



**NON-EXCLUSIVE GROWER AGREEMENT
(WA 38 APPLE VARIETY)**

This Non-Exclusive Grower Agreement (“Agreement”) is effective on ____ / ____ / ____
(hereinafter “Effective Date”) by and between:

Northwest Nursery Improvement Institute
a Washington corporation
2340 Lee Road
Prosser, WA 99350
(hereinafter “NNII”)

License Information	

Planting Year:	
Maximum Quantity:	0

And

Name of entity or person: _____
Entity type (LLC, individual, partnership, etc.): _____
Physical address of grower: _____

Mailing address: _____

(hereinafter “Grower”).

RECITALS

A. Washington State University (WSU) is the owner of the apple variety ‘WA 38,’ (the "Licensed Variety") which is the subject of U.S. Plant Patent No. PP24,210 issued February 4, 2014 (the “’210 Plant Patent”). WSU has entered into an agreement with Proprietary Variety Management, LLC (“PVM”) for commercialization of the Licensed Variety. PVM has granted a license to the Northwest Nursery Improvement Institute (“NNII”) to propagate and provide trees of the Licensed Variety to growers through NNII qualified nurseries, subject to grower’s entry into a license under the ‘210 Plant Patent.

B. Grower grows and sells fruit from land owned in Washington State. Grower desires to receive trees of the Licensed Variety from a qualified nursery licensed by NNII (“Licensed Nursery”), and to receive a limited non-exclusive license under the ‘210 Plant Patent to grow trees of the Licensed Variety only in Washington State. NNII desires to grant that limited non-exclusive license to Grower, subject to the terms and conditions set forth below.

C. NNII has authorized Licensed Nursery to execute this Agreement on NNII’s behalf.

AGREEMENT

NOW THEREFORE, NNII and Grower (collectively the "Parties" and individually as a "Party") hereby agree as follows:

1. DEFINITIONS

For the purposes of the Agreement, the following words and phrases shall have the following meanings:

1.1 "Licensed Apples" means fresh whole apples grown from Licensed Trees.

1.2 "Licensed Variety" means the following WSU intellectual property: WSU apple Variety No. WSU 38 patented under the name, 'WA 38,' which is the subject of U.S. Plant Patent No. PP24,210 issued February 4, 2014.

1.3 "Licensed Trees" means finished trees of the Licensed Variety that have been duly and properly obtained from a Licensed Nursery.

1.4 "Licensed Nursery" means a nursery that has a license to produce Licensed Trees. A list of Licensed Nurseries can be obtained from "NNII" www.nniifruittrees.org.

1.5 "Territory" means the state of Washington.

1.6 "Licensed Packer" means a fruit packer licensed under the '210 Plant Patent to store, pack, and to transport fresh whole apples of the Licensed Variety that are duly and properly received from a Licensed Grower.

1.7 "Licensed Marketer" means a fruit marketer licensed under the '210 Plant Patent to market, offer for sale, sell, and to export Licensed Apples that are duly and properly received from a Licensed Packer.

1.8 "Licensed Processor" means a fruit processor licensed under the '210 Plant Patent to process Licensed Apples duly and properly received from a Licensed Grower into food, beverage, or ingredient products other than fresh whole apples.

1.9 "Farmgate" means the retail sale of Licensed Apples directly or indirectly from farm to consumer at venues such as pick your own operations, fruit stands, and farmer's markets. It does not include sales for the wholesale and retail distribution to consumers supplied through the commercial retail market.

2. LICENSE

2.1 Subject to the terms and conditions of this Agreement, NNII hereby grants to Grower a non-exclusive, royalty bearing, limited license to (a) plant and grow Licensed Trees in commercial orchards located in the Territory, and to harvest and transport Licensed Apples produced from those Licensed Trees for delivery to a Licensed Packer; (b) to store and pack those Licensed Apples using the services and facilities of a Licensed Packer; and (c) to market, offer for sale, sell, and to export those Licensed Apples using the services and facilities of a Licensed Marketer.

OR to (a) plant and grow Licensed Trees in commercial orchards located in the Territory; (b) harvest the Licensed Apples produced by those Licensed Trees; (c) sell the Licensed Apples subject to royalty assessments at Farmgate, either directly or through another Farmgate entity.

2.2 Subject to the terms and conditions of this Agreement, NNII hereby grants to Grower a non-exclusive, fully paid-up, limited license to offer for sale and to sell Licensed Apples directly to Licensed Processors.

2.3 This license is personal to Grower. Grower is strictly prohibited from reselling or otherwise transferring Licensed Trees to a third party.

2.4 Grower acknowledges and understands that Licensed Trees must be planted within the Territory, and that the transfer of Licensed Trees outside of the Territory is strictly prohibited.

