

DRAFT FOR DISCUSSION AND REVIEW

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NON-ASSERT AGREEMENT FOR EUROPEAN SMALL VEGETABLE BREEDING COMPANY**European Patent No. EP [1234567] B1**

This NON-ASSERT AGREEMENT (the “Agreement”) is made and effective this [Month Day, Year] (the “Effective Date”) by and between Seminis Vegetable Seeds, Inc., a California corporation, with offices at 800 North Lindbergh Boulevard, Saint Louis, Missouri, 63167 United States (herein “Bayer”), and _____, a _____ corporation, with offices at _____, and any Permitted Affiliates (herein collectively “EUSVBC”). In this Agreement, Bayer and EUSVBC are sometimes referred to individually as “Party” and collectively as the “Parties”.

RECITALS

WHEREAS, Bayer is willing to facilitate access for European Small Vegetable Breeding Companies to certain of its patents listed in the Euroseeds PINTO database in the form of a non-assert agreement as herein defined;

WHEREAS, Bayer owns or has rights to European Patent No. EP [1234567] B1 entitled _____ (“Bayer IP Right” as defined in Section 1.1) related to Crop;

WHEREAS, EUSVBC is a European Small Vegetable Breeding Company as defined in Section 1.2 and wishes to obtain a non-assert agreement with respect to the Bayer IP Right to commercialize one or more vegetable varieties in the Member States of the European Union (“Territory”); and

WHEREAS, Bayer is willing to provide such non-assert agreement to EUSVBC with respect to the Bayer IP Right for EUSVBC to develop and commercialize one or more vegetable varieties in the Territory under the terms and conditions set forth herein.

Bayer and EUSVBC hereby agree as follows:

1. DEFINITIONS

1.1 **“Bayer IP Right”** means solely national validations of European patent EP [1234567] B1 in the Territory and specifically excludes: (i) all counterparts outside of the Territory claiming the same priority as or that claim priority of EP [1234567] B1, (ii) all European Union, national, and foreign plant variety rights, and (iii) any and all other European Union, national, or foreign intellectual property rights.

1.2 **“European Small Vegetable Breeding Company”** means a company (i) registered in a Member State of the European Union, (ii) operating in the business of breeding and selling seeds of vegetable varieties in the Field, and (iii) that is a small enterprise according to the definition of the European Commission Recommendation 2003/361/EC, i.e. an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million, taking into consideration partner enterprises and linked enterprises as defined in such Commission Recommendation.

1.3 **“Field”** means the home garden market segment, the open field market segment, the protected market segment, and the greenhouse protected market segment.

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1.4 “**PINTO**” means the online database of EuroSeeds (<https://euroseeds.eu/pinto-patent-information-and-transparency-on-line/>), where the acronym PINTO stands for “Patent Information and Transparency On-line”.

1.5 “**Product**” means a commercial variety of **Crop** created by EUSVBC using conventional breeding methods and without the use of marker assisted selection, gene editing, transformation, or similar methods, and covered by the Bayer IP Right. A Product may not be the same as, essentially derived from, or produced by backcrossing, selecting from, or selfing a Bayer variety.

1.6 “**Territory**” means a Member State of the European Union.

2. NON-ASSERT COVENANT

2.1 Non-assert. Bayer hereby covenants, and EUSVBC hereby accepts, on and subject to the terms and conditions set forth in this Agreement, not to assert the Bayer IP Right against EUSVBC during the Term for breeding, making, using, developing, producing, having produced, offering to sell, and selling a Product by EUSVBC in the Territory in the Field.

2.2 Dealers, Distributors, Customers. The non-assert set forth in Section 2.1 includes the limited right for EUSVBC to (i) contract with a third party to produce seed of a Product in the Territory solely as set forth in this Agreement and for the benefit and use by EUSVBC; (ii) contract with a third party to promote, sell, commercialize, or distribute a Product in the Territory in the Field solely as set forth in this Agreement and for the benefit of EUSVBC; and (iii) permit customers who legally purchase a Product in the Territory to plant the seed or a transplant from the seed in the Territory in the Field to produce a crop.

