

ROCHE DIAGNOSTICS LIMITED.

TERMS AND CONDITIONS OF SALE (ARRAY SYSTEMS)

1. **SCOPE OF AGREEMENT:** This Agreement together with any Addenda attached hereto (collectively, the "Agreement") establishes (a) the terms and conditions of sale that will apply to all sales (relating solely to Array Systems) of services by Roche Diagnostics Limited or its affiliates (collectively, "Roche"), and/or the sale of goods by Roche Diagnostics Limited, to the customer ("Customer"), and (b) the procedure by which Roche and Customer may from time agree to such sales. In these terms and conditions, any and all goods so sold are referred to as "Products," and any and all services so provided and sold are referred to as "Services". If Roche is willing to sell Products and/or Services to Customer, it is on the express condition that Customer accepts these terms and conditions. Roche objects to any additional or different terms contained in any purchase order or other communication previously or hereafter provided by Customer to Roche; and no such additional or different terms or conditions will be of any force or effect. These terms and conditions, supplemented as provided in Section 2 below, will be the entire agreement between Roche and Customer on the subject of the sale of Products and/or Services by Roche to Customer; and there are no conditions to that agreement that are not expressly contained in these terms and conditions. Any variation, cancellation or waiver of these terms and conditions shall only be effective if made in writing and signed by a duly authorised representative of Roche.
2. **CONTRACTING PROCEDURE.** From time to time, Roche may propose to sell Products or Services to Customer, whether at Customer's request or not. Customer's express acceptance of any such quote/proposal, or Customer's acceptance of any Products or Services provided by Roche, will form a contract for the sale of such Products or Services on the terms set forth in Roche's quote/proposal, together with the terms of this Agreement.. Roche is under no obligation to issue any such proposal, nor to accept any order from a Customer, nor to make any sale of Products and/or Services to Customer.

No order placed by the Customer shall be deemed to be accepted by Roche until a written acknowledgement of order, which may include email or facsimile, is issued by Roche or, if earlier, Roche delivers the Goods and/or Services to the Customer
3. **PRICE:** The price(s) for the Services and Products provided to Customer will be those in Roche's quote/proposal, which shall expire thirty (30) days from the date thereof (unless otherwise specified in the quote/proposal). If the price(s) for the Services and Products have expired, Customer fails to send the Materials (as defined herein) within the time specified in the quote/proposal, or the prices are not listed on the quote/proposal, then the prices(s) for the Services and Products shall be the then-current prices for goods and services similar to such Services and Products generally in effect at the time Roche manufactures the Products or performs the Services. Except as otherwise stated on Roche's quote/proposal or agreed in writing between Roche and Customer, all prices shall exclude shipping costs, insurance, freight, taxes, fees, duties and levies, which shall be payable by Customer.
4. **DELIVERY/TIMING OF PERFORMANCE:**
 - A. Products and Data are delivered to Customer ex works Roche's facilities, as such delivery term is defined in *Incoterms 2000*.
 - B. All dates for delivery of Products or Data, or performance of Services are approximate. Further, Roche shall not be responsible for loss of Materials, delays or failures in the delivery of any Data

or Products, or in performance of Services, and reserves the right to cancel or delay any contract, due to causes beyond its reasonable control, including but not limited to shortages of supplies, actions of government agencies, acts of nature, acts by Customer, fires, strikes, or other labor difficulties, wars, hostilities or terrorist acts, embargoes, equipment breakdown, or inability to obtain necessary labor, material or manufacturing facilities. In the event of such delay, and assuming that Roche chooses not to cancel due to such cause, the date of delivery shall be extended for a period equal to the time lost by reason of the delay.

5. **MATERIALS:**

- A. All samples, sequences, polynucleotide or polypeptide sequences, reagents, biological materials, data, or results to be provided by Customer to Roche ("Materials") must be shipped to Roche NimbleGen Inc. facility in either Reykjavik, Iceland or Madison, Wisconsin, in accordance with and as specified in Roche's quote/proposal and eform instructions, DDP such facility (as such delivery term is defined in *Incoterms 2000*). Any Materials not used in Roche's performance of Services shall be returned to Customer only upon Customer's written request, and provided that Customer gives such notice within six (6) months from completion of the Services and pays for the shipment of Materials back to Customer. If Roche does not receive any notice from Customer within such six-month period, Roche may destroy any remaining Materials at any time thereafter.
- B. Customer represents that any Materials provided by Customer are not subject to any restrictions or regulations related to the Materials' import into or export from the United States and/or Iceland, that Customer is the owner of, or otherwise has the right to authorize Roche to perform the Services on, use and/or copy the Materials, and that the Materials are non-pathogenic. Customer agrees to identify and label as such any of the Materials provided by Customer that are derived from Class II or Class III organisms, to provide Roche with all information regarding real or potential hazards known to be associated with the use of the Materials, and to comply with all laws and regulations governing the shipment of the Materials. Customer will defend, indemnify, and hold Roche harmless from and against any claim, demand, or cause of action (each a "Claim") brought against Roche to the extent the Claim is attributable to any breach of the foregoing representations and/or covenants, provided that (1) Roche promptly notifies Customer in writing of any Claim within 10 days after Roche becomes aware of such Claim or the potential that a third party may assert such a Claim; (2) Customer has sole control of the defense and all related settlement negotiations; and (3) on Customer's request and expense, Roche cooperates with and assists Customer in the defense of any such Claim or potential Claim.

