocket expenses paid by MDA through May 31, 1996 in filing, prosecuting, enforcing and maintaining PATENT RIGHTS licensed hereunder as follows: (i) \$53,125.00 due September 1, 1996, (ii) \$53,125.00 due April 1, 1997, and (iii) \$53,125.00 due January 1, 1998; and all future expenses paid by MDA, for so long as, and in such countries as, this AGREEMENT remains in effect. MDA will invoice LICENSEE in accordance with the schedule herein, and upon a quarterly basis thereafter beginning March 1, 1998 for expenses paid by MDA after May 31, 1996 and the amounts invoiced will be due and payable by LICENSEE within thirty (30) days thereafter; AND

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(b) A running royalty equal to six percent (6%) of LICENSEE's NET SALES of LICENSED PRODUCTS in national political jurisdictions in the LICENSED TERRITORY where LICENSED SUBJECT MATTER is covered by one (1) or more issued patents or pending patent applications and three percent (3%) of LICENSEE'S NET SALES of LICENSED PRODUCTS in national political jurisdictions in the LICENSED TERRITORY where LICENSED SUBJECT MATTER is NOT covered by one (1) or more issued patents or pending patent applications, and fifty percent (50%) (or forty percent (40%) when LICENSEE has expended or committed to expend and is current in its obligations to expend Two Million Dollars (\$2,000,000.00) on research and

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development of the LICENSED SUBJECT MATTER) of all consideration other than Research and Development ("R&D") money received by LICENSEE from (i) any sublicensee pursuant to Paragraphs 3.3 and 3.4 herein above, and (ii) any assignee pursuant to Paragraph 12.1 hereinbelow including but not limited to royalties, up-front payments, marketing, distribution, franchise, option, license, or documentation fees, bonus and milestone payments and equity securities, all payable within thirty (30) days after March 31, June 30, September 30, and December 31 of each year during the term of this AGREEMENT, at which time LICENSEE shall also deliver to BOARD and MDA a true and accurate report, giving such particulars of the business conducted by LICENSEE and its sublicensees, if any exist, during the preceding three (3) calendar months under this AGREEMENT as necessary for BOARD are to account for LICENSEE's payments hereunder. Such report shall include all pertinent data, including, but not limited to: (a) the total quantities of LICENSED PRODUCTS produced; (b) the total SALES, (c) the calculation of royalties thereon; (d) the total royalties (or minimum royalties) so computed and due MDA; and (e) all other amounts covered and due herein. Simultaneously with the delivery of each such report, LICENSEE shall pay to MDA the amount, if any, due for the period of such report. If no payments are due, it shall be so reported. Should LICENSEE be obligated to pay running royalties to third parties to avoid infringing such third parties' patent rights which dominate BOARD'S PATENT RIGHTS, LICENSEE may reduce the running royalty due MDA by such running royalties to such third parties, provided, however, the running royalty due MDA shall in no case be less than one-half the rates stated herein.

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4.2 During the Term of this AGREEMENT and for one (1) year thereafter, LICENSEE shall keep complete and accurate records of its and its sublicensees' SALES and NET SALES of LICENSED PRODUCTS to enable the royalties payable hereunder to be determined. LICENSEE shall permit MDA or its representatives, at MDA's expense, to periodically examine its books, ledgers, and records during regular business hours for the purpose of and to the extent necessary to verify any report required under this AGREEMENT. In the event that the amounts due to MDA are determined to have been underpaid in an amount equal to or greater than five percent (5%) of the total amount due during the period of time so examined, LICENSEE shall pay the cost of such examination, and accrued interest at the highest allowable rate.

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4.3 Upon the request of BOARD or MDA but not more often than once per calendar year, LICENSEE shall deliver to BOARD and MDA a written report as to LICENSEE'S (and sublicensees') efforts and accomplishments during the preceding year in diligently commercializing LICENSED SUBJECT MATTER in the LICENSED TERRITORY and LICENSEE'S (and sublicensees') commercialization plans for the upcoming year.

4.4 All amounts payable hereunder by LICENSEE shall be payable in United States funds without deductions for taxes, assessments, fees, or charges of any kind.