2.5 All Licensed Apples must be a) packed or processed by a Licensed Packer or Licensed Processor in the Territory and sold from the Territory or b) sold at Farmgate. Grower must select by which of these two methods the Licensed Apples will be sold. While Grower has complete freedom to deliver Licensed Apples to the Licensed Packer or Licensed Processor of its choice, Grower must not deliver any Licensed Apples to any party other than a Licensed Packer or a Licensed Processor in the Territory.

2.6 Grower shall take all reasonable precautions to ensure that no third party obtains budwood or other propagation materials from the Licensed Trees.

2.7 Grower is not licensed to import any plant materials of the Licensed Variety into the United States. Grower must not import any apples of the Licensed Variety into the United States from any foreign country.

2.8 All rights not specifically granted herein are reserved by WSU and its licensees.

3. ROYALTIES

3.1 Grower acknowledges and agrees that the rights under the '210 Plant Patent for the Licensed Variety have substantial value and represent an investment of time, money, resources, and expertise by WSU and its licensees, for which payment in the form of a royalty is appropriate. The royalty charged under the '210 Plant Patent for the Licensed Variety has two parts: a Tree Royalty and a Fruit Production Royalty, as set forth in Schedule 1, attached hereto and incorporated herein by reference. Schedule 1 may be revised from time to time at the sole discretion of WSU and its licensees.

3.2 The Tree Royalties will be paid by Grower directly to the Licensed Nursery, prior to or simultaneous with the delivery of Licensed Trees to Grower.

3.3 **For Commercial Growers:** The Fruit Production Royalties will be retained and paid on behalf of Grower by Licensed Packers out of the crop proceeds for the Licensed Apples received by Licensed Packers from Licensed Marketers. Licensed Packers will account to the Grower for all Fruit Production Royalties on behalf of the Grower in the grower returns that Licensed Packers provide annually to Grower.

For Farmgate Sales: a production royalty beginning in the second (2nd) year after planting in the amount of Two Dollars (\$2.00) per Licensed Tree per year of the total amount of Licensed Trees planted will be assessed. This amount will be paid by the Grower to Proprietary Variety Management.

3.4 No Tree Royalty will be charged for replacement trees provided to Grower by a Licensed Nursery.

3.5 No Fruit Production Royalty will be charged for boxes of fruit that are legitimately rejected by a buyer for quality problems.

4. MUTATIONS; PROPAGATION AND BREEDING PROHIBITED

4.1 Grower must promptly notify NNII of any mutation that may appear on Licensed Trees. Licensee agrees that ownership of, and title to, any such mutations is retained by WSU. NNII and its representatives shall be granted unfettered access to Licensee's property, upon reasonable notice, for the limited purposes of inspecting trees, budwood, and scion wood of the Licensed Variety and removing all mutated plant material.

4.2 Unless Grower has obtained prior written permission from NNII, Grower must not engage, directly or indirectly, in the propagation or asexual reproduction of the Licensed Variety by grafting, budding, top-working, or other means for any purpose.

4.3 Use of any plant material of the Licensed Variety (including without limitation the buds, roots, flowers, pollen, fruit, seeds, leaves, tissue, bark or genes), for any activity which may result, either intentionally or unintentionally, in the development of any new fruit tree variety is strictly prohibited. Examples of activities which are hereby expressly prohibited include, without limitation, selecting new plants growing from seeds of the Licensed Variety, or using pollen or seeds from the Licensed Variety in any controlled or uncontrolled breeding program.

5. RECORDS AND AUDIT

Grower shall keep full, true, and accurate records of account for six (6) years from the date of termination of this Agreement. Grower agrees that WSU, PVM, NNII and their third-party representatives are authorized to inspect trees and fruit subject to this Agreement on site along with all relevant records to confirm compliance with this Agreement including royalties and quality standards.

6. INFRINGEMENT

6.1 Grower must not infringe, or induce or contribute to any third party's infringement, of the '210 Plant Patent.

6.2 Grower agrees to notify NNII or Licensed Nursery promptly of any suspected asexual propagation, sale, or use of the Licensed Trees by persons not duly licensed to propagate, sell, or use such material.

6.3 Grower agrees to cooperate with WSU and its licensees in any infringement proceeding instituted hereunder at the expense of WSU. Nothing herein shall be construed as conferring upon WSU or any of its licensees any obligation to bring or prosecute actions or suits against third parties for infringement.

7. LIMITATION OF WARRANTIES

7.1 WSU owns and has all exclusive rights to the "WA 38 apple variety," which is the subject matter of U.S. Plant Patent No. PP24,210 issued February 4, 2014.

7.2 EXCEPT AS OTHERWISE EXPRESSLY SET FORTH IN THIS AGREEMENT, WSU, PVM, NNII, AND THE NNII LICENSED NURSERIES MAKE NO REPRESENTATIONS AND EXTEND NO WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE OF ANY LICENSED TREES OR FRUIT OF THE LICENSED VARIETY THAT MAY BE PRODUCED AT ANY TIME NOW OR IN THE FUTURE. WSU, PVM, NNII, AND THE NNII LICENSED NURSERIES SPECIFICALLY MAKE NO WARRANTY, EXPRESS OR IMPLIED, THAT LICENSED TREES WILL BE GROWN SUCCESSFULLY FOR FRUIT PRODUCTION IN ANY AREA, THE MARKET OR MARKET PRICES OBTAINABLE FOR ANY APPLES, AND WSU, PVM, NNII, AND THE NNII LICENSED NURSERIES DISCLAIM ANY RESPONSIBILITY FOR LOSSES INCURRED FROM ANY DEFECT OF LICENSED TREES.

7.3 Grower assumes all risks associated with horticultural practices and harvesting. Grower shall, at all times during the term of this Agreement and thereafter, indemnify, defend, and hold WSU, PVM, NNII, and the NNII Licensed Nurseries and their respective employees, agents, and regents, the state of Washington harmless against all claims and expenses, including legal expenses and reasonable attorney's fees, arising out of the death of or injury to any person or persons or out of any damage to property and against any other claim, proceeding, demand, expense, and liability of any kind whatsoever (other than patent infringement claims) arising from any right or obligation of Grower hereunder or resulting from the production, manufacture, sale, use, lease, or consumption of the Licensed Trees or fruit of the Licensed Variety. Notwithstanding the above, WSU, PVM, NNII, and the NNII Licensed Nurseries reserve the right to retain counsel of their own to defend their respective interests.

8. ASSIGNMENT RESTRICTIONS

Grower may not sell, assign, or transfer this Agreement except with the prior written permission of NNII. Sixty (60) days prior to the transfer or sale to a third party of Grower's property that has been planted with the trees of the Licensed Variety, Grower will contact NNII to arrange assignment of this Agreement, a separate license agreement with the land purchaser, or other disposition of Licensed Trees on such property. If no agreement is reached as to a license or the disposition of the Licensed Trees, Grower agrees to completely destroy all the trees of the Licensed Variety planted on the property prior to closing of the sale to the third party.

9. TERM AND TERMINATION

This Agreement is contingent upon payment in full of the tree price and all royalties in the form of both tree royalties and fruit production royalties due under this Agreement. This Agreement shall be in full force and effect until the expiration of the '210 Plant Patent. Any failure by Grower, or any subsequent purchaser, to strictly and timely comply with any requirement, prohibition, or condition of this Agreement shall immediately terminate this Agreement, without notice, and all Licensed Trees and Licensed Apples will immediately become infringing trees and infringing fruit, subjecting the Grower and/or subsequent purchaser to monetary damages, injunctive relief, and seizure or destruction of trees and/or fruit.

10. MISCELLANEOUS

This Agreement embodies the entire understanding between the Parties and shall supersede all previous communications, representations, or understandings, either oral or written, relating to the subject matter hereof. This Agreement shall be construed, interpreted, and applied in accordance with the laws of the state of Washington. None of the terms, covenants, and conditions of this Agreement may be waived except by the written consent of both Parties. The failure of either Party to assert a right hereunder or to insist upon compliance with any term or condition of this Agreement shall not constitute a waiver of that right or excuse a similar subsequent failure to perform any such term or condition by the other Party.

IN WITNESS WHEREOF, the Parties have duly executed this Agreement as of the Effective Date:

Licensed Nursery, signing on behalf of the NORTHWEST NURSERY IMPROVEMENT INSTITUTE:	_____
By: _____	By: _____
Name: _____	Name: _____
Title: _____	Title: _____

Tree use purpose (please check one): Commercial Farmgate (see section 1.9 and 2.1)

*Should Grower select Farmgate, a separate trademark addendum will follow.

Use the QR Code below to enter in the physical location of your orchard using your smartphone. Optionally, fill in the box below with the GPS coordinates or physical address of the planting.

Physical Address or GPS Coordinates of Planting:

**Schedule I
WA 38 Apple Variety
ROYALTY RATES**

These royalties are subject to periodic review and revision by WSU and its licensees.

- a. Per-Tree Royalty: One dollar (\$1.00) per Licensed Tree.
- b. Production Royalty: The royalty on fruit production of the Licensed Cultivar is determined according to the sale price of the Licensed Apples, based on a 40-lb. tray pack equivalent system:

<u>Fruit price per 40lb equivalent box</u>	<u>Royalty per 40lb equivalent box</u>
Less than \$20.00	\$0.00
\$20.00 or more	4.75% of total box sale price

- c. Production Royalty for Farm Gate Sales Only: A Production Royalty will be assessed beginning in the second (2nd) year after planting in the amount of Two dollars (\$2.00) per tree per year of the total amount of trees planted.