



AFFYMETRIX, INC.
SOFTWARE DEVELOPMENT KIT (SDK) AND DATA COMMERCIAL USE LICENSE AGREEMENT

This SDK and Data Commercial Use License Agreement (the "Agreement") is made and entered into as of _____ ("Effective Date"), by and between Affymetrix, Inc. with an address at 3380 Central Expressway, Santa Clara, CA 95051 ("Affymetrix") and _____ with an address at _____ ("Developer").

For purposes of this Agreement, "Software" means the software product(s) listed on the Affymetrix Developer Network home page currently located at <http://www.affymetrix.com/support/developer/index.affx> (the "ADN Homepage"), which includes computer software in object code (or machine readable) and/or source code (human readable) form, and may also include related media, printed materials and/or electronic documentation.

This Agreement contains terms and conditions which are applicable to Developer's use of the Software. This Agreement also contains a license to download and use certain Data (as defined below) from the Affymetrix.com web site (the "Site") for Developer's commercial purposes in connection with Developer's use of the Software, and contains terms and conditions which are applicable to Developer's use of such Data.

1. **OPEN SOURCE OVERRIDE.** The Software may include or require use of one or more software programs or components (e.g., software code, algorithms, documentation) listed on the ADN Homepage that are also made available by Affymetrix under an open source license (e.g., the Common Public License (CPL), the General Public License (GPL) or the Lesser General Public License (LGPL)). As between Developer and Affymetrix, and only to the extent that Affymetrix is the owner of such components or otherwise has sufficient rights from its licensor(s) with respect to such program(s) or component(s) to grant the rights and impose the restrictions and obligations contained in this Agreement, this Agreement shall exclusively govern Developer's use and distribution of such program(s) and component(s) when licensed to Developer by Affymetrix as part of the Software, and used by Developer, in accordance under this Agreement, notwithstanding any provision to the contrary in any open source license or related notice (including any software header file) that accompanies such program(s) or component(s). All such open source licenses shall continue to apply to (a) use of the program(s) or component(s) to which they apply, and any derivative works thereof to which they apply, after termination of this Agreement for any reason or otherwise outside the scope of the software license granted to Developer in this Agreement, and (b) distribution of such program(s) or component(s), and any derivative works thereof, before the effective date of this Agreement, after its termination for any reason or otherwise outside the scope of the software license granted to Developer in this Agreement. This Agreement shall not be deemed to supersede, terminate or otherwise amend any of Developer's rights or obligations pursuant to any open source license with respect to any use or distribution described in the preceding sentence.

2. **LICENSE GRANT – SOFTWARE.** Subject to the terms and conditions of this Agreement and Developer's payment to Affymetrix of the applicable then-current annual subscription fee (the "Subscription Fee"), Affymetrix grants Developer a limited, non-exclusive, non-transferable, non-sublicensable license to download from the ADN Homepage, reproduce, install and internally use the Software to develop Developer's own commercial and non-commercial software application(s) ("Developer Software") capable of interfacing with Affymetrix® GeneChip® data file formats, Affymetrix Laboratory Information Management System (LIMS) software and data structures, and/or an Affymetrix GeneChip Operating Software (GCOS) database, provided that Developer Software contains significant and primary functionality independent of the Software, Data and any know-how embodied therein. To the extent Developer Software incorporates or practices any Affymetrix patent or other intellectual property right, this license does not include the right for Developer Software, or any Distributable Component (as defined below) or other portions of the Software, to interface with, process or otherwise act upon data generated by any products other than Affymetrix GeneChip probe arrays or related Affymetrix products or services.