Checks shall be made payable to The of M. D. Anderson Cancer

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Center and mailed by U.S. Mail to Box 297402, Houston, 77297 Attention:
Manager, Sponsored Programs.

4.5 No payments due or royalty rates under this AGREEMENT shall be reduced as
the result of co-ownership of LICENSED SUBJECT MATTER by BOARD and another
party, including LICENSEE.

V. SPONSORED RESEARCH

5.1 If LICENSEE desires to fund sponsored research within the LICENSED SUBJECT
MATTER, and particularly where LICENSEE receives money for sponsored research
payments pursuant to a sublicense under this AGREEMENT, LICENSEE shall notify
MDA in writing of all opportunities to conduct such sponsored research
(including clinical trials, if applicable), shall solicit research and/or
clinical proposals from MDA for such purpose, and shall give good faith
consideration to funding such proposals at MDA.

VI. PATENTS AND INVENTIONS

6.1 If after consultation with LICENSEE it is agreed by BOARD and LICENSEE that
a new patent application should be filed for LICENSED SUBJECT MATTER, BOARD will
prepare and file appropriate patent applications, and LICENSEE will pay the cost
of searching, preparing, filing, prosecuting and maintaining same. If LICENSEE
notifies BOARD that it does not intend to pay the cost of an application, or if
LICENSEE does not respond or make an effort to agree with BOARD on the

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disposition of rights of the subject invention, then BOARD may file such application at its own expense and LICENSEE shall have no rights to such invention. BOARD shall provide LICENSEE with a copy of the application for which LICENSEE has paid the cost of filing, as well as copies of any documents received or filed during prosecution thereof.

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VII. INFRINGEMENT BY THIRD PARTIES

7.1 LICENSEE shall have the obligation of enforcing at its expense any patent exclusively licensed hereunder against infringement by third parties and shall be entitled to retain recovery from such enforcement. LICENSEE shall pay MDA a royalty on any monetary recovery to the extent that such monetary recovery by LICENSEE is held to be damages or a reasonable royalty in lieu thereof. In the event that LICENSEE does not file suit against a substantial infringer of such patents within six (6) months of knowledge thereof, then BOARD shall have the right to enforce any patent licensed hereunder on behalf of itself and LICENSEE (MDA retaining all recoveries from such enforcement) and/or reduce the license granted hereunder to non-exclusive.

7.2 In any suit or dispute involving an infringer, the parties shall cooperate fully, and upon the request and at the expense of the party bringing suit, the

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other party shall make available to the party bringing suit at reasonable times and under appropriate conditions all relevant personnel, records, papers, information, samples, specimens, and the like which are in its possession.

VIII. PATENT MARKING

8.1 LICENSEE agrees that all packaging containing individual LICENSED PRODUCT(S), and documentation therefor, sold by LICENSEE, SUBSIDIARIES, and sublicensees of LICENSEE will be marked permanently and legibly with the number of the applicable patent(s) licensed hereunder in accordance with each country's patent laws, including Title 35, United States Code.

IX. INDEMNIFICATION

9.1 LICENSEE shall hold harmless and indemnify BOARD, YYY, MDA, its Regents, officers, employees, students, and agents from and against any claims, demand, or causes of action whatsoever, costs of suit and reasonable attorney's fees including without limitation those costs arising on account of any injury or death of persons or damage to property caused by, or arising out of, or resulting from, the exercise or practice of the license granted hereunder by LICENSEE or its officers, employees, agents or representatives.

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X. USE OF BOARD AND COMPONENT'S NAME

10.1 LICENSEE shall not use the name of (or the name of any employee of) MDA, YYY or BOARD without the advance, express written consent of BOARD secured through:

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ATTENTION:

XI. CONFIDENTIAL INFORMATION

11.1 BOARD and LICENSEE each agree that all information contained in documents marked "confidential" which are forwarded to one by the other shall be received in strict confidence, used only for the purposes of this AGREEMENT, and not disclosed by the recipient party (except as required by law or court order), its agents or employees without the prior written consent of the other party, unless such information (a) was in the public domain at the time of disclosure, (b) later became part of the public domain through no act or omission of the recipient party, its employees, agents, successors or assigns, (c) was lawfully disclosed to the recipient party by a third party having the right to disclose it, (d) was already known by the recipient party at the time of disclosure, (e)

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was independently developed or (f) is required to be submitted to a government agency pursuant to any preexisting obligation.

