

TESTING AGREEMENT FOR FRUIT PLANT MATERIAL

Established (2007) by the EUFRIN Working Group "Apple and pear variety testing"
Version 1.1 - Updated March 4th, 2009

The Parties:

.....

hereafter designated The Recipient,

and

.....

hereafter designated The Breeder,

Whereas:

The Recipient.....

The Breeder.....

hereinafter both together and individually also referred to as the ‘Parties’ respectively ‘Party’;

NOW IT IS HEREBY AGREED AS FOLLOWS:

CLAUSE 1 –Definitions

1.1 Unless the context otherwise requires, the following definitions shall apply throughout this Agreement:

“Agreement” this agreement including the recitals and the Attachments, and any modifications and updates made in accordance with the provisions hereof.

“Attachment” any appendix attached to this Agreement.

“Breeder” means the owner of, or has exclusive rights in relation to, the Variety.

“Confidential Information” means the Material and any and all the information and data, technical or non-technical, which relates to the Variety and which is or has been transferred to or disclosed in confidence to The Recipient by The Breeder, in connection with this Agreement, as described in Clause 10.

"EUFRIN-network" means members of the EUFRIN Working Group "Apple and pear variety testing".

"Material" means Trees and any kind of vegetative material of the Variety.

"PVR" means the grant of certain plant variety rights (equivalent to "Certificat d'Obtention Végétale") pursuant to the Plant Variety Rights Act 1991 or the equivalent to that legislation in any other jurisdiction for the Variety.

"Test" or "Testing" means to carry out the services/activities/... according the latest version of the "EUFRIN Descriptor List for level-1-Trials" for apple and pear (Attachment 2).

"Testing Period" means the term of this Agreement as provided for in Clause 12.

"Testing Station" means the testing station of The Recipient at and such other testing stations as the Parties may subsequently agree.

"Trees" means trees of the Variety.

"To grub" means the removal and destruction of the Material

"Variety" means the cultivars described in Attachment 1 and, where the context requires, refers to the list of cultivars either singularly, in combination of some of them or jointly as a group.

CLAUSE 2 – Engagement

The Breeder engages The Recipient, and The Recipient accepts that engagement, to Test the Variety by growing Trees from Material supplied by The Breeder or an authorised representative of The Breeder, and to provide information on these Tests in accordance with Clause 5 during the Testing period on the terms of this Agreement.

CLAUSE 3 – Rights

- 3.1 The rights granted to The Recipient pursuant to Clause 2 are non-exclusive and are solely to evaluate the horticultural merit of the Variety, including sensory and consumer tests, by experimental means in accordance to Clause 4.
- 3.2 The Recipient shall not release the Material nor shall it permit any other party to do so or to have access to it. As long as the variety is not protected by a successful PVR-registration in the country of the Recipient, the Recipient shall not release any fruits, pips or pollen of the variety nor shall it permit any other party to do so or to have access to it.

CLAUSE 4 – Testing

- 4.1 The Recipient shall keep clear and full records of the numbers and location of the Material on the Testing Station.
- 4.2 The maximum volume of the Material for Testing will be described in Attachment 1.
- 4.3 The Recipient shall not receive any financial compensation from The Breeder for Testing.

- 4.4 Any additional testing requested by The Breeder shall only be carried out by The Recipient after adding an additional clause to this Agreement, setting out the technical and financial terms.

CLAUSE 5 – *Transmission of testing results and information*

- 5.1 On written request of The Breeder, The Recipient shall, to ensure Clause 8 and this Clause 5 are complied with, confidentially provide The Breeder or, where The Breeder gives his consent, his agent, with the Testing Results.
All such results shall remain the property of The Recipient and shall not be released by The Breeder or any authorised representative of The Breeder without the prior written consent of The Recipient.
- 5.2 The Recipient is entitled to show fruits and/or plants and to publish the Testing Results after prior written notice to the Breeder, but only without reference of origin and pedigree and only under a concocted code name (not related to the cultivar name or the Breeder). The Recipient is entitled to publish from the moment that Trees are sold or any kind of advertisement with the Variety takes place in the country of the Recipient.

In addition, in case any part of information for which publication is requested is the subject of a PVR application, the publication shall be delayed until one (1) year after the filing of a national or European PVR.