3. **DERIVATIVE WORKS.** If the Software includes a source code component (e.g., the PLIER algorithm SDK), then Developer is permitted to modify and make derivative works of such source code component for Developer's internal use consistent with the terms and conditions of this Agreement, and Developer is permitted to distribute derivative works, or portions thereof, of such Software components to Developer's end user customers solely as Distributable Components in accordance with Section 5 below. However, Developer is not licensed to, and agrees not to, identify or refer to such component by the name or other identifier given to it by Affymetrix (e.g., "PLIER") unless, when used under normal conditions as recommended by Developer for Developer Software and permitted by this license, the derivative work processes or otherwise acts upon the validation data set(s), if any, provided or recommended by Affymetrix for testing such component, within the parameters of acceptable performance established by Affymetrix for such component. Furthermore, Developer agrees that the name or other identifier that Developer uses for such derivative work shall be unique, identify the original Software program or component from which it was derived, and indicate to the user that it is a derivative work of that program or component. However, except for the name or identifier given to the Software program or component by Affymetrix (e.g., "PLIER"), Developer is not licensed to and agrees not to use any Affymetrix trademark, trade name or service mark, or other designation in connection with any such activities unless Developer is licensed to do so under a separate written agreement with Affymetrix signed by an authorized corporate officer of Affymetrix. Developer agrees not to infringe upon the intellectual property or other rights of any other party, and to indemnify, defend and hold harmless Affymetrix and its licensors from and against any claim, lawsuit or related action for infringement, in accordance with Section 19 below.

4. **LICENSE GRANT – DATA.** Subject to all terms and conditions of this Agreement, the Site's terms and conditions of use (currently located at <http://www.affymetrix.com/site/terms.affx>), which are incorporated herein by reference, and any Third Party Terms, and Developer's payment to Affymetrix of the Subscription Fee, Affymetrix grants Developer a limited, non-exclusive, non-transferable, non-sublicensable license to download Data from the Analysis Center, internally use such Data to develop Developer Software as permitted by this license, and redistribute such Data with Developer Software pursuant to Section 6 below. For purposes of this Agreement, the following terms have the following meaning:

"Affymetrix Data" means data, library files and other information that (a) are made available by Affymetrix for download through the Center, (b) are/were created, developed, generated, derived, selected, annotated or arranged by or specifically for Affymetrix, and (c) are specific to Affymetrix' GeneChip probe arrays or related Affymetrix products or services, including, without limitation: the selection, arrangement, identity, and nucleic acid sequence to the

extent not already contained in Third Party Data, of consensus, exemplar, probe and target sequences represented on GeneChip probe arrays; probe IDs and definitions; protein annotation and alignments; and the identity of GENBANK accession numbers and/or identity of other Third Party Data specifically associated with any of the foregoing.

“Data” means collectively the Affymetrix Data and Third Party Data.

“Analysis Center” means the NetAffx™ Analysis Center currently accessible to registered users of the Site and currently located at <http://www.affymetrix.com/analysis/index.affx>.

“Third Party Data” means data and other information, if any, that (i) are made available by Affymetrix for download through the Analysis Center, (ii) are/were obtained from third party Web sites or otherwise made available publicly by third parties, or licensed to Affymetrix for use on the Site, and (iii) are not Affymetrix Data.

“Third Party Terms” means any third party copyright notice, license agreement, or other terms applicable to Third Party Data.

5. DISTRIBUTION OF CERTAIN SOFTWARE COMPONENTS. Developer is authorized to commercially and non-commercially redistribute, *in object code form only*, those components (the “Distributable Components”) of the Software that Developer embeds into Developer Software’s executable or library file, and only to the extent required for the proper functioning of Developer Software when interfacing with Affymetrix® GeneChip® data file formats, Affymetrix Laboratory Information Management System (LIMS) software and data structures, and/or an Affymetrix GeneChip Operating Software (GCOS) database, as permitted by this license. Developer’s distribution of Distributable Components shall occur solely in connection with Developer’s distribution of Developer Software to Developer’s end user customers and pursuant to an end user license agreement with terms no less protective of the Distributable Components than those contained herein. For purposes of the preceding sentence, “distribution” includes Developer’s distribution of Developer Software via a hosted web server (i.e., an application service provider business model) operated by Developer or by another party on Developer’s behalf and for Developer’s benefit. If Affymetrix makes available to Developer an installation program for a Distributable Component then Developer agrees to use such installation program for such Distributable Component. Developer shall not permit further distribution of the Distributable Components except by Developer’s distributor(s) solely in connection with their distribution of Developer Software to Developer’s end user customers in accordance with the terms and conditions of this Agreement. Except for the name or identifier given to a Software component by Affymetrix (e.g., “PLIER”), Developer is not licensed to, and agrees not to, use any Affymetrix trademark, trade name or service mark, or other designation in connection with any such activities unless Developer is licensed to do so under a separate written agreement with Affymetrix signed by an authorized corporate officer of Affymetrix.