11.2 Each party's obligation of confidence hereunder shall be fulfilled by using at least the same degree of care with the other party's confidential information as it uses to protect its own confidential information. This obligation shall exist while this AGREEMENT is in force and for a period of three (3) years thereafter.

XII. ASSIGNMENT

12.1 Except in connection with the sale of substantially all of the assets of LICENSEE to a third party, this AGREEMENT may not be assigned by LICENSEE without the prior written consent of BOARD.

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XII. TERMS AND TERMINATION

13.1 Subject to Articles 13.2, 13.3, 13.4, and 13.5 hereinbelow, the term of this AGREEMENT shall extend from the Effective Date set forth hereinabove to the full end of the term or terms for which PATENT RIGHTS have not expired, and if only TECHNOLOGY RIGHTS are licensed and no PATENT RIGHTS are applicable, for a

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term of fifteen (15) years.

13.2 BOARD shall have the right at any time after one (1) year from the EFFECTIVE DATE of this AGREEMENT to terminate the license granted herein in any national political jurisdiction within the LICENSED TERRITORY if LICENSEE, within ninety days after written notice from BOARD of such intended termination, fails to provide written evidence satisfactory to BOARD that LICENSEE has commercialized or is actively and effectively attempting to commercialize an invention licensed hereunder within such jurisdiction(s). Accurate, written evidence provided by LICENSEE to BOARD within said ninety (90) day period that LICENSEE has an effective, ongoing and active research, development, manufacturing, marketing, or sales program, as appropriate, directed toward obtaining regulatory approval and/or production and/or sale of LICENSED PRODUCTS incorporating PATENT RIGHTS or incorporating TECHNOLOGY RIGHTS within such jurisdiction shall be deemed satisfactory evidence.

13.3 Subject to any rights herein which survive termination, this AGREEMENT will earlier terminate in its entirety:

(a) automatically if LICENSEE shall become bankrupt or insolvent and/or if the business of LICENSEE shall be placed in the hands of a receiver or trustee, whether by voluntary act of LICENSEE or otherwise; or

(b) (i) upon thirty (30) days written notice by BOARD if LICENSEE shall breach or default on the payment obligations of ARTICLE IV, or use of name obligations

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of ARTICLE X; or (ii) upon ninety (90) days written notice by BOARD if LICENSEE shall breach or default on any other obligation under this AGREEMENT; provided, however, LICENSEE may avoid such termination if before the end of such thirty (30) or ninety (90) day period if LICENSEE provides notice and accurate, written evidence satisfactory to BOARD that such breach has been cured and the manner of such cure; or.

(c) at any time by mutual written agreement between LICENSEE and BOARD, or without cause upon one hundred eighty (180) days written notice by LICENSEE to BOARD, subject to any terms herein which survive termination.

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13.4 Upon termination of this AGREEMENT for any cause:

(a) nothing herein shall be construed to release either party of any obligation matured prior to the effective date of such termination.

(b) LICENSEE covenants and agrees to be bound by the provisions of ARTICLES IX, X AND XI of this AGREEMENT.

(c) LICENSEE may, after the effective date of such termination, sell all LICENSED PRODUCTS and parts therefore that it may have on hand at the date of

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termination, provided that LICENSEE pays the earned royalty thereon and any other amounts due pursuant to ARTICLE IV of this AGREEMENT.

(d) LICENSEE grants to BOARD a non-exclusive royalty bearing license with the right to sublicense others with respect to improvements made by LICENSEE (including improvements licensed by LICENSEE from third parties) in the LICENSED SUBJECT MATTER. LICENSEE and BOARD agree to negotiate in good faith the royalty rate for said non-exclusive license. BOARD's right to sublicense others hereunder shall be solely for purposes of permitting others to develop and commercialize the entire technology package.