- 5.3 The Breeder shall supply The Recipient with any and all relevant information that relate to the Variety and of which The Breeder reasonably considers they may be useful for the Testing of a foresaid Variety by The Recipient.

CLAUSE 6 – *Ownership of the plant material*

- 6.1 The Material shall remain the property of The Breeder.
- 6.2 Parties retain absolute discretion over the continued use by or supply to The Recipient of the Material and the testing of the Variety.
- 6.3 The Recipient is not allowed to use the Material for breeding activities until the Material is introduced into the market in the country of The Recipient and conditional to The Breeder being informed of the fact that the Material is being used for breeding.

CLAUSE 7 – *Testing station*

- 7.1 The Recipient shall notify The Breeder prior to any change of the location of the Testing Station.
- 7.2 At such time as the Trees have been planted, The Recipient will furnish on written request of The Breeder, a statement to The Breeder identifying such Trees and their location and will identify the Trees by code number assigned, row number and position in row.
- 7.3 The Recipient shall ensure the Testing Station is secure and that access to the Trees shall be limited to such staff as reasonably need access.

CLAUSE 8 – *Quality and performance*

- 8.1 The Recipient will grow the Trees in a good and husband-like manner in accordance with the standard prevailing for such Trees in the industry and shall exercise reasonable skill and care.
- 8.2 The Recipient shall permit The Breeder, after prior written request, during business hours to visit the Testing Station to inspect his Material whilst accompanied by The Recipient staff to ensure that the standards required under this clause 8 are being met and to take such samples of any improved or developed Material (including fruit) as The Breeder considers necessary.

CLAUSE 9 – *Plant variety rights*

- 9.1 The Recipient shall not:
- a) take any action which might prejudice the PVR for the Material;
 - b) make application for, nor maintain any rights for the Material.
- 9.2 Any essentially derived variety (as defined in Article 14 (5) (b) and (c) of the 1991 text of the UPOV Convention as subsequently amended) arising from the Material in The Recipient's possession or control is the property of the owner of the relevant Material, who has the exclusive rights in respect of it. On becoming aware of any essentially derived variety The Recipient shall immediately notify The Breeder. Any assistance given by The Recipient, on written request of The Breeder, with the transfer of all rights thereto shall be remunerated at its fair value by The Breeder. The Recipient will not seek any plant variety rights or any other intellectual property rights for any variety, or any essentially derived variety arising through the use of the variety under this agreement, or anything relating to them.

CLAUSE 10 – *Confidentiality*

- 10.1 Each Party must at all times maintain confidentiality of the Confidential Information, except:
- a. information or material that as of the date of receipt by The Recipient was available to the public or subsequently available to the public in a manner not in breach of this Agreement;
 - b. information or material that at the time of receipt by The Recipient was known to The Recipient;
 - c. information or material that at any time is received in good faith by The Recipient from a third party, whom The Recipient could reasonably consider to be lawfully entitled to transfer this information or material;
 - d. information or material that the Parties mutually agree in writing to release from the terms of this Agreement;
 - e. information exchange between the formal members of the EUFRIN-network.
- 10.2 The Recipient, The Breeder and any authorised representative of The Breeder shall take all reasonable steps to minimise the risk of disclosure or release of Confidential Information by ensuring that only employees whose duties will require them to possess all or any part of the Confidential Information shall have access thereto, and they

shall be instructed to treat the same as confidential. Proper and secure storage shall be provided for the Material, papers, drawings and other Confidential Information.

- 10.3 For the avoidance of doubt, any authorised representative of The Breeder and such other parties to whom The Breeder has granted prior written consent may have access to the Trees.
- 10.4 The obligations of confidence remain in force for a period of 5 (five) years after expiration or termination of this Agreement.

CLAUSE 11 – Assignment

- 11.1 The Breeder may assign its rights and obligations and will inform The Recipient about this assignment at the earliest convenience. Such party shall sign a clause under which it commits itself to comply with all and any obligations pursuant to this Agreement.
- 11.2 The Recipient may sublicense the Testing under this Agreement to a party authorised by The Breeder. Such party shall sign a clause under which it commits itself to comply with all and any obligations pursuant to this Agreement.

CLAUSE 12 – Term and termination

- 12.1. This Agreement shall be in effect on the date of signature by the second Party for a period of five (5) years. Without written notice 60 days prior to termination, this Agreement will automatically be renewed annually for the period of one year.
- 12.2. Based on the evaluation data, The Recipient is entitled to finish Testing of and to grub the Trees of a nominated Variety included in the Attachment 1 of this Agreement at the earliest 60 days after prior written notice to The Breeder.
- 12.3. At the latest 60 days after prior written notice by The Breeder, Testing of a Variety nominated in the Attachment shall terminate. When this written notice of The Breeder is received by The Recipient after the 1st of March of a calendar year, The Recipient is entitled to complete the Testing till the end of this year.
- 12.4. Notwithstanding Clauses 12.1, 12.2 and 12.3, a Party, i.e. The Breeder or The Recipient, may terminate this Agreement by notice in writing if the other Party fails to remedy any breach of any obligation undertaken by it or imposed upon it under this Agreement which is capable of remedy within thirty days of a notice from the first Party (such notice specifying the default and warning of the intention to terminate).
- 12.5. Any termination or expiration of this Agreement or parts of it shall be without prejudice of the rights of each Party against the other which may have accrued up to the date of such termination.
- 12.6. Upon expiration or termination of this Agreement The Recipient shall destroy all Material in The Recipient's possession or control.
- 12.7 Termination of the Agreement shall be without prejudice to the obligations of Parties pursuant to the articles 6 and 10.

CLAUSE 13 – General

- 13.1 This Agreement comprises the entire Agreement between the Parties in relation to the matters referred to herein and supersedes any previous agreement or arrangement or in relation to the subject matter of the Agreement. The Parties unconditionally waive any right to rely on any state or representation not expressly recorded in this Agreement.
- 13.2 Enforceability: Should any part or provision of this Agreement be held unenforceable or in conflict with the applicable laws of any jurisdiction, the invalid or unenforceable part or provision shall be replaced with a provision which accomplishes, to the extent possible, the original business purpose of such part or provision in a valid and enforceable manner, and the remainder of the Agreement shall remain binding upon the Parties.
- 13.3 References in this Agreement to any statutory provision shall include a reference to that provision as amended, extended or re-enacted and to any statutory replacement thereof and shall also include reference to all statutory instruments and orders made pursuant to any such statutory provision.

CLAUSE 14 – Liability

- 14.1 The liability for damage of Parties to each other, except for malicious intent or gross negligence, for each damage by virtue of an imputable failure to comply with any obligation arising from this Agreement and/or by virtue of unlawful act or omission or any other ground or title, shall be fully excluded.

CLAUSE 15 – Laws

- 15.1 This Agreement shall be construed according to and governed by the laws of the country of the Breeder and each of the Parties submits to the exclusive jurisdiction of the home-city Court of the Breeder.

The Parties:

hereafter designated The Recipient,

and

hereafter designated The Breeder,

Whereas:

The Recipient.....

The Breeder.....

hereinafter both together and individually also referred to as the ‘Parties’ respectively ‘Party’;

In witness whereof this Agreement has been executed in duplicate and signed and initialled per page and lawfully represented by,

The Breeder,
X
Name:
Function:
Place:
Date:
Signature:

The Recipient
X
Name:
Function:
Place:
Date:
Signature:

Attachment 1 : Varieties in Testing belonging to testing agreement

The Parties:

.....

hereafter designated The Recipient,

and

.....

hereafter designated The Breeder,

Table : Varieties in Testing

Cultivar	Species	Parentage	Virusstatus	Resistance	Maximum Number of Trees	Year*	Location of Testing

* Year = date of sending the Material or the Variety.

In witness whereof this Attachment has been executed in duplicate and signed and initialled per page and lawfully represented by,

The Breeder,

X

Name:

Function:

Place:

Date:

Signature:

The Recipient

X

Name:

Function:

Place:

Date:

Signature:

It is the intention of this document, that the Breeder every year sends a new document/list to the Recipient (= a new Attachment 1) with those varieties from his property, that are in test (if there are new varieties for testing or if there are varieties, that are grubbed). Varieties that are grubbed, must be deleted and new varieties have to be added to the list.