6. REDISTRIBUTION OF DATA. Developer is authorized to redistribute the Data, in unmodified form (except for reformatting that does not alter the content or remove any identification, trademark, copyright or other notices), solely in connection with Developer’s distribution of Developer Software to Developer’s end user customers, provided that Developer redistribute the Data pursuant to an end user license agreement with terms no less protective of the Data than those contained herein (but consistent with Third Party Terms with respect to any Third Party Data to which they apply). Developer shall not permit further distribution of the Data except by Developer’s distributor(s) solely in connection with their distribution of Developer Software to Developer’s end user customers in accordance with the terms and conditions of this Agreement.

7. LICENSE TERM. The term of such licenses and this Agreement shall be one (1) year from the date Developer pay the Subscription Fee to Affymetrix, unless earlier terminated as provided herein. Following the initial term, this Agreement shall and shall renew for one or more subsequent one (1) year periods only upon Developer’s payment to Affymetrix of the Subscription Fee for each such renewal term. Affymetrix may terminate the licenses and this Agreement immediately if Developer is in material breach of any of its provisions, or if Developer fail to comply with the terms and conditions applicable to the Site or any product(s) to which the Software or Data pertains, or any Third Party Terms. Affymetrix has the right to inspect Developer Software in source code/human readable form at any time during normal working hours, and under reasonable obligations of confidentiality, to ensure compliance with this Agreement.

8. RESTRICTIONS. Developer shall not: (a) modify or create derivative works of the Software (except as expressly provided in Section 3 above) or Data (except for reformatting that does not alter the content or remove any identification, trademark, copyright or other notices); (b) distribute, market, rent, lease or transfer to any third party the Software (except as expressly provided in Section 5 above) or Data (except as expressly provided in Section 6 above), or use the Software or Data in any time sharing or rental arrangement; (c) download, upload, or otherwise export or re-export the Software, Data, Distributable Components or any underlying information or technology (or direct product thereof) except in full compliance with all United States and other applicable laws and regulations; (d) use the Software, Distributable Components or Data for any purpose that is unlawful or prohibited by this Agreement, the Site’s Terms of Use or any Third Party Terms, nor (e) remove any product identification, trademark, copyright or other notices (except as expressly provided in Section 3 above regarding Developer’s use of Software component names/identifiers for derivative works).

9. CONFLICTING TERMS OR CONDITIONS. In the event of any conflict between the express terms and conditions of this Agreement and the Site’s Terms of Use, this Agreement shall govern. In the event of any conflict between this Agreement and any Third Party Terms, the Third Party Terms shall govern solely with respect to the Third Party Data to which they apply. Developer understand that Third Party Data, if any, is only licensed herein to the extent Affymetrix has the legal right to do so, and any restriction herein on Developer’s use of Third Party Data is not intended to, and shall not, limit any rights to Third Party Data expressly granted to Developer by any Third Party Terms. Developer is solely responsible for complying with all Third Party Terms. Where the Software and/or Data are used in connection with an Affymetrix product or service, the licenses granted in this Agreement are subject to any license limitations or other restrictions in Affymetrix’ terms and conditions governing the use of such product or service. Developer agrees that any additional or different terms contained in Developer’s purchase orders or similar forms shall have no force or effect with respect to the subject matter of this Agreement.