13.5 This AGREEMENT shall automatically terminate if LICENSEE fails to deliver to MDA by September 1, 1996 (i) payment of \$53,125.00 pursuant to 4.1(a) hereinabove and (ii) notice that LICENSEE has legally binding funding commitments from its investors totaling Two Million Dollars (\$2,000,000.00) or more.

XIV. WARRANTY: SUPERIOR-RIGHTS

14.1 Except for the rights, if any, of the Government of the United States as set forth hereinbelow, BOARD represents and warrants its belief that it is the owner of the entire right, title, and interest in and to LICENSED SUBJECT MATTER, and that it has the sole right to grant licenses thereunder, and that it has not knowingly granted licenses thereunder to any other entity that would restrict rights granted hereunder except as stated herein.

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14.2 LICENSEE understands that the LICENSED SUBJECT MATTER may have been developed under a funding agreement with the Government of the United States of America and, if so, that the Government may have certain rights relative thereto. This AGREEMENT is explicitly made subject to the Government's rights under any such agreement and any applicable law or regulation, including P.L. 96-517 as amended by P.L. 98-620. To the extent that there is a conflict between any such agreement, applicable law or regulation and this AGREEMENT, the terms of such Government agreement, applicable law or regulation shall prevail.

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14.3 LICENSEE understands and agrees that BOARD, by this AGREEMENT, makes no representation as to the operability or fitness for any use, safety, efficacy, approvability by regulatory authorities, time and cost of development, patentability, and/or breadth of the LICENSED SUBJECT MATTER. BOARD, by this AGREEMENT, makes no representation as to whether there are any patents now held, or which will be held, by others or by BOARD in the LICENSED FIELD, nor does BOARD make any representation that the inventions contained in PATENT RIGHTS do not infringe any other patents now held or that will be held by others or by BOARD.

14.4 LICENSEE, by execution hereof, acknowledges, covenants and agrees that

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LICENSEE has not been induced in anyway by BOARD, YYY, MDA or employees thereof to enter into this Agreement, and further agrees that LICENSEE has conducted sufficient due diligence with respect to all items and issues pertaining to Article XIV herein and all other matters pertaining to this Agreement and agrees to accept all risks inherent herein.

XV. GENERAL

15.1 This AGREEMENT constitutes the entire and only AGREEMENT between the parties for LICENSED SUBJECT MATTER and all other prior negotiations, representations, agreements and understandings are superseded hereby. No agreements altering or supplementing the terms hereof may be made except by means of a written document signed by the duly authorized representatives of the parties.

15.2 Any notice required by this AGREEMENT shall be given by prepaid, first class, certified mail, return receipt requested, and addressed in the case of BOARD to:

BOARD OF REGENTS

The of YYY

....., 78701

ATTENTION: YYY Intellectual

Property Office

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with copy to:

The of

ATTENTION:

or in the case of LICENSEE to: XYZ, Inc.

ATTENTION:

or such other address as may be given from time to time under the terms

of this

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notice provision.

15.3 LICENSEE covenants and agrees to comply with all applicable federal, state and local laws and regulations in connection with its activities pursuant to this AGREEMENT.

15.4 This AGREEMENT shall be construed and enforced in accordance with the laws of the United States of America and of the State of

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15.5 Failure of BOARD to enforce a right under this AGREEMENT shall not act as a waiver of that right or the ability to later assert that right relative to the particular situation involved.

15.6 Headings included herein are for convenience only and shall not be used to construe this AGREEMENT.

15.7 If any provision of this AGREEMENT shall be found by a court to be void, invalid or unenforceable, the same shall be reformed to comply with applicable law or stricken if not so conformable, so as not to affect the validity or enforceability of this AGREEMENT.

IN WITNESS WHEREOF, parties hereto have caused their duly authorized representatives to execute this AGREEMENT.

THE OF

BOARD OF REGENTS OF THE

..... OF YYY

By /s/

By /s/

Executive Vice President

Vice Chancellor and

for Administration and Finance

General Counsel

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APPROVED AS TO CONTENT:

APPROVED AS TO FORM:

By /s/

By /s/

Director, Technology Development

Manager, Intellectual

Property

BIOTEX, INC.

By /s/

President

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EXHIBIT I

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