2.3 Limits. Except for the non-assert as set forth in Sections 2.1 and 2.2, EUSVBC shall have no rights to the Bayer IP Right and shall not license, practice, assign, use, or sublicense the Bayer IP Right. The non-assert does not apply outside the Territory or outside the Field and EUSVBC shall not have the right to import a Product into the Territory or export a Product from the Territory. This Agreement provides no rights or licenses to any seed, varieties, germplasm, material, other patents, plant variety rights, identity marks, service marks, trademarks, or other rights of Bayer. All proprietary rights are hereby reserved by Bayer.

3. OBLIGATIONS OF EUSVBC

3.1 Reporting on status of European Small Vegetable Breeding Company. Based on the prior year financial figures from January 1st to December 31st of a given year, EUSVBC shall report once every calendar year to Bayer about its status as a European Small Vegetable Breeding Company by declaring on honor whether its company structure still meets the requirements set forth in Section 1.2. Such report shall be made using the declaration form attached as Annex 1, which shall be sent to Bayer no later than March 31st every year following the applicable year. Bayer may reasonably request and EUSVBC shall promptly provide documentation to verify the status of EUSVBC as a European Small Vegetable Breeding Company.

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3.2 **Disqualification as a European Small Vegetable Breeding Company.** EUSVBC shall promptly notify Bayer when and if EUSVBC no longer qualifies as a European Small Vegetable Breeding Company according to the definition set forth in Section 1.2 or in the event the following occurs: (a) EUSVBC together with any partner or linked enterprises as defined in the European Commission Recommendation 2003/361/EC, generates an annual turnover or annual balance sheet total above EUR 10 million, or has a number of employees above 50 persons, for two consecutive years, during which no acquisition event described under (b) has occurred; or (b) EUSVBC incorporates one or more new partner or linked enterprise in a given year, either by acquiring, or being acquired by, a third party, which acquisitions leading to EUSVBC, together with its partner or linked enterprises, generating a proforma annual turnover or annual balance sheet total above EUR 10 million, or a number of employees above 50 persons, in such given year.

3.3 **Notification of Product and Inclusion in PINTO.** EUSVBC shall notify Bayer, in writing, prior to commercialization of a Product and include the name(s) of the Product and the names(s) of the entities or Permitted Affiliates authorized to sell the Product. EUSVBC shall include a Product and the Bayer IP Right in PINTO. EUSVBC shall use its own branding with the Product and shall not include any reference to Bayer or its affiliates.

3.4 **Notice of Infringement.** As reasonably possible, EUSVBC shall promptly notify Bayer of any known infringement, suspected infringement, or potential infringement of the Bayer IP Right by any third party.

3.5 **Royalty Bearing License.** EUSVBC may request a royalty-bearing, non-transferable, non-exclusive license from Bayer to (i) the Bayer IP Rights after disqualification according to Section 3.2 and as set forth in Section 4.2; (ii) other intellectual property related to Product; or (iii) for rights outside the Territory. To the extent possible, Bayer agrees to negotiate with EUSVBC, in good faith, for a non-exclusive, non-transferable, royalty bearing license with fair and reasonable royalty terms.

4. TERM AND TERMINATION

4.1 **Term.** The term of this Agreement shall begin on the Effective Date and shall continue until (i) the date of expiry of the Bayer IP Right; or (ii) the date set forth in Section 4.2 with respect to a disqualification under Section 3.2, unless earlier terminated as set forth in Section 4.3 (“Term”). Expiration or termination shall not relieve EUSVBC of any obligation accruing prior to or continuing after such expiration or termination. Upon expiration or termination, the provisions set forth in this Agreement shall immediately terminate.

4.2 **Expiration under Section 4.1(ii).** Upon written request from EUSVBC within thirty (30) days of the disqualification as set forth in Section 3.2, to the extent possible, Bayer agrees to negotiate with EUSVBC, in good faith, for a non-exclusive, non-transferable, royalty-bearing license to the Bayer IP Right with fair and reasonable royalty terms. In the absence of a written request from EUSVBC, the Term will expire thirty (30) days after the date on which EUSVBC no longer qualifies as a European Small Breeding Company as set forth in Section 3.2. To the extent EUSVBC makes a written request to Bayer,

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the Term will expire ninety (90) days after receipt of the written request. Upon expiration, the provisions set forth in this Agreement shall immediately terminate.