10. USE OF ROBOTS. Developer is authorized to use automated retrieval mechanisms (i.e., “robots”) to download Data as permitted herein at reasonable periodic intervals, provided that such activity does not create or threaten to create any significant or undue burden on, or security risk for, the Analysis Center, the Site or any system resources associated therewith. The Software currently includes the NetAffx SDK, which is a set of application programming interfaces (APIs) used to download Data from the Center. Notwithstanding the foregoing, Affymetrix reserves the right to suspend or revoke such authorization and/or block the use of any such mechanism temporarily or permanently at any time without notice to Developer; Affymetrix may attempt to provide Developer with advance notice where practical in its sole discretion, but shall not have liability for any failure to do so.

11. MARKS. Developer agrees to identify “Affymetrix, Inc.” as the source of the Software, Distributable Components (except as otherwise provided in Section 3 above) and Data, except as otherwise required by any Third Party Terms, and, for derivative works, to use the names or other identifiers given to Software components by Affymetrix in accordance with Section 3 above. Developer agrees that all such uses shall be in accordance with Affymetrix’ guidelines for proper trademark use, currently located at <http://www.affymetrix.com/corporate/media/guidelines.affx>. No other license, right, or interest in any Affymetrix trademark, trade name, service mark, or other designation is granted hereunder. Without limiting the foregoing, Developer agrees not to use any Affymetrix name, identifier, trademark, trade name, service mark, or other designation (a) to imply sponsorship or endorsement by Affymetrix, (b) to disparage Affymetrix, its products or services, (c) in conjunction with any products or services that in Affymetrix’ sole judgment may diminish or damage the goodwill in Affymetrix’ marks, (d) in such a way that Affymetrix’ marks are displayed more prominently than the name/logo of Developer’s company, or (e) to infringe Affymetrix’ intellectual property rights or violate any state, federal or international law. Developer further agrees to indemnify, defend and hold harmless Affymetrix and its licensors from and against any claim, lawsuit or related action that arises or results from any such activities, in accordance with Section 19 below.

12. INTELLECTUAL PROPERTY RIGHTS. Except as expressly provided in this Agreement, all rights to Affymetrix’ intellectual property are specifically reserved. Subject to Developer’s limited license to use the Software and Data as provided above, and except as otherwise provided in any Third Party Terms, Developer agrees that Affymetrix owns all copyright, patent, trademark, trade secret, and all other intellectual property rights in the Software, Data and any modifications or enhancements to the Software or Data. Developer agrees that Affymetrix at its sole discretion may incorporate as its own (including distribution in source code form under a commercial, open source or other license) any and all modifications or enhancements Developer makes to the Software or Data and any feedback or guidance Developer provides regarding the Software or Data. Except where prohibited by any Third Party Terms with respect to Data, Developer hereby assigns to Affymetrix all rights, title and interest in such modifications, enhancements, feedback and/or guidance and agrees to execute all documents necessary to implement such assignment.

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16. U.S. GOVERNMENT END USERS. If Developer is an agency, department, or other entity of the United States government (“Government”), the use, duplication, reproduction, release, modification, disclosure or transfer of this product, or of any related documentation of any kind, including technical data, is restricted in accordance with Federal Acquisition Regulation (“FAR”) 12.212 for civilian agencies and Defense Federal Acquisition Regulation Supplement (“DFARS”) 227.7202 for military agencies. The Software is commercial computer software and commercial computer software documentation. The use of the Software by the Government is further restricted in accordance with the terms of this Agreement. The contractor/manufacturer is Affymetrix Inc., 3380 Central Expressway, Santa Clara, CA 95051.

17. LIMITATIONS OF LIABILITY AND DAMAGES. IN NO EVENT SHALL AFFYMETRIX BE LIABLE FOR ANY DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY, PUNITIVE OR OTHER DAMAGES, WHETHER IN CONTRACT OR TORT (INCLUDING NEGLIGENCE) OR UNDER ANY OTHER LEGAL THEORY, ARISING OUT OF OR RELATING IN ANY WAY TO THIS AGREEMENT OR THE USE, THE RESULTS OF THE USE, OR THE INABILITY TO USE THE SOFTWARE, DATA, ANALYSIS CENTER OR THE SITE. DEVELOPER'S SOLE AND EXCLUSIVE REMEDY FOR ANY CLAIM RELATING TO THE FOREGOING IS TO STOP USING THEM. THE LIABILITY OF AFFYMETRIX, FOR ALL CLAIMS AND EVERY FORM OF DAMAGES, SHALL IN NO EVENT EXCEED THE AMOUNT ACTUALLY PAID BY DEVELOPER IN THE PRECEDING TWELVE (12) MONTH PERIOD FOR DEVELOPER'S USE OF THE SOFTWARE AND DATA, OR FIFTY DOLLARS (U.S. \$50.00), WHICHEVER IS GREATER. DEVELOPER ACKNOWLEDGES AND AGREES THAT THE RISKS OF LOSS HEREUNDER ARE REFLECTED IN THE PRICE OF THE SOFTWARE LICENSE, AND THAT THESE TERMS WOULD HAVE BEEN DIFFERENT IF THERE HAD BEEN A DIFFERENT ALLOCATION OF RISK.

18. NOT APPROVED FOR DIAGNOSTIC USE. The Software and Data are for research use only and not for use in diagnostic procedures. Neither the Software or Data has the approval of the U.S. Food and Drug Administration ("FDA"), the Japanese Minister of Health, Labor and Welfare ("MHLW") or other regulatory approval. No license is conveyed or implied for Developer to use, and Developer agrees not to use, the Software, Data or any results generated therefrom in any manner requiring FDA, MHLW or similar regulatory approval FDA.

19. INDEMNITY. Developer agrees to indemnify, defend and hold harmless Affymetrix and its licensors from any claim (including attorneys fees and costs) arising from Developer's (a) use of Software, Data, the Analysis Center or the Site, (b) violation of any Third Party Terms, (c) violation or infringement of any third party intellectual property or other right, (c) breach of this Agreement or the Site's Terms of Use or (d) violation of any United States export law or regulation, or any other United States or other law or regulation. Developer agrees to cooperate as fully as reasonably required in the defense of any claim. Affymetrix reserves the right, at its own expense, to assume the exclusive defense and control of any matter otherwise subject to indemnification under this section and, in any event, Developer agrees not to settle any such matter without the prior written consent of Affymetrix.

20. GENERAL. This Agreement and the Site's Terms of Use constitute the entire agreement between Developer and Affymetrix with respect to the subject matter hereof and is the final, complete and exclusive statement of the terms of the Agreement, superseding all prior written and oral agreements, understandings and undertakings, as well as the terms of any current or future purchase orders or similar forms between Developer and Affymetrix, relating to the subject matter hereof. Modifications may be made only in writing and signed by an authorized corporate officer of Affymetrix. The waiver of any term or condition or any breach thereof shall not affect any other term or condition of this Agreement. Developer may not assign or transfer this Agreement without the prior written consent of Affymetrix. This Agreement shall be governed by and construed according to the laws of California, without regard to conflict of law provisions. In the event that any provision of this Agreement or portion thereof is found to be illegal or unenforceable, the Agreement shall be construed without the unenforceable provision or portion thereof.

IN WITNESS WHEREOF, duly authorized officers of Affymetrix and Company have executed this Agreement as of the Effective Date.

AFFYMETRIX, INC.

By: _____

Name: _____

Steve Lincoln

Title: _____

Vice President, Informatics