6. **PRICE and PAYMENT:**

- A. Roche's list prices are subject to alteration without notice and are stated exclusive of Value Added Tax and all other taxes (where applicable).
- B. Unless orders are accepted on a pre-payment basis, when payment for the goods shall be due in advance of delivery, accounts are due for payment within thirty days of the date of invoice and no accounts shall be deemed to be paid until Roche has received cleared funds. Roche reserves the right to withdraw these credit terms at any time without notice.
- C. UK accounts are invoiced and payable in pounds sterling and all other EU accounts are invoiced and payable in euros.
- D. The Customer shall notify Roche of any invoice discrepancy within 14 days of receipt of the invoice after which time the invoice shall be deemed accepted by the Customer.
- E. In the event Services are performed but cannot be completed because Customer has not provided such Materials as are required to complete the Services, Roche will make a good faith effort, for a period of time not to exceed six months, to retain arrays and

other work product (Work Product") so that the Services can be completed upon receipt of Customer's Materials. At the expiration of six months, Roche may discard the Work Product without notice and without any liability to Customer. In such event, Customer will remain liable to pay for Services that have been performed.

- F. Roche reserves the right to charge interest pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 (as supplemented, amended or replaced from time to time) on any sums remaining unpaid after the due date.
- G. Roche reserves the right at any time at its discretion to demand security for payment before continuing with or delivering any order.

The Customer shall not be entitled to set-off against any sums owed to Roche.

7. INTELLECTUAL PROPERTY RIGHTS/USE OF PRODUCTS AND SERVICES:

- A. Customer shall own all right, title and interest in and to any data pertaining to the Materials and that is generated in the performance of the Services ("Data") and any microarray probe designs supplied by Customer. Customer acknowledges that the Services and Products provided to Customer, including but not limited to designs created by Roche in order to manufacture Products for sale to Customer or for use by Roche in performing Services, embody intellectual property deemed to be of significant value to Roche, and that such intellectual property is owned by Roche, and may be protected by the law of patents, copyrights, trade secrets, and other laws pertaining to computer software, which Customer agrees to preserve. Customer acknowledges and agrees that neither this Agreement nor the performance of the Services for Customer or the purchase of the Products by Customer shall be construed as a transfer of any title to the intellectual property or the grant of any rights in and to the intellectual property embodied in the Services and Products owned by Roche. Any data, discoveries or inventions (a) pertaining to how the Services are performed or how the Products are manufactured, (b) the underlying technology used by Roche to perform the Services and manufacture Products, or (c) in any microarray probe designs developed or designed by Roche, shall be exclusively owned by Roche.

- B. PRODUCTS, AND/OR COMPONENTS OF THE PRODUCTS SOLD PURSUANT TO THESE TERMS, ARE LICENSED BY AFFYMETRIX UNDER CERTAIN PATENTS OWNED BY AFFYMETRIX. PRODUCTS ARE LICENSED FOR RESEARCH USE ONLY, AND NOT FOR USE IN DIAGNOSTIC PROCEDURES. THIS LIMITED LICENSE PERMITS ONLY THE USE OF PRODUCTS FOR RESEARCH PURPOSES. NO OTHER RIGHT, EXPRESS OR IMPLIED, IS CONVEYED BY THE SALE OF PRODUCTS. IN PARTICULAR, NO RIGHT TO MAKE, HAVE MADE, OFFER TO SELL, OR SELL MICROARRAYS IS IMPLIED BY THE SALE OR PURCHASE OF PRODUCTS. THE PURCHASE OF PRODUCTS DOES NOT BY ITSELF CONVEY OR IMPLY THE RIGHT TO USE SUCH PRODUCTS IN COMBINATION WITH ANY OTHER GOODS WHOSE MANUFACTURE, SALE OR USE IS COVERED BY AN AFFYMETRIX PATENT. NO RIGHT TO MAKE, HAVE MADE, USE, IMPORT, OFFER TO SELL, OR SELL ANY OTHER GOODS IN WHICH AFFYMETRIX HAS PATENT RIGHTS (INCLUDING WITHOUT LIMITATION MICROARRAY READERS OR DETECTORS OR SOFTWARE FOR USE WITH MICROARRAY READERS OR DETECTORS) IS IMPLIED BY THE SALE OR PURCHASE OF PRODUCTS.

- C. Customers may use the Data and the Products sold by Roche for research purposes only and not in diagnostic procedures.

- 8. CONFIDENTIALITY: Any information marked confidential by Roche and transmitted to Customer in confidence shall be maintained in confidence by Customer, except to the extent that (i) Customer can show by written record that it possessed the information prior to its receipt from Roche; or (ii) the information was already available to the public or became so through no fault of Customer; (iii) the information is required to be disclosed under operation of law; or (iv) five (5) years have elapsed since the disclosure of the information to Customer by Roche; provided, however, that the expiration of that five-year period shall not affect the respective rights of Roche or responsibilities of Customers with respect to information that constitutes "trade secrets" as defined in applicable law, which rights and responsibilities shall continue for as long as such information remains trade secrets. Any information marked confidential by Customer and transmitted to Roche in confidence shall be maintained in confidence by Roche, except to the extent that (i) Roche can show by written record that it possessed the information prior to its receipt from Customer; or (ii) the information was already available to the public or became so through no fault of Roche; (iii) the information is required to be disclosed under operation of law; or (iv) five (5) years have elapsed since the disclosure of the information to Roche by Customer; provided, however, that the expiration of that five-year period shall not affect the respective rights of Customer or responsibilities of Roche with respect to information that constitutes "trade secrets" as defined in applicable law, which rights and responsibilities shall continue for as long as such information remains trade secrets.

9. LIMITED WARRANTY BY ROCHE:
- A. **Services:** Roche represents and warrants that any Services that it provides to Customer will be performed in accordance with generally accepted industry standards of care and competence. Customer's sole and exclusive remedy (and Roche's sole and exclusive liability) under this limited warranty shall be for Roche to either (a) re-perform the Services, or (b) provide Customer with a refund (the choice between those alternatives being in Roche's sole discretion). Roche makes no warranties or guaranties regarding the Data that is generated from Services and Products. The Data is dependent upon the Materials provided by Customer and the scientific results possible under the underlying technology employed in performing the Services.
- B. **Products:** Roche warrants that its Products conform to its published specifications and are free from defects in material or workmanship. Customer's sole and exclusive remedy (and Roche's sole and exclusive liability) under this limited warranty shall be for Roche to either (a) replace the defective Products, or (b) provide Customer with a refund (the choice between those alternatives being in Roche's sole discretion).
- C. **Liability Limitation:** Under no circumstances shall Roche's liability to Customer for breach of the above warranties, or other breach of this Agreement, exceed the amount paid by Customer for such Services and Products. Roche will bear all reasonable shipping costs if Service are re-performed at Roche or the Products are replaced. This warranty does not apply to any defect or nonconformance caused by (i) the failure by Customer to provide a suitable storage, use, or operating environment for the Materials or Customer's submission of substandard quality Materials or contaminated or degraded Materials to Roche, (ii) Customer's use of reagents other than those recommended by Roche, (iii) Customer's use of the Products, Materials or Data for a purpose or in a manner other than that for which they were designed, (iv) the failure by Customer to follow Roche's published protocols; or (v) any other abuse, misuse or neglect of the Products, Materials or Data by Customer. This warranty applies only to Customer and not to third parties.
- D. Roche disclaims all other representations, and warranties, express or implied, with respect to the products, services and data, including but not limited to, any implied warranties of merchantability, fitness for a particular purpose or non-infringement. Customer's sole remedy for breach of warranty is stated above.
- E. Any action by Customer against Roche for Roche's breach of this warranty must be commenced within 12 months following the date of such breach. Notwithstanding such 12-month period, within twenty (20) days of the delivery of Data and/or Products to Customer, Customer must notify Roche in writing of any nonconformity of the Services and Products, describing the nonconformity in detail; otherwise all Services and Products shall be conclusively deemed accepted without qualification
10. **FURTHER LIABILITY LIMITATION:** Roche shall in no event be liable for incidental, punitive, consequential, indirect, special or other, similar categories of damages, however caused and regardless of form of action, whether in contract, tort (including negligence), strict liability or otherwise, even if Roche has been advised of the possibility of such damages. Customer understands that any risks of loss hereunder are reflected in the price of the services and products and that these terms would have been different if there had been a different allocation of risk
11. **MISCELLANEOUS:** Modifications to this Agreement may be made only in writing, signed by an authorized corporate officer of Roche. The waiver of any term or condition or any breach thereof shall not affect any other term or condition of this Agreement. A person who is not a party to

the Contract has no right under the Contracts (Rights of Third Parties) Act 1999 to enforce any of these terms and conditions.

These terms and conditions shall be governed by and construed in accordance with English law and the parties submit to the exclusive jurisdiction of the English courts.