4.3. Early Termination. Bayer may immediately terminate this Agreement if (i) EUSVBC commits a material breach of its obligations under this Agreement and EUSVBC fails to cure such breach within sixty (60) days from written notice; (ii) EUSVBC becomes bankrupt, is insolvent, or has a custodian, receiver, or trustee appointed; or (iii) EUSVBC is disqualified under Section 3.2, subject to Section 4.2. Upon termination, the provisions set forth in this Agreement shall immediately terminate.

5. REPRESENTATIONS, WARRANTIES AND LIABILITY

5.1 EUSVBC. EUSVBC represents and warrants that it is a European Small Vegetable Breeding Company and that EUSVBC is an entity duly organized, validly existing, and in good standing under the laws of [REDACTED] with full power and authority to execute and deliver this Agreement and to perform its obligations hereunder.

5.2 Bayer. Bayer represents and warrants that Bayer has sufficient rights to the Bayer IP Right to the extent required for the non-assert in this Agreement. Except for the express warranty set forth above, the covenant is provided AS IS, WHERE IS, with all faults. Bayer makes no other representations or warranties, express or implied, and expressly disclaims all other warranties, express or implied, including, but not limited to, warranties of performance, fitness for a particular purpose, or non-infringement with respect to third party rights. In no event shall Bayer be liable for any indirect, special, or consequential damages of any kind.

5.3 Liability. EUSVBC shall be liable and shall assume and bear any and all risks and liability in connection with EUSVBC's actions or failures to act under this Agreement, with respect to a Product, or any other activities of EUSVBC.

6. MISCELLANEOUS

6.1 Assignment and Affiliates. This Agreement shall be binding and inure to the benefit of the Parties and their permitted successors and assignees. This Agreement may not be assigned, sold, transferred, or otherwise disposed of by EUSVBC, by asset sale, operation of law, or otherwise, without the prior written consent of Bayer, which shall not be unreasonably withheld to the extent the assignee qualifies as a European Small Vegetable Breeding Company. For any intended assignment that would transfer the Agreement to a third party not qualifying as European Small Vegetable Breeding Company, Section 4.2 shall apply. EUSVBC shall give Bayer prompt notice of the assignment. EUSVBC shall disclose to Bayer the name of affiliates involved in activities under this Agreement ("Permitted Affiliates"), and EUSVBC shall be liable for acts or omissions of such Permitted Affiliates.

6.2 Compliance with Laws. The Parties agree to comply with all national, international, federal, national, and state laws applicable to this Agreement and the performance thereof including any seed laws.

6.3 Relationship of Parties. The Parties acknowledge that this Agreement does not create a joint venture, partnership, or the like between them. A Party shall not be deemed or construed to be a partner, agent, or representative of the other Party.

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6.4 Counterparts and Electronic Signature. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and which together will constitute one instrument. Signatures may be validly delivered by original signature or electronic signature system, including DocuSign, and all such signatures may be used for any and all purposes for which an original signature may have been used.

IN WITNESS WHEREOF, the Parties caused this Agreement to be executed by their duly authorized and empowered representatives.

Bayer
Date:

EUSVBC
Date:

Name:
Title:

Name:
Title:

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Annex 1

DECLARATION as EUROPEAN SMALL VEGETABLE BREEDING COMPANY

according to the

NON-ASSERT AGREEMENT FOR EUROPEAN SMALL VEGETABLE BREEDING COMPANY

European Patent No. EP[1234567]B1

between Bayer and EUSVBC

Identification of the EUSVBC:

Name:

Address:

Registration Number:

The criteria determining whether a company has the status of European Small Vegetable Breeding Company are set forth in Section 1.2 of the Agreement.

I hereby declare on my honor that the above-identified enterprise that I lawfully represent, together with any partner enterprise or linked enterprise as defined in the European Commission Recommendation 2003/361/EC, fulfils the criteria of a European Small Vegetable Breeding Company as set forth in Section 1.2 of the Agreement.

Name and position of the signatory:

Signature:

Place and Date: