VIVUS INC

FORM 10-K
(Annual Report)

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended December 31, 2012

OR

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 (NO FEE REQUIRED)**

For the transition period from to

Commission File Number 001-33389

VIVUS, INC.
(Exact name of Registrant as specified in its charter)

Delaware	**94-3136179**
(State or other jurisdiction of incorporation or organization)	(IRS employer identification number)
1172 Castro Street **Mountain View, California**	**94040**
(Address of principal executive office)	(Zip Code)

Registrant's telephone number, including area code: **(650) 934-5200**

Securities registered pursuant to Section 12(b) of the Act:

Title of Each Class	**Name of Each Exchange on Which Registered**
Common Stock, $.001 Par Value (Title of class) Preferred Share Purchase Rights (Title of class)	The NASDAQ Global Select Market

Securities registered pursuant to Section 12(g) of the Act:
None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☒ No ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the Registrant: (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the Registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K (§229.405) is not contained herein, and will not be contained, to the best of Registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer ☒	Accelerated filer ☐	Non-accelerated filer ☐ (Do not check if a smaller reporting company)	Smaller reporting company ☐

Indicate by check mark whether the Registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes ☐ No ☒

The aggregate market value of the common equity held by non-affiliates of the Registrant as of June 30, 2012 totaled approximately $2,847,137,500 based on the closing stock price as reported by the NASDAQ Global Market.

As of February 19, 2013, there were 100,660,029 shares of the Registrant's common stock, $0.001 par value per share, outstanding.

DOCUMENTS INCORPORATED BY REFERENCE

Document Description	10-K part
Portions of the Registrant's notice of annual meeting of stockholders and proxy statement to be filed pursuant to Regulation 14A within 120 days after Registrant's fiscal year end of December 31, 2012 are incorporated by reference into Part III of this report.	III, ITEMS 10, 11, 12, 13, 14

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PART I
FORWARD-LOOKING STATEMENTS

This Form 10-K contains "forward-looking" statements that involve risks and uncertainties. These statements may typically be identified by the use of forward-looking words or phrases such as "anticipate," "believe," "forecast," "estimate," "expect," "intend," "likely," "may," "plan," "potential," "predict," "opportunity" and "should," the negative use of these words or other similar words. All forward looking statements included in this document are based on our current expectations, and we assume no obligation to update any such forward looking statements. The Private Securities Litigation Reform Act of 1995 provides a "safe harbor" for such forward looking statements. In order to comply with the terms of the safe harbor, we note that a variety of factors could cause actual results and experiences to differ materially from the anticipated results or other expectations expressed in such forward looking statements. The risks and uncertainties that may affect the operations, performance, development, and results of our business include but are not limited to: (1) our limited commercial experience with Qsymia™ in the United States, or U.S.; (2) the timing of initiation and completion of the clinical studies required as part of the approval of Qsymia by the U.S. Food and Drug Administration, or FDA; (3) the response from the FDA to the data that VIVUS will submit relating to post-approval clinical studies; (4) the impact of the indicated uses and contraindications contained in the Qsymia label and the Risk Evaluation and Mitigation Strategy, or REMS, requirements; (5) the impact of distribution of Qsymia through a certified home delivery pharmacy network; (6) whether or not the FDA approves our amendment to the REMS for Qsymia, which, if approved, would allow dispensing through select certified retail pharmacies to increase access while meeting all requirements of the REMS; (7) that we may be required to provide further analysis of previously submitted clinical trial data; (8) the negative opinion of the European Medicines Agency's, or EMA, Committee for Medicinal Products for Human Use, or CHMP, for the Marketing Authorization Application, or MAA, for Qsymia; (9) our ability to successfully commercialize or establish a marketing partnership for avanafil, which will be marketed in the U.S. under the name STENDRA™; (10) the ability of our partners to maintain regulatory approvals to manufacture and adequately supply our products to meet demand; (11) our history of losses and variable quarterly results; (12) substantial competition; (13) risks related to the failure to protect our intellectual property and litigation in which we may become involved; (14) uncertainties of government or third-party payor reimbursement; (15) our reliance on sole source suppliers; (16) our limited sales and marketing and manufacturing experience; (17) our reliance on third parties and our collaborative partners; (18) our failure to continue to develop innovative investigational drug candidates and drugs; (19) risks related to the failure to obtain FDA or foreign authority clearances or approvals and noncompliance with FDA or foreign authority regulations; (20) our ability to demonstrate through clinical testing the safety and effectiveness of our investigational drug candidates; (21) the timing of initiation and completion of clinical trials and submissions to foreign authorities; (22) the results of post-marketing studies are not favorable; (23) compliance with post-marketing regulatory standards is not maintained; (24) the volatility and liquidity of the financial markets; (25) our liquidity and capital resources; (26) our expected future revenues, operations and expenditures and (27) other factors that are described from time to time in our periodic filings with the Securities and Exchange Commission, or the SEC, including those set forth in this filing as "Item 1A. Risk Factors."

Item 1. *Business*

Overview

VIVUS is a biopharmaceutical company dedicated to commercializing and developing innovative therapies to address unmet needs in obesity, sleep apnea, diabetes and sexual health. Our drug, Qsymia (phentermine and topiramate extended-release) (formerly known as Qnexa®) was approved by the FDA for the treatment of obesity as an adjunct to a reduced-calorie diet and increased physical activity for chronic weight management in adult patients with an initial body mass index, or BMI, of 30 or greater (obese), or 27 or greater (overweight) in the presence of at least one weight-related comorbidity, such as hypertension, type 2 diabetes mellitus or high cholesterol (dyslipidemia). Qsymia incorporates low

doses of active ingredients from two previously approved drugs, phentermine and topiramate. Although the exact mechanism of action is not known, Qsymia is believed to target appetite and satiety, or the feeling of being full, the two main mechanisms that impact eating behavior. We announced the U.S. market availability of Qsymia for obesity in September 2012. On February 21, 2013, the CHMP confirmed its October 18, 2012 decision to deny the MAA for Qsiva™ (phentermine/topiramate ER) for the treatment of obesity in the European Union, or EU. We have completed Phase 2 clinical studies for Qsymia for the treatment of sleep apnea and Qsymia for the treatment of type 2 diabetes.

Our drug, STENDRA, or avanafil, was approved by the FDA for the treatment of erectile dysfunction, or ED, in the U.S. We, through collaboration arrangements with third parties, intend to market and sell STENDRA in the U.S. and, if approved, under the trade name SPEDRA™ in the EU and other territories outside the U.S.

We were incorporated in California in 1991 and reincorporated in Delaware in 1996. Our corporate headquarters is located at 1172 Castro Street, Mountain View, California and our phone number is (650) 934-5200.

Our Strategy

Our goal is to build a successful biopharmaceutical company through the development and commercialization of innovative proprietary drugs. We intend to achieve this by:

- successfully commercializing Qsymia in the U.S.;
- entering into and supporting a collaboration agreement for the commercialization of STENDRA for the treatment of ED in the U.S.;
- obtaining regulatory approval for SPEDRA for the treatment of ED in the EU and other territories worldwide; and
- if approved, entering into and supporting collaboration agreements for the commercialization of SPEDRA for the treatment of ED in the EU and other territories worldwide.

It is our objective to become a leader in the development and commercialization of drugs for large underserved markets. We believe we have strong intellectual property supporting several opportunities in obesity and related disorders, such as sleep apnea and diabetes, and sexual health. Our future growth depends on our ability to further develop and obtain regulatory approval of our investigational drug candidates for indications that we have studied, or plan to study, as well as in-licensing and product line extensions.

Products and Development Programs

Our approved drugs and investigational drug candidates are summarized as follows:

Drug	Indication	Status	Commercial rights
Qsymia (phentermine and topiramate extended-release)	Obesity	NDA approved July 2012; First commercial sale September 2012 MAA denied	Worldwide
Qsymia (phentermine and topiramate extended-release)	Obstructive Sleep Apnea	Phase 2 study completed	Worldwide
Qsymia (phentermine and topiramate extended-release)	Diabetes	Phase 2 study completed	Worldwide
STENDRA (avanafil)	Erectile dysfunction	NDA approved April 2012; Seeking collaboration agreement MAA submitted March 2012; Preparing response to Day 180 List of Outstanding Issues, or LoOIs	Worldwide license from Mitsubishi Tanabe Pharma Corporation, or MTPC (excluding certain Asian markets)

Qsymia for the treatment of Obesity

Many factors contribute to excess weight gain. These include environmental factors, genetics, health conditions, certain medications, emotional factors and other behaviors. All this contributes to more than 110 million Americans being obese or overweight with at least one weight-related comorbidity. Excess weight increases the risk of conditions including type 2 diabetes, high cholesterol, high blood pressure, heart disease, sleep apnea, stroke and osteoarthritis. According to the National Institutes of Health, or NIH, losing just 10% of body weight may help obese patients reduce the risk of developing other weight-related medical conditions, while making a meaningful difference in health and well-being.

Qsymia for the treatment of obesity was approved as an adjunct to a reduced-calorie diet and increased physical activity for chronic weight management in adult patients with an initial BMI of 30 or greater (obese), or 27 or greater (overweight) in the presence of at least one weight-related comorbidity, such as hypertension, type 2 diabetes mellitus or high cholesterol (dyslipidemia). Qsymia incorporates low doses of active ingredients from two previously approved drugs, phentermine and topiramate. Although the exact mechanism of action is unknown, Qsymia is believed to target appetite and satiety, or the feeling of being full, the two main mechanisms that impact eating behavior.

We initially launched Qsymia for distribution to eligible patients through the home delivery networks of two certified pharmacies, CVS Pharmacy and Walgreens. Since then, we have expanded the

distribution of Qsymia to include the home delivery networks of Express Scripts, Wal-Mart Pharmacy and, for its members only, Kaiser Permanente.

Qsymia was approved with a REMS with a goal of informing prescribers and patients of reproductive potential about an increased risk of orofacial clefts in infants exposed to Qsymia during the first trimester of pregnancy, the importance of pregnancy prevention for females of reproductive potential receiving Qsymia and the need to discontinue Qsymia immediately if pregnancy occurs. The Qsymia REMS program includes a medication guide, healthcare provider training, distribution through certified home delivery pharmacies, an implementation system and a time table for assessments. On October 17, 2012, we submitted an amendment to our New Drug Application, or NDA, that requests a modification of the REMS for Qsymia, which, if approved, would allow dispensing through select certified retail pharmacies, to increase access while meeting all requirements of the REMS. This amendment to our NDA was made at the mutual request of VIVUS and the FDA, as documented in the FDA approval letter.

As part of the approval of Qsymia, we have committed to conduct post-marketing studies. We will conduct a study to assess the long-term treatment effect of Qsymia on the incidence of major adverse cardiovascular events in overweight and obese subjects with confirmed cardiovascular disease, studies to assess the safety and efficacy of Qsymia for weight management in obese pediatric and adolescent subjects, studies to assess drug utilization and pregnancy exposure, a study to assess renal function, as well as animal and in vitro studies. We are finalizing the designs and protocols for these studies at the current time and expect to begin the studies in late 2013.

On December 17, 2010, we filed an MAA with the EMA to market Qsiva in the EU for the treatment of obesity. On October 18, 2012, we received the formal opinion from the EMA's CHMP recommending against approval of the MAA for Qsiva in the EU due to concerns over the potential cardiovascular and central nervous system effects associated with long-term use, teratogenic potential and use by patients for whom Qsiva would not have been indicated. We appealed this opinion and the CHMP again denied the MAA on February 21, 2013. We intend to seek approval for Qsymia in other territories outside the United States and intend to commercialize Qsymia in such territories where we obtain approval through collaboration agreements with third parties.

Qsymia in development for Obstructive Sleep Apnea

Obstructive sleep apnea, or OSA, is a chronic and potentially serious sleep disorder in which breathing is abnormally shallow, or hypopnea, or stops altogether, or apnea, for at least ten seconds. These repetitive events are associated with collapse of the upper airway during sleep, and may occur five to thirty or more times per hour. Although many cases are unrecognized, symptoms may include snoring, fatigue or sleepiness during the day.

OSA afflicts approximately 3% to 7% of the U.S. population. Data from the Wisconsin Cohort Study indicate that the prevalence of OSA in people 30-60 years of age is 9-24% for men and 4-9% for women. OSA is associated with an increased risk of hypertension, cardiovascular disease, myocardial infarction, stroke and increased mortality.

The current standard of care treatment for OSA is continuous positive airway pressure, or CPAP, in which the upper airway is kept open by increased air pressure, but CPAP provides benefits only when used consistently. Many patients find CPAP to be inconvenient or uncomfortable, and compliance with CPAP treatment limits its effectiveness.

We believe a safe and effective pharmacologic treatment for OSA could be useful and more acceptable to some patients than CPAP, but no drug is currently approved to treat OSA.

In January 2010, we announced positive results from a Phase 2 study evaluating the safety and efficacy of Qsymia for the treatment of moderate to severe OSA. This Phase 2 study (OB-204) was a single-center, randomized, double-blind, placebo-controlled parallel group trial including 45 obese men

and women (BMI 30 to 40 kg/m2 inclusive), 30 to 65 years of age with OSA (apnea-hypopnea index, or AHI, greater than or equal to 15 at baseline) who had not been treated with, or who were not compliant with CPAP within three months of screening. Patients were randomized to placebo or top dose Qsymia. We are currently contemplating when to undertake a Phase 3 study.

Qsymia in development for Diabetes

Diabetes is a disease in which the body does not produce or properly use insulin. Insulin is a hormone that is needed to convert sugar and starches into energy needed for daily life. Type 2 diabetes is characterized by inadequate response to insulin and/or inadequate secretion of insulin as blood glucose levels rise. Currently approved therapies for type 2 diabetes are directed toward correcting the body's inadequate response with oral or injectable medications, or directly modifying insulin levels through injection of insulin or insulin analogs. The cause of diabetes continues to be a mystery, although both genetics and environmental factors such as obesity and lack of exercise appear to play roles.

There are 23.6 million children and adults in the U.S., or 7.8% of the population, who have diabetes. While an estimated 17.9 million Americans have been diagnosed with diabetes, unfortunately, another 5.7 million Americans (or nearly one quarter) are unaware that they have the disease. It is estimated that there are nearly 350 million diabetics worldwide.

The currently approved oral medications for type 2 diabetes include insulin releasers such as glyburide, insulin sensitizers such as Actos and Avandia, inhibitors of glucose production by the liver such as metformin, DPP-IV inhibitors like Januvia, as well as Precose and Glyset, which slow the uptake of glucose from the intestine. Approved injectable medications for type 2 diabetes treatment include glucagon-like peptide-1, or GLP-1, analogs such as Liraglutide, marketed under the brand name Victoza, developed by Novo Nordisk and Exenatide, marketed under the brand name Byetta, and a long-acting version of Exenatide marketed under the brand name Bydureon, developed by Amylin Pharmaceuticals and Eli Lilly and Company. Studies to date suggest GLP-1s improve control of blood glucose by increasing insulin secretion, delaying gastric emptying, and suppressing prandial glucagon secretion. Clinical studies have reported that patients treated with GLP-1s have reported weight loss of approximately six to eight pounds.

It is estimated that a significant portion of type 2 diabetics fail oral medications and require injected insulin therapy. Current oral medications for type 2 diabetes have a number of common drug-related side effects, including hypoglycemia, weight gain and edema. Numerous pharmaceutical and biotechnology companies are seeking to develop insulin sensitizers, novel insulin formulations and other therapeutics to improve the treatment of diabetes. Previous clinical studies of topiramate, a component of Qsymia, in type 2 diabetics resulted in a clinically meaningful reduction of hemoglobin A1c, or HbA1c, a measure used to determine treatment efficacy of anti-diabetic agents.

In December 2008, we announced the results of our DM-230 diabetes study. The DM-230 Phase 2 study enrolled 130 patients, who had completed our Phase 2 study for the treatment of obesity (OB-202), at ten study sites in the U.S., to continue in a blinded fashion as previously randomized for an additional 28 weeks. The results of the DM-230 study included assessments from the start of the OB-202 study through the end of the DM-230 study in this population, for a total treatment period of 56 weeks.

Patients treated with Qsymia had a reduction in HbA1c of 1.6%, from 8.8% to 7.2%, as compared to 1.1% from 8.5% to 7.4% in the placebo-treated standard of care group (Intent to Treat population Using the Last Observation Carried Forward Method, or ITT LOCF, $p=0.0381$) at 56 weeks. All patients in the study were actively managed according to American Diabetes Association, or ADA, standards of care with respect to diabetes medications and lifestyle modification. For patients treated with placebo, increases in the number and doses of concurrent anti-diabetic medications were required to bring about the observed reduction in HbA1c. By contrast, concurrent anti-diabetic medications were reduced over the course of the trial in patients treated with Qsymia ($p<0.05$).

Over 56 weeks, patients treated with Qsymia also lost 9.4% of their baseline body weight, or 20.5 pounds, as compared to 2.7%, or 6.1 pounds, for the placebo group ($p<0.0001$). Sixty-five percent of the Qsymia patients lost at least 5% of their body weight, as compared to 24% in the placebo group ($p<0.001$), and 37% of the Qsymia patients lost at least 10% of their body weight, as compared to 9% of patients in the placebo group ($p<0.001$). Patients treated with Qsymia had reductions in blood pressure, triglycerides and waist circumference. Both treatment groups had a study completion rate of greater than 90%.

The most common drug-related side effects reported were tingling, constipation and nausea. Patients on antidepressants such as selective serotonin reuptake inhibitors, or SSRI's, or serotonin and norepinephrine reuptake inhibitors, or SNRI's, were allowed to participate in the studies. Patients were monitored for depression and suicidality using the Patient Health Questionnaire-9, or PHQ-9, a validated mental health assessment tool agreed to by the FDA for use in our studies. Patients treated with Qsymia demonstrated greater improvements in PHQ-9 scores from baseline to the end of the study than patients in the placebo group.

Despite a mean baseline HbA1c level of 8.8%, 53% of the patients treated with Qsymia were able to achieve the ADA recommended goal of 7% or lower, versus 40% of the patients in the placebo arm ($p<0.05$). The incidence of hypoglycemia in the treatment and placebo arms was similar (12% and 9%, respectively). Patients in the Qsymia arm experienced no treatment-related serious adverse events.

We also studied the effect of Qsymia on well-controlled diabetics as part of our Phase 3 obesity study, CONQUER, (OB-303). The results were consistent and supportive of the Phase 2 results.

Data from the Phase 3 EQUATE trial (OB-301) demonstrated that weight loss with Qsymia stops the progression of type 2 diabetes in obese, non-diabetic patients. The results of DM-230 demonstrated that weight loss with Qsymia can significantly lower blood sugar in type 2 diabetics. Results from both of these studies were presented at the ADA's annual scientific session in June 2009. We are currently contemplating when to undertake a Phase 3 study.

Qsymia in development for Other Indications

We believe Qsymia may be helpful in treating other obesity-related diseases including nonalcoholic steatohepatitis, or NASH, or its precursor, nonalcoholic fatty liver disease, or NAFLD, also known as fatty liver disease. We believe Qsymia may also be helpful in treating hyperlipidemia, or an elevation of lipids (fats) in the bloodstream. These lipids include cholesterol, cholesterol esters (compounds), phospholipids and triglycerides. In addition, we believe Qsymia may be helpful in patients with hypertension that do not respond well to antihypertensive medication. We are currently contemplating whether to pursue these other indications.

STENDRA for the treatment of Erectile Dysfunction

Erectile dysfunction, or ED, affects an estimated 52% of men between the ages of 40 and 70. Prevalence increases with age and can be caused by a variety of factors, including medications (anti-hypertensives, histamine receptor antagonists); lifestyle (tobacco, alcohol use); diseases (diabetes, cardiovascular conditions, prostate cancer); and spinal cord injuries. Left untreated, ED can negatively impact relationships and self-esteem, causing feelings of embarrassment and guilt. About half of men being treated with currently available phosphodiesterase 5, or PDE5, inhibitors are dissatisfied with treatment. The market opportunity for ED medical treatments continues to grow, with worldwide sales of PDE5 inhibitors exceeding $5 billion in 2012.

Our drug, STENDRA (avanafil), is an oral PDE5 inhibitor we have licensed from MTPC. STENDRA was approved by the FDA on April 27, 2012 for the treatment of ED. As part of the approval of STENDRA, we are committed to conduct two post-approval clinical studies. The first is a

randomized, double-blind, placebo-controlled, parallel group multicenter clinical trial on the effect of STENDRA on spermatogenesis in healthy adult males and males with mild erectile dysfunction, or ED. The other study is a double-blind, randomized, placebo-controlled, single-dose clinical trial to assess the effects of STENDRA on multiple parameters of vision, including, but not limited to, visual acuity, intraocular pressure, pupillometry, and color vision discrimination in healthy male subjects. We are currently in the planning stages and expect to begin these studies in 2013.

In March 2012, we filed an MAA with the EMA to market avanafil in the EU for the treatment of ED. The approved trade name for STENDRA in the EU is SPEDRA. In January 2013, we received the Day 180 LoOIs from the EMA. We are currently reviewing the LoOIs which covers a broad range of topics including, without limitation, questions relating to clinical relevance in certain populations as well as questions regarding drug-drug interaction and pharmacokinetics. We are in the process of preparing our response to the CHMP. In order to respond to certain of the items contained in the LoOIs we have requested and have been granted a 30 day extension to respond.

Through collaboration arrangements with third parties, we intend to market and sell STENDRA in the U.S. and, if approved, SPEDRA in the EU and other territories outside the United States. We are currently in discussions with potential collaboration partners for all stated territories.

Other Programs

We have licensed and intend to continue to license from third parties the rights to other investigational drug candidates to treat various diseases and medical conditions. We also sponsor early stage clinical trials at various research institutions and intend to conduct early stage proof of concept studies on our own. We expect to continue to use our expertise in designing and conducting clinical trials, formulation and investigational drug candidate development to commercialize pharmaceuticals for unmet medical needs or for disease states that are underserved by currently approved drugs. We intend to develop products with a proprietary position or that complement our other products currently under development, although there can be no assurance that any of these investigational product candidates will be successfully developed and approved by regulatory authorities.

Government Regulations

FDA Regulation

Prescription pharmaceutical products are subject to extensive pre- and post-marketing regulation by the FDA. The Federal Food, Drug, and Cosmetic Act, and its implementing regulations govern, among other things, requirements for the testing, development, manufacturing, quality control, safety, efficacy, approval, labeling, storage, recordkeeping, reporting, distribution, import, export, advertising and promotion of drug products.

The activities required before a pharmaceutical agent may be marketed in the U.S. begin with pre-clinical testing. Pre-clinical tests generally include laboratory evaluation of potential products and animal studies to assess the potential safety and efficacy of the product and its formulations. The results of these studies and other information must be submitted to the FDA as part of an Investigational New Drug, or IND, application, which must be reviewed and approved by the FDA before proposed clinical testing in human volunteers can begin. Clinical trials involve the administration of the investigational new drug to healthy volunteers or to patients under the supervision of a qualified principal investigator. Clinical trials must be conducted in accordance with Good Clinical Practices, or GCP, which establish standards for conducting, recording data from, and reporting results of, clinical trials, and are intended to assure that the data and reported results are credible, accurate, and that the rights, safety and well-being of study participants are protected. Clinical trials must be under protocols that detail the objectives of the study, the parameters to be used to monitor safety and the efficacy criteria to be evaluated. Each protocol must be submitted to the FDA as part of the IND application.

Further, each clinical study must be conducted under the auspices of an independent institutional review board. The institutional review board will consider, among other things, regulations and guidelines for obtaining informed consent from study subjects, as well as other ethical factors and the safety of human patients. The sponsoring company, the FDA, or the Institutional Review Board, or IRB, may suspend or terminate a clinical trial at any time on various grounds, including a finding that the subjects or patients are being exposed to an unacceptable health risk.

Typically, human clinical trials are conducted in three phases that may overlap. In Phase 1, clinical trials are conducted with a small number of patients to determine the early safety profile and pharmacology of the new therapy. In Phase 2, clinical trials are conducted with groups of patients afflicted with a specific disease or medical condition in order to determine preliminary efficacy, optimal dosages and expanded evidence of safety. In Phase 3, large scale, multicenter clinical trials are conducted with patients afflicted with a target disease or medical condition in order to provide substantial evidence of efficacy and safety required by the FDA and others.

The results of the pre-clinical and clinical testing, together with chemistry and manufacturing information, are submitted to the FDA in the form of a New Drug Application, or NDA, for a pharmaceutical product in order to obtain approval to commence commercial sales. In responding to an NDA, the FDA may grant marketing approvals, may request additional information or further research or studies, or may deny the application if it determines that the application does not satisfy its regulatory approval criteria. FDA approval for a pharmaceutical product may not be granted on a timely basis, if at all. Under the goals and policies agreed to by the FDA under the Prescription Drug User Fee Act, or PDUFA, the FDA has twelve months in which to complete its initial review of a standard NDA and respond to the applicant, and eight months for a priority NDA. The FDA does not always meet its PDUFA goal dates and in certain circumstances, the review process and the PDUFA goal date may be extended. In addition, even if FDA approval is granted, it may not cover all the clinical indications for which approval is sought or may contain significant limitations in the form of warnings, precautions or contraindications with respect to conditions of use. In addition, the FDA may require the establishment of REMS that may, for instance, restrict distribution and impose burdensome implementation requirements. Our approved product Qsymia is subject to a REMS program.

Satisfaction of FDA premarket approval requirements for new drugs typically takes several years and the actual time required may vary substantially based upon the type, complexity and novelty of the product or targeted disease. Government regulation may delay or prevent marketing of potential products for a considerable period of time and may impose costly procedures upon our activities. Success in early stage clinical trials or with prior versions of products does not assure success in later stage clinical trials. Data obtained from clinical activities are not always conclusive and may be susceptible to varying interpretations that could delay, limit or prevent regulatory approval.

Once approved, products are subject to continuing regulation by the FDA. The FDA may withdraw the product approval if compliance with post-marketing regulatory standards is not maintained or if problems occur after the product reaches the marketplace. In addition, the FDA may require post-marketing studies, referred to as PMR studies, to monitor the effect of an approved product, and may limit further marketing of the product based on the results of these post-market studies. The FDA has required us to perform PMR studies for both of our approved products, Qsymia and STENDRA. The FDA has broad post-market regulatory and enforcement powers, including the ability to levy fines and civil penalties, suspend or delay issuance of approvals, seize or recall products, or withdraw approvals. Additionally, the Food and Drug Amendment Act of 2007 requires all clinical trials we conduct for our investigational drug candidates, both before and after approval, and the results of those trials when available, to be included in a clinical trials registry database that is available and accessible to the public via the Internet. Our failure to properly participate in the clinical trial database registry would subject us to significant civil penalties.

Facilities used to manufacture drugs are subject to periodic inspection by the FDA, and other authorities where applicable, and must comply with the FDA's current Good Manufacturing Practice, or cGMP regulations. Compliance with cGMP includes adhering to requirements relating to organization of personnel, buildings and facilities, equipment, control of components and drug product containers and closures, production and process controls, packaging and labeling controls, holding and distribution, laboratory controls, and records and reports. Failure to comply with the statutory and regulatory requirements subjects the manufacturer to possible legal or regulatory action, such as suspension of manufacturing, seizure of product or voluntary recall of a product.

The FDA imposes a number of complex regulations on entities that advertise and promote pharmaceuticals, which include, among other things, standards and regulations relating to direct-to-consumer advertising, off-label promotion, industry-sponsored scientific and educational activities, and promotional activities involving the Internet. A product cannot be commercially promoted before it is approved. After approval, product promotion can include only those claims relating to safety and effectiveness that are consistent with the labeling approved by the FDA. The FDA has very broad enforcement authority. Failure to abide by these regulations can result in adverse publicity, and/or enforcement actions, including the issuance of a warning letter directing the entity to correct deviations from FDA standards, and state and federal civil and criminal investigations and prosecutions. This could subject a company to a range of penalties that could have a significant commercial impact, including civil and criminal fines and agreements that materially restrict the manner in which a company promotes or distributes drug products.

Companies that manufacture or distribute drug products or that hold approved NDAs must comply with other regulatory requirements, including submitting annual reports, reporting information about adverse drug experiences, and maintaining certain records. In addition, we are subject to various laws and regulations regarding the use and disposal of hazardous or potentially hazardous substances in connection with our research. In each of these areas, as noted above, the government has broad regulatory and enforcement powers, including the ability to levy fines and civil penalties, suspend or delay issuance of approvals, seize or recall products, and withdraw approvals, any one or more of which could have a material adverse effect upon us.

Other Government Regulations

In addition to laws and regulations enforced by the FDA, we are also subject to regulation under National Institutes of Health guidelines as well as under the Controlled Substances Act, the Occupational Safety and Health Act, the Environmental Protection Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act and other present and potential future federal, state or local laws and regulations, as our research and development may involve the controlled use of hazardous materials, chemicals, viruses and various radioactive compounds.

In addition to regulations in the U.S., we are subject to a variety of foreign regulations governing clinical trials and commercial sales and distribution of our investigational drug candidates. Whether or not we obtain FDA approval for a product, we must obtain approval of a product by the comparable regulatory authorities of foreign countries before we can commence clinical trials or marketing of the product in those countries. The approval process varies from country to country, and the time may be longer or shorter than that required for FDA approval. The requirements governing the conduct of clinical trials, product licensing, pricing and reimbursement vary greatly from country to country.

United States Healthcare Reform

In March 2010, the Patient Protection and Affordable Care Act, as amended by the Health Care and Education Affordability Reconciliation Act of 2010, which is referred to in this report as the Affordable Care Act or the PPACA, was adopted in the United States. This law substantially changes

the way healthcare is financed by both governmental and private insurers, and significantly impacts the pharmaceutical industry. The Affordable Care Act contains a number of provisions that are expected to impact our business and operations, in some cases in ways we cannot currently predict. Changes that may affect our business include those governing enrollment in federal healthcare programs, reimbursement changes, fraud and abuse and enforcement. These changes will impact existing government healthcare programs and will result in the development of new programs, including Medicare payment for performance initiatives and improvements to the physician quality reporting system and feedback program.

Additional provisions of the Affordable Care Act, some of which became effective in 2011, may negatively affect our revenues in the future. For example, as part of the Affordable Care Act's provisions closing a funding gap that currently exists in the Medicare Part D prescription drug program, or the donut hole, manufacturers are required to provide a 50% discount on branded prescription drugs dispensed to beneficiaries within this donut hole. The Affordable Care Act also makes changes to the Medicaid Drug Rebate Program, discussed further herein, including increasing the minimum rebate from 15.1% to 23.1% of the average manufacturer price for most innovator products and from 11% to 13% for non-innovator products.

Many of the Affordable Care Act's most significant reforms do not take effect until 2014 and thereafter, and their details will be shaped significantly by implementing regulations that have yet to be proposed. In 2012, the Supreme Court of the United States heard challenges to the constitutionality of the individual mandate and the viability of certain provisions of the Affordable Care Act. The Supreme Court's decision upheld most of the Affordable Care Act and determined that requiring individuals to maintain "minimum essential" health insurance coverage or pay a penalty to the Internal Revenue Service was within Congress's constitutional taxing authority. However, the Supreme Court struck down a provision in the Affordable Care Act that penalized states that choose not to expand their Medicaid programs through an increase in the Medicaid eligibility income limit from a state's current eligibility levels to 133% of the federal poverty limit. As a result of the Supreme Court's ruling, it is unclear whether states will expand their Medicaid programs by raising the income limit to 133% of the federal poverty level and whether there will be more uninsured patients in 2014 than anticipated when Congress passed the Affordable Care Act. For each state that does not choose to expand its Medicaid program, there will be fewer insured patients overall, which could impact our sales, business and financial condition.

Pharmaceutical Pricing and Reimbursement

In both U.S. and foreign markets, our ability to commercialize our products successfully, and to attract commercialization partners for our products, depends in significant part on the availability of adequate financial coverage and reimbursement from third-party payors, including, in the United States, governmental payors such as the Medicare and Medicaid programs, managed care organizations, and private health insurers. Third-party payors are increasingly challenging the prices charged for medicines and examining their cost effectiveness, in addition to their safety and efficacy. We may need to conduct expensive pharmacoeconomic studies in order to demonstrate the cost effectiveness of our products. Even with studies, our products may be considered less safe, less effective or less cost-effective than existing products, and third-party payors may not provide coverage and reimbursement for our product candidates, in whole or in part.

Political, economic and regulatory influences are subjecting the healthcare industry in the United States to fundamental changes. There have been, and we expect there will continue to be, legislative and regulatory proposals to change the healthcare system in ways that could impact our ability to sell our products profitably. We anticipate that the United States Congress, state legislatures and the private sector will continue to consider and may adopt healthcare policies intended to curb rising healthcare costs. These cost containment measures include: controls on government funded

reimbursement for drugs; new or increased requirements to pay prescription drug rebates to government health care programs; controls on healthcare providers; challenges to the pricing of drugs or limits or prohibitions on reimbursement for specific products through other means; requirements to try less expensive products or generics before a more expensive branded product; changes in drug importation laws; expansion of use of managed care systems in which healthcare providers contract to provide comprehensive healthcare for a fixed cost per person; and public funding for cost effectiveness research, which may be used by government and private third-party payors to make coverage and payment decisions.

Payors also are increasingly considering new metrics as the basis for reimbursement rates, such as average sales price, average manufacturer price and Actual Acquisition Cost. The existing data for reimbursement based on these metrics is relatively limited, although certain states have begun to survey acquisition cost data for the purpose of setting Medicaid reimbursement rates, and Centers for Medicare and Medicaid Services, or CMS, has begun making pharmacy National Average Drug Acquisition Cost and National Average Retail Price data publicly available on at least a monthly basis. Therefore, it may be difficult to project the impact of these evolving reimbursement mechanics on the willingness of payors to cover our products.

We participate in the Medicaid Drug Rebate program, established by the Omnibus Budget Reconciliation Act of 1990 and amended by the Veterans Health Care Act of 1992 as well as subsequent legislation. Under the Medicaid Drug Rebate program, we are required to pay a rebate to each state Medicaid program for our covered outpatient drugs that are dispensed to Medicaid beneficiaries and paid for by a state Medicaid program as a condition of having federal funds being made available to the states for our drugs under Medicaid and Medicare Part B. Those rebates are based on pricing data reported by us on a monthly and quarterly basis to the CMS, the federal agency that administers the Medicaid Drug Rebate program. This includes the average manufacturer price and, in the case of innovator products, the best price for each drug.

Federal law requires that any company that participates in the Medicaid rebate program also participate in the Public Health Service's 340B drug pricing discount program in order for federal funds to be available for the manufacturer's drugs under Medicaid and Medicare Part B. The 340B pricing program requires participating manufacturers to agree to charge statutorily-defined covered entities no more than the 340B "ceiling price" for the manufacturer's covered outpatient drugs. The 340B ceiling price is calculated using a statutory formula, which is based on the average manufacturer price and rebate amount for the covered outpatient drug as calculated under the Medicaid rebate program. Changes to the definition of average manufacturer price and the Medicaid rebate amount under PPACA and CMS's issuance of final regulations implementing those changes also could affect our 340B ceiling price calculations and negatively impact our results of operations.

In order to be eligible to have our products paid for with federal funds under the Medicaid and Medicare Part B programs and purchased by PHS 340B eligible entities and certain federal agencies, we participate in the Department of Veterans Affairs, or VA, Federal Supply Schedule, or FSS, pricing program, established by Section 603 of the Veterans Health Care Act of 1992. Under this program, we are obligated to make our product available for procurement on an FSS contract and charge a price to four federal agencies—VA, Department of Defense, Public Health Service, and Coast Guard—that is no higher than the statutory Federal Ceiling Price, or FCP. The FCP is based on the non-federal average manufacturer price, or Non-FAMP, which we calculate and report to the VA on a quarterly and annual basis. As a new manufacturer, we are currently operating under an Interim Agreement, which is a truncated version of the FSS contract that allows the manufacturer to sell to FSS purchasers while it goes through the lengthy process of negotiating an FSS contract. We also participate in the Tricare Retail Pharmacy program, established by Section 703 of the National Defense Authorization Act for FY 2008 and related regulations, under which we pay quarterly rebates on utilization of

innovator products that are dispensed through the Tricare Retail Pharmacy network to Tricare beneficiaries. The rebates are calculated as the difference between Annual Non-FAMP and FCP.

We expect to experience pricing pressures in the United States in connection with the sale of our products due to the trend toward managed healthcare, the increasing influence of health maintenance organizations and additional legislative proposals. In various European countries we expect to be subject to continuous cost-cutting measures, such as lower maximum prices, lower or lack of reimbursement coverage and incentives to use cheaper, usually generic, products as an alternative.

We are unable to predict what additional legislation, regulations or policies, if any, relating to the healthcare industry or third-party coverage and reimbursement may be enacted in the future or what effect such legislation, regulations or policies would have on our business. Any cost containment measures, including those listed above, or other healthcare system reforms that are adopted, could have a material adverse effect on our ability to operate profitably.

Corporate Collaborations and Licenses from Third Parties

Mitsubishi Tanabe Pharma Corporation

In January 2001, we entered into an exclusive development, license and clinical trial and commercial supply agreement with Tanabe Seiyaku Co., Ltd., or Tanabe, now Mitsubishi Tanabe Pharma Corporation, or MTPC, and hereinafter collectively referred to as MTPC, for the development and commercialization of avanafil, a PDE5 inhibitor compound for the oral and local treatment of male and female sexual dysfunction. Under the terms of the agreement, MTPC agreed to grant an exclusive license to us for products containing avanafil outside of Japan, North Korea, South Korea, China, Taiwan, Singapore, Indonesia, Malaysia, Thailand, Vietnam and the Philippines. We agreed to grant MTPC an exclusive, royalty-free license within those countries for oral products that we develop containing avanafil. In addition, we agreed to grant MTPC an exclusive option to obtain an exclusive, royalty-bearing license within those countries for non-oral products that we develop containing avanafil. MTPC agreed to manufacture and supply us with avanafil for use in clinical trials, which was our primary responsibility. The MTPC agreement contains a number of milestone payments to be made by VIVUS based on various triggering events. Through December 31, 2012, under the terms of the MTPC agreement, we have paid a total of $13.0 million to MTPC, including a $3.0 million milestone payment made in June 2012, upon FDA approval of STENDRA, or avanafil. In addition, during 2012, we purchased from MTPC $7.4 million of inventory under the supply portion of the Agreement in preparation for the commercial launch in the U.S. and certain other territories that use the U.S. approval.

We expect to make other substantial payments to MTPC in accordance with the MTPC agreement as we continue to develop avanafil in our territories outside of the United States and, if approved for sale, commercialize avanafil for the oral treatment of male sexual dysfunction in those territories. Potential future milestone payments include $2.0 million upon the obtainment of the first regulatory approval in any major European country and $6.0 million upon the achievement of $250.0 million or more in worldwide net sales during any calendar year.

The term of the MTPC agreement is based on a country-by-country and on a product-by-product basis. The term shall continue until the later of (i) 10 years after the date of the first sale for a particular product, or (ii) the expiration of the last-to-expire patents within the MTPC patents covering such product in such country. In the event that our product is deemed to be (i) insufficiently effective or insufficiently safe relative to other PDE5 inhibitor compounds based on published information, or (ii) not economically feasible to develop due to unforeseen regulatory hurdles or costs as measured by standards common in the pharmaceutical industry for this type of product, we have the right to terminate the agreement with MTPC with respect to such product.

In August 2012, we entered into an amendment to the MTPC agreement which, among other matters, allows us to manufacture the active pharmaceutical ingredients, or API, and tablets for avanafil and expands our rights to develop and commercialize avanafil for all indications. The amendment permits us to manufacture the API and tablets for avanafil ourselves or through a third-party supplier at any time; however, the transition away from MTPC supply will need to occur on or before June 2015. On February 21, 2013, we entered into the third amendment to our agreement with MTPC which, among other things, expands our rights, or those of our sublicensees, to enforce the patents licensed under the MTPC agreement against alleged infringement, and clarifies the rights and duties of the parties and our sublicensees upon termination of the MTPC agreement. In addition, we are obligated to use our best commercial efforts to market STENDRA in the U.S. by December 31, 2013.

Other

In October 2001, we entered into an assignment agreement, or the Assignment Agreement, with Thomas Najarian, M.D. for a combination of pharmaceutical agents for the treatment of obesity and other disorders, or the Combination Therapy, that has since been the focus of our investigational drug candidate development program for Qsymia for the treatment of obesity, obstructive sleep apnea and diabetes. The Combination Therapy and all related patent applications, or the Patents, were transferred to VIVUS with worldwide rights to develop and commercialize the Combination Therapy and exploit the Patents. Pursuant to the Assignment Agreement, through December 31, 2012, we have paid a total of $1.2 million and have issued fully vested and exercisable options to purchase 60,000 shares of VIVUS' common stock to Dr. Najarian. In addition, the Assignment Agreement will require us to pay royalties on worldwide net sales of a product for the treatment of obesity that is based upon the Combination Therapy and Patents until the last-to-expire of the assigned Patents. To the extent that we decide not to commercially exploit the Patents, the Assignment Agreement will terminate and the Combination Therapy and Patents will be assigned back to Dr. Najarian. In 2006, Dr. Najarian joined the Company as a part-time employee and currently serves as a Principal Scientist.

Patents, Proprietary Technology and Data Exclusivity

We own or are the exclusive licensee of 33 patents and 14 published patent applications in the U.S. and Canada. We intend to develop, maintain and secure intellectual property rights and to aggressively defend and pursue new patents to expand upon our current patent base. Our portfolio of patents as it primarily relates to Qsymia, our FDA approved drug for the treatment of obesity, and STENDRA, our FDA approved drug for the treatment of erectile dysfunction, is summarized as follows:

QSYMIA	
U.S. Patent No. 7,056,890	Expiring 06/14/2020
U.S. Patent No. 7,553,818	Expiring 06/14/2020
U.S. Patent No. 7,659,256	Expiring 06/14/2020
U.S. Patent No. 7,674,776	Expiring 06/14/2020
U.S. Patent Publication No. 2009/0304785 A1	Pending
U.S. Patent Publication No. 2010/0105765 A1	Pending
U.S. Patent Publication No. 2010/0215739 A1	Pending
U.S. Patent Publication No. 2012/0196881 A1	Pending
Canadian Patent No. 2,377,330	Expiring 06/14/2020
Canadian Patent Publication No. 2,691,991 A1	Pending
Canadian Patent Publication No. 2,727,313 A1	Pending
Canadian Patent Publication No. 2,727,319 A1	Pending
STENDRA	
U.S. Patent No. 6,656,935	Expiring 09/13/2020
U.S. Patent No. 7,501,409	Expiring 05/05/2023
Canadian Patent No. 2,383,466	Expiring 09/13/2020
ERECTILE DYSFUNCTION	
U.S. Patent No. 5,482,039	Expiring 03/25/2014
U.S. Patent No. 5,769,088	Expiring 03/25/2014
U.S. Patent No. 5,820,587	Expiring 03/14/2015
U.S. Patent No. 5,849,803	Expiring 12/15/2015
U.S. Patent No. 5,922,341	Expiring 10/28/2017
U.S. Patent No. 5,925,629	Expiring 10/28/2017
U.S. Patent No. 6,037,346	Expiring 10/28/2017
U.S. Patent No. 6,093,181	Expiring 07/25/2017
U.S. Patent No. 6,127,363	Expiring 10/28/2017
U.S. Patent No. 6,156,753	Expiring 10/28/2017
U.S. Patent No. 6,403,597	Expiring 10/28/2017
U.S. Patent No. 6,495,154	Expiring 11/21/2020
U.S. Patent No. 6,548,490	Expiring 10/28/2017
U.S. Patent No. 6,946,141	Expiring 11/21/2020
Canadian Patent No. 2,305,394	Expiring 10/28/2018

The EU has adopted a harmonized approach to data and marketing exclusivity under Regulation (EC) No. 726/2004 and Directive 2001/83/EC. The exclusivity scheme applies to products that have been authorized in the EU by either the EMA, through the centralized procedure, or the competent authorities of the Member States of the European Economic Area, or EEA, under the Decentralized or Mutual Recognition procedures. The approach (known as the 8+2+1 formula) permits eight years of data exclusivity and 10 years of marketing exclusivity. Within the first eight years of the 10 years, a generic applicant is not permitted to cross refer to the preclinical and clinical trial data relating to the reference product. Even if the generic product is authorized, it cannot be placed on the market until the full 10-year regulatory data protection has expired. This 10-year data protection may be extended

cumulatively to a maximum period of 11 years if during the first eight years of those 10 years, the marketing authorization holder obtains an authorization for a new (second) therapeutic indication which, during the scientific evaluation prior to their authorization, are held to bring a significant clinical benefit in comparison with existing therapies.

In addition to the Canadian patents and applications identified in the table, we also hold foreign counterparts, patents and patent applications in major foreign jurisdictions related to our U.S. patents. We have developed and acquired exclusive rights to patented technology in support of our development and commercialization of our approved drugs and investigational drug candidates, and we rely on trade secrets and proprietary technologies in developing potential drugs. We continue to place significant emphasis on securing global intellectual property rights and are aggressively pursuing new patents to expand upon our strong foundation for commercializing investigational drug candidates in development.

Manufacturing

Our commercial products, Qsymia and STENDRA, together with their respective active pharmaceutical ingredients, or APIs, and finished products, as well as our clinical supplies, are manufactured on a contract basis. In addition, packaging for the commercial distribution of the Qsymia product capsules and the STENDRA product tablets is performed by contract packaging companies. We expect to continue to contract with other third-party providers for manufacturing services, including APIs, finished products, and packaging operations as needed. Although we believe that our current agreements and purchase orders with third-party manufacturers provide for sufficient operating capacity to support the anticipated commercial demand for Qsymia and STENDRA and our clinical supplies, we have only one approved contract manufacturer for each aspect of the manufacturing and packaging processes. If we are unable to obtain a sufficient supply of Qsymia or STENDRA for our commercial sales, or the clinical supplies to support our clinical trials, or if we should encounter delays or difficulties in our relationships with our manufacturers or packagers, we may lose potential sales, have difficulty entering into a collaboration agreement for the commercialization of STENDRA or our clinical trials may be delayed.

The API and the tablets for STENDRA (avanafil) are currently manufactured by MTPC. MTPC has arrangements for the three main starting materials necessary for the manufacturing of avanafil API. In August 2012, we entered into an amendment to our agreement with MTPC that permits us to manufacture the API and tablets for avanafil ourselves or through third-party suppliers at any time. The transition away from MTPC supply will need to occur on or before June 2015.

We currently do not have any manufacturing facilities and intend to continue to rely on third parties for the supply of the starting materials, API and finished dosage forms (tablets and capsules). However, we cannot be certain that we will be successful in entering into such agreements with other suppliers or that we will be able to obtain the necessary regulatory approvals for these suppliers in a timely manner or at all.

Catalent manufactured the supply for our Phase 3 program for Qsymia, and Catalent currently manufactures our clinical and commercial supplies for Qsymia. Catalent has been successful in validating the commercial manufacturing process for Qsymia at a scale which has been able to support the launch of Qsymia in the U.S. market. While Catalent has significant experience in commercial scale manufacturing, there is no assurance that they will be successful with the commercial scale manufacturing of Qsymia.

We attempt to prevent disruption of supplies through supply agreements, purchase orders, appropriate forecasting, maintaining stock levels and other strategies. In the event we are unable to manufacture our products, either directly or indirectly through others or on commercially acceptable terms, if at all, we may not be able to commercialize our products as planned. Although we are taking these actions to avoid a disruption in supply, we cannot provide assurance that we may not experience a disruption in the future.

Sales and Marketing

We rely on PDI, Inc., or PDI, a third-party contract sales organization, to assist with the hiring of sales representatives and the promotion of Qsymia to physicians. Our internal sales and marketing personnel manage and supervise the activities of this sales force.

We depend on the success of PDI in performing its services, and we cannot be certain PDI will cooperate with us to perform its obligations under the agreement. Although they are contractually obligated, we cannot control the amount of resources that will be devoted by PDI to the promotion of Qsymia. Any failure of PDI to perform its obligations or delay in allocating resources to the promotion of Qsymia could adversely affect the commercialization of Qsymia and materially harm our business, financial condition and results of operations.

Qsymia Distribution and REMS

We have contracted with Cardinal Health PTS, LLC, or Cardinal Health, a third-party distribution and supply-chain management company, to warehouse Qsymia and distribute it to the certified home delivery pharmacies that then distribute Qsymia directly to patients. Cardinal Health provides billing, collection and returns services. We also have entered into agreements with select certified pharmacies, including CVS Pharmacy, Express Scripts, Walgreens, Wal-Mart Pharmacy and Kaiser Permanente to distribute Qsymia to eligible patients through their home delivery networks. We rely on these certified pharmacies to implement a number of safety procedures and to report certain information to the third-party data warehouse.

Our distribution channel for Qsymia was only recently deployed, and some patients and physicians have experienced delays processing and filling prescriptions. Additionally, some Qsymia prescriptions were brought to retail pharmacies that do not dispense the drug. We believe that some prescriptions may never be filled as a result of these factors.

Failure to maintain our contracts with Cardinal Health, with the select certified home delivery pharmacies, or the third-party data warehouse, or the inability or failure of any of them to adequately perform under the contracts, could negatively impact the distribution of Qsymia, or adversely affect our ability to comply with the REMS applicable to Qsymia. Failure to coordinate financial systems could also negatively impact our ability to accurately report and forecast product revenue. If we are unable to effectively manage the distribution and data collection process, sales of Qsymia could be severely compromised and our business, financial condition and results of operations would be harmed.

Competition

Competition in the pharmaceutical and medical products industries is intense and is characterized by costly and extensive research efforts and rapid technological progress. We are aware of several pharmaceutical companies also actively engaged in the development of therapies for the treatment of obesity, diabetes and sexual health and medical device companies for the treatment of sleep apnea. Many of these companies have substantially greater research and development capabilities as well as substantially greater marketing, financial and human resources than we do. Our competitors may develop technologies and products that are more effective than those we are currently marketing or researching and developing. Some of the drugs which may compete with Qsymia may not have a REMS requirement and the accompanying complexities such a requirement presents. Such developments could render Qsymia and STENDRA less competitive or possibly obsolete. We are also competing with respect to marketing capabilities and manufacturing efficiency, areas in which we have limited experience.

Qsymia for the treatment of chronic weight management competes with several approved anti-obesity drugs including, Belviq (lorcaserin), Arena Pharmaceutical's approved anti-obesity compound to be marketed by Eisai Inc., Eisai Co., Ltd.'s U.S. subsidiary; Xenical (orlistat), marketed by Roche; alli, the over-the-counter version of orlistat, marketed by GlaxoSmithKline; and Suprenza

(phentermine hydrochloride), marketed by Akrimax Pharmaceuticals, LCL. In addition, Orexigen Therapeutics, Inc., or Orexigen, has an investigational drug in late stage testing, Contrave, which, according to Orexigen, could be approved and on the market in 2014. Contrave would be marketed by Takeda Pharmaceutical Company Limited.

There are also several drugs in development for obesity including an investigational drug candidate, liraglutide, in Phase 3 clinical trials being developed by Novo Nordisk A/S. Victoza (liraglutide) is approved by the FDA for the treatment of type 2 diabetes. The approved doses are 1.2mg and 1.8mg in the U.S. and EU while Victoza 3.0mg is being developed for the treatment of obesity. In addition, there are several other investigational drug candidates in Phase 2 clinical trials. In January 2013, Rhythm Pharmaceuticals announced the initiation of a Phase 2 clinical trial with RM-493, a small-peptide melanocortin 4 receptor (MC4R) agonist, for the treatment of obesity. There are a number of generic pharmaceutical drugs that are prescribed for obesity, predominantly phentermine. Phentermine is sold at much lower prices than we charge for Qsymia and is available in retail pharmacies. The availability of branded prescription drugs, generic drugs and over-the-counter drugs could limit the demand for, and the price we are able to charge for, Qsymia.

We also may face competition from the off-label use of the generic components in our drugs. In particular, it is possible that patients will seek to acquire phentermine and topiramate, the generic components of Qsymia. Neither of these generic components has a REMS program and both are available at retail pharmacies. Although the dose strength of these generic components has not been approved by the FDA for use in the treatment of obesity, the off-label use of the generic components in the U.S. or the importation of the generic components from foreign markets could adversely affect the commercial potential for our drugs and adversely affect our overall business, financial conditions and results of operations.

Qsymia and STENDRA may also face challenges and competition from newly developed generic products. Under the U.S. Drug Price Competition and Patent Term Restoration Act of 1984, known as the Hatch-Waxman Act, newly approved drugs and indications may benefit from a statutory period of non-patent marketing exclusivity. The Hatch-Waxman Act stimulates competition by providing incentives to generic pharmaceutical manufacturers to introduce non-infringing forms of patented pharmaceutical products and to challenge patents on branded pharmaceutical products. If we are unsuccessful at challenging an Abbreviated New Drug Application, or ANDA, filed pursuant to the Hatch-Waxman Act, a generic version of Qsymia or STENDRA may be launched, which would harm our business.

There are also surgical approaches to treat severe obesity that are becoming increasingly accepted. Two of the most well established surgical procedures are gastric bypass surgery and adjustable gastric banding, or lap bands. In February 2011, the FDA approved the use of a lap band in patients with a BMI of 30 (reduced from 35) with comorbidities. The lowering of the BMI requirement will make more obese patients eligible for lap band surgery. In addition, other potential approaches that utilize various implantable devices or surgical tools are in development. Some of these approaches are in late stage development and may be approved for marketing.

We anticipate that STENDRA (avanafil) for the treatment of ED will compete with PDE5 inhibitors in the form of oral medications including Viagra® (sildenafil citrate), marketed by Pfizer, Inc.; Cialis® (tadalafil), marketed by Eli Lilly and Company; Levitra® (vardenafil), co-marketed by GlaxoSmithKline plc and Schering-Plough Corporation in the U.S.; and STAXYN™ (vardenafil in an oral disintegrating tablet, or ODT), co-marketed by GlaxoSmithKline plc and Merck & Co., Inc.

As patents for the three major PDE5 inhibitors, sildenafil citrate, tadalafil and vardenafil, expire beginning in 2017, we anticipate that generic PDE5 inhibitors will enter the market. Generic PDE5 inhibitors would likely be sold at lower prices and may reduce the demand for STENDRA especially at the prices we would be required to charge for STENDRA to cover our manufacturing and other costs. In addition, PDE5 inhibitors are in various stages of development by other companies. Warner-

Chilcott plc has licensed the U.S. rights to udenafil, a PDE5 inhibitor from Dong-A Pharmaceutical. Warner-Chilcott continues Phase 3 development of this compound. Other treatments for ED exist, such as needle injection therapies, vacuum constriction devices and penile implants, and the manufacturers of these products will most likely continue to develop or improve these therapies.

New developments, including the development of other drug technologies and methods of preventing the incidence of disease, occur in the pharmaceutical and medical technology industries at a rapid pace. These developments may render our drugs and future investigational drug candidates obsolete or noncompetitive. Compared to us, many of our potential competitors have substantially greater:

- research and development resources, including personnel and technology;
- regulatory experience;
- investigational drug candidate development and clinical trial experience;
- experience and expertise in exploitation of intellectual property rights; and
- access to strategic partners and capital resources.

As a result of these factors, our competitors may obtain regulatory approval of their products more rapidly than we or may obtain patent protection or other intellectual property rights that limit our ability to develop or commercialize our investigational drug candidates. Our competitors may also develop drugs or surgical approaches that are more effective, more useful and less costly than ours and may also be more successful in manufacturing and marketing their products. In addition, our competitors may be more effective in commercializing their products. We currently outsource our manufacturing and therefore rely on third parties for that competitive expertise. There can be no assurance that we will be able to develop or contract for these capabilities on acceptable economic terms, or at all.

Research and Development

We incurred $32.1 million in 2012, $24.6 million in 2011 and $40.0 million in 2010 in research and development expenses, primarily to support the approval efforts for Qsymia and STENDRA.

Employees

As of February 19, 2013, we had 121 employees located at our corporate headquarters in Mountain View, California and in the field. None of our current employees are represented by a labor union or are the subject of a collective bargaining agreement. We believe that our relations with our employees are good and we have never experienced a work stoppage at any of our facilities.

Insurance

We maintain product liability insurance for our clinical trials and commercial sales and general liability and directors' and officers' liability insurance for our operations. Insurance coverage is becoming increasingly expensive and no assurance can be given that we will be able to maintain insurance coverage at a reasonable cost or in sufficient amounts to protect us against losses due to liability. Although we have obtained product liability insurance coverage for Qsymia, we may be unable to maintain this product liability coverage for Qsymia or any other of our approved drugs in amounts or scope sufficient to provide us with adequate coverage against all potential risks.

Available Information

Our Annual Report on Form 10-K, Quarterly Reports on Form 10-Q, Current Reports on Form 8-K and amendments to reports filed pursuant to Section 13(a) and 15(d) of the Securities Exchange Act of 1934, as amended, are available on our website at *www.vivus.com* , when such reports

are available on the SEC website. Copies of our annual report will be made available, free of charge, upon written request.

The public may read and copy any materials filed by VIVUS with the SEC at the SEC's Public Reference Room at 100 F Street, NE, Washington, DC 20549. The public may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. The SEC maintains an Internet site that contains reports, proxy and information statements and other information regarding issuers that file electronically with the SEC at *http://www.sec.gov.* The contents of these websites are not incorporated into this filing. Further, VIVUS' references to the URLs for these websites are intended to be inactive textual references only.

In addition, information regarding our code of ethics and the charters of our Audit, Compensation, and Nominating and Governance Committees are available free of charge on our website listed above, or in print upon written request.

Item 1A. ***Risk Factors***

Set forth below and elsewhere in this Annual Report on Form 10-K and in other documents we file with the Securities and Exchange Commission, or the SEC, are risks and uncertainties that could cause actual results to differ materially from the results contemplated by the forward-looking statements contained in this Annual Report on Form 10-K. These are not the only risks and uncertainties facing VIVUS. Additional risks and uncertainties not presently known to us or that we currently deem immaterial may also impair our business operations.

Risks Relating to our Business

Our success will depend on our ability to effectively and profitably commercialize Qsymia ™.

We began commercial sales of Qsymia in September 2012, and initial sales of Qsymia have been slow. Our success will depend on our ability to effectively and profitably commercialize Qsymia, formerly known as Qnexa®, which will include our ability to:

- create market demand for Qsymia through education, marketing and sales activities;
- achieve market acceptance and generate product sales;
- receive adequate levels of reimbursement from third-party payors, such as private insurance programs;
- comply with the post-marketing requirements established by the U.S. Food and Drug Administration, or FDA, including the Risk Evaluation and Mitigation Strategy, or REMS, and any other requirements established by the FDA in the future;
- conduct the post-marketing studies required by the FDA;
- comply with other healthcare regulatory requirements;
- ensure that the active pharmaceutical ingredients, or APIs, for Qsymia and the finished product are manufactured in sufficient quantities and in compliance with requirements of the FDA and similar foreign regulatory agencies and with an acceptable quality and pricing level in order to meet commercial demand; and
- ensure that the entire supply chain for Qsymia, from API to finished product, efficiently and consistently delivers Qsymia to our customers.

Prior to the commercialization of Qsymia, we have not had any commercial products since the divestiture of MUSE in November 2010. While our management and key personnel have significant experience launching and commercializing drugs at VIVUS and at other companies, we have only recently begun to work together to commercialize Qsymia and we cannot be certain that we will be successful. If we are unable to successfully commercialize Qsymia, our ability to generate product sales

will be severely limited, which will have a material adverse impact on our business, financial condition, and results of operations.

We intend to market and sell STENDRA ™ (avanafil) in the U.S. under a collaboration arrangement with a third party. We also intend to market and sell SPEDRA ™ (avanafil) outside the U.S., if approved, under collaboration arrangements with third parties. These arrangements might subject us to a number of risks.

We intend to enter into collaborative arrangements or strategic alliances with pharmaceutical partners or others to commercialize STENDRA in the U.S. and, if approved, to commercialize SPEDRA outside the U.S.

We may be unable to enter into agreements with third parties for these arrangements on favorable terms or at all, which could delay or impair our ability to commercialize STENDRA and SPEDRA in the relevant territories. Additionally, dependence on collaborative arrangements or strategic alliances will subject us to a number of risks, including the following:

- we may not be able to control the commercialization of our drug products in the relevant territories, including amount, timing and quality of resources that our collaborators may devote to our drug products;
- our collaborators may experience financial, regulatory or operational difficulties, which may impair their ability to commercialize our drug products;
- our collaborators may be required under the laws of the relevant territory to disclose our confidential information or may fail to protect our confidential information;
- as a requirement of the collaborative arrangement, we may be required to relinquish important rights with respect to our drug products, such as marketing and distribution rights;
- business combinations or significant changes in a collaborator's business strategy may adversely affect a collaborator's willingness or ability to satisfactorily complete its commercialization or other obligations under any collaborative arrangement;
- legal disputes or disagreements may occur with one or more of our collaborators;
- a collaborator could independently move forward with a competing investigational drug candidate developed either independently or in collaboration with others, including with one of our competitors; and
- a collaborator could terminate the collaborative arrangement, which could negatively impact the continued commercialization of our drug products.

Failure to obtain regulatory approval in foreign jurisdictions will prevent us from marketing our products abroad.

We intend to market and sell SPEDRA, if approved, in the European Union, or EU, and in other territories outside the U.S. through collaboration arrangements with third parties. In order to market products in the EU and many other foreign jurisdictions, we must obtain separate regulatory approvals. In March 2012, we filed a Marketing Authorization Application, or MAA, with the European Medicines Agency, or EMA, to market SPEDRA in the EU for the treatment of ED. In January 2013, we received the Day 180 List of Outstanding Issues, or LoOIs, for SPEDRA from the EMA's Committee for Medicinal Products for Human Use, or CHMP. We are currently reviewing the LoOIs which covers a broad range of topics including, without limitation, questions relating to clinical relevance in certain populations as well as questions regarding drug-drug interaction and pharmacokinetics. We are in the process of preparing our response to the CHMP. In order to respond to certain of the items contained in the LoOIs we have requested and have been granted a 30 day extension to respond. We have had limited interactions with foreign regulatory authorities, and the approval procedures vary among countries and can involve additional testing. Approval by the FDA

does not ensure approval by regulatory authorities in other countries, and approval by one foreign regulatory authority does not ensure approval by regulatory authorities in other foreign countries. For example, Qsymia was approved in the U.S. by the FDA; however, we were denied an MAA for the same product in the EU. Foreign regulatory approvals may not be obtained on a timely basis, or at all, for any of our products and the failure to receive regulatory approvals in a foreign country would prevent us from marketing our products in that country, which could have a material adverse effect on our business, financial condition and results of operations.

We intend to market SPEDRA outside the U.S., if approved, which will subject us to risks related to conducting business internationally.

We, together with our affiliates and partners, intend to manufacture, market, and distribute SPEDRA, if approved, outside the U.S. We expect that we will be subject to additional risks related to conducting business internationally, including:

- different regulatory requirements for drug approvals in foreign countries;
- differing U.S. and foreign drug import and export rules;
- reduced protection for intellectual property rights in some foreign countries;
- unexpected changes in tariffs, trade barriers and regulatory requirements;
- different reimbursement systems;
- economic weakness, including inflation, or political instability in particular foreign economies and markets;
- compliance with tax, employment, immigration and labor laws for employees living or traveling abroad;
- foreign taxes, including withholding of payroll taxes;
- foreign currency fluctuations, which could result in increased operating expenses and reduced revenues, and other obligations incident to doing business in another country;
- workforce uncertainty in countries where labor unrest is more common than in the U.S.;
- production shortages resulting from events affecting raw material supply or manufacturing capabilities abroad;
- potential liability resulting from development work conducted by these distributors; and
- business interruptions resulting from geopolitical actions, including war and terrorism, or natural disasters.

We rely in part on a third-party contract sales organization for certain sales and marketing support services for Qsymia.

We rely on PDI, Inc., or PDI, a third-party contract sales organization, to assist with the hiring of sales representatives and the promotion of Qsymia to physicians. Our internal sales and marketing personnel manage and supervise the activities of this sales force. Nevertheless, we face risks in our partial reliance on the third-party contract sales organization including the following:

- PDI may not apply the expected financial resources or required expertise to successfully promote Qsymia;
- PDI may not invest in the continued development of a sales force and the related infrastructure at levels that ensure that sales of Qsymia reach their full potential;
- PDI, or its sales representatives, may not comply with applicable legal or regulatory requirements, including the requirement to promote drugs only for uses for which they have been approved;

- disputes may arise between us and PDI that may delay the commercialization of Qsymia or adversely affect its sales or profitability; and

- PDI may enter into agreements with other parties that have products that could compete with Qsymia.

We depend on the success of PDI in performing its services, and we cannot be certain PDI will cooperate with us to perform its obligations under the agreement. Although they are contractually obligated, we cannot control the amount of resources that will be devoted by PDI to the promotion of Qsymia. Any failure of PDI to perform its obligations or to continue to allocate resources to the promotion of Qsymia could adversely affect the commercialization of Qsymia and materially harm our business, financial condition and results of operations.

Our failure to manage and maintain our distribution network for Qsymia could compromise the commercialization of this product.

We rely on Cardinal Health PTS, LLC, or Cardinal Health, a third-party distribution and supply-chain management company, to warehouse Qsymia and distribute it to the certified home delivery pharmacies that then distribute Qsymia directly to patients. Cardinal Health provides billing, collection and returns services. We also have entered into agreements with select certified pharmacies, including CVS Pharmacy, Express Scripts, Walgreens, Wal-Mart Pharmacy and Kaiser Permanente, to distribute Qsymia to eligible patients through their home delivery networks. As this distribution channel is new, patients and physicians have experienced delays in processing prescriptions and some prescriptions were sent to retail pharmacies and will not be dispensed. In addition to providing services to support the distribution and use of Qsymia, each of the pharmacies has agreed to comply with the REMS program certified pharmacy requirements and will provide us with the necessary patient and prescribing physician data. We have contracted with a third-party data warehouse to collect this patient and prescribing physician data from the certified pharmacy home delivery network and report it to us. We rely on this third-party data in order to recognize revenue and comply with the REMS requirements for Qsymia, such as data analysis. This distribution and data collection network requires significant coordination with our sales and marketing, finance, regulatory and medical affairs teams, in light of the REMS requirements applicable to Qsymia.

Cardinal Health is our exclusive supplier of distribution logistics services, and accordingly we depend on Cardinal Health to satisfactorily perform its obligations under our agreement with them. Pursuant to the REMS program applicable to Qsymia, our distribution network is through a small number of certified home delivery pharmacies, and we rely on these pharmacies to implement a number of safety procedures and report certain information to the third-party data warehouse. Failure to maintain our contracts with Cardinal Health, with the select certified home delivery pharmacies, or with the third-party data warehouse, or the inability or failure of any of them to adequately perform under the contracts, could negatively impact the distribution of Qsymia, or adversely affect our ability to comply with the REMS applicable to Qsymia. Failure to comply with a requirement of an approved REMS can result in, among other things, civil penalties, operating restrictions and criminal prosecution. Failure to coordinate financial systems could also negatively impact our ability to accurately report and forecast product revenue. If we are unable to effectively manage the distribution and data collection process, sales of Qsymia could be severely compromised and our business, financial condition and results of operations would be harmed.

If we are unable to enter into agreements with suppliers or our suppliers fail to supply us with the APIs for our drugs or if we rely on sole source suppliers, we may experience delays in commercializing our drugs.

We currently do not have supply agreements for extended-release topiramate or phentermine, which are the APIs used in Qsymia. We cannot guarantee that we will be successful in entering into supply agreements on reasonable terms or at all or that we will be able to obtain or maintain the necessary regulatory approvals for these suppliers in a timely manner or at all.

We anticipate that we will continue to rely on single source suppliers for phentermine and extended-release topiramate for the foreseeable future. Any production shortfall on the part of our suppliers that impairs the supply of phentermine or extended-release topiramate could have a material adverse effect on our business, financial condition and results of operations. If we are unable to obtain a sufficient quantity of these compounds, there could be a substantial delay in successfully developing a second source supplier. An inability to continue to source product from any of these suppliers, which could be due to regulatory actions or requirements affecting the supplier, adverse financial or other strategic developments experienced by a supplier, labor disputes or shortages, unexpected demands or quality issues, could adversely affect our ability to satisfy demand for Qsymia, which could adversely affect our product sales and operating results materially, which could significantly harm our business.

The API and the tablets for STENDRA are currently manufactured by Mitsubishi Tanabe Pharma Corporation, or MTPC. MTPC has arrangements for the three main starting materials necessary for the manufacturing of avanafil API. The MTPC manufacturing sites for the API (avanafil) and STENDRA tablets have been inspected by the U.S. authorities. We do not believe the results of those inspections will have an impact on MTPC's ability to supply STENDRA, or the approval, or the timing of approval, of SPEDRA in the EU. However, if MTPC is unable to receive approval from foreign regulators and maintain ongoing FDA or foreign regulatory compliance, or manufacture STENDRA's API or tablets in sufficient quantities to meet projected demand, the EU approval, the U.S. commercial launch, and future sales of STENDRA and SPEDRA will be adversely effected, which in turn could have a detrimental impact on our financial results and could impact our ability to enter into a collaboration for the commercialization of STENDRA and SPEDRA, if approved.

In August 2012, we entered into an amendment to our agreement with MTPC that permits us to manufacture the API and tablets for STENDRA ourselves or through third-party suppliers at any time, and we are required under the amendment to transition away from MTPC supply on or before June 2015.

We currently do not have any manufacturing facilities and intend to continue to rely on third parties for the supply of the starting materials, API and tablets. However, we cannot be certain that we will be successful in entering into such agreements with other suppliers or that we will be able to obtain the necessary regulatory approvals for these suppliers in a timely manner or at all.

We have in-licensed all or a portion of the rights to Qsymia and STENDRA from third parties. If we default on any of our material obligations under those licenses, we could lose rights to these drugs.

We have in-licensed and otherwise contracted for rights to Qsymia and STENDRA, and we may enter into similar licenses in the future. Under the relevant agreements, we are subject to commercialization, development, supply, sublicensing, royalty, insurance and other obligations. If we fail to comply with any of these requirements, or otherwise breach these license agreements, the licensor may have the right to terminate the license in whole or to terminate the exclusive nature of the license. Loss of any of these licenses or the exclusive rights provided therein could harm our financial condition and operating results.

In particular, we license the rights to avanafil from MTPC, and we have certain obligations to MTPC in connection with that license. For example, we are obligated to use our best commercial efforts to market STENDRA in the U.S. by December 31, 2013. Failure to launch STENDRA in the U.S. before this date may result in us losing our license to STENDRA in the U.S. and could adversely impact the commercial future of STENDRA outside of the U.S. In addition, we license the rights to Qsymia from Dr. Najarian. We believe we are in compliance with the material terms of our license agreements with MPTC and Dr. Najarian. However, there can be no assurance that this compliance will continue or that the licensors will not have a differing interpretation of the material terms of the agreements. If the license agreements were terminated early or if the terms of the licenses were contested for any reason, it would have a material adverse impact on our ability to commercialize products subject to these agreements, our ability to raise funds to finance our operations, our stock

price and our overall financial condition. The monetary and disruption costs of any disputes involving our agreements could be significant despite rulings in our favor.

Our ability to gain market acceptance and generate revenues will be subject to a variety of risks, many of which are out of our control.

Qsymia and STENDRA may not gain market acceptance among physicians, patients, healthcare payors or the medical community. We believe that the degree of market acceptance and our ability to generate revenues from such drugs will depend on a number of factors, including:

- our distribution system for Qsymia, which will be limited to a certified home delivery pharmacy network in accordance with the REMS requirement;
- contraindications for Qsymia and STENDRA;
- competition and timing of market introduction of competitive drugs;
- efficacy and safety in the approved setting;
- prevalence and severity of any side effects, including those of the generic components of our drugs;
- emergence of previously unknown side effects, including those of the generic components of our drugs;
- results of any post-approval studies;
- potential or perceived advantages or disadvantages over alternative treatments including generics;
- the relative convenience and ease of administration and dosing schedule;
- the convenience and ease of purchasing the drug, as perceived by potential patients;
- strength of sales, marketing and distribution support;
- price both in absolute terms and relative to alternative treatments;
- the effectiveness of our or any future collaborators' sales and marketing strategies;
- the effect of current and future healthcare laws;
- availability of coverage and reimbursement from government and other third-party payors;
- the level of mandatory discounts required under federal and state healthcare programs and the volume of sales subject to those discounts;
- recommendations for prescribing physicians to complete certain educational programs for prescribing drugs;
- the willingness of patients to pay out of pocket in the absence of government or third-party coverage; and
- product labeling or product insert requirements of the FDA or other regulatory authorities.

Our drugs may fail to achieve market acceptance or generate significant revenue to achieve or sustain profitability. In addition, our efforts to educate the medical community and third-party payors on the safety and benefits of our drugs may require significant resources and may not be successful.

We are required to complete post-approval studies mandated by the FDA for both Qsymia and STENDRA, and such studies are expected to be costly and time consuming. If the results of these studies reveal unacceptable safety risks, Qsymia or STENDRA may be required to be withdrawn from the market.

As part of the approval for STENDRA, the FDA is requiring us to perform two post-approval clinical studies. The first is a randomized, double-blind, placebo-controlled, parallel group multicenter clinical trial on the effect of STENDRA on spermatogenesis in healthy adult males and males with mild erectile dysfunction, or ED. The other study is a double-blind, randomized, placebo-controlled, single-dose clinical trial to assess the effects of STENDRA on multiple parameters of vision, including, but not limited to, visual acuity, intraocular pressure, pupillometry, and color vision discrimination in healthy male subjects. If we are unable to complete these studies or the results of these studies reveal unacceptable safety risks, we could be required to perform additional tests and regulatory approval could even be withdrawn.

As part of the approval of Qsymia, we are required to conduct several post-marketing studies, including a study to assess the long-term treatment effect of Qsymia on the incidence of major adverse cardiovascular events in overweight and obese subjects with confirmed cardiovascular disease, studies to assess the safety and efficacy of Qsymia for weight management in obese pediatric and adolescent subjects, studies to assess drug utilization and pregnancy exposure and a study to assess renal function. The details of the cardiovascular outcomes study, known as ACQLAIM, have not yet been agreed upon with the FDA. This study could cost between $150.0 and $250.0 million and take as long as five years to complete. Enrollment is expected to begin in the fourth quarter of 2013. There can be no assurance that the FDA will not request or require us to provide additional information or undertake additional prospective studies or retrospective observational studies or that we will be able to agree with the FDA on the details of ACQLAIM.

In addition, at the FDA's request, we initiated a retrospective observational study utilizing existing electronic medical claims healthcare databases to review fetal outcomes, including the incidence of congenital malformations and oral cleft, in the offspring of women who received treatment with topiramate, for any condition or at any dose, or FORTRESS. We announced preliminary results from FORTRESS in December 2011. The results of the study are considered to be preliminary until the results are validated, which we expect to complete in the second half of 2013. If the results of this study reveal unacceptable safety risks for topiramate, we could be required to perform additional studies and regulatory approval could even be withdrawn.

In addition to these studies, the FDA may also require us to commit to perform other lengthy post-approval studies, for which we would have to expend significant additional resources, which could have an adverse effect on our operating results, financial condition and stock price. Failure to comply with the applicable regulatory requirements can result in, among other things, civil penalties, suspensions of regulatory approvals, operating restrictions and criminal prosecution. The restriction, suspension or revocation of regulatory approvals or any other failure to comply with regulatory requirements could have a material adverse effect on our business, financial condition, results of operations and stock price.

We depend upon consultants and outside contractors extensively in important roles within our company.

We outsource many key functions of our business and therefore rely on a substantial number of consultants, and we will need to be able to effectively manage these consultants to ensure that they successfully carry out their contractual obligations and meet expected deadlines. However, if we are unable to effectively manage our outsourced activities or if the quality or accuracy of the services provided by consultants is compromised for any reason, our clinical trials or other development activities may be extended, delayed or terminated, and we may not be able to complete our post-approval clinical trials for Qsymia and STENDRA, obtain regulatory approval for our current and

future investigational drug candidates, successfully commercialize our approved drugs or otherwise advance our business. There can be no assurance that we will be able to manage our existing consultants or find other competent outside contractors and consultants on commercially reasonable terms, or at all.

Qsymia is a combination of two active ingredient drug products approved individually by the FDA that are commercially available and marketed by other companies, although the specific dose strengths and formulation (extended-release vs. immediate-release) would differ. As a result, Qsymia may be subject to substitution by prescribing physicians with individual drugs contained in the Qsymia formulation, which would adversely affect our business.

Although Qsymia is a once-a-day, proprietary extended-release formulation, each of the approved APIs (phentermine and topiramate extended-release) that is combined to produce Qsymia is commercially available as drug products at prices that together are lower than the price at which we sell Qsymia. In addition, the distribution and sale of these drug products is not limited under a REMS program, as is the case with Qsymia. Further, the individual drugs contained in the Qsymia formulation are available in retail pharmacies and neither has a Pregnancy Category X, which is used to indicate that the risks involved in the use of the drug in pregnant women clearly outweigh potential benefits, as is the case with Qsymia. We cannot be sure that physicians will view Qsymia as sufficiently superior to a treatment regimen of Qsymia's individual APIs to justify the significantly higher cost for Qsymia, and they may prescribe the individual generic drugs already approved and marketed by other companies instead of our combination drug. Although our U.S. and European patents contain composition, product formulation and method-of-use claims that we believe protect Qsymia, these patents do not prevent physicians from prescribing the individual generic constituents marketed by other companies instead of our combination drug. Phentermine and topiramate are currently available in generic form, although the doses used in Qsymia are currently not available and no extended-release formulation of topiramate is currently available. In addition, topiramate is not approved for obesity treatment, and phentermine is only approved for short-term treatment of obesity. However, because the price of Qsymia is significantly higher than the prices of the individual components as marketed by other companies, physicians may have a greater incentive to write prescriptions for the individual components outside of their approved indication, instead of for our combination drug, and this may limit how we price or market Qsymia. Similar concerns could also limit the reimbursement amounts private health insurers or government agencies in the U.S. are prepared to pay for Qsymia, which could also limit market and patient acceptance of our drug and could negatively impact our revenues.

In many regions and countries where we may plan to market Qsymia, the pricing of reimbursed prescription drugs is controlled by the government or regulatory agencies. The government or regulatory agencies in these countries could determine that the pricing for Qsymia should be based on prices for its APIs when sold separately, rather than allowing us to market Qsymia at a premium as a new drug.

If we become subject to product liability claims, we may be required to pay damages that exceed our insurance coverage.

Qsymia and STENDRA, like all pharmaceutical products, are subject to heightened risk for product liability claims due to inherent potential side effects. For example, because topiramate, a component of Qsymia, may increase the risk of congenital malformation in infants exposed to topiramate during the first trimester of pregnancy and also may increase the risk of suicidal thoughts and behavior, such risks may be associated with Qsymia as well. Other potential risks involving Qsymia may include, but are not limited to, an increase in resting heart rate, acute angle closure glaucoma, cognitive and psychiatric adverse events, metabolic acidosis, an increase in serum creatinine,

hypoglycemia in patients with type 2 diabetes, kidney stone formation, decreased sweating and hypokalemia, or lower-than-normal amount of potassium in the blood.

Although we have obtained product liability insurance coverage for Qsymia, we may be unable to maintain this product liability coverage for Qsymia or any other of our approved drugs in amounts or scope sufficient to provide us with adequate coverage against all potential risks. A product liability claim in excess of, or excluded from, our insurance coverage would have to be paid out of cash reserves and could have a material adverse effect upon our business, financial condition and results of operations. Product liability insurance is expensive, difficult to maintain, and current or increased coverage may not be available on acceptable terms, if at all.

In addition, we develop, test, and manufacture through third parties, approved drugs and future investigational drug candidates that are used by humans. We face an inherent risk of product liability exposure related to the testing of our approved drugs and investigational drug candidates in clinical trials. An individual may bring a liability claim against us if one of our approved drugs or future investigational drug candidates causes, or merely appears to have caused, an injury.

If we cannot successfully defend ourselves against a product liability claim, whether involving Qsymia, STENDRA or a future investigational drug candidate, we may incur substantial liabilities. Regardless of merit or eventual outcome, liability claims may result in:

- injury to our reputation;
- withdrawal of clinical trial patients;
- costs of defending the claim and/or related litigation;
- cost of any potential adverse verdict;
- substantial monetary awards to patients or other claimants; and
- the inability to commercialize our drugs.

Damages awarded in a product liability action could be substantial and could have a negative impact on our financial condition. Whether or not we were ultimately successful in product liability litigation, such litigation would consume substantial amounts of our financial and managerial resources, and might result in adverse publicity, all of which would impair our business. In addition, product liability claims could result in an FDA investigation of the safety or efficacy of our product, our third-party manufacturing processes and facilities, or our marketing programs. An FDA investigation could also potentially lead to a recall of our products or more serious enforcement actions, limitations on the indications for which they may be used, or suspension or withdrawal of approval.

The markets in which we operate are highly competitive and we may be unable to compete successfully against new entrants or established companies.

Competition in the pharmaceutical and medical products industries is intense and is characterized by costly and extensive research efforts and rapid technological progress. We are aware of several pharmaceutical companies also actively engaged in the development of therapies for the treatment of obesity, diabetes and sexual health and medical device companies for the treatment of sleep apnea. Many of these companies have substantially greater research and development capabilities as well as substantially greater marketing, financial and human resources than we do. Some of the drugs which may compete with Qsymia may not have a REMS requirement and the accompanying complexities such a requirement presents. Our competitors may develop technologies and products that are more effective than those we are currently marketing or researching and developing. Such developments could render Qsymia and STENDRA less competitive or possibly obsolete. We are also competing with

respect to marketing capabilities and manufacturing efficiency, areas in which we have limited experience.

Qsymia for the treatment of chronic weight management competes with several approved anti-obesity drugs including, Belviq® (lorcaserin), Arena Pharmaceutical's approved anti-obesity compound to be marketed by Eisai Inc., Eisai Co., Ltd.'s U.S. subsidiary; Xenical (orlistat), marketed by Roche; alli®, the over-the-counter version of orlistat, marketed by GlaxoSmithKline; and Suprenza (phentermine hydrochloride), marketed by Akrimax Pharmaceuticals, LCL. In addition, Orexigen Therapeutics, Inc., or Orexigen, has an investigational drug in late stage testing, Contrave®, which, according to Orexigen, could be approved and on the market in 2014. Contrave would be marketed by Takeda Pharmaceutical Company Limited.

There are also several drugs in development for obesity including an investigational drug candidate, liraglutide, in Phase 3 clinical trials being developed by Novo Nordisk A/S. Victoza® (liraglutide) is approved by the FDA for the treatment of type 2 diabetes and also is being developed for the treatment of obesity. In addition, there are several other investigational drug candidates in Phase 2 clinical trials. There are also a number of generic pharmaceutical drugs that are prescribed for obesity, predominantly phentermine. Phentermine is sold at much lower prices than we charge for Qsymia and is available in retail pharmacies. The availability of a branded prescription drugs, generic drugs and over-the-counter drugs could limit the demand for, and the price we are able to charge for, Qsymia.

We also may face competition from the off-label use of the generic components in our drugs. In particular, it is possible that patients will seek to acquire phentermine and topiramate, the generic components of Qsymia. Neither of these generic components has a REMS program and both are available at retail pharmacies. Although the dose strength of these generic components has not been approved by the FDA for use in the treatment of obesity, the off-label use of the generic components in the U.S. or the importation of the generic components from foreign markets could adversely affect the commercial potential for our drugs and adversely affect our overall business, financial conditions and results of operations.

There are also surgical approaches to treat severe obesity that are becoming increasingly accepted. Two of the most well established surgical procedures are gastric bypass surgery and adjustable gastric banding, or lap bands. In February 2011, the FDA approved the use of a lap band in patients with a BMI of 30 (reduced from 35) with comorbidities. The lowering of the BMI requirement will make more obese patients eligible for lap band surgery. In addition, other potential approaches that utilize various implantable devices or surgical tools are in development. Some of these approaches are in late stage development and may be approved for marketing.

We anticipate that STENDRA (avanafil) for the treatment of erectile dysfunction will compete with PDE5 inhibitors in the form of oral medications including Viagra® (sildenafil citrate), marketed by Pfizer, Inc.; Cialis® (tadalafil), marketed by Eli Lilly and Company; Levitra® (vardenafil), co-marketed by GlaxoSmithKline plc and Schering-Plough Corporation in the U.S.; and STAXYN™ (vardenafil in an oral disintegrating tablet, or ODT), co-marketed by GlaxoSmithKline plc and Merck & Co., Inc.

As patents for the three major PDE5 inhibitors, sildenafil citrate, tadalafil and vardenafil, expire beginning in 2017, we anticipate that generic PDE5 inhibitors will enter the market. Generic PDE5 inhibitors would likely be sold at lower prices and may reduce the demand for STENDRA especially at the prices we would be required to charge for STENDRA to cover our manufacturing and other costs. In addition, PDE5 inhibitors are in various stages of development by other companies. Warner-Chilcott plc has licensed the U.S. rights to udenafil, a PDE5 inhibitor from Dong-A Pharmaceutical. Warner-Chilcott continues Phase 3 development of this compound. Other treatments for ED exist, such as needle injection therapies, vacuum constriction devices and penile implants, and the manufacturers of these products will most likely continue to develop or improve these therapies.

Qsymia and STENDRA may also face challenges and competition from newly developed generic products. Under the U.S. Drug Price Competition and Patent Term Restoration Act of 1984, known as the Hatch-Waxman Act, newly approved drugs and indications may benefit from a statutory period of non-patent marketing exclusivity. The Hatch-Waxman Act stimulates competition by providing incentives to generic pharmaceutical manufacturers to introduce non-infringing forms of patented pharmaceutical products and to challenge patents on branded pharmaceutical products. If we are unsuccessful at challenging an Abbreviated New Drug Application, or ANDA, filed pursuant to the Hatch-Waxman Act, a generic version of Qsymia or STENDRA may be launched, which would harm our business.

New developments, including the development of other drug technologies and methods of preventing the incidence of disease, occur in the pharmaceutical and medical technology industries at a rapid pace. These developments may render our drugs and future investigational drug candidates obsolete or noncompetitive. Compared to us, many of our potential competitors have substantially greater:

- research and development resources, including personnel and technology;
- regulatory experience;
- investigational drug candidate development and clinical trial experience;
- experience and expertise in exploitation of intellectual property rights; and
- access to strategic partners and capital resources.

As a result of these factors, our competitors may obtain regulatory approval of their products more rapidly than we or may obtain patent protection or other intellectual property rights that limit our ability to develop or commercialize our investigational drug candidates. Our competitors may also develop drugs or surgical approaches that are more effective, more useful and less costly than ours and may also be more successful in manufacturing and marketing their products. In addition, our competitors may be more effective in commercializing their products. We currently outsource our manufacturing and therefore rely on third parties for that competitive expertise. There can be no assurance that we will be able to develop or contract for these capabilities on acceptable economic terms, or at all.

We may participate in new partnerships and other strategic transactions that could impact our liquidity, increase our expenses and present significant distractions to our management.

From time to time we consider strategic transactions, such as out-licensing or in-licensing of compounds or technologies, acquisitions of companies and asset purchases. Additional potential transactions we may consider include a variety of different business arrangements, including strategic partnerships, joint ventures, spin-offs, restructurings, divestitures, business combinations and investments. In addition, another entity may pursue us as an acquisition target. Any such transactions may require us to incur non-recurring or other charges, may increase our near and long-term expenditures and may pose significant integration challenges, require additional expertise or disrupt our management or business, any of which could harm our operations and financial results.

As part of an effort to enter into significant transactions, we conduct business, legal and financial due diligence with the goal of identifying and evaluating material risks involved in the transaction. Despite our efforts, we ultimately may be unsuccessful in ascertaining or evaluating all such risks and, as a result, might not realize the expected benefits of the transaction. If we fail to realize the expected benefits from any transaction we may consummate, whether as a result of unidentified risks, integration difficulties, regulatory setbacks or other events, our business, results of operations and financial condition could be adversely affected.

Our failure to successfully acquire, develop and market additional investigational drug candidates or approved drugs would impair our ability to grow.

As part of our growth strategy, we may acquire, in-license, develop and/or market additional products and investigational drug candidates. We have not in-licensed any new product candidates in several years. Because our internal research capabilities are limited, we may be dependent upon pharmaceutical and biotechnology companies, academic scientists and other researchers to sell or license products or technology to us. The success of this strategy depends partly upon our ability to identify, select and acquire promising pharmaceutical investigational drug candidates and products.

The process of proposing, negotiating and implementing a license or acquisition of an investigational drug candidate or approved product is lengthy and complex. Other companies, including some with substantially greater financial, marketing and sales resources, may compete with us for the license or acquisition of investigational drug candidates and approved products. We have limited resources to identify and execute the acquisition or in-licensing of third-party products, businesses and technologies and integrate them into our current infrastructure. Moreover, we may devote resources to potential acquisitions or in-licensing opportunities that are never completed, or we may fail to realize the anticipated benefits of such efforts. We may not be able to acquire the rights to additional investigational drug candidates on terms that we find acceptable, or at all.

In addition, future acquisitions may entail numerous operational and financial risks, including:

- exposure to unknown liabilities;
- disruption of our business and diversion of our management's time and attention to develop acquired products or technologies;
- incurrence of substantial debt or dilutive issuances of securities to pay for acquisitions;
- higher than expected acquisition, integration and maintenance costs;
- increased amortization expenses;
- difficulty and cost in combining the operations and personnel of any acquired businesses with our operations and personnel;
- impairment of relationships with key suppliers or customers of any acquired businesses due to changes in management and ownership; and
- inability to retain key employees of any acquired businesses.

Further, any investigational drug candidate that we acquire may require additional development efforts prior to commercial sale, including extensive clinical testing and obtaining approval by the FDA and applicable foreign regulatory authorities. All investigational drug candidates are prone to certain failures that are relatively common in the field of drug development, including the possibility that an investigational drug candidate will not be shown to be sufficiently safe and effective for approval by regulatory authorities. In addition, we cannot be certain that any drugs that we develop or approved products that we may acquire will be commercialized profitably or achieve market acceptance.

If we fail to retain our key personnel and hire, train and retain qualified employees, we may not be able to compete effectively, which could result in reduced revenues or delays in the development of our investigational drug candidates or commercialization of our approved drugs.

Our success is highly dependent upon the skills of a limited number of key management personnel. To reach our business objectives, we will need to retain and hire qualified personnel in the areas of manufacturing, commercial operations, research and development, regulatory and legal affairs, business development, clinical trial design, execution and analysis, and pre-clinical testing. There can be no

assurance that we will be able to hire or retain such personnel, as we must compete with other companies, academic institutions, government entities and other agencies. The loss of any of our key personnel or the failure to attract or retain necessary new employees could have an adverse effect on our research programs, investigational drug candidate development, approved drug commercialization efforts and business operations.

We rely on third parties and collaborative partners to manufacture sufficient quantities of compounds within product specifications as required by regulatory agencies for use in our pre-clinical and clinical trials and commercial operations and an interruption to this service may harm our business.

We do not have the ability to manufacture the materials we use in our pre-clinical and clinical trials and commercial operations. Rather, we rely on various third parties to manufacture these materials and there may be long lead times to obtain materials. There can be no assurance that we will be able to identify, qualify and obtain prior regulatory approval for additional sources of clinical materials. If interruptions in this supply occur for any reason, including a decision by the third parties to discontinue manufacturing, technical difficulties, labor disputes, natural or other disasters, or a failure of the third parties to follow regulations, we may not be able to obtain regulatory approvals for our investigational drug candidates and may not be able to successfully commercialize these investigational drug candidates or our approved drugs.

Our third-party manufacturers and collaborative partners, may encounter delays and problems in manufacturing our investigational drug candidates or approved drugs for a variety of reasons, including accidents during operation, failure of equipment, delays in receiving materials, natural or other disasters, political or governmental changes, or other factors inherent in operating complex manufacturing facilities. Supply chain management is difficult. Commercially available starting materials, reagents, excipients, and other materials may become scarce, more expensive to procure, or not meet quality standards, and we may not be able to obtain favorable terms in agreements with subcontractors. Our third-party manufacturers, may not be able to operate manufacturing facilities in a cost-effective manner or in a time frame that is consistent with our expected future manufacturing needs. If our third-party manufacturers, cease or interrupt production or if our third-party manufacturers and other service providers fail to supply materials, products or services to us for any reason, such interruption could delay progress on our programs, or interrupt the commercial supply, with the potential for additional costs and lost revenues. If this were to occur, we may also need to seek alternative means to fulfill our manufacturing needs.

For example, Catalent supplied the product for the Phase 3 program for Qsymia and is our sole source of clinical and commercial supplies for Qsymia. Catalent has been successful in validating the commercial manufacturing process for Qsymia at a scale which has been able to support the launch of Qsymia in the U.S. market. While Catalent has significant experience in commercial scale manufacturing, there is no assurance that they will be successful with the commercial scale manufacturing of Qsymia, which may be required to support future increases in market demand of Qsymia. Such a failure by Catalent to further scale up the commercial manufacturing process for Qsymia could have a material adverse impact on our ability to realize commercial success with Qsymia in the U.S. market, and have a material adverse impact on our plan, market price of our common stock and financial condition.

In the case of STENDRA, we currently rely on MTPC to supply the API (avanafil) and the tablets for STENDRA. MTPC is responsible for all aspects of manufacture, including obtaining the starting materials for the production of API. If MTPC is unable to manufacture the API for STENDRA or tablets in sufficient quantities to meet projected demand future sales of STENDRA could be adversely effected, which in turn could have a detrimental impact on our financial results and could impact our ability to enter into a collaboration for the commercialization of STENDRA.

In August 2012, we entered into an amendment to our agreement with MTPC that permits us to manufacture the API and tablets for avanafil ourselves or through third parties. According to the amendment, the transition of manufacturing from MTPC must occur on or before June 2015. The transfer of technology to, and qualification of, a new supplier is expensive, time consuming and logistically complicated. The technology transfer needed for this transition is highly dependent on the cooperation of MTPC and its current suppliers. If MTPC, or its current suppliers, is unable to effectively transfer the technology or supply on commercially reasonable terms, the approvability, partnerability and commercial success of STENDRA could be adversely impacted. Any future manufacturing sites would need to be inspected by the U.S. and EU authorities, and any failure of such manufacturing sites to receive approval from FDA or foreign authorities, obtain and maintain ongoing FDA or foreign regulatory compliance, or manufacture avanafil API or STENDRA tablets in expected quantities, could adversely affect future sales of STENDRA, which in turn could have a detrimental impact on our financial results and could impact our ability to enter into a collaboration for the commercialization of STENDRA.

We rely on third parties to maintain appropriate levels of confidentiality of the data compiled during clinical, pre-clinical and retrospective observational studies and trials.

We seek to maintain the confidential nature of our confidential information through contractual provisions in our agreements with third parties, including our agreements with clinical research organizations, or CROs, that manage our clinical studies for our investigational drug candidates. These CROs may fail to comply with their obligations of confidentiality or may be required as a matter of law to disclose our confidential information. As the success of our clinical studies depends in large part on our confidential information remaining confidential prior to, during and after a clinical study, any disclosure could have a material adverse effect on the outcome of a clinical study, our business, financial condition and results of operations.

If we fail to comply with applicable healthcare regulations, we could face substantial penalties and our business, operations and financial condition could be adversely affected.

Even though we do not bill directly to Medicare, Medicaid or other third-party payors, certain federal and state healthcare laws and regulations pertaining to fraud and abuse are and will be applicable to our business. The regulations that may affect our ability to operate include, but are not limited to:

- the federal Anti-Kickback Law, which prohibits, among other things, knowingly or willingly offering, paying, soliciting or receiving remuneration, directly or indirectly, to induce or in return for purchasing, leasing, ordering or arranging for the purchase, lease or order of any health care items or service reimbursable under federal healthcare programs such as Medicare and Medicaid. Further, the Affordable Care Act, among other things, amends the intent requirement of the federal anti-kickback statute. A person or entity no longer needs to have actual knowledge of this statute or specific intent to violate it. In addition, the Affordable Care Act provides that the government may assert that a claim including items or services resulting from a violation of the federal anti-kickback statute constitutes a false or fraudulent claim for purposes of the false claims statutes. This statute has been interpreted to apply to arrangements between pharmaceutical companies on one hand and prescribers, purchasers and formulary managers on the other. Although there are a number of statutory exemptions and regulatory safe harbors protecting certain common manufacturer business arrangements and activities from prosecution, the exemptions and safe harbors are drawn narrowly, and practices that involve remuneration intended to induce prescribing, purchases or recommendations of our products may be subject to scrutiny if they do not qualify for an exemption or safe harbor. We seek to comply with the

exemptions and safe harbors whenever possible, but our practices may not in all cases meet all of the criteria for safe harbor protection from anti-kickback liability;

- the federal False Claims Laws, which prohibits, among other things, individuals or entities from knowingly presenting, or causing to be presented, a false claim for payment to the federal government or knowingly making, or causing to be made, a false statement to get a false claim paid. Many pharmaceutical and other healthcare companies have been investigated and have reached substantial financial settlements with the federal government under the False Claims Act for a variety of alleged improper marketing activities, including providing free product to customers with the expectation that the customers would bill federal programs for the product; providing consulting fees, grants, free travel, and other benefits to physicians to induce them to prescribe the company's products; and inflating prices reported to private price publication services, which are used to set drug payment rates under government healthcare programs. In addition, in recent years the government has pursued False Claims Act cases against a number of pharmaceutical companies for causing false claims to be submitted as a result of the marketing of their products for unapproved, and thus non-reimbursable, uses. Pharmaceutical and other healthcare companies also are subject to other federal false claim laws, including federal criminal healthcare fraud and false statement statutes that extend to non-government health benefit programs;

- numerous federal and state laws, including state security breach notification laws, state health information privacy laws and federal and state consumer protection laws, govern the collection, use and disclosure of personal information. Other countries also have, or are developing, laws governing the collection, use and transmission of personal information. In addition, most healthcare providers who prescribe our product and from whom we obtain patient health information are subject to privacy and security requirements under the Health Insurance Portability and Accountability Act of 1996, or HIPAA. We are not a HIPAA covered entity and we do not operate as a business associate to any covered entities. Therefore, these privacy and security requirements do not apply to us. However, we could be subject to criminal penalties if we knowingly obtain individually identifiable health information from a covered entity in a manner that is not authorized or permitted by HIPAA or for aiding and abetting the violation of HIPAA. We are unable to predict whether our actions could be subject to prosecution in the event of an impermissible disclosure of health information to us. The legislative and regulatory landscape for privacy and data protection continues to evolve, and there has been an increasing amount of focus on privacy and data protection issues with the potential to affect our business, including recently enacted laws in a majority of states requiring security breach notification. These laws could create liability for us or increase our cost of doing business;

- state law equivalents of each of the above federal laws, such as anti-kickback and false claims laws that may apply to items or services reimbursed under Medicaid and other state programs or, in several states, apply regardless of the payor. Some state laws also require pharmaceutical companies to report expenses relating to the marketing and promotion of pharmaceutical products and to report gifts and payments to individual physicians in the states. Other states prohibit providing meals to prescribers or other marketing related activities. Still other states require the posting of information relating to clinical studies and their outcomes. In addition, California, Nevada, and Massachusetts require pharmaceutical companies to implement compliance programs or marketing codes of conduct. Additional states are considering or recently have considered similar proposals. Foreign governments often have similar regulations which we also will be subject to in those countries where we market and sell products; and

- the federal Physician Payment Sunshine Act will require extensive tracking of physician and teaching hospital payments, maintenance of a payments database, and public reporting of the payment data. Centers for Medicare and Medicaid Services, or CMS, recently issued a final rule

implementing the Physician Payment Sunshine Act provisions and clarified the scope of the reporting obligations, as well as that manufacturers must begin tracking on August 1, 2013 and must report payment data to CMS by March 31, 2014.

If our operations are found to be in violation of any of the laws described above or any other governmental regulations that apply to us, we may be subject to penalties, including civil and criminal penalties, damages, fines, exclusion from government healthcare programs, like Medicare and Medicaid, and the curtailment or restructuring of our operations. Any penalties, damages, fines, curtailment or restructuring of our operations could adversely affect our ability to operate our business and our financial results. Although compliance programs can mitigate the risk of investigation and prosecution for violations of these laws, the risks cannot be entirely eliminated. Any action against us for violation of these laws, even if we successfully defend against it, could cause us to incur significant legal expenses and divert our management's attention from the operation of our business. Moreover, achieving and sustaining compliance with applicable federal and state privacy, security and fraud laws may prove costly.

Marketing activities for our approved drugs are subject to continued governmental regulation.

The FDA has the authority to impose significant restrictions, including REMS requirements, on approved products through regulations on advertising, promotional and distribution activities. After approval, if products are marketed in contradiction with FDA laws and regulations, the FDA may issue warning letters that require specific remedial measures to be taken, as well as an immediate cessation of the impermissible conduct resulting in adverse publicity. The FDA may also require that all future promotional materials receive prior agency review and approval before use. Certain states have also adopted regulations and reporting requirements surrounding the promotion of pharmaceuticals. Qsymia and STENDRA are subject to these regulations. Failure to comply with state requirements may affect our ability to promote or sell pharmaceuticals drugs in certain states. This in turn could have a material adverse impact on our financial results and financial condition and could subject us to significant liability, including civil and administrative remedies as well as criminal sanctions.

We are subject to ongoing regulatory obligations and restrictions, which may result in significant expense and limit our ability to commercialize our drugs.

We are required to comply with extensive regulations for drug manufacturing, labeling, packaging, adverse event reporting, storage, distribution, advertising, promotion and record keeping in connection with the marketing of Qsymia and STENDRA. Regulatory approvals may also be subject to significant limitations on the indicated uses or marketing of the investigational drug candidates or to whom and how we may distribute our products. Even after FDA approval is obtained, the FDA may still impose significant restrictions on a drug's indicated uses or marketing or impose ongoing requirements for potentially costly post-approval studies. For example, the labeling approved for Qsymia includes restrictions on use, including recommendations for pregnancy testing, level of obesity and duration of treatment. We are subject to ongoing regulatory obligations and restrictions which may result in significant expense and limit our ability to commercialize Qsymia. The FDA has also required the distribution of a Medication Guide to patients outlining the increased risk of teratogenicity with fetal exposure and the possibility of suicidal thinking or behavior. In addition, the FDA has required a REMS that may act to limit access to the drug, reduce our revenues and/or increase our costs. The FDA may modify the Qsymia REMS in the future to be more or less restrictive.

Even if we receive FDA and other regulatory approvals, if we or others identify adverse side effects after any of our products are on the market, or if manufacturing problems occur, regulatory approval may be withdrawn and reformulation of our products, additional clinical trials, changes in labeling and additional marketing applications may be required, any of which could harm our business and cause our stock price to decline.

We and our contract manufacturers are subject to significant regulation with respect to manufacturing of our products.

All of those involved in the preparation of a therapeutic drug for clinical trials or commercial sale, including our existing supply contract manufacturers, and clinical trial investigators, are subject to extensive regulation. Components of a finished drug product approved for commercial sale or used in late-stage clinical trials must be manufactured in accordance with current Good Manufacturing Practices, or cGMP. These regulations govern quality control of the manufacturing processes and documentation policies and procedures, and the implementation and operation of quality systems to control and assure the quality of investigational products and products approved for sale. Our facilities and quality systems and the facilities and quality systems of our third-party contractors must be inspected routinely for compliance. If any such inspection or audit identifies a failure to comply with applicable regulations or if a violation of our product specifications or applicable regulation occurs independent of such an inspection or audit, we or the FDA may require remedial measures that may be costly and/or time consuming for us or a third party to implement and that may include the issuance of a warning letter, temporary or permanent suspension of a clinical trial or commercial sales, recalls, market withdrawals, seizures, or the temporary or permanent closure of a facility. Any such remedial measures would be imposed upon us or third parties with whom we contract until satisfactory cGMP compliance is achieved. The FDA could also impose civil penalties. We must also comply with similar regulatory requirements of foreign regulatory agencies.

We obtain the necessary raw materials and components for the manufacture of Qsymia and STENDRA as well as certain services, such as analytical testing packaging and labeling, from third parties. In particular, we rely on Catalent Pharma Solutions, LLC to supply Qsymia capsules and Packaging Coordinators, Inc., or PCI, for Qsymia packaging services. We and these suppliers and service providers are required to follow cGMP requirements and are subject to routine and unannounced inspections by the FDA and by state and foreign regulatory agencies for compliance with cGMP requirements and other applicable regulations. Upon inspection of these facilities, the FDA or foreign regulatory agencies may find the manufacturing process or facilities are not in compliance with cGMP requirements and other regulations. Because manufacturing processes are highly complex and are subject to a lengthy regulatory approval process, alternative qualified supply may not be available on a timely basis or at all. Difficulties, problems or delays in our suppliers and service providers' manufacturing and supply of raw materials, components and services could delay our clinical trials, increase our costs, damage our reputation and cause us to lose revenue or market share if we are unable to timely meet market demands.

In addition, we have an agreement with MTPC to supply the API and the tablets for STENDRA. The MTPC manufacturing sites have been inspected by the U.S. authorities. We do not believe the results of those inspections will have an impact on MTPC's ability to supply STENDRA, or the approval, or the timing of approval, of SPEDRA in the EU. However, if MTPC is unable to receive approval from foreign authorities, and maintain ongoing FDA or foreign regulatory compliance, or manufacture avanafil API or STENDRA tablets in sufficient quantities to meet projected demand, the EU approval, the U.S. commercial launch, and future sales of STENDRA will be adversely effected, which in turn could have a detrimental impact on our financial results and could impact our ability to enter into a collaboration for the commercialization of STENDRA. In August 2012, we entered into an amendment to our agreement with MTPC that permits us to manufacture the API and STENDRA tablets for avanafil ourselves or through third parties. According to the amendment, the transition of manufacturing from MTPC must occur on or before June 2015. The technology transfer needed for this transition is highly dependent on the cooperation of MTPC and its current suppliers. If MTPC, or its current suppliers, is unable to effectively transfer the technology or supply on commercially reasonable terms, the approvability, partnerability and commercial success of STENDRA could be adversely impacted. Any future manufacturing sites would need to be inspected by the U.S. and EU authorities,

and any failure of such manufacturing sites to receive approval from FDA or foreign authorities, obtain and maintain ongoing FDA or foreign regulatory compliance, or manufacture avanafil API or tablets in expected quantities, could adversely affect future sales of STENDRA, which in turn could have a detrimental impact on our financial results and could impact our ability to enter into a collaboration for the commercialization of STENDRA.

Any adverse changes in reimbursement procedures by government and other third-party payors may limit our ability to market and sell our approved drugs, or any future drugs, if approved or limit our product revenues and delay profitability.

In the U.S. and abroad, sales of pharmaceutical drugs are dependent, in part, on the availability of reimbursement to the consumer from third-party payors, such as government and private insurance plans. Third-party payors are increasingly challenging the prices charged for medical products and services. Some third-party payor benefit packages restrict reimbursement, charge co-pays to patients, or do not provide coverage for specific drugs or drug classes.

In addition, certain healthcare providers are moving towards a managed care system in which such providers contract to provide comprehensive healthcare services, including prescription drugs, for a fixed cost per person. We are unable to predict the reimbursement policies employed by third-party healthcare payors.

The healthcare industry in the U.S. and abroad is undergoing fundamental changes that are the result of political, economic and regulatory influences. The levels of revenue and profitability of pharmaceutical companies may be affected by the continuing efforts of governmental and third-party payors to contain or reduce healthcare costs through various means. Reforms that have been and may be considered include mandated basic healthcare benefits, controls on healthcare spending through limitations on the increase in private health insurance premiums and the types of drugs eligible for reimbursement and Medicare and Medicaid spending, the creation of large insurance purchasing groups and fundamental changes to the healthcare delivery system. These proposals include measures that would limit or prohibit payments for some medical treatments or subject the pricing of drugs to government control and regulations changing the rebates we are required to provide. These changes could impact our ability to maximize revenues in the federal marketplace.

The Affordable Care Act substantially changed the way healthcare is financed by both governmental and private insurers, and could have a material adverse effect on our future business, cash flows, financial condition and results of operations, including by operation of the following provisions:

- Effective March 23, 2010, drug rebates are due on the utilization of Medicaid managed care organizations. This expanded eligibility affects rebate liability for that utilization.

- Effective January 1, 2011, pharmaceutical companies must provide a 50% discount on branded prescription drugs dispensed to beneficiaries within the Medicare Part D coverage gap or "donut hole," which is a funding gap that currently exists in the Medicare Part D prescription drug program. We currently do not anticipate coverage under Medicare Part D, but this could change in the future.

- Effective January 1, 2011, the U.S. Federal government must allocate an annual branded prescription drug fee among pharmaceutical manufacturers of branded prescription drugs based on the dollar value of their branded prescription drug sales to certain federal health care programs identified in the law. The Affordable Care Act determines an individual manufacturer's market share as the ratio of its aggregate sales of branded prescription drugs during the preceding calendar year as a percentage of the aggregate branded prescription drug sales for all covered manufacturers. Each individual pharmaceutical manufacturer will pay a

prorated share of the branded prescription drug fee of $2.8 billion in 2013 (and set to increase in ensuing years) based on the dollar value of its branded prescription drug sales to certain federal programs identified in the law.

- Changes made by the Affordable Care Act are expected to result in the coverage of 32 million uninsured individuals through an expansion of the Medicaid program, and private sector coverage either through their employer or the new state-based Health Insurance Exchanges effective in 2014. In 2012, the Supreme Court of the United States heard challenges to the constitutionality of the individual mandate and the viability of certain provisions of the Affordable Care Act. The Supreme Court's decision upheld most of the Affordable Care Act and determined that requiring individuals to maintain "minimum essential" health insurance coverage or pay a penalty to the Internal Revenue Service was within Congress's constitutional taxing authority. However, the Supreme Court struck down a provision in the Affordable Act that penalized states that choose not to expand their Medicaid programs through an increase in the Medicaid eligibility income limit from a state's current eligibility levels to 133% of the federal poverty limit. As a result of the Supreme Court's ruling, it is unclear whether states will expand their Medicaid programs by raising the income limit to 133% of the federal poverty level and whether there will be more uninsured patients in 2014 than anticipated when Congress passed the Affordable Care Act. For each state that does not choose to expand its Medicaid program, there will be fewer insured patients overall, which could impact our sales, business and financial condition. We expect any Medicaid expansion to impact the number of adults in Medicaid more than children because many states have already set their eligibility criteria for children at or above the level designated in the Affordable Care Act. An increase in the proportion of patients who receive our drugs and who are covered by Medicaid could adversely affect our net sales.

Presently, uncertainty exists as many of the specific determinations necessary to implement the Affordable Care Act have yet to be decided and communicated to industry participants. At this time, we cannot predict the full impact of the Affordable Care Act, or the timing and impact of any future rules or regulations promulgated to implement the Affordable Care Act.

There can be no assurance that future healthcare legislation or other changes in the administration or interpretation of government healthcare or third-party reimbursement programs will not have a material adverse effect on us. Healthcare reform is also under consideration in other countries where we intend to market Qsymia.

We expect to experience pricing and reimbursement pressures in connection with the sale of Qsymia, STENDRA and our investigational drug candidates, if approved, due to the trend toward managed healthcare, the increasing influence of health maintenance organizations and additional legislative proposals. In addition, we may confront limitations in insurance coverage for Qsymia, STENDRA and our investigational drug candidates. For example, the Medicare program generally does not provide coverage for drugs used to treat erectile dysfunction or drugs used to treat obesity. Similarly, other insurers may determine that such products are not covered under their programs. If we fail to successfully secure and maintain reimbursement coverage for our investigational drug candidates or are significantly delayed in doing so, we will have difficulty achieving market acceptance of our investigational drug candidates and our business will be harmed. Congress has enacted healthcare reform and may enact further reform, which could adversely affect the pharmaceutical industry as a whole, and therefore could have a material adverse effect on our business.

Both of the active pharmaceutical ingredients in Qsymia, phentermine and topiramate, are available as generics and do not have a REMS requirement. The exact doses of the active ingredients in Qsymia are different than those currently available for the generic components. State pharmacy laws prohibit pharmacists from substituting drugs with differing doses and formulations. The safety and

efficacy of Qsymia is dependent on the titration, dosing and formulation, which we believe could not be easily duplicated, if at all, with the use of generic substitutes. However, there can be no assurance that we will be able to provide for optimal reimbursement of Qsymia as a treatment for obesity or any other indication, if approved, from third-party payors or the U.S. government. Furthermore, there can be no assurance that healthcare providers would not actively seek to provide patients with generic versions of the active ingredients in Qsymia in order to treat obesity at a potential lower cost and outside of the REMS requirements.

Setbacks and consolidation in the pharmaceutical and biotechnology industries, and our or our collaborators' inability to obtain third-party coverage and adequate reimbursement, could make partnering more difficult and diminish our revenues.

Setbacks in the pharmaceutical and biotechnology industries, such as those caused by safety concerns relating to high-profile drugs like Avandia, Vioxx and Celebrex, or investigational drug candidates, as well as competition from generic drugs, litigation, and industry consolidation, may have an adverse effect on us. For example, pharmaceutical companies may be less willing to enter into new collaborations or continue existing collaborations if they are integrating a new operation as a result of a merger or acquisition or if their therapeutic areas of focus change following a merger. Moreover, our and our collaborators' ability to commercialize any of our approved drugs or future investigational drug candidates will depend in part on government regulation and the availability of coverage and adequate reimbursement from third-party payors, including private health insurers and government payors, such as the Medicaid and Medicare programs, increases in government-run, single-payor health insurance plans and compulsory licenses of drugs. Government and third-party payors are increasingly attempting to contain healthcare costs by limiting coverage and reimbursement levels for new drugs. Given the continuing discussion regarding the cost of healthcare, managed care, universal healthcare coverage and other healthcare issues, we cannot predict with certainty what additional healthcare initiatives, if any, will be implemented or the effect any future legislation or regulation will have on our business. These efforts may limit our commercial opportunities by reducing the amount a potential collaborator is willing to pay to license our programs or investigational drug candidates in the future due to a reduction in the potential revenues from drug sales. Adoption of legislation and regulations could limit pricing approvals for, and reimbursement of, drugs. A government or third-party payor decision not to approve pricing for, or provide adequate coverage and reimbursements of, our drugs could limit market acceptance of these drugs.

Our business and operations would suffer in the event of system failures.

Despite the implementation of security measures, our internal computer systems and those of our contract sales organization, or CSO, CROs, safety monitoring company and other contractors and consultants are vulnerable to damage from computer viruses, unauthorized access, natural disasters, accidents, terrorism, war and telecommunication and electrical failures. While we have not experienced any such system failure, accident or security breach to date, if such an event were to occur and cause interruptions in our operations, it could result in a material disruption of our investigational drug candidate development programs and drug manufacturing operations. For example, the loss of clinical trial data from completed or ongoing clinical trials for our investigational drug candidates could result in delays in our regulatory approval efforts and significantly increase our costs to recover or reproduce the data. To the extent that any disruption or security breach was to result in a loss of or damage to our data or applications, or inappropriate disclosure of confidential or proprietary information, we could incur liability and the further development of our investigational drug candidates, or commercialization of our approved drugs, could be delayed. If we are unable to restore our information systems in the event of a systems failure, our communications, daily operations and the ability to develop our investigational drug candidates and approved drug commercialization efforts would be severely affected.

Natural disasters or resource shortages could disrupt our investigational drug candidate development and approved drug commercialization efforts and adversely affect results.

Our ongoing or planned clinical trials and approved drug commercialization efforts could be delayed or disrupted indefinitely upon the occurrence of a natural disaster. For example, Hurricane Sandy in October 2012 has hindered our Qsymia sales efforts, the nature and extent of which is not yet known. In 2005, our clinical trials in the New Orleans area were interrupted by Hurricane Katrina. In addition, our offices are located in the San Francisco Bay Area near known earthquake fault zones and are therefore vulnerable to damage from earthquakes. In October 1989, a major earthquake in our area caused significant property damage and a number of fatalities. Our supplier of STENDRA is located in Japan near known earthquake fault zones and is vulnerable to damage from earthquakes and tsunamis. We are also vulnerable to damage from other disasters, such as power loss, fire, floods and similar events. If a significant disaster occurs, our ability to continue our operations could be seriously impaired and we may not have adequate insurance to cover any resulting losses. Any significant unrecoverable losses could seriously impair our operations and financial conditions.

Risks Relating to our Intellectual Property

Obtaining intellectual property rights is a complex process, and we may be unable to adequately protect our proprietary technologies.

We hold various patents and patent applications in the U.S. and abroad targeting obesity and morbidities related to obesity, including sleep apnea and diabetes, and sexual health, among other indications. The procedures for obtaining a patent in the U.S. and in most foreign countries are complex. These procedures require an analysis of the scientific technology related to the invention and many sophisticated legal issues. Consequently, the process for having our pending patent applications issue as patents will be difficult, complex and time consuming. We do not know when, or if, we will obtain additional patents for our technologies, or if the scope of the patents obtained will be sufficient to protect our investigational drug candidates or products, or be considered sufficient by parties reviewing our patent positions pursuant to a potential licensing or financing transaction.

In addition, even if our patent applications issue as patents, we cannot make assurances as to how much protection, if any, will be provided by these patents. Our existing patents and any future patents we obtain may not be sufficiently broad to prevent others from practicing our technologies or from developing competing products. Others may independently develop similar or alternative technologies or design around our patented technologies or products. These companies would then be able to develop, manufacture and sell products that compete directly with our products. In that case, our revenues and operating results could decline.

Other entities may also challenge the validity or enforceability of our patents and patent applications in litigation or administrative proceedings. The sponsor of a generic application seeking to rely on one of our approved drug products as the reference listed drug must make one of several certifications regarding each listed patent. A "Paragraph III" certification is the sponsor's statement that it will wait for the patent to expire before obtaining approval for its product. A "Paragraph IV" certification is a challenge to the patent; it is an assertion that the patent does not block approval of the later product, either because the patent is invalid or unenforceable or because the patent, even if valid, is not infringed by the new product. Once the FDA accepts for filing a generic application containing a Paragraph IV certification, the applicant must within 20 days provide notice to the reference listed drug, or RLD, NDA holder and patent owner that the application with patent challenge has been submitted, and provide the factual and legal basis for the applicant's assertion that the patent is invalid or not infringed. If the NDA holder or patent owner file suit against the generic applicant for patent infringement within 45 days of receiving the Paragraph IV notice, the FDA is prohibited from approving the generic application for a period of 30 months from the date of receipt

of the notice. If the RLD has new chemical entity exclusivity and the notice is given and suit filed during the fifth year of exclusivity, the 30-month stay does not begin until five years after the RLD approval. The FDA may approve the proposed product before the expiration of the 30-month stay if a court finds the patent invalid or not infringed or if the court shortens the period because the parties have failed to cooperate in expediting the litigation. If a competitor or a generic pharmaceutical provider successfully challenges our patents, the protection provided by these patents could be reduced or eliminated and our ability to commercialize any approved drugs would be at risk. In addition, if a competitor or generic manufacturer were to receive approval to sell a generic or follow-on version of one of our products, our approved product would become subject to increased competition and our revenues for that product would be adversely affected.

On September 16, 2011, the Leahy-Smith America Invents Act, or the Leahy-Smith Act, was signed into law. The Leahy-Smith Act includes a number of significant changes to U.S. patent law. These changes include provisions that affect the way patent applications will be prosecuted and may also affect patent litigation. The U.S. Patent Office is currently developing regulations and procedures to govern administration of the Leahy-Smith Act, and many of the substantive changes to patent law associated with the Leahy-Smith Act have only recently become effective, while others will not become effective until 18 months after its enactment. Accordingly, it is too early to tell what, if any, impact the Leahy-Smith Act will have on the operation of our business. However, the Leahy-Smith Act and its implementation could increase the uncertainties and costs surrounding the prosecution of our patent applications and the enforcement or defense of our issued patents, all of which could have a material adverse effect on our business and financial condition.

We also may rely on trade secrets and other unpatented confidential information to protect our technology, especially where we do not believe patent protection is appropriate or obtainable. However, trade secrets are difficult to protect. We seek to protect our trade secrets and other confidential information by entering into confidentiality agreements with employees, collaborators, vendors (including CROs and our CSO), consultants and, at times, with potential investors. Nevertheless, employees, collaborators, vendors, consultants or potential investors may still disclose or misuse our trade secrets and other confidential information, and we may not be able to meaningfully protect our trade secrets. In addition, others may independently develop substantially equivalent information or techniques or otherwise gain access to our trade secrets. Disclosure or misuse of our confidential information would harm our competitive position and could cause our revenues and operating results to decline.

If we believe that others have infringed or misappropriated our proprietary rights, we may need to institute legal action to protect our intellectual property rights. Such legal action may be expensive, and we may not be able to afford the costs of enforcing or defending our intellectual property rights against others.

We may be sued for infringing the intellectual property rights of others, which could be costly and result in delays or termination of our future research, development, manufacturing and sales activities.

Our commercial success also depends, in part, upon our ability to develop future investigational drug candidates, market and sell approved drugs and conduct our other research, development and commercialization activities without infringing or misappropriating the patents and other proprietary rights of others. There are many patents and patent applications owned by others that could be relevant to our business. For example, there are numerous U.S. and foreign issued patents and pending patent applications owned by others that are related to the therapeutic areas in which we have approved drugs or future investigational drug candidates as well as the therapeutic targets to which these drugs and candidates are directed. There are also numerous issued patents and patent applications covering chemical compounds or synthetic processes that may be necessary or useful to use in our research, development, manufacturing or commercialization activities. Because patent

applications can take many years to issue, there may be currently pending applications, unknown to us, which may later result in issued patents that our approved drugs, future investigational drug candidates or technologies may infringe. There also may be existing patents, of which we are not aware, that our approved drugs, investigational drug candidates or technologies may infringe. Further, it is not always clear to industry participants, including us, which patents cover various types of products or methods. The coverage of patents is subject to interpretation by the courts, and the interpretation is not always uniform. We cannot assure you that others holding any of these patents or patent applications will not assert infringement claims against us for damages or seek to enjoin our activities. If we are sued for patent infringement, we would need to demonstrate that our products or methods do not infringe the patent claims of the relevant patent and/or that the patent claims are invalid or unenforceable, and we may not be able to do this.

There can be no assurance that approved drugs or future investigational drug candidates do not or will not infringe on the patents or proprietary rights of others. In addition, third parties may already own or may obtain patents in the future and claim that use of our technologies infringes these patents.

If a person or entity files a legal action or administrative action against us, or our collaborators, claiming that our drug discovery, development, manufacturing or commercialization activities infringes a patent owned by the person or entity, we could incur substantial costs and diversion of the time and attention of management and technical personnel in defending ourselves against any such claims. Furthermore, parties making claims against us may be able to obtain injunctive or other equitable relief that could effectively block our ability to further develop, commercialize and sell any current or future approved drugs, and such claims could result in the award of substantial damages against us. In the event of a successful claim of infringement against us, we may be required to pay damages and obtain one or more licenses from third parties. We may not be able to obtain these licenses at a reasonable cost, if at all. In that case, we could encounter delays in product introductions while we attempt to develop alternative investigational drug candidates or be required to cease commercializing any affected current or future approved drugs and our operating results would be harmed.

Furthermore, because of the substantial amount of pre-trial document and witness discovery required in connection with intellectual property litigation, there is a risk that some of our confidential information could be compromised by disclosure during this type of litigation. In addition, during the course of this kind of litigation, there could be public announcements of the results of hearings, motions or other interim proceedings or developments. If securities analysts or investors perceive these results to be negative, it could have a substantial adverse effect on the trading price of our common stock.

We may face additional competition outside of the U.S. as a result of a lack of patent coverage in some territories and differences in patent prosecution and enforcement laws in foreign counties.

Filing, prosecuting, defending and enforcing patents on all of our drug discovery technologies and all of our approved drugs and potential investigational drug candidates throughout the world would be prohibitively expensive. While we have filed patent applications in many countries outside the U.S., and have obtained some patent coverage for SPEDRA in certain foreign countries, we do not currently have widespread patent protection for these drugs outside the U.S. and have no protection in many foreign jurisdictions. Competitors may use our technologies to develop their own drugs in jurisdictions where we have not obtained patent protection. These drugs may compete with our approved drugs or future investigational drug candidates and may not be covered by any of our patent claims or other intellectual property rights.

Even if international patent applications ultimately issue or receive approval, it is likely that the scope of protection provided by such patents will be different from, and possibly less than, the scope provided by our corresponding U.S. patents. The success of our international market opportunity is

dependent upon the enforcement of patent rights in various other countries. A number of countries in which we have filed or intend to file patent applications have a history of weak enforcement and/or compulsory licensing of intellectual property rights. Moreover, the legal systems of certain countries, particularly certain developing countries, do not favor the aggressive enforcement of patents and other intellectual property protection, particularly those relating to biotechnology and/or pharmaceuticals, which makes it difficult for us to stop the infringement of our patents. Even if we have patents issued in these jurisdictions, there can be no assurance that our patent rights will be sufficient to prevent generic competition or unauthorized use.

Attempting to enforce our patent rights in foreign jurisdictions could result in substantial cost and divert our efforts and attention from other aspects of our business.

Our failure to successfully acquire, develop and market additional investigational drug candidates or approved drugs would impair our ability to grow.

As part of our growth strategy, we may acquire, in-license, develop and/or market additional products and investigational drug candidates. Because our internal research capabilities are limited, we may be dependent upon pharmaceutical and biotechnology companies, academic scientists and other researchers to sell or license products or technology to us. The success of this strategy depends partly upon our ability to identify, select and acquire promising pharmaceutical investigational drug candidates and products.

The process of proposing, negotiating and implementing a license or acquisition of an investigational drug candidate or approved product is lengthy and complex. Other companies, including some with substantially greater financial, marketing and sales resources, may compete with us for the license or acquisition of investigational drug candidates and approved products. We have limited resources to identify and execute the acquisition or in-licensing of third-party products, businesses and technologies and integrate them into our current infrastructure. Moreover, we may devote resources to potential acquisitions or in-licensing opportunities that are never completed, or we may fail to realize the anticipated benefits of such efforts. We may not be able to acquire the rights to additional investigational drug candidates on terms that we find acceptable, or at all.

In addition, future acquisitions may entail numerous operational and financial risks, including:

- exposure to unknown liabilities;
- disruption of our business and diversion of our management's time and attention to develop acquired products or technologies;
- incurrence of substantial debt or dilutive issuances of securities to pay for acquisitions;
- higher than expected acquisition, integration and maintenance costs;
- increased amortization expenses;
- difficulty and cost in combining the operations and personnel of any acquired businesses with our operations and personnel;
- impairment of relationships with key suppliers or customers of any acquired businesses due to changes in management and ownership; and
- inability to retain key employees of any acquired businesses.

Further, any investigational drug candidate that we acquire may require additional development efforts prior to commercial sale, including extensive clinical testing and approval by the FDA and applicable foreign regulatory authorities. All investigational drug candidates are prone to risks of failure typical of pharmaceutical investigational drug candidate development, including the possibility that an

investigational drug candidate will not be shown to be sufficiently safe and effective for approval by regulatory authorities. In addition, we cannot provide assurance that any drugs that we develop or approved products that we may acquire will be commercialized profitably or achieve market acceptance.

Risks Relating to our Financial Position and Need for Financing

We may require additional capital for our future operating plans, and we may not be able to secure the requisite additional funding on acceptable terms, or at all, which would force us to delay, reduce or eliminate commercialization efforts.

We expect that our existing capital resources combined with future anticipated cash flows will be sufficient to support our operating activities at least through 2013. Should product sales and planned partnering activities be significantly less than internal expectations, we would need to raise additional capital to support operating activities through 2013 and beyond. However, we anticipate that we will be required to obtain additional financing to fund our commercialization efforts, additional clinical studies for approved products and the development of our research and development pipeline in future periods. Our future capital requirements will depend upon numerous factors, including:

- the cost required to maintain the certified home delivery pharmacy network and REMS program for Qsymia, including a substantial cost to expand into retail locations, if the amendment to our NDA requesting a modification of the REMS program for Qsymia is approved;
- our ability to successfully commercialize Qsymia in the U.S. on a timely basis;
- our ability to successfully commercialize through marketing partnerships for STENDRA in the U.S. and SPEDRA, if approved, in our territories outside the U.S.;
- the cost, timing and outcome of the post-approval clinical studies the FDA has required us to perform as part of the approval for STENDRA and Qsymia;
- the progress and costs of our research and development programs;
- the scope, timing, costs and results of pre-clinical, clinical and retrospective observational studies and trials;
- the cost of access to electronic records and databases that allow for retrospective observational studies;
- patient recruitment and enrollment in future clinical trials;
- the costs involved in seeking regulatory approvals for future drug candidates;
- the costs involved in filing and pursuing patent applications, defending and enforcing patent claims;
- the establishment of collaborations, sublicenses and strategic alliances and the related costs, including milestone payments;
- the costs involved in establishing a commercial operation and in launching a product without a partner;
- the cost of manufacturing and commercialization activities and arrangements;
- the level of resources devoted to our future sales and marketing capabilities;
- the cost, timing and outcome of litigation, if any;
- the impact of healthcare reform, if any, imposed by the federal government; and
- the activities of competitors.

Future capital requirements will also depend on the extent to which we acquire or invest in additional complementary businesses, products and technologies. We currently have no commitments or agreements relating to any of these types of transactions.

To obtain additional capital when needed, we will evaluate alternative financing sources, including, but not limited to, the issuance of equity or debt securities, corporate alliances, joint ventures and licensing agreements. However, there can be no assurance that funding will be available on favorable terms, if at all. We are continually evaluating our existing portfolio and we may choose to divest, sell or spin-off one or more of our drugs and/or investigational drug candidates at any time. We cannot assure you that our drugs will generate revenues sufficient to enable us to earn a profit. If we are unable to obtain additional capital, management may be required to explore alternatives to reduce cash used by operating activities, including the termination of research and development efforts that may appear to be promising to us, the sale of certain assets and the reduction in overall operating activities. If adequate funds are not available, we may be required to delay, reduce the scope of or eliminate one or more of our development programs or our commercialization efforts.

Raising additional funds by issuing securities will cause dilution to existing stockholders and raising funds through lending and licensing arrangements may restrict our operations or require us to relinquish proprietary rights.

To the extent that we raise additional capital by issuing equity securities, our existing stockholders' ownership will be diluted. We have financed our operations, and we expect to continue to finance our operations, primarily by issuing and selling our common stock. For example, in March 2012, we sold 9,000,000 shares of our common stock resulting in net proceeds to us of approximately $192.0 million. Moreover, any issuances by us of equity securities may be at or below the prevailing market price of our common stock and in any event may have a dilutive impact on your ownership interest, which could cause the market price of our common stock to decline. To raise additional capital, we may choose to issue additional securities at any time and at any price.

We may also raise additional capital through the incurrence of debt, and the holders of any debt we may issue would have rights superior to our stockholders' rights in the event we are not successful and are forced to seek the protection of bankruptcy laws. In addition, debt financing typically contains covenants that restrict operating activities. Any future debt financing we enter into may involve similar or more onerous covenants that restrict our operations.

If we raise additional capital through collaboration, licensing or other similar arrangements, it may be necessary to relinquish potentially valuable rights to our drugs or future investigational drug candidates, potential products or proprietary technologies, or grant licenses on terms that are not favorable to us. If adequate funds are not available, our ability to achieve profitability or to respond to competitive pressures would be significantly limited and we may be required to delay, significantly curtail or eliminate the commercialization of one or more of our approved drugs or the development of one or more of our future investigational drug candidates.

The investment of our cash balance and our available-for-sale securities are subject to risks which may cause losses and affect the liquidity of these investments.

At December 31, 2012, we had $58.6 million in cash and cash equivalents and $156.0 million in available-for-sale securities. While at December 31, 2012, our excess cash balances were invested in money market and U.S. Treasury securities, our investment policy as approved by our Board of Directors, also provides for investments in debt securities of U.S. government agencies, corporate debt securities and asset-backed securities. Our investment policy has the primary investment objectives of preservation of principal. However, there may be times when certain of the securities in our portfolio will fall below the credit ratings required in the policy. Although the U.S. Congress was able to resolve

the debt ceiling issue in time to avoid default, the major credit rating agencies have expressed their ongoing concern about the high levels of debt that the U.S. government has taken on. Standard & Poor's announced that it had revised its outlook on the long-term credit rating of the U.S. to negative, which could affect the trading market for U.S. government securities. These factors could impact the liquidity or valuation of our available-for-sale securities, all of which were invested in U.S. treasury securities as of December 31, 2012. If those securities are downgraded or impaired we would experience losses in the value of our portfolio which would have an adverse effect on our results of operations, liquidity and financial condition. An investment in money market mutual funds is not insured or guaranteed by the Federal Deposit Insurance Corporation or any other government agency. Although money market mutual funds seek to preserve the value of the investment at $1 per share, it is possible to lose money by investing in money market mutual funds.

Our involvement in securities related class action litigation could divert our resources and management's attention and harm our business.

The stock markets have from time to time experienced significant price and volume fluctuations that have affected the market prices for the common stock of pharmaceutical companies. These broad market fluctuations may cause the market price of our common stock to decline. In the past, securities related class action litigation has often been brought against a company following a decline in the market price of its securities. This risk is especially relevant for us because biotechnology and biopharmaceutical companies often experience significant stock price volatility in connection with their investigational drug candidate development programs, the review of marketing applications by regulatory authorities and the commercial launch of newly approved drugs. We are a defendant in federal and consolidated state shareholder derivative lawsuits. These securities related class action lawsuits generally allege that we and our officers misled the investing public regarding the safety and efficacy of Qsymia and the prospects for the FDA's approval of the Qsymia NDA as a treatment for obesity. Securities related class action litigation often is expensive and diverts management's attention and our financial resources, which could adversely affect our business. For example, following the Court's granting of our prior motion to dismiss with leave to amend, on September 27, 2012, the Honorable Phyllis J. Hamilton of the U.S. District Court for the Northern District of California granted, with prejudice, our motion to dismiss the putative class action lawsuit captioned *Kovtun v. Vivus, Inc., et al.* , Case No. 4:10-CV-04957-PJH. Despite the granting of the prior two motions to dismiss, on October 26, 2012, plaintiff filed a Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit, and on February 19, 2013 plaintiff filed his opening appellate brief. Briefing is expected to continue into April 2013.

We have an accumulated deficit of $486.1 million as of December 31, 2012, and we may continue to incur substantial operating losses for the future.

We have generated a cumulative net loss of $486.1 million for the period from our inception through December 31, 2012, and we anticipate losses in future years due to continued investment in our research and development programs. There can be no assurance that we will be able to achieve or maintain profitability or that we will be successful in the future.

Our ability to utilize our net operating loss carryforwards and other tax attributes to offset future taxable income may be limited.

As of December 31, 2012, we had approximately $424.7 million and $118.1 million of net operating loss, or NOL, carryforwards with which to offset our future taxable income for federal and state income tax reporting purposes, respectively. We used $121.2 million federal and $32.2 million state NOLs to offset our year ended December 31, 2007 federal and state taxable income, which included the $150.0 million in gain recognized from our sale of Evamist. Utilization of our net operating loss and tax

credit carryforwards, or Tax Attributes, may be subject to substantial annual limitations provided by the Internal Revenue Code and similar state provisions to the extent certain ownership changes are deemed to occur. Such an annual limitation could result in the expiration of the Tax Attributes before utilization. The Tax Attributes reflected above have not been reduced by any limitations. To the extent it is determined upon completion of the analysis that such limitations do apply, we will adjust the Tax Attributes accordingly. We face the risk that our ability to use our Tax Attributes will be substantially restricted if we undergo an "ownership change" as defined in Section 382 of the U.S. Internal Revenue Code, or Section 382. An ownership change under Section 382 would occur if "5-percent shareholders," within the meaning of Section 382, collectively increased their ownership in the Company by more than fifty percentage points over a rolling three-year period. There can be no assurance that a Section 382 ownership change has not occurred or will not occur in the future.

We may have exposure to additional tax liabilities that could negatively impact our income tax provision, net income, and cash flow.

We are subject to income taxes and other taxes in both the U.S. and the foreign jurisdictions in which we currently operate or have historically operated. The determination of our worldwide provision for income taxes and current and deferred tax assets and liabilities requires judgment and estimation. In the ordinary course of our business, there are many transactions and calculations where the ultimate tax determination is uncertain. We are subject to regular review and audit by U.S. tax authorities as well as subject to the prospective and retrospective effects of changing tax regulations and legislation. Although we believe our tax estimates are reasonable, the ultimate tax outcome may materially differ from the tax amounts recorded in our consolidated financial statements and may materially affect our income tax provision, net income, or cash flows in the period or periods for which such determination and settlement is made.

Risks Relating to an Investment in our Common Stock

Our stock price has been and may continue to be volatile.

The market price of our common stock has been volatile and is likely to continue to be so. The market price of our common stock may fluctuate due to factors including, but not limited to:

- our ability to meet the expectations of investors related to the commercialization of Qsymia and STENDRA;
- the costs, timing and outcome of post-approval clinical studies which the FDA has required us to perform as part of the approval for STENDRA and Qsymia;
- the cost required to maintain the certified home delivery pharmacy network and REMS program for Qsymia, including a substantial cost to expand into retail locations, if the amendment to our NDA requesting a modification of the REMS program is approved;
- results within the clinical trial programs for Qsymia and STENDRA or other results or decisions affecting the development of our investigational drug candidates;
- announcements of technological innovations or new products by us or our competitors;
- approval of or announcements of other anti-obesity compounds in development;
- publication of generic drug combination weight loss data by outside individuals or companies;
- actual or anticipated fluctuations in our financial results;
- our ability to obtain needed financing;
- sales by insiders or major stockholders;

- economic conditions in the U.S. and abroad;
- the volatility and liquidity of the financial markets;
- comments by or changes in assessments of us or financial estimates by security analysts;
- negative reports by the media or industry analysts on various aspects of our products, our performance and our future operations;
- adverse regulatory actions or decisions;
- any loss of key management;
- deviations in our operating results from the estimates of securities analysts or other analyst comments;
- discussions about us or our stock price by the financial and scientific press and in online investor communities;
- investment activities employed by short sellers of our common stock;
- developments or disputes concerning patents or other proprietary rights;
- reports of prescription data by us or from independent third parties for our products;
- licensing, product, patent or securities litigation; and
- public concern as to the safety and efficacy of our drugs or future investigational drug candidates developed by us.

These factors and fluctuations, as well as political and other market conditions, may adversely affect the market price of our common stock. Securities related class action litigation is often brought against a company and senior officers following periods of volatility in the market price of its securities. We have been a defendant in shareholder lawsuits—a securities class action against the Company and several senior officers has been dismissed with prejudice but plaintiff has filed an appeal—and we could be the target of similar litigation in the future, particularly if we release news about the Company and its performance that proves to be disappointing to investors. Securities related litigation, whether with or without merit, could result in substantial costs and divert management's attention and financial resources, which could harm our business and financial condition, as well as the market price of our common stock.

Additionally, volatility or a lack of positive performance in our stock price may adversely affect our ability to retain or recruit key employees, all of whom have been or will be granted stock options as an important part of their compensation packages.

Our operating results are unpredictable and may fluctuate. If our operating results are below the expectations of securities analysts or investors, the trading price of our stock could decline.

Our operating results will likely fluctuate from fiscal quarter to fiscal quarter, and from year to year, and are difficult to predict. Although we have commenced sales of Qsymia, we may never increase these sales or become profitable. In addition, we have not entered into a marketing, sales or promotional arrangement with a pharmaceutical partner to commercialize STENDRA. Our operating expenses are largely independent of sales in any particular period. We believe that our quarterly and annual results of operations may be negatively affected by a variety of factors. These factors include, but are not limited to, the level of patient demand for Qsymia and STENDRA, the ability of our distribution partners to process and ship product on a timely basis, the success of our third-party's manufacturing efforts to meet customer demand, fluctuations in foreign exchange rates, investments in

sales and marketing efforts to support the sales of Qsymia and STENDRA, investments in the research and development efforts, and expenditures we may incur to acquire additional products.

Future sales of our common stock may depress our stock price.

Sales of our stock by our executive officers and directors, or the perception that such sales may occur, could adversely affect the market price of our stock. We have also registered all common stock that we may issue under our employee benefits plans. As a result, these shares can be freely sold in the public market upon issuance, subject to restrictions under the securities laws. Some of our executive officers have adopted trading plans under SEC Rule 10b5-1 to dispose of a portion of their stock. Any of our executive officers or directors may adopt such trading plans in the future. If any of these events cause a large number of our shares to be sold in the public market, the sales could reduce the trading price of our common stock and impede our ability to raise future capital.

Our charter documents and Delaware law could make an acquisition of our company difficult, even if an acquisition may benefit our stockholders.

Our Board of Directors has adopted a Preferred Shares Rights Plan. The Preferred Shares Rights Plan has the effect of causing substantial dilution to a person or group that attempts to acquire us on terms not approved by our Board of Directors. The existence of the Preferred Shares Rights Plan could limit the price that certain investors might be willing to pay in the future for shares of our common stock and could discourage, delay or prevent a merger or acquisition that a stockholder may consider favorable.

Some provisions of our Amended and Restated Certificate of Incorporation and Bylaws could delay or prevent a change in control of our Company. Some of these provisions:

- authorize the issuance of preferred stock by the Board of Directors without prior stockholder approval, commonly referred to as "blank check" preferred stock, with rights senior to those of common stock;
- prohibit stockholder actions by written consent;
- specify procedures for director nominations by stockholders and submission of other proposals for consideration at stockholder meetings; and
- eliminate cumulative voting in the election of directors.

In addition, we are governed by the provisions of Section 203 of Delaware General Corporate Law. These provisions may prohibit large stockholders, in particular those owning 15% or more of our outstanding voting stock, from merging or combining with us. These and other provisions in our charter documents could reduce the price that investors might be willing to pay for shares of our common stock in the future and result in the market price being lower than it would be without these provisions.

Item 1B. ***Unresolved Staff Comments***

None.

Item 2. ***Properties***

In November 2006, we entered into a 30-month lease for our corporate headquarters located in Mountain View, California, or Castro Lease. On February 14, 2012, we extended the lease term for the current premises for a period of twelve months commencing August 1, 2012 and terminating July 31, 2013. In addition, we have a lease on an additional 4,914 square feet of office space located at 1174 Castro Street, Mountain View, California, or the Expansion Space, which is adjacent to our current corporate headquarters. The lease for the Expansion Space has a term of 60 months

commencing March 15, 2012, with an option to extend the term for one year from the expiration of the new lease.

We entered into a lease effective as of December 11, 2012 for new principal executive offices, consisting of an approximately 45,240 square foot building, located at 351 East Evelyn Avenue, Mountain View, California, or the Evelyn Lease. The Evelyn Lease has an initial term of approximately 84 months, commencing on the later of (i) May 1, 2013 and (ii) four months following delivery of the premises to us. We have one option to renew the Evelyn Lease for a term of three years at the prevailing market rate. We expect to occupy our new principal executive offices in the spring of 2013.

In general, our existing facilities are in good condition and adequate for all present and near term uses.

Item 3. ***Legal Proceedings***

Securities Related Class Action Lawsuits

The Company and two of its officers were defendants in a putative class action lawsuit captioned *Kovtun v. Vivus, Inc., et al.* , Case No. 4:10-CV-04957-PJH, in the U.S. District Court, Northern District of California. The action, filed in November 2010, alleged violations of Section 10(b) and 20(a) of the federal Securities Exchange Act of 1934 based on allegedly false or misleading statements made by the defendants in connection with the Company's clinical trials and NDA for Qsymia as a treatment for obesity. In the Amended Class Action Complaint filed on April 4, 2011, the plaintiff alleged generally that the defendants misled investors regarding the prospects for Qsymia's NDA approval, and the drug's efficacy and safety. On June 3, 2011, the defendants filed a motion to dismiss, which, after briefing and argument was granted but extending plaintiff leave to amend. On November 9, 2011, plaintiff filed his Second Amended Class Action Complaint, again generally alleging that the defendants misled investors regarding the prospects for Qsymia's NDA approval, and Qsymia's efficacy and safety. On December 30, 2011, defendants filed a motion to dismiss the Second Amended Complaint. Briefing concluded in late March 2012, and the motion was argued to the Court on April 18, 2012. On September 27, 2012, Judge Phyllis J. Hamilton granted defendants' motion to dismiss the Second Amended Complaint and dismissed the action with prejudice. She entered final judgment for defendants the same day. On October 26, 2012, plaintiff filed a Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. Plaintiff filed his opening appellate brief on February 19, 2013. Briefing is expected to continue into April 2013.

Additionally, certain of the Company's officers and directors are defendants in a shareholder derivative lawsuit captioned *Turberg v. Logan, et al.* , Case No. CV-10-05271-PJH, pending in the same federal court. In the plaintiff's Verified Amended Shareholder Derivative Complaint filed June 3, 2011, the plaintiff largely restated the allegations of the *Kovtun* action and alleged that the directors breached fiduciary duties to the Company by purportedly permitting the Company to violate the federal securities laws as alleged in the *Kovtun* action. The parties had agreed to stay the litigation pending resolution of the defendants' second motion to dismiss in the *Kovtun* action, but have now extended that stay through resolution of the appeal. The same individuals are also named defendants in consolidated shareholder derivative suits pending in the California Superior Court, Santa Clara County under the caption *In re VIVUS, Inc. Derivative Litigation*, Master File No. 11 0 CV188439. The allegations in the state court derivative suits are substantially similar to the other lawsuits. The parties have agreed to stay these consolidated actions on the same terms as the federal derivative litigation.

The Company and its directors believe that the various shareholder lawsuits are without merit, and they intend to vigorously defend the various actions.

Other Matters

In the normal course of business, the Company receives claims and makes inquiries regarding patent and trademark infringement and other related legal matters. The Company believes that it has meritorious claims and defenses and intends to pursue any such matters vigorously. Additionally, the Company in the normal course of business may become involved in lawsuits and subject to various claims from current and former employees including wrongful termination, sexual discrimination and employment matters. Employees may be more likely to file employment-related claims following termination of their employment. Employment-related claims also may be more likely following a poor performance review. Although there may be no merit to such claims or legal matters, the Company may be required to allocate additional monetary and personnel resources to defend against these type of allegations. The Company believes the disposition of the current lawsuit and claims is not likely to have a material effect on its financial condition or liquidity.

The Company is not aware of any other asserted or unasserted claims against it where it believes that an unfavorable resolution would have an adverse material impact on the operations or financial position of the Company.

Item 4. ***Mine Safety Disclosures.***

None.

PART II

Item 5. *Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities.*

VIVUS' common stock trades publicly on the NASDAQ Global Select Market under the symbol "VVUS." The following table sets forth for the periods indicated the quarterly high and low sales prices of our common stock as reported on the NASDAQ Global Select Market.

	Three Months Ended			
	March 31	June 30	September 30	December 31
2012				
High	$ 25.14	$ 29.42	$ 31.21	$ 23.59
Low	9.76	21.12	17.21	9.89
2011				
High	$ 11.48	$ 9.07	$ 9.62	$ 10.80
Low	6.00	6.20	6.13	7.47

Stockholders

As of February 19, 2013, there were 100,660,029 shares of outstanding common stock that were held by 3,242 stockholders of record and no outstanding shares of preferred stock. On February 19, 2013, the last reported sales price of our common stock on the NASDAQ Global Select Market was $13.46 per share.

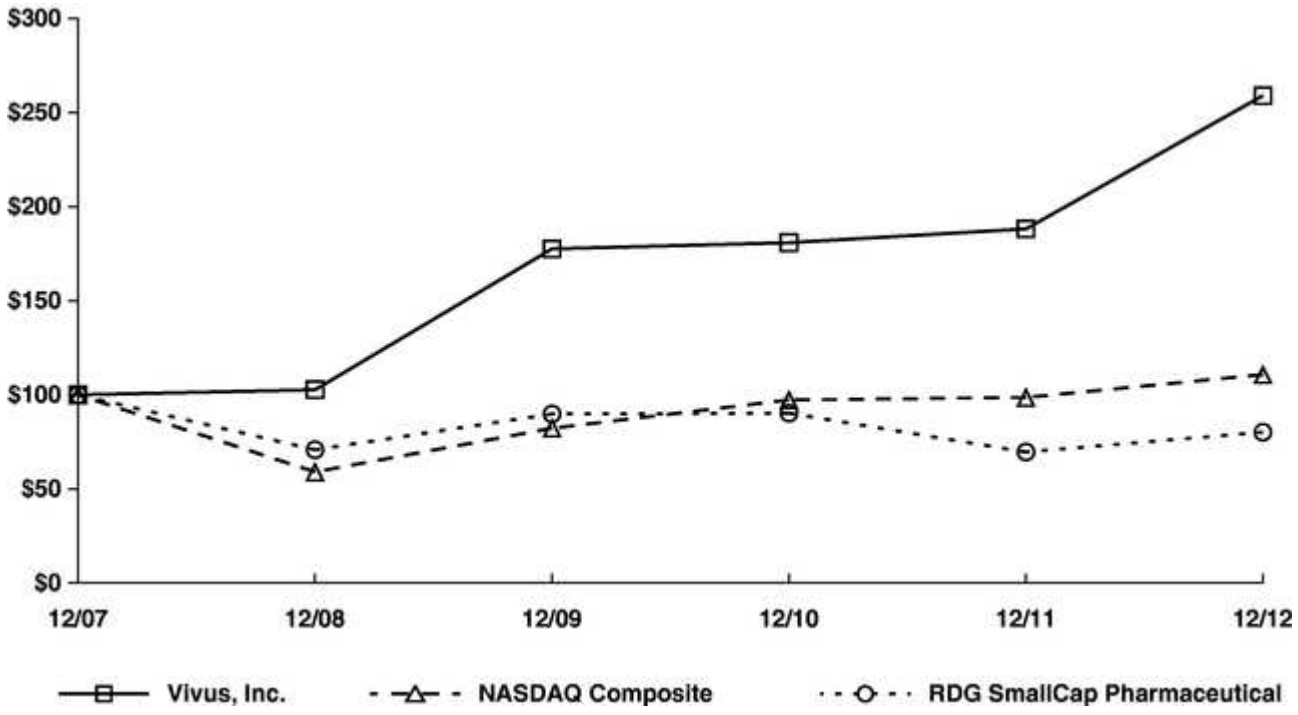
Dividends

We have not paid any dividends since our inception and we do not intend to declare or pay any dividends on our common stock in the foreseeable future. Declaration or payment of future dividends, if any, will be at the discretion of our Board of Directors after taking into account various factors, including VIVUS' financial condition, operating results and current and anticipated cash needs.

Stock Performance Graph

The following graph shows a comparison of total stockholder return for holders of our common stock from December 31, 2007 through December 31, 2012 compared with the NASDAQ Composite Index and the RDG SmallCap Pharmaceutical Index. Total stockholder return assumes $100 invested at the beginning of the period in our common stock, the stock represented in the NASDAQ Composite Index and the stock represented by the RDG SmallCap Pharmaceutical Index, respectively. This graph is presented pursuant to SEC rules. We believe that while total stockholder return can be an important indicator of corporate performance, the stock prices of smallcap pharmaceutical stocks like VIVUS are subject to a number of market-related factors other than company performance, such as competitive announcements, mergers and acquisitions in the industry, the general state of the economy, and the performance of other medical technology stocks.

COMPARISON OF 5 YEAR CUMULATIVE TOTAL RETURN*
Among VIVUS, Inc., the NASDAQ Composite Index, and the RDG SmallCap Pharmaceutical Index



* $100 invested on 12/31/07 in stock or index, including reinvestment of dividends.
Fiscal year ending December 31.

Item 6. ***Selected Financial Data***

The following selected financial data have been derived from our audited financial statements. The information set forth below is not necessarily indicative of the results of future operations and should be read in conjunction with "Management's Discussion and Analysis of Financial Condition and Results of Operations" and the financial statements and notes thereto included elsewhere in this Annual Report on Form 10-K. The selected data is not intended to replace the financial statements.

Selected Financial Data
(In thousands, except per share)

Selected Annual Financial Data

	Year Ended December 31				
	2012	2011	2010	2009	2008
Income Statement Data:					
Net product revenue	$ 2,012	$ —	$ —	$ —	$ —
License and other revenue	—	—	—	31,395	83,721
Total revenue	2,012	—	—	31,395	83,721
Operating expenses:					
Cost of goods sold	187	—	—	—	—
Research and development	32,065	24,604	39,971	70,940	76,673
Selling, general and administrative	109,665	22,472	25,656	13,870	12,253
Total operating expenses	141,917	47,076	65,627	84,810	88,926
Loss from operations	(139,905)	(47,076)	(65,627)	(53,415)	(5,205)
Interest and other income (expense)					
Interest and other income	199	240	468	1,998	4,406
Interest expense	—	—	(4,308)	(3,693)	(659)
Other-than-temporary loss on impaired securities	—	—	—	(654)	(7,689)
Loss on early extinguishment of debt	—	—	(5,958)	—	—
Total interest and other income (expense)	199	240	(9,798)	(2,349)	(3,942)
(Loss) income from continuing operations before income taxes	(139,706)	(46,836)	(75,425)	(55,764)	(9,147)
Benefit (provision) for income taxes	(27)	(190)	(9)	2,379	7
Net loss from continuing operations	(139,733)	(47,026)	(75,434)	(53,385)	(9,140)
Net income (loss) from discontinued operations, net of income taxes	(148)	886	9,369	(906)	(800)
Net loss	$ (139,881)	$ (46,140)	$ (66,065)	$ (54,291)	$ (9,940)
Basic and diluted net income (loss) per share:					
Continuing operations	$ (1.42)	$ (0.56)	$ (0.93)	$ (0.74)	$ (0.15)
Discontinued operations	$ —	$ 0.01	$ 0.11	$ (0.01)	$ (0.01)
Net loss per share	$ (1.42)	$ (0.55)	$ (0.82)	$ (0.75)	$ (0.16)
Shares used in per share computation:					
Basic and diluted	98,289	84,392	81,017	72,779	63,724
Balance Sheet Data (at year end):					
Working capital	$ 220,958	$ 140,764	$ 131,781	$ 200,852	$ 134,880
Total assets	$ 264,114	$ 152,056	$ 144,286	$ 230,032	$ 207,622
Long-term debt	$ —	$ —	$ —	$ 19,998	$ 11,177
Accumulated deficit	$ (486,146)	$ (346,265)	$ (300,125)	$ (234,060)	$ (179,769)
Stockholders' equity	$ 222,909	$ 141,084	$ 132,002	$ 186,726	$ 131,213

Item 7. ***Management's Discussion and Analysis of Financial Conditions and Results of Operations***

Forward Looking Statement

This Management's Discussion and Analysis of Financial Conditions and Results of Operations and other parts of this Form 10-K contain "forward-looking" statements that involve risks and uncertainties. These statements may typically be identified by the use of forward-looking words or phrases such as "anticipate," "believe," "forecast," "estimate," "expect," "intend," "likely," "may," "plan," "potential," "predict," "opportunity" and "should," the negative use of these words or other similar words. All forward looking statements included in this document are based on our current expectations, and we assume no obligation to update any such forward looking statements. The Private Securities Litigation Reform Act of 1995 provides a "safe harbor" for such forward looking statements. In order to comply with the terms of the safe harbor, we note that a variety of factors could cause actual results and experiences to differ materially from the anticipated results or other expectations expressed in such forward looking statements. The risks and uncertainties that may affect the operations, performance, development, and results of our business include but are not limited to: (1) our limited commercial experience with Qsymia™ in the United States, or U.S.; (2) the timing of initiation and completion of the clinical studies required as part of the approval of Qsymia by the U. S. Food and Drug Administration, or FDA; (3) the response from the FDA to the data that VIVUS will submit relating to post-approval clinical studies; (4) the impact of the indicated uses and contraindications contained in the Qsymia label and the Risk Evaluation and Mitigation Strategy, or REMS, requirements; (5) the impact of distribution of Qsymia through a certified home delivery pharmacy network; (6) whether or not the FDA approves our amendment to the REMS for Qsymia, which, if approved, would allow dispensing through select certified retail pharmacies to increase access while meeting all requirements of the REMS; (7) that we may be required to provide further analysis of previously submitted clinical trial data; (8) the negative opinion of the European Medicines Agency's, or EMA, Committee for Medicinal Products for Human Use, or CHMP, for the Marketing Authorization Application, or MAA, for Qsymia; (9) our ability to successfully commercialize or establish a marketing partnership for avanafil, which will be marketed in the U.S. under the name STENDRA™; (10) the ability of our partners to maintain regulatory approvals to manufacture and adequately supply our products to meet demand; (11) our history of losses and variable quarterly results; (12) substantial competition; (13) risks related to the failure to protect our intellectual property and litigation in which we may become involved; (14) uncertainties of government or third-party payor reimbursement; (15) our reliance on sole source suppliers; (16) our limited sales and marketing and manufacturing experience; (17) our reliance on third parties and our collaborative partners; (18) our failure to continue to develop innovative investigational drug candidates and drugs; (19) risks related to the failure to obtain FDA or foreign authority clearances or approvals and noncompliance with FDA or foreign authority regulations; (20) our ability to demonstrate through clinical testing the safety and effectiveness of our investigational drug candidates; (21) the timing of initiation and completion of clinical trials and submissions to foreign authorities; (22) the results of post-marketing studies are not favorable; (23) compliance with post-marketing regulatory standards is not maintained; (24) the volatility and liquidity of the financial markets; (25) our liquidity and capital resources; (26) our expected future revenues, operations and expenditures and (27) other factors that are described from time to time in our periodic filings with the Securities and Exchange Commission, or the SEC, including those set forth in this filing as "Item 1A. Risk Factors."

All percentage amounts and ratios were calculated using the underlying data in thousands. Operating results for the year ended December 31, 2012 are not necessarily indicative of the results that may be expected for future fiscal years. The following discussion and analysis should be read in conjunction with our historical financial statements and the notes to those financial statements that are included in Item 8 of Part II of this Form 10-K.

Overview

VIVUS is a biopharmaceutical company dedicated to commercializing and developing innovative therapies to address unmet needs in obesity, sleep apnea, diabetes and sexual health. Our drug, Qsymia (phentermine and topiramate extended-release) (formerly known as Qnexa®) was approved by the FDA for the treatment of obesity as an adjunct to a reduced-calorie diet and increased physical activity for chronic weight management in adult patients with an initial body mass index, or BMI, of 30 or greater (obese), or 27 or greater (overweight) in the presence of at least one weight-related comorbidity, such as hypertension, type 2 diabetes mellitus or high cholesterol (dyslipidemia). Qsymia incorporates low doses of active ingredients from two previously approved drugs, phentermine and topiramate. Qsymia is believed to target excessive appetite and a high threshold for satiety, or the feeling of being full, the two main mechanisms that impact eating behavior. We announced the U.S. market availability of Qsymia for obesity in September 2012. On February 21, 2013, the CHMP confirmed its October 18, 2012 decision to deny the MAA for Qsiva™ (phentermine/topiramate extended-release) for the treatment of obesity in the European Union, or EU. We have completed Phase 2 clinical studies for Qsymia for the treatment of sleep apnea and Qsymia for the treatment of type 2 diabetes.

Our drug, STENDRA, or avanafil, was approved by the FDA for the treatment of erectile dysfunction, or ED, in the U.S. We, through collaboration arrangements with third parties, intend to market and sell STENDRA in the U.S., and if approved, under the trade name SPEDRA™ in the EU and other territories outside the U.S.

Our Strategy

Our goal is to build a successful biopharmaceutical company through the development and commercialization of innovative proprietary drugs. We intend to achieve this by:

- successfully commercializing Qsymia in the U.S.;
- entering into and supporting a collaboration agreement for the commercialization of STENDRA for the treatment of ED in the U.S.;
- obtaining regulatory approval for SPEDRA for the treatment of ED in the EU and other territories worldwide; and
- if approved, entering into and supporting collaboration agreements for the commercialization of SPEDRA for the treatment of ED in the EU and other territories worldwide.

It is our objective to become a leader in the development and commercialization of drugs for large underserved markets. We believe we have strong intellectual property supporting several opportunities in obesity and related disorders, such as sleep apnea and diabetes, and sexual health. Our future growth depends on our ability to further develop and obtain regulatory approval of our investigational drug candidates for indications that we have studied, or plan to study, as well as in-licensing and product line extensions.

Critical Accounting Policies and Estimates

The discussion and analysis of our financial condition and results of operations are based upon our consolidated financial statements, which have been prepared in accordance with accounting principles generally accepted in the U.S. The preparation of these financial statements requires us to make estimates and judgments that affect the reported amounts of assets, liabilities, revenues and expenses, and related disclosure of contingent assets and liabilities. On an ongoing basis, we evaluate our estimates, including those related to available-for-sale securities, research and development expenses, income taxes, inventories, contingencies and litigation and share-based compensation. We base our estimates on historical experience, information received from third parties and on various other

assumptions that are believed to be reasonable under the circumstances, the results of which form the basis for making judgments about the carrying values of assets and liabilities that are not readily apparent from other sources. Actual results may differ from these estimates under different assumptions or conditions.

We believe the following critical accounting policies affect our more significant judgments and estimates used in the preparation of our consolidated financial statements:

Revenue Recognition

We recognize revenue from the sale of Qsymia when: (i) persuasive evidence that an arrangement exists, (ii) delivery has occurred and title has passed, (iii) the price is fixed or determinable and (iv) collectability is reasonably assured. Revenue from sales transactions where the customer has the right to return the product is recognized at the time of sale only if: (i) our price to the customer is substantially fixed or determinable at the date of sale, (ii) the customer has paid us, or the customer is obligated to pay us and the obligation is not contingent on resale of the product, (iii) the customer's obligation to us would not be changed in the event of theft or physical destruction or damage of the product, (iv) the customer acquiring the product for resale has economic substance apart from that provided by us, (v) we do not have significant obligations for future performance to directly bring about resale of the product by the customer, and (vi) the amount of future returns can be reasonably estimated.

Net Product Revenue and Product Revenue Allowances

Product revenue is recognized net of cash consideration paid to our customers, the certified pharmacies, for services rendered by the pharmacies in accordance with certified pharmacy services network agreements, and include a fixed rate per prescription shipped and monthly program management and data fees. These services are not deemed sufficiently separable from the customers' purchase of the product; therefore, they are recorded as a reduction of revenue at the time of revenue recognition.

Other reductions of revenue include certain prompt pay discounts and allowances offered our customers which are recognized as a reduction of revenue at the later of the date at which the related revenue is recognized or the date at which the allowance is offered.

Calculating certain of these items involves estimates and judgments based on sales or invoice data and historical experience. Amounts accrued for sales deductions are adjusted when trends, significant events, or actual results indicate that adjustment is appropriate. Revisions of estimates for sales deductions are charged to income in the period in which the information that gives rise to the revision becomes known.

Qsymia was approved by the FDA in July 2012. We sell Qsymia product in the U.S. only to select certified pharmacies through their home delivery pharmacy services networks, which are collectively, our customers. Under this arrangement, title and risk of loss transfer to our customers upon delivery of the product to their distribution facilities. They in turn, sell, dispense and ship directly to patients through their home delivery service.

We shipped initial orders of Qsymia to our customers in September 2012 and announced the availability of the product on September 17, 2012. Qsymia has a 24-month shelf life and we grant rights to our customers to return unsold product three months prior to and up to twelve months after product expiration and issue credits which may be applied against existing or future invoices. Given our limited history of selling Qsymia and the lengthy return period, we have not been able to reliably estimate expected returns of Qsymia at the time of shipment, and therefore we recognize revenue when units are shipped to patients through prescriptions, at which point, the product is not subject to return. We

obtain the prescription shipment data directly from the pharmacies to determine the amount of revenue to recognize.

We will continue to recognize revenue for Qsymia based upon prescription sell-through until we have sufficient historical information to reliably estimate returns. As of December 31, 2012, we have recorded deferred revenue of $1.2 million related to shipments of Qsymia, which represents product shipped to our customers, but not yet shipped to patients through prescriptions. A corresponding accounts receivable is also recorded for this amount, as the payments from customers are not contingent upon the sale of product to patients.

Inventories and Related Reserves

Inventories are valued at the lower of cost or market. Cost is determined using the first-in, first-out method for all inventories, which are valued using a weighted average cost method calculated for each production batch. Inventory includes the cost of active pharmaceutical ingredients, or APIs, raw materials and third-party contract manufacturing and packaging services. Indirect overhead costs associated with production and distribution are allocated to the appropriate cost pool and then absorbed into inventory based on the units produced or distributed, assuming normal capacity, in the applicable period.

Inventory costs of product shipped to customers, but not yet shipped to patients through prescriptions, are recorded as deferred costs within inventories on the consolidated balance sheets and are subsequently recognized to cost of goods sold when shipped to patients through prescriptions.

Our policy is to write down inventory that has become obsolete, inventory that has a cost basis in excess of its expected net realizable value and inventory in excess of expected requirements. The estimate of excess quantities is subjective and primarily dependent on our estimates of future demand for a particular product. If the estimate of future demand is inaccurate based on actual sales, we may adjust the reserve for excess inventory for that product and record a charge to cost of goods sold.

Research and Development Expenses

Research and development, or R&D, expenses include license fees, related compensation, consultants' fees, facilities costs, accrued milestones, administrative expenses related to R&D activities and clinical trial costs incurred by clinical research organizations, or CROs, and research institutions under agreements that are generally cancelable, among other related R&D costs. We also record accruals for estimated ongoing clinical trial costs. Clinical trial costs represent costs incurred by CROs and clinical sites and include advertising for clinical trials and patient recruitment costs. These costs are recorded as a component of R&D expenses and are expensed as incurred. Under our agreements, progress payments are typically made to investigators, clinical sites and CROs. We analyze the progress of the clinical trials, including levels of patient enrollment, invoices received and contracted costs when evaluating the adequacy of accrued liabilities. Significant judgments and estimates must be made and used in determining the accrued balance in any accounting period. Actual results could differ from those estimates under different assumptions. Revisions are charged to expense in the period in which the facts that give rise to the revision become known.

In addition, the Company has obtained rights to patented intellectual properties under several licensing agreements for use in research and development activities. Non-refundable licensing payments made for intellectual properties that have no alternative future use are expensed to research and development as incurred.

Share-Based Payments

We follow the fair value method of accounting for share-based compensation arrangements in accordance with in the Financial Accounting Standards Board, or FASB, Accounting Standards Codification, or ASC, topic 718, *Compensation—Stock Compensation*, or ASC 718. Under ASC 718, the estimated fair value of share-based compensation, including stock options and restricted stock units granted under our stock option plans and purchases of common stock by employees at a discount to market price under our Employee Stock Purchase Plan, or the ESPP, is recognized as compensation expense. Compensation expense for purchases under the ESPP is recognized based on the estimated fair value of the common stock purchase rights during each offering period and the percentage of the purchase discount.

We use the Black-Scholes option pricing model to estimate the fair value of the share-based awards as of the grant date. The Black-Scholes model, by its design, is highly complex, and dependent upon key data inputs estimated by management. The primary data inputs with the greatest degree of judgment are the estimated lives of the share-based awards and the estimated volatility of our stock price. The Black-Scholes model is highly sensitive to changes in these two data inputs. The expected term of the options represents the period of time that options granted are expected to be outstanding and is derived by analyzing the historical experience of similar awards, giving consideration to the contractual terms of the share-based awards, vesting schedules and expectations of future employee behavior. We determine expected volatility using the historical method, which is based on the daily historical trading data of our common stock over the expected term of the option. Management selected the historical method primarily because we have not identified a more reliable or appropriate method to predict future volatility. For more information about our share-based payments, see Note 8: "Stock Option and Purchase Plans" to the consolidated financial statements included in this Form 10-K.

Share-based compensation expense is allocated among cost of goods sold, research and development and selling, general and administrative expenses, or included in the inventory carrying value and absorbed into inventory, based on the function of the related employee. As of December 31, 2012, unrecognized estimated compensation expense totaled $569,000 related to non-vested restricted stock units, $19.9 million related to non-vested stock options and $123,000 related to the ESPP. The weighted average remaining requisite service period of the non-vested restricted stock units was 2.1 years, of the non-vested stock options was 1.2 years and of the ESPP was 4.5 months.

Fair Value Measurements

Financial Instruments Measured at Fair Value. Our cash and cash equivalents and available-for-sale financial instruments are carried at fair value and we make estimates regarding valuation of these assets measured at fair value in preparing the consolidated financial statements.

Fair Value Measurement—Definition and Hierarchy. ASC 820 defines fair value as the price that would be received to sell an asset or paid to transfer a liability (i.e., the "exit price") in an orderly transaction between market participants at the measurement date.

Valuation Technique. ASC 820 establishes a hierarchy for inputs used in measuring fair value that maximizes the use of observable inputs and minimizes the use of unobservable inputs by requiring that the observable inputs be used when available. Observable inputs are inputs that market participants would use in pricing the asset or liability developed based on market data obtained from sources independent of VIVUS. Unobservable inputs are inputs that reflect our assumptions about the assumptions market participants would use in pricing the asset or liability developed based on the best

information available in the circumstances. ASC 820 prescribes three valuation techniques that shall be used to measure fair value as follows:

1. Market Approach—uses prices or other relevant information generated by market transactions involving identical or comparable assets or liabilities.

2. Income Approach—uses valuation techniques to convert future cash flow amounts to a single present value amount (discounted).

3. Cost Approach—the amount that currently would be required to replace the service capacity of an asset (i.e., current replacement cost).

One or a combination of the approaches above can be used to calculate fair value, whichever results in the most representative fair value.

As of December 31, 2012, our cash and cash equivalents and available-for-sale securities measured at fair value on a recurring basis totaled $214.6 million.

All of our cash and cash equivalents and available-for-sale securities are in cash, money market instruments and U.S. Treasury securities at December 31, 2012, and these are classified as Level 1. The valuation techniques used to measure the fair values of these financial instruments were derived from quoted market prices, as substantially all of these instruments have maturity dates, if any, within one year from the date of purchase and active markets for these instruments exists.

Income Taxes

We make certain estimates and judgments in determining income tax expense for financial statement purposes. These estimates and judgments occur in the calculation of certain tax assets and liabilities, which arise from differences in the timing of recognition of revenue and expense for tax and financial statement purposes.

As part of the process of preparing our consolidated financial statements, we are required to estimate our income taxes in each of the jurisdictions in which we operate. This process involves us estimating our current tax exposure under the most recent tax laws and assessing temporary differences resulting from differing treatment of items for tax and accounting purposes. These differences result in deferred tax assets and liabilities, which are included in our consolidated balance sheets.

We assess the likelihood that we will be able to recover our deferred tax assets. We consider all available evidence, both positive and negative, including historical levels of income, expectations and risks associated with estimates of future taxable income and ongoing prudent and feasible tax planning strategies in assessing the need for a valuation allowance. If it is not more likely than not that we will recover our deferred tax assets, we will increase our provision for taxes by recording a valuation allowance against the deferred tax assets that we estimate will not ultimately be recoverable. As a result of our analysis of all available evidence, both positive and negative, as of December 31, 2012, it was considered more likely than not that our deferred tax assets would not be realized. However, should there be a change in our ability to recover our deferred tax assets, we would recognize a benefit to our tax provision in the period in which we determine that it is more likely than not that we will recover our deferred tax assets.

Contingencies and Litigation

We are periodically involved in disputes and litigation related to a variety of matters. When it is probable that we will experience a loss, and that loss is quantifiable, we record appropriate reserves. We record legal fees and costs as an expense when incurred.

RESULTS OF OPERATIONS

For the year ended December 31, 2012, we reported a net loss of $139.9 million, or $1.42 net loss per share as compared to a net loss of $46.1 million, or $0.55 net loss per share during the same period in 2011. The increase in net loss is primarily attributable to increased selling, general and administrative expenses related to commercialization and pre-commercialization activities for Qsymia.

We may have continued losses in future periods, depending on our success in commercializing Qsymia and STENDRA, the timing of our research and development expenditures, and our continued investment in the clinical development of our current research and investigational drug candidates, to bring those potential drugs to market.

Continuing operations

Net product revenue

Net product revenue was $2.0 million for the year ended December 31, 2012. We had no net product revenue from continuing operations for the year ended December 31, 2011 or 2010.

The following table reconciles gross revenue to net revenue for the year ended December 31, 2012 (in thousands):

Gross product revenue	$ 2,642
Pharmacy fees	(577)
Cash discounts	(53)
Net product revenue	$ 2,012

Pharmacy fees are based on information provided by the pharmacies and include fixed monthly management and data fees and fees incurred per prescription order shipped to patients by the pharmacies. Cash discounts for prompt payment are based on 2% of gross product revenue. We did not have any other typical gross to net items such as rebates, chargebacks or similar items for the year ended December 31, 2012 but we expect such items to be part of our net sales in the future.

On September 17, 2012, we announced the commercial availability of Qsymia in the U.S. In September 2012, we began distributing Qsymia to two of the certified home delivery pharmacies, and later in 2012, we added three more certified home delivery pharmacies to the network. We currently recognize revenue for the sales of Qsymia when the prescriptions are shipped to the patients by the pharmacies because we do not have sufficient historical information to reliably estimate returns.

At December 31, 2012, we have deferred revenue of $1.2 million, which represents Qsymia product shipped to customers but not yet shipped to patients through prescriptions, net of prompt payment discounts.

We expect Qsymia product revenue and prescriptions shipped to patients to increase in 2013 as we continue to introduce Qsymia to healthcare professionals. In addition, we have submitted a request to the FDA to modify our REMS program to include access to select certified retail pharmacies. If approved, we would be permitted to expand our distribution network which is currently limited to the certified pharmacies' home delivery networks.

Cost of goods sold

Cost of goods sold is $187,000 for the year ended December 31, 2012 and relates to our product shipments of Qsymia to patients and includes the inventory costs of APIs, third-party contract manufacturing and packaging and distribution costs, royalties, cargo insurance, freight, shipping, handling and storage costs, and overhead costs of the employees involved with production. The cost of

goods sold associated with deferred revenue on Qsymia product shipments is recorded as deferred costs, which are included in inventories in the consolidated balance sheets, until such time as the deferred revenue is recognized.

Research and development

Drug Indication/Description	Years Ended December 31, 2012	2011	2010	% Change Increase/(Decrease) 2012 vs 2011	2011 vs 2010
	(In thousands, except percentages)				
Qsymia for obesity	$ 10,729	$ 5,762	$ 14,854	86%	(61)%
STENDRA for ED	8,601	9,467	16,968	(9)%	(44)%
Other projects	1,662	1,414	851	18%	66%
Share-based compensation	3,487	1,917	1,204	82%	59%
Overhead costs*	7,586	6,044	6,094	26%	(1)%
Total research and development expenses	$ 32,065	$ 24,604	$ 39,971	30%	(38)%

* Overhead costs include compensation and related expenses, consulting, legal and other professional services fees relating to research and development activities, which we do not allocate to specific projects.

The increase in research and development expenses for the year ended December 31, 2012, as compared to the year ended December 31, 2011, is primarily due to start-up costs associated with the post-approval studies for Qsymia and STENDRA, partially offset by a decrease in STENDRA program costs due to the filing of the NDA in June 2011.

We anticipate that our research and development expenses in 2013 will increase significantly as compared to 2012 as we begin the post-approval cardiovascular outcomes study for Qsymia, known as ACQLAIM. The details of ACQLAIM have not yet been agreed upon with the FDA. This study could cost between $150.0 and $250.0 million and take as long as five years to complete. Enrollment is expected to begin in the fourth quarter of 2013. There are likely to be additional research and development expenses for other post-approval studies related to STENDRA and Qsymia, and for our investigational drug candidates under development. Our research and development expenses may fluctuate from period to period due to the timing and scope of our development activities and the results of clinical and pre-clinical studies.

The decrease in research and development expenses in the year ended December 31, 2011, as compared to the year ended December 31, 2010, was primarily due to the completion of the Phase 3 development programs for Qsymia and STENDRA.

Selling, general and administrative

	Years Ended December 31, 2012	2011	2010	% Change Increase/(Decrease) 2012 vs 2011	2011 vs 2010
	(In thousands, except percentages)				
Selling, general and administrative	$ 109,665	$ 22,472	$ 25,656	388%	(12)%

In the year ended December 31, 2012, the increase in selling, general and administrative expenses includes $44.7 million of increased spending primarily due to Qsymia pre-commercialization and commercialization activities (primarily related to marketing programs, market research and analytics and additional headcount), sales expenses of $17.0 million primarily related to our contract sales

organization, which provides 150 fully dedicated sales personnel for promoting Qsymia in the U.S., medical affairs-related expenses of $8.4 million (primarily expenses related to CME grants, the Qsymia REMS program and additional headcount), increased corporate expenses of $10.1 million (primarily compensation and related expenses and professional fees), and increased share-based compensation expense of $7.0 million, as compared to the year ended December 31, 2011.

We anticipate our selling, general and administrative expenses to be significantly higher in 2013 as compared to 2012, primarily due to the additional efforts involved in the commercialization and marketing activities for Qsymia, which may include further spending for healthcare provider and patient education and awareness programs and direct-to-patient and direct-to-consumer advertising.

General and administrative expenses in the year ended December 31, 2011 decreased $3.2 million, or 12% to $22.5 million as compared to the same period in 2010. In the year ended December 31, 2011, the decrease is primarily due to lower spending on Qsymia pre-commercialization expenses of $4.9 million, partially offset by incremental increases of $0.8 million in corporate expenses (primarily compensation and related increases), $0.7 million in STENDRA pre-commercialization expenses and net increases in other general and administrative expense of $0.2 million as compared to the year ended December 31, 2010.

Interest income and expense

Interest and other income, net in the year ended December 31, 2012 was $199,000 as compared to $240,000 in the year ended December 31, 2011. Although our cash balances were higher in 2012 than in 2011, interest and other income decreased in the year ended December 31, 2012 as compared to the same period last year largely due to lower interest rates, year-over-year, on our cash, cash equivalents and available-for-sale securities and $100,000 in other income recognized in the year ended December 31, 2011.

Interest and other income, net for the year ended December 31, 2011 was $240,000 as compared to $468,000 for the year ended December 31, 2010. The decrease in interest and other income in the year ended December 31, 2011 as compared to the same period last year was largely due to lower interest rates, year-over-year, on our cash, cash equivalents and available-for-sale securities partially offset by an increase in other income of $100,000 in the year ended December 31, 2011.

Interest expense for the year ended December 31, 2010 was $4.3 million. The outstanding balance on the Deerfield loan was paid off in the fourth quarter of 2010.

In addition, we recognized a $6.0 million loss on the early extinguishment of debt in connection with the payoff of the Deerfield loan in the year ended December 31, 2010.

Benefit (provision) for income taxes

We recorded a provision for income taxes in the year ended December 31, 2012 of $27,000, as compared to $190,000 in the year ended December 31, 2011. Our income tax return for the year ended December 31, 2007 is currently under examination by the California Franchise Tax Board, or FTB. Based on the progress of the audit to date, adjustments may be made in earlier years that will reduce tax attributes available to offset tax due in 2007. We recognize interest and penalties accrued on any unrecognized tax benefits as a component of our provision for income taxes. During the year ended December 31, 2012, $6,000 of interest on the unrecognized tax benefits was recorded.

In the year ended December 31, 2011, we recorded a provision for income taxes of $190,000. We increased our unrecognized tax benefits to $160,000 for the year ended December 31, 2011, based on the progress of the California Franchise Tax Board audit. During the year ended December 31, 2011, $32,000 of interest on the unrecognized tax benefits was recorded.

In the year ended December 31, 2010, we recorded a provision for income taxes of $9,000. We increased our unrecognized tax benefits to $7,000 for the year ended December 31, 2010, based on the progress of the California Franchise Tax Board audit. During the year ended December 31, 2010, $1,000 of interest on the unrecognized tax benefits was recorded.

On January 2, 2013, the "American Taxpayer Relief Act of 2012" was signed into law. It provides for an extension of the federal research credit retroactive for 2012 and extended through 2013. The impact of the 2012 federal research credit will be reflected in our effective tax rate in the first quarter of 2013 and is estimated to be between $1.0 million - $2.0 million.

Discontinued operations

On November 5, 2010, we completed the sale of the MUSE product to Meda AB. In the years ended December 31, 2012 and 2011, we recorded some minor adjustments related to the MUSE disposition.

Total revenue for the year ended December 31, 2010 was $13.3 million. In the year ended December 31, 2010, cost of goods sold was $9.8 million, research and development expenses were $2.3 million and selling, general and administrative expenses were $5.1 million. In addition, we recognized a $13.7 million gain on the disposal of discontinued operations in the fourth quarter of 2010.

Liquidity and Capital Resources

Continuing Operations

Cash. Unrestricted cash, cash equivalents and available-for-sale securities totaled $214.6 million at December 31, 2012, as compared to $146.8 million at December 31, 2011. The increase in cash, cash equivalents and available-for-sale securities of $67.8 million is primarily the net result of cash provided by financing activities and cash used for investing and operating activities. Included in this increase are $192.0 million in net proceeds from an underwritten public offering of our common stock and $13.6 million in net proceeds from common stock option exercises and ESPP purchases during the year ended December 31, 2012.

Since inception, we have financed operations primarily from the issuance of equity securities. Through December 31, 2012, we have raised $661.0 million from financing activities, received $150.0 million from the sale of Evamist and had an accumulated deficit of $486.1 million at December 31, 2012.

At December 31, 2012, we had $58.6 million in cash and cash equivalents and $156.0 million in available-for-sale securities. We invest our excess cash balances in money market and marketable securities, primarily U.S. Treasury securities and debt securities of U.S. government agencies, corporate debt securities and asset-backed securities, in accordance with our investment policy. At December 31, 2012, all of our cash equivalents and available-for-sale securities were invested in either U.S. government securities or money market funds that invest only in U.S. Treasury securities. The investment policy has the primary investment objectives of preservation of principal; however, there may be times when certain of the securities in our portfolio will fall below the credit ratings required in the policy. If those securities are downgraded or impaired, we would experience realized or unrealized losses in the value of our portfolio, which would have an adverse effect on our results of operations, liquidity and financial condition.

Investment securities are exposed to various risks, such as interest rate, market and credit. Due to the level of risk associated with certain investment securities and the level of uncertainty related to changes in the value of investment securities, it is possible that changes in these risk factors in the near term could have an adverse material impact on our results of operations or stockholders' equity.

Accounts Receivable. We extend credit to our customers for product sales resulting in accounts receivable. Customer accounts are monitored for past due amounts. Past due accounts receivable, determined to be uncollectible, are written off against the allowance for doubtful accounts. Allowances for doubtful accounts are estimated based upon past due amounts, historical losses and existing economic factors, and are adjusted periodically. We offer cash discounts to our customers, generally 2% of the sales price as an incentive for prompt payment.

Accounts receivable (net of allowance for cash discounts) at December 31, 2012 was $2.8 million, as compared to none at December 31, 2011. Currently, we do not have any significant concerns related to accounts receivable or collections. As of February 19, 2013, we had collected 70% of the accounts receivable outstanding at December 31, 2012.

Revenues from significant customers as a percentage of total revenues for the year ended December 31, 2012 is as follows:

CVS	50%
Walgreens	39%
Express Scripts, Inc.	10%

Liabilities. Total liabilities were $41.2 million at December 31, 2012, which is $30.2 million higher than at December 31, 2011. The change in total liabilities is primarily due to increased commercialization activities related to Qsymia and the timing of payments.

Operating Activities. Our operating activities used $132.2 million, $36.9 million and $64.1 million during the years ended December 31, 2012, 2011 and 2010, respectively.

During the year ended December 31, 2012, our net operating loss of $139.7 million was offset by $15.9 million in share-based compensation expense due to increased headcount and a $22.2 million net increase in accounts payable, primarily due to an increase in marketing and sales activities and startup costs for the post-approval STENDRA and Qsymia clinical trials. The increase in accounts payable was offset by a $17.7 million net increase in prepaid expenses and other assets, which primarily was comprised of prepayments related to Qsymia product liability insurance, manufacturing commitment fees, medical affairs activities for Qsymia, and prepaid product commercialization costs for sales and marketing activities in support of the commercial launch of Qsymia in the U.S. These prepayments represent probable future economic benefits obtained or controlled by us as a result of past transactions or events, which meet the definition of an asset under the FASB Concept Statement 6. As such, the costs have been deferred as prepaid expenses on the consolidated balance sheets and will be charged to expense accordingly when the related prepaid services are rendered to us. In addition, there was a net $22.1 million increase in inventories, primarily for Qsymia and pre-launch inventory for STENDRA.

During the year ended December 31, 2011, our net operating loss of $47.0 million was offset by $7.4 million in share-based compensation expense, a $0.9 million increase in accrued employee compensation and benefits and a $0.5 million increase in accounts payable. These positive cash flows to our net operating loss were in turn offset by a $1.2 million decrease in accrued research and clinical expenses.

During the year ended December 31, 2010, our net operating loss of $75.4 million was offset by $6.4 million in share-based compensation expense, $6.0 million in loss on early extinguishment of the Deerfield loan, a $2.7 million decrease in prepaid expenses and other assets, and $2.2 million in cash provided by discontinued operations. These positive cash flows to our net operating loss were in turn offset by a $3.2 million increase in inventories due to the purchase of Qsymia raw material inventory and a $5.7 million decrease in accounts payable.

Investing Activities. Our investing activities used $54.3 million and $8.6 million and provided $84.8 million in cash during the years ended December 31, 2012, 2011 and 2010, respectively. The fluctuations from period to period are due primarily to the timing of purchases, sales and maturity of investment securities. In the year ended December 31, 2010, cash provided by investing activities for discontinued operations included $21.6 million in cash proceeds from the sale of MUSE to Meda.

Financing Activities. Financing activities provided cash of $205.6 million and $47.8 million and used cash of $24.0 million during the years ended December 31, 2012, 2011 and 2010, respectively. In the year ended December 31, 2012, cash provided by financing activities included $192.0 million in net proceeds from an underwritten public offering of our common stock. In the year ended December 31, 2011, cash provided by financing activities included $45.3 million in net proceeds from a registered direct offering of our common stock. In 2010, cash used in financing activities included $23.0 million to pay off the Deerfield loan and $4.9 million in discontinued operations to pay off the loan to Crown Bank.

Financing Activities

On March 6, 2012, we closed the underwritten public offering and sale of 9,000,000 shares of the Company's common stock. Gross proceeds to us from this sale totaled approximately $202.5 million before deduction of approximately $10.5 million in underwriting discounts and commissions and offering expenses. All of the shares of common stock were offered pursuant to the Company's effective shelf registration statement on Form S-3 (Registration No. 333-161948), including the prospectus dated September 16, 2009 (as amended on February 28, 2012) contained therein, as the same has been supplemented.

On August 24, 2011, we closed on the sale of a total of 6,889,098 shares of the Company's common stock, at a price of $6.65 per share, pursuant to a previously-reported securities purchase agreement entered into on August 23, 2011 with certain investors in connection with a registered direct offering of our common stock, or the Offering. Gross proceeds to us from the sale of the common stock in the Offering totaled approximately $45.8 million before deduction of approximately $529,000 in fees and expenses related to the Offering. All of the shares of common stock were offered pursuant to an effective shelf registration statement on Form S-3ASR (Registration No. 333-161948), including the prospectus dated September 16, 2009 contained therein.

On August 1, 2011, we filed a Form S-8 (File Number 333-175926) with the SEC registering 600,000 shares of common stock, par value $0.001 per share, under the 1994 Employee Stock Purchase Plan, as amended.

On July 14, 2010, we filed a Form S-8 (File Number 333-168106) with the SEC registering 16,615,199 shares of common stock, par value $0.001 per share, to be issued pursuant to the 2010 Equity Incentive Plan, and registering 400,000 shares of common stock, par value $0.001 per share, to be issued pursuant to the Stand-Alone Stock Option Agreement with Michael P. Miller, the Company's Senior Vice President and Chief Commercial Officer.

On February 16, 2010, we filed a Form S-8 (File Number 333-164921) with the SEC registering 1,000,000 shares of common stock, par value $0.001 per share, under the 2001 Stock Option Plan, as amended. The funding necessary to execute our business strategies is subject to numerous uncertainties, which may adversely affect our liquidity and capital resources. Commercialization of Qsymia and STENDRA may be more costly than we planned. In addition, completion of clinical trials and approval by the FDA of investigational drug candidates may take several years or more, but the length of time generally varies substantially according to the type, complexity, novelty and intended use of an investigational drug candidate. It is also important to note that if an investigational drug candidate is identified, the further development of that candidate can be halted or abandoned at any time due to a

number of factors. These factors include, but are not limited to, funding constraints, lack of efficacy or safety or change in market demand.

We anticipate that our existing capital resources combined with anticipated future cash flows will be sufficient to support our operating needs at least through 2013. Should product sales and planned partnering activities be significantly less than internal expectations, we would need to raise additional capital to support operating activities through 2013 and beyond. We anticipate that we may require additional funding to continue our commercialization of Qsymia, to conduct post-approval clinical studies for both Qsymia and STENDRA, to conduct non-clinical and clinical research and development work to support regulatory submissions and applications for our current and future investigational drug candidates, to finance the costs involved in filing and prosecuting patent applications and enforcing or defending our patent claims, if any, to fund operating expenses, to establish additional or new manufacturing and marketing capabilities, to manufacture quantities of our drugs and investigational drug candidates and to make payments under our existing license agreements for Qsymia and STENDRA.

While some of our anticipated costs are unknown at the current time, we may need to raise additional capital to continue the funding of our commercialization efforts, product development programs and our research and development plans in future periods beyond 2013. If we require additional capital, we may seek any required additional funding through collaborations, public and private equity or debt financings, capital lease transactions or other available financing sources. Additional financing may not be available on acceptable terms, or at all. If additional funds are raised by issuing equity securities, substantial dilution to existing stockholders may result. If adequate funds are not available, we may be required to delay, reduce the scope of or eliminate one or more of our commercialization or development programs or obtain funds through collaborations with others that are on unfavorable terms or that may require us to relinquish rights to certain of our technologies, product candidates or products that we would otherwise seek to develop on our own.

Contractual Obligations

The following table summarizes our contractual obligations at December 31, 2012, excluding amounts already recorded on our consolidated balance sheet as accounts payable or accrued liabilities, and the effect such obligations are expected to have on our liquidity and cash flow in future fiscal years. This table includes our enforceable, non-cancelable, and legally binding obligations and future commitments as of December 31, 2012. The amounts below do not include contingent milestone payments or royalties, and assume the agreements and commitments will run through the end of terms, as such no early termination fees or penalties are included herein:

	Payments Due by Period				
Contractual obligations	**Total**	**2013**	**2014 - 2016**	**2017 - 2018**	**Thereafter**
			(in thousands)		
Operating leases	$ 13,525	$ 1,639	$ 5,529	$ 3,780	$ 2,577
Purchase obligations:					
Manufacturing agreements	48,629	48,318	311	—	—
Other agreements	51,455	34,252	17,203	—	—
Total contractual obligations	$ 113,609	$ 84,209	$ 23,043	$ 3,780	$ 2,577

Operating Leases

In November 2006, we entered into a 30-month lease for our corporate headquarters located in Mountain View, California, or Castro Lease. On February 14, 2012, we entered into the most current, fourth amendment, to the Castro Lease. Under the fourth amendment to the Castro Lease, the average

base rent for the current premises is set at $2.50 per square foot or $45,015 per month. The fourth amendment also extended the lease term for the current premises for a period of twelve months commencing August 1, 2012 and terminating July 31, 2013. In addition, the fourth amendment included a lease on an additional 4,914 square feet of office space located at 1174 Castro Street, Mountain View, California, or the Expansion Space, which is adjacent to our current corporate headquarters. The average base rent for the Expansion Space is approximately $2.75 per square foot or $13,513 per month. The lease for the Expansion Space has a term of 60 months commencing March 15, 2012, with an option to extend the term for one year from the expiration of the new lease.

We entered into a lease effective as of December 11, 2012 with SFERS Real Estate Corp. U, or the Landlord, for new principal executive offices, consisting of an approximately 45,240 square foot building, located at 351 East Evelyn Avenue, Mountain View, California, or the Evelyn Lease. The Evelyn Lease has an initial term of approximately 84 months, commencing on the later of (i) May 1, 2013 and (ii) four months following delivery of the premises, and at a starting annual rental rate of $31.20 per rentable square foot (subject to agreed increases). We will be entitled to an abatement of the monthly installments of rent for months seven through twelve of the initial term subject to the conditions detailed in the Evelyn Lease. We have one option to renew the Evelyn Lease for a term of three years at the prevailing market rate as detailed in the Evelyn Lease. In addition, we have a one-time right to accelerate the termination date of the Evelyn Lease from the expiration of the 84th full calendar month of the term to the expiration of the 60th full calendar month of the term subject to the conditions detailed in the Evelyn Lease. If this acceleration of the termination date is exercised, the following will be payable to the Landlord: (i) six months of the monthly installments of rent and our proportionate share of expenses and taxes subject to the fifth lease year and (ii) the unamortized portion of all of the leasing commissions and legal fees, the initial alterations, and the Landlord's allowance towards the cost of performing the initial alterations. We expect to occupy our new principal executive offices in the spring of 2013.

Purchase Obligations

Purchase obligations consist of agreements to purchase goods or services that are enforceable and legally binding on us and that specify all significant terms, including: fixed or minimum quantities to be purchased; fixed, minimum or variable price provisions; and the approximate timing of the transaction. These include obligations for product manufacturing, sales and marketing services, including for our contract sales organization, and research and development.

Manufacturing agreements

We have purchase commitments for raw material supplies for Qsymia totaling $26.6 million at December 31, 2012. In addition, in July 2012, we entered into a manufacturing agreement with Catalent Pharma Solutions, LLC, or Catalent, to supply commercial inventory for Qsymia beginning in 2012 and ending in 2016. Our remaining commitment under this agreement is to pay Catalent a minimum total of $12.5 million for the production of Qsymia in 2013. The API and the tablets for STENDRA (avanafil) are currently manufactured by MTPC. There are no minimum purchase obligations for STENDRA under our agreements with MTPC. We have placed orders with MTPC for avanafil product testing and finished goods and our remaining commitment under these purchase obligations at December 31, 2012 totaled $9.5 million.

Other agreements

On May 22, 2012, we entered into a Dedicated Sales Team Agreement, or the Sales Team Agreement, with PDI, Inc., or PDI, to provide us with promotional and commercialization support services for Qsymia. The Sales Team Agreement is effective beginning on July 30, 2012 and ending on July 29, 2014. We have the option to extend the term of the agreement for two consecutive

twelve-month periods. Under the terms of the Sales Team Agreement, PDI provides us with 150 full-time sales representatives, three full-time field liaison managers, and one full-time account manager. In addition, under the Sales Team Agreement, PDI provides us with program personnel to collect and capture physician information, including physician target call plan reach and frequency, deactivation information related to physician accounts and physician's behavioral or attitudinal response. As of December 31, 2012, our total obligation under the Sales Team Agreement is $44.2 million, including primarily compensation costs and administrative service fees. In addition, we have remaining commitments under other various sales and marketing services and research and development agreements totaling $7.3 million at December 31, 2012.

Additional Contingent Payments

We have entered into development, license and supply agreements that contain provisions for payments upon completion of certain development, regulatory and sales milestones. Due to the uncertainty concerning when and if these milestones may be completed or other payments are due, we have not included these potential future obligations in the above table.

Mitsubishi Tanabe Pharma Corporation

In January 2001, we entered into an exclusive development, license and clinical trial and commercial supply agreement with Tanabe Seiyaku Co., Ltd., or Tanabe, now MTPC, and hereinafter collectively referred to as MTPC, for the development and commercialization of avanafil, a PDE5 inhibitor compound for the oral and local treatment of male and female sexual dysfunction. Under the terms of the agreement, MTPC agreed to grant an exclusive license to us for products containing avanafil outside of Japan, North Korea, South Korea, China, Taiwan, Singapore, Indonesia, Malaysia, Thailand, Vietnam and the Philippines. We agreed to grant MTPC an exclusive, royalty-free license within those countries for oral products that we develop containing avanafil. In addition, we agreed to grant MTPC an exclusive option to obtain an exclusive, royalty-bearing license within those countries for non-oral products that we develop containing avanafil. MTPC agreed to manufacture and supply us with avanafil for use in clinical trials, which was our primary responsibility. The MTPC agreement contains a number of milestone payments to be made by VIVUS based on various triggering events. Through December 31, 2012, under the terms of the MTPC agreement, we have paid a total of $13.0 million to MTPC, including a $3.0 million milestone payment made in June 2012, upon FDA approval of STENDRA, or avanafil. In addition, during 2012, we purchased from MTPC $7.4 million of inventory under the supply portion of the Agreement in preparation for the commercial launch of STENDRA in the U.S. and certain other territories that use the U.S. approval.

We expect to make other substantial payments to MTPC in accordance with this agreement as we continue to develop avanafil in our territories outside of the United States and, if approved for sale, commercialize avanafil for the oral treatment of male sexual dysfunction in those territories. Potential future milestone payments include $2.0 million upon the obtainment of the first regulatory approval in any major European country and $6.0 million upon achievement of $250.0 million or more in worldwide net sales during any calendar year.

The term of the MTPC agreement is based on a country-by-country and on a product-by-product basis. The term shall continue until the later of (i) 10 years after the date of the first sale for a particular product, or (ii) the expiration of the last-to-expire patents within the MTPC patents covering such product in such country. In the event that our product is deemed to be (i) insufficiently effective or insufficiently safe relative to other PDE5 inhibitor compounds based on published information, or (ii) not economically feasible to develop due to unforeseen regulatory hurdles or costs as measured by standards common in the pharmaceutical industry for this type of product, we have the right to terminate the agreement with MTPC with respect to such product.

In August 2012, we entered into an amendment to the MTPC agreement which, among other matters, allows us to manufacture the API and STENDRA tablets for avanafil and expands our rights to develop and commercialize avanafil for all indications. The amendment permits us to manufacture the API and STENDRA tablets for avanafil ourselves or through a third-party supplier at any time; however, the transition away from MTPC supply will need to occur on or before June 2015. On February 21, 2013, we entered into the third amendment to our agreement with MTPC which, among other things, expands our rights, or those of our sublicensees, to enforce the patents licensed under the MTPC agreement against alleged infringement, and clarifies the rights and duties of the parties and our sublicensees upon termination of the MTPC agreement. In addition, we are obligated to use our best commercial efforts to market STENDRA in the U.S. by December 31, 2013.

Other

In October 2001, we entered into an assignment agreement, or the Assignment Agreement, with Thomas Najarian, M.D. for a combination of pharmaceutical agents for the treatment of obesity and other disorders, or the Combination Therapy, that has since been the focus of our investigational drug candidate development program for Qsymia for the treatment of obesity, obstructive sleep apnea and diabetes. The Combination Therapy and all related patent applications, or the Patents, were transferred to VIVUS with worldwide rights to develop and commercialize the Combination Therapy and exploit the Patents. Pursuant to the Assignment Agreement, through December 31, 2012, we have paid a total of $1.2 million and have issued fully vested and exercisable options to purchase 60,000 shares of VIVUS' common stock to Dr. Najarian. In addition, the Assignment Agreement will require us to pay royalties on worldwide net sales of a product for the treatment of obesity that is based upon the Combination Therapy and Patents until the last-to-expire of the assigned Patents. To the extent that we decide not to commercially exploit the Patents, the Assignment Agreement will terminate and the Combination Therapy and Patents will be assigned back to Dr. Najarian. In 2006, Dr. Najarian joined the Company as a part-time employee and currently serves as our Principal Scientist.

Off-Balance Sheet Arrangements

We have not entered into any off-balance sheet financing arrangements and have not established any special purpose entities. We have not guaranteed any debt or commitments of other entities or entered into any options on non-financial assets.

Indemnifications

In the normal course of business, the Company provides indemnifications of varying scope to certain customers against claims of intellectual property infringement made by third parties arising from the use of its products and to its clinical research organizations and investigator sites against liabilities incurred in connection with any third-party claim arising from the work performed on behalf of the Company, among others. Historically, costs related to these indemnification provisions have not been significant and the Company is unable to estimate the maximum potential impact of these indemnification provisions on its future results of operations.

Pursuant to the terms of the Asset Purchase Agreement with Meda to sell certain of the assets related to the MUSE business to Meda, the Company agreed to indemnify Meda in connection with the representations and warranties that it made concerning its rights, liabilities and assets related to the MUSE business and its authority to enter into and consummate the MUSE Transaction. The Company also made certain covenants in the Asset Purchase Agreement which survive the closing of the MUSE Transaction, including a three year covenant not to develop, manufacture, promote or commercialize a trans-urethral erectile dysfunction drug. See Note 13: "Discontinued Operations" for additional information.

On May 15, 2007, the Company closed its transaction with K-V Pharmaceutical Company, or K-V, for the sale of its investigational drug candidate, Evamist. At the time of the sale, Evamist was an investigational drug candidate and was not yet approved by the FDA for marketing. Pursuant to the terms of the Asset Purchase Agreement for the sale of Evamist, the Company made certain representations and warranties concerning its rights and assets related to Evamist and the Company's authority to enter into and consummate the transaction. The Company also made certain covenants that survive the closing date of the transaction, including a covenant not to operate a business that competes, in the U.S. and its territories and protectorates, with the Evamist product.

To the extent permitted under Delaware law, the Company has agreements whereby it indemnifies its officers and directors for certain events or occurrences while the officer or director is, or was, serving at the Company's request in such capacity. The indemnification period covers all pertinent events and occurrences during the officer's or director's lifetime. The maximum potential amount of future payments the Company could be required to make under these indemnification agreements is unlimited; however, the Company maintains director and officer insurance coverage that reduces its exposure and enables the Company to recover a portion of any future amounts paid. The Company believes the estimated fair value of these indemnification agreements in excess of applicable insurance coverage is minimal.

Recent Accounting Pronouncements

There have been no recent accounting pronouncements or changes in accounting pronouncements during the year ended December 31, 2012 that are of significance, or potential significance to the Company.

Dividend Policy

We have not paid any dividends since our inception and do not intend to declare or pay any dividends on our common stock in the foreseeable future. Declaration or payment of future dividends, if any, will be at the discretion of our Board of Directors after taking into account various factors, including our financial condition, operating results and current and anticipated cash needs.

Cautionary Note on Forward-Looking Statements

Our business is subject to significant risks, including but not limited to, the risks inherent in our research and development activities, including the successful completion of clinical trials, the lengthy, expensive and uncertain process of seeking regulatory approvals, uncertainties associated both with the potential infringement of patents and other intellectual property rights of third parties, and with obtaining and enforcing our own patents and patent rights, uncertainties regarding government reforms and of product pricing and reimbursement levels, technological change, competition, manufacturing uncertainties and dependence on third parties. Even if our investigational drug candidates appear promising at an early stage of development, they may not reach the market for numerous reasons. Such reasons include the possibilities that the drug will be ineffective or unsafe during clinical trials, will fail to receive necessary regulatory approvals, will be difficult to manufacture on a large scale, will be uneconomical to market or will be precluded from commercialization by proprietary rights of third parties. For more information about the risks we face, see "Item 1.A. Risk Factors" included in this report.

Item 7A. ***Quantitative and Qualitative Disclosures about Market Risk***

The Securities and Exchange Commission's rule related to market risk disclosure requires that we describe and quantify our potential losses from market risk sensitive instruments attributable to reasonably possible market changes. Market risk sensitive instruments include all financial or

commodity instruments and other financial instruments that are sensitive to future changes in interest rates, currency exchange rates, commodity prices or other market factors.

Market and Interest Rate Risk

Our cash, cash equivalents and available-for-sale securities as of December 31, 2012 consisted primarily of money market funds and U.S. Treasury securities. Our cash is invested in accordance with an investment policy approved by our Board of Directors that specifies the categories (money market funds, U.S. Treasury securities and debt securities of U.S. government agencies, corporate bonds, asset-backed securities, and other securities), allocations, and ratings of securities we may consider for investment. Currently, we have focused on investing in U.S. Treasuries until market conditions improve.

Our primary exposure to market risk is interest income sensitivity, which is affected by changes in the general level of U.S. interest rates, particularly because the majority of our investments are in short-term marketable debt securities. The primary objective of our investment activities is to preserve principal. Some of the securities that we invest in may be subject to market risk. This means that a change in prevailing interest rates may cause the value of the investment to fluctuate. For example, if we purchase a security that was issued with a fixed interest rate and the prevailing interest rate later rises, the value of our investment may decline. A hypothetical 100 basis point increase in interest rates would reduce the fair value of our available-for-sale securities at December 31, 2012 by approximately $453,000. In general, money market funds are not subject to market risk because the interest paid on such funds fluctuates with the prevailing interest rate.

Item 8. ***Financial Statements and Supplementary Data***

VIVUS, INC.

1. Index to Consolidated Financial Statements

The following financial statements are filed as part of this Report:

REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

The Board of Directors and Stockholders of
VIVUS, Inc.

We have audited the accompanying consolidated balance sheets of VIVUS, Inc. as of December 31, 2012 and 2011, and the related consolidated statements of operations, comprehensive loss, stockholders' equity and cash flows for each of the three years in the period ended December 31, 2012. Our audits also included the financial statement schedule listed in Item 15(a)(2). These financial statements and schedule are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements and schedule based on our audits.

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the consolidated financial statements audited by us present fairly, in all material respects, the consolidated financial position of VIVUS, Inc. at December 31, 2012 and 2011 , and the consolidated results of its operations and its cash flows for each of the three years in the period ended December 31, 2012, in conformity with U.S. generally accepted accounting principles. Also, in our opinion, the related financial statement schedule, when considered in relation to the basic financial statements taken as a whole, presents fairly in all material respects the information set forth therein.

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), VIVUS, Inc.'s internal control over financial reporting as of December 31, 2012, based on criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission and our report dated February 26, 2013 expressed an unqualified opinion thereon.

/s/ OUM & Co. LLP

San Francisco, California
February 26, 2013

REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

The Board of Directors and Stockholders of
VIVUS, Inc.

We have audited VIVUS, Inc.'s internal control over financial reporting as of December 31, 2012, based on criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (the COSO criteria). VIVUS, Inc.'s management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting included in Management's Annual Report on Internal Control Over Financial Reporting included in Item 9A. Our responsibility is to express an opinion on the company's internal control over financial reporting based on our audit.

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, assessing the risk that a material weakness exists, testing and evaluating the design and operating effectiveness of internal control based on the assessed risk, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinion.

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

In our opinion, VIVUS, Inc. maintained, in all material respects, effective internal control over financial reporting as of December 31, 2012, based on the COSO criteria.

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the consolidated balance sheets of VIVUS, Inc. as of December 31, 2012 and 2011, and the related consolidated statements of operations, comprehensive loss, stockholders' equity and cash flows for each of the three years in the period ended December 31, 2012 and our report dated February 26, 2013 expressed an unqualified opinion thereon.

/s/ OUM & Co. LLP

San Francisco, California
February 26, 2013

VIVUS, INC.

CONSOLIDATED BALANCE SHEETS

(In thousands, except par value)

	December 31	
	2012	2011
ASSETS		
Current assets:		
Cash and cash equivalents	$ 58,605	$ 39,554
Available-for-sale securities	155,981	107,282
Accounts receivable, net	2,778	—
Inventories	25,353	3,107
Prepaid expenses and other assets	19,446	1,793
Total current assets	262,163	151,736
Property and equipment, net	1,951	320
Total assets	$ 264,114	$ 152,056
LIABILITIES AND STOCKHOLDERS' EQUITY		
Current liabilities:		
Accounts payable	$ 25,375	$ 2,940
Accrued and other liabilities	13,777	6,392
Deferred revenue	1,150	—
Current liabilities of discontinued operations	903	1,640
Total current liabilities	41,205	10,972
Commitments and contingencies		
Stockholders' equity:		
Preferred stock; $1.00 par value; 5,000 shares authorized; no shares issued and outstanding at December 31, 2012 and 2011	—	—
Common stock; $.001 par value; 200,000 shares authorized at December 31, 2012 and 2011; 100,659 and 88,975 shares issued and outstanding at December 31, 2012 and 2011, respectively	101	89
Additional paid-in capital	708,921	487,235
Accumulated other comprehensive income	33	25
Accumulated deficit	(486,146)	(346,265)
Total stockholders' equity	222,909	141,084
Total liabilities and stockholders' equity	$ 264,114	$ 152,056

See accompanying notes to consolidated financial statements.

VIVUS, INC.

CONSOLIDATED STATEMENTS OF OPERATIONS

(In thousands, except per share data)

	Years Ended December 31		
	2012	2011	2010
Revenue:			
Net product revenue	$ 2,012	$ —	$ —
Operating expenses:			
Cost of goods sold	187	—	—
Research and development	32,065	24,604	39,971
Selling, general and administrative	109,665	22,472	25,656
Total operating expenses	141,917	47,076	65,627
Loss from operations	(139,905)	(47,076)	(65,627)
Interest and other income (expense):			
Interest and other income, net	199	240	468
Interest expense	—	—	(4,308)
Loss on early extinguishment of debt	—	—	(5,958)
Total interest and other income (expense)	199	240	(9,798)
Loss from continuing operations before income taxes	(139,706)	(46,836)	(75,425)
Provision for income taxes	(27)	(190)	(9)
Net loss from continuing operations	(139,733)	(47,026)	(75,434)
Net (loss) income from discontinued operations	(148)	886	9,369
Net loss	$ (139,881)	$ (46,140)	$ (66,065)
Basic and diluted net income (loss) per share:			
Continuing operations	$ (1.42)	$ (0.56)	$ (0.93)
Discontinued operations	0.00	0.01	0.11
Net loss per share	$ (1.42)	$ (0.55)	$ (0.82)
Shares used in per share computation:			
Basic and diluted	98,289	84,392	81,017

VIVUS, INC.

CONSOLIDATED STATEMENTS OF COMPREHENSIVE LOSS

(In thousands)

	Years Ended December 31		
	2012	2011	2010
Net loss	$ (139,881)	$ (46,140)	$ (66,065)
Other comprehensive income—unrealized gain on securities, net of taxes	8	21	7
Comprehensive loss	$ (139,873)	$ (46,119)	$ (66,058)

See accompanying notes to consolidated financial statements.

VIVUS, INC.

CONSOLIDATED STATEMENTS OF STOCKHOLDERS' EQUITY

(In thousands)

	Common Stock		Additional Paid-In Capital	Accumulated Other Comprehensive Income (Loss)	Accumulated Deficit	Total
	Shares	Amount				
Balances, December 31, 2009	80,607	$ 81	$ 420,708	$ (3)	$ (234,060)	$ 186,726
Sale of common stock through employee stock purchase plan	48	—	304	—	—	304
Exercise of common stock options for cash	913	1	3,616	—	—	3,617
Share-based compensation expense	—	—	7,413	—	—	7,413
Net unrealized gain on securities	—	—	—	7	—	7
Net loss	—	—	—	—	(66,065)	(66,065)
Balances, December 31, 2010	81,568	82	432,041	4	(300,125)	132,002
Sale of common stock through employee stock purchase plan	36	—	211	—	—	211
Exercise of common stock options for cash	482	—	2,354	—	—	2,354
Share-based compensation expense	—	—	7,353	—	—	7,353
Proceeds from registered direct public offering of common stock	6,889	7	45,805	—	—	45,812
Issue costs for registered direct public offering of common stock	—	—	(529)	—	—	(529)
Net unrealized gain on securities	—	—	—	21	—	21
Net loss	—	—	—	—	(46,140)	(46,140)
Balances, December 31, 2011	88,975	89	487,235	25	(346,265)	141,084
Sale of common stock through employee stock purchase plan	35	—	314	—	—	314
Exercise of common stock options for cash	2,649	3	13,248	—	—	13,251
Share-based compensation expense	—	—	16,133	—	—	16,133
Proceeds from registered direct public offering of common stock	9,000	9	202,491	—	—	202,500
Issue costs for						

registered direct public offering of common stock	—	—	(10,500)	—	—	(10,500)
Net unrealized gain on securities	—	—	—	8	—	8
Net loss	—	—	—	—	(139,881)	(139,881)
Balances, December 31, 2012	100,659	$ 101	$ 708,921	$ 33	$ (486,146)	$ 222,909

See accompanying notes to consolidated financial statements.

VIVUS, INC.

CONSOLIDATED STATEMENTS OF CASH FLOWS

(In thousands)

	Years Ended December 31		
	2012	2011	2010
Cash flows from operating activities:			
Net loss from continuing operations	$(139,733)	$ (47,026)	$ (75,434)
Adjustments to reconcile net loss from continuing operations to net cash used for operating activities from continuing operations:			
Provision for cash discounts	53	—	—
Depreciation	271	102	138
Amortization of discount or premium on available-for-sale securities	3,958	3,118	1,655
Net realized gain on investments	(8)	—	(5)
Share-based compensation expense	15,938	7,353	6,443
Loss on early extinguishment of debt	—	—	5,958
Changes in assets and liabilities:			
Accounts receivable	(2,835)	—	—
Inventories	(22,050)	118	(3,225)
Prepaid expenses and other assets	(17,653)	(145)	2,658
Accounts payable	22,202	545	(5,687)
Accrued and other liabilities	7,385	15	1,197
Deferred revenue	1,154	—	—
Net cash used for operating activities from continuing operations	(131,318)	(35,920)	(66,302)
Net cash (used for) provided by operating activities from discontinued operations	(885)	(980)	2,195
Net cash used for operating activities	(132,203)	(36,900)	(64,107)
Cash flows from investing activities:			
Property and equipment purchases	(1,669)	(201)	(105)
Release of restricted cash	—	—	700
Purchases of available-for-sale securities	(226,654)	(137,409)	(209,759)
Proceeds from maturity of available-for-sale securities	133,250	129,000	243,900
Proceeds from sale of available-for-sale securities	40,763	—	28,487
Net cash (used for) provided by investing activities from continuing operations	(54,310)	(8,610)	63,223
Net cash provided by investing activities from discontinued operations	—	—	21,546
Net cash (used for) provided by investing activities	(54,310)	(8,610)	84,769
Cash flows from financing activities:			
Payments of notes payable	—	—	(23,000)
Net proceeds from exercise of common stock options	13,250	2,354	3,617
Sale of common stock through employee stock purchase plan	314	211	304
Net proceeds from issuance of common stock	192,000	45,283	—
Net cash provided by (used for) financing activities from continuing operations	205,564	47,848	(19,079)
Net cash used for financing activities from discontinued operations	—	—	(4,900)
Net cash provided by (used for) financing activities	205,564	47,848	(23,979)
Net increase (decrease) in cash and cash equivalents	19,051	2,338	(3,317)
Cash and cash equivalents:			
Beginning of year	39,554	37,216	40,533
End of year	$ 58,605	$ 39,554	$ 37,216
Supplemental cash flow disclosure:			
Interest paid	$ —	$ —	$ 6,030
Income taxes paid	$ 7	$ 24	$ 41
Non-cash investing and financing activities:			

Unrealized gain on securities	$ 8	$ 21	$ 7

See accompanying notes to consolidated financial statements.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

Note 1. Business and Significant Accounting Policies

Business

VIVUS is a biopharmaceutical company dedicated to commercializing and developing innovative therapies to address unmet needs in obesity, sleep apnea, diabetes and sexual health. The Company's drug, Qsymia ™ (phentermine and topiramate extended-release) (formerly known as Qnexa®) was approved by the U.S. Food and Drug Administration, or FDA, for the treatment of obesity as an adjunct to a reduced-calorie diet and increased physical activity for chronic weight management in adult patients with an initial body mass index (BMI) of 30 or greater (obese), or 27 or greater (overweight) in the presence of at least one weight-related comorbidity, such as hypertension, type 2 diabetes mellitus or high cholesterol (dyslipidemia). Qsymia incorporates low doses of active ingredients from two previously approved drugs, phentermine and topiramate. Although the exact mechanism of action is unknown, Qsymia is believed to target appetite and satiety, or the feeling of being full, the two main mechanisms that impact eating behavior. The Company announced the U.S. market availability of Qsymia for obesity in September 2012. On February 21, 2013, the European Medicines Agency's, or EMA, Committee for Medicinal Products for Human Use, or CHMP, confirmed its October 18, 2012 decision to deny the Marketing Authorization Application, or MAA, for Qsiva™ (phentermine/topiramate ER) for the treatment of obesity in the European Union, or EU. The Company has completed Phase 2 clinical studies for Qsymia for the treatment of sleep apnea and Qsymia for the treatment of type 2 diabetes.

The Company's drug, STENDRA ™ , or avanafil, was approved by the FDA for the treatment of erectile dysfunction, or ED, in the U.S. The Company, through collaboration arrangements with third parties, intends to market and sell STENDRA in the U.S. and, if approved, under the trade name SPEDRA ™ in the EU and other territories outside the United States.

At December 31, 2012, the Company's accumulated deficit was approximately $486.1 million. Based on current plans, management expects to incur further losses for the foreseeable future. Management believes that the Company's cash, cash equivalents, and available-for-sale securities at December 31, 2012 will be sufficient to meet the Company's obligations at least through 2013. Should product sales and planned partnering activities be significantly less than the Company's expectations, it would need to raise additional capital to support operating activities through 2013 and beyond. Until the Company can generate sufficient levels of cash from its operations, the Company expects to continue to finance its future cash needs primarily through proceeds from equity or debt financing, loans and collaborative agreements with corporate partners. Management has evaluated all events and transactions that occurred after December 31, 2012 through the date these consolidated financial statements were filed. There were no events or transactions occurring during this period which require recognition or disclosure in these consolidated financial statements, except as disclosed in Note 15. The Company operates in a single segment, the development and commercialization of novel therapeutic products.

When we refer to "we," "our," "us," the "Company" or "VIVUS" in this document, we mean the current Delaware corporation, or VIVUS, Inc., and its California predecessor, as well as all of our consolidated subsidiaries.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 1. Business and Significant Accounting Policies (Continued)

Significant Accounting Policies

Reclassifications

Certain prior year amounts in the consolidated financial statements have been reclassified to conform to the current year's presentation. In particular, accrued research and clinical expenses, and accrued employee compensation and benefits have been combined with accrued and other liabilities in the consolidated balance sheets and consolidated statements of cash flows. In addition, the amortization of discount or premium on available-for-sale securities has been shown separately from proceeds from maturity of available-for-sale securities in the consolidated statement of cash flows.

Principles of Consolidation

The consolidated financial statements include the accounts of VIVUS, Inc., and its wholly owned subsidiaries: VIVUS Limited, VIVUS International LP, VIVUS Real Estate LLC, VIVUS International Limited, VIVUS U.K. Limited and VIVUS B.V. Limited. All significant intercompany transactions and balances have been eliminated in consolidation. On December 31, 2005, VIVUS U.K. Limited became a dormant company. On March 20, 2008, VIVUS International Limited was dissolved. The Company acquired 100% of the outstanding shares of Deerfield ED Corp., a Delaware corporation, on November 5, 2010. Deerfield ED Corp. was dissolved on December 9, 2010. On July 22, 2011, VIVUS Real Estate LLC was cancelled.

Use of Estimates

The preparation of financial statements in conformity with U.S. generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosures of contingent assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. On an ongoing basis, the Company evaluates its estimates, including critical accounting policies or estimates related to available-for-sale securities, research and development expenses, income taxes, inventories, contingencies and litigation and share-based compensation. The Company bases its estimates on historical experience, information received from third parties and on various market specific and other relevant assumptions that it believes to be reasonable under the circumstances, the results of which form the basis for making judgments about the carrying values of assets and liabilities that are not readily apparent from other sources. Actual results could differ significantly from those estimates under different assumptions or conditions.

Cash and Cash Equivalents

The Company considers highly liquid investments with maturities from the date of purchase of three months or less to be cash equivalents. At December 31, 2012 and 2011, all cash equivalents are invested in money market funds and U.S. Treasury securities. These investments are recorded at fair value.

As of December 31, 2012 and 2011, the temporary unrealized gains (losses) on cash, cash equivalents and available-for-sale securities, net of tax, were included in accumulated other comprehensive income (loss) in the accompanying consolidated balance sheets.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 1. Business and Significant Accounting Policies (Continued)

Available-for-Sale Securities

The Company focuses on liquidity and capital preservation in its investments in available-for-sale securities. The Company's investment policy, as approved by the Audit Committee of the Board of Directors, allows it to invest its excess cash balances in money market and marketable securities, primarily U.S. Treasury securities and debt securities of U.S. government agencies, corporate debt securities and asset-backed securities in accordance with its investment policy. The Company periodically evaluates its investments to determine if impairment charges are required.

The Company determines the appropriate classification of marketable securities at the time of purchase and reevaluates such designation at each balance sheet date. Marketable securities have been classified and accounted for as available-for-sale. The Company may or may not hold securities with stated maturities greater than 12 months until maturity. In response to changes in the availability of and the yield on alternative investments as well as liquidity requirements, the Company may sell these securities prior to their stated maturities. As these securities are viewed by the Company as available to support current operations, securities with maturities beyond 12 months are classified as current assets.

Securities are carried at fair value, with the unrealized gains and losses, net of taxes, reported as a component of stockholders' equity, unless the decline in value is deemed to be other-than-temporary and the Company intends to sell such securities before recovering their costs, in which case such securities are written down to fair value and the loss is charged to other-than-temporary loss on impaired securities. The Company evaluates its investment securities for other-than-temporary declines based on quantitative and qualitative factors. Any realized gains or losses on the sale of marketable securities are determined on a specific identification method, and such gains and losses are reflected as a component of interest income.

Fair Value Measurements

Financial Instruments Measured at Fair Value. Cash and cash equivalents and available-for-sale financial instruments are carried at fair value and the Company makes estimates regarding valuation of these assets measured at fair value in preparing the consolidated financial statements.

Fair Value Measurement—Definition and Hierarchy. FASB ASC topic 820, *Fair Value Measurements and Disclosures* , or ASC 820, defines fair value as the price that would be received to sell an asset or paid to transfer a liability (i.e., the "exit price") in an orderly transaction between market participants at the measurement date.

Valuation Technique. ASC 820 establishes a hierarchy for inputs used in measuring fair value that maximizes the use of observable inputs and minimizes the use of unobservable inputs by requiring that the observable inputs be used when available. Observable inputs are inputs that market participants would use in pricing the asset or liability developed based on market data obtained from sources independent of the Company. Unobservable inputs are inputs that reflect the Company's assumptions about the assumptions market participants would use in pricing the asset or liability developed based on the best information available in the circumstances.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 1. Business and Significant Accounting Policies (Continued)

ASC 820 prescribes a fair value hierarchy in order to increase consistency and comparability in fair value measurements and related disclosures. The hierarchy is broken down into three levels based on the reliability of inputs as follows:

- Level 1—Valuations based on quoted prices in active markets for identical assets. Since valuations are based on quoted prices that are readily and regularly available in an active market, valuation of these products does not entail a significant degree of judgment.

- Level 2—Valuations based on quoted prices in markets that are not active or for which all significant inputs are observable, directly or indirectly. Quoted prices for similar instruments in active markets, quoted prices for identical or similar instruments in markets that are not active, or other inputs that are observable or can be corroborated by observable market data for substantially the full term of the assets or liabilities.

- Level 3—Valuations based on inputs that are unobservable and significant to the overall fair value measurement.

As of December 31, 2012, the Company's cash and cash equivalents and available-for-sale securities measured at fair value on a recurring basis totaled $214.6 million. All of the Company's cash and cash equivalents and available-for-sale securities are cash, money market instruments and U.S. Treasury securities and these are classified as Level 1. The valuation techniques used to measure the fair values of these financial instruments were derived from quoted market prices, as substantially all of these instruments have maturity dates, if any, within one year from the date of purchase and active markets for these instruments exists. The Company's valuation techniques used to measure the fair value of money market funds were derived from quoted market prices as active markets for these instruments exist. Investments in marketable securities are held by a custodian who obtains investment prices from a third-party pricing provider that uses standard inputs derived from or corroborated by observable market data to models that vary by asset class. There were no assets or liabilities where Level 2 or Level 3 valuation techniques were used and there were no assets and liabilities measured at fair value on a non-recurring basis.

Concentration of Credit Risk

Financial instruments that potentially subject the Company to concentrations of credit risk consist primarily of cash, cash equivalents, available-for-sale-securities, and accounts receivable. The Company has established guidelines to limit its exposure to credit risk by placing investments with a number of high credit quality institutions, in U.S. Treasury securities or diversifying its investment portfolio and placing investments with maturities that maintain safety and liquidity within the Company's liquidity needs.

Accounts Receivable, Allowances for Doubtful Accounts and Cash Discounts

The Company extends credit to its customers for product sales resulting in accounts receivable. Customer accounts are monitored for past due amounts. Past due accounts receivable, determined to be uncollectible, are written off against the allowance for doubtful accounts. Allowances for doubtful accounts are estimated based upon past due amounts, historical losses and existing economic factors, and are adjusted periodically. The Company offers cash discounts to its customers, generally 2% of the sales price as an incentive for prompt payment. The estimate of cash discounts is recorded at the time

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 1. Business and Significant Accounting Policies (Continued)

of sale. The Company accounts for the cash discounts by reducing revenue and accounts receivable by the amount of the discounts it expects the customers to take. The accounts receivable are reported in the consolidated balance sheets, net of the allowances for doubtful accounts and cash discounts. There is no allowance for doubtful accounts at December 31, 2012 or 2011. The allowance for cash discounts is $57,000 at December 31, 2012, and $0 at December 31, 2011.

Inventories and related reserves

Inventories are valued at the lower of cost or market. Cost is determined using the first-in, first-out method for all inventories, which are valued using a weighted average cost method calculated for each production batch. Inventory includes the cost of the active pharmaceutical ingredients, or APIs, materials and third-party contract manufacturing and packaging services. Indirect overhead costs associated with production and distribution are allocated to the appropriate cost pool and then absorbed into inventory based on the units produced or distributed, assuming normal capacity, in the applicable period.

Inventory costs of product shipped to customers, but not yet shipped to patients through prescriptions, are recorded within inventories on the consolidated balance sheets and are subsequently recognized to cost of goods sold when shipped to patients through prescriptions.

The Company's policy is to write down inventory that has become obsolete, inventory that has a cost basis in excess of its expected net realizable value and inventory in excess of expected requirements. The estimate of excess quantities is subjective and primarily dependent on the Company's estimates of future demand for a particular product. If the estimate of future demand is inaccurate based on actual sales, the Company may adjust the reserve for excess inventory for that product and record a charge to cost of goods sold. There are no such inventory charges for the years presented in this Form 10-K.

Property and Equipment

Property and equipment is stated at cost and includes leasehold improvements, computers and software and furniture and fixtures. For financial reporting, depreciation is computed using the straight-line method over estimated useful lives of two to seven years for computers and software and furniture and fixtures. Leasehold improvements are amortized using the straight-line method over the shorter of the expected lease term or the estimated useful lives. Expenditures for repairs and maintenance, which do not extend the useful life of the property and equipment, are expensed as incurred. Upon retirement, the asset cost and related accumulated depreciation are relieved from the accompanying consolidated balance sheets. Gains and losses associated with dispositions are reflected as a component of other income, net in the accompanying consolidated statements of operations.

Long-lived assets, such as property and equipment, are reviewed for impairment whenever events or changes in circumstances indicate that the carrying amount of an asset may not be recoverable. Recoverability of assets to be held and used is measured by a comparison of the carrying amount of an asset to an estimate of undiscounted future cash flows expected to be generated by the asset. If the carrying amount of the asset exceeds its estimated future cash flows, an impairment charge is recognized by the amount by which the carrying amount of the asset exceeds the fair value of the asset.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 1. Business and Significant Accounting Policies (Continued)

Revenue Recognition

The Company recognizes revenue from the sale of Qsymia ™ (phentermine and topiramate extended-release) when: (i) persuasive evidence that an arrangement exists, (ii) delivery has occurred and title has passed, (iii) the price is fixed or determinable, and (iv) collectability is reasonably assured. Revenue from sales transactions where the customer has the right to return the product is recognized at the time of sale only if: (i) the price to the customer is substantially fixed or determinable at the date of sale, (ii) the customer has paid the Company, or the customer is obligated to pay the Company and the obligation is not contingent on resale of the product, (iii) the customer's obligation would not be changed in the event of theft or physical destruction or damage of the product, (iv) the customer acquiring the product for resale has economic substance apart from that provided by the Company, (v) the Company does not have significant obligations for future performance to directly bring about resale of the product by the customer, and (vi) the amount of future returns can be reasonably estimated.

Net Product Revenue and Product Revenue Allowances

Product revenue is recognized net of cash consideration paid to customers for service fees in accordance with certified pharmacy services network agreements, and include a fixed rate per prescription shipped and monthly program management and data fees for certain services performed by the customer. These services are not deemed sufficiently separable from the customers' purchase of the product; therefore, they are recorded as a reduction of revenue at the time of revenue recognition.

Other reductions of revenue include certain prompt pay cash discounts and allowances offered to the customers which are recognized as a reduction of revenue at the later of the date at which the related revenue is recognized or the date at which the allowance is offered. The Company recognized $53,000 as a reduction of revenue for prompt pay cash discounts in the year ended December 31, 2012.

Calculating certain of these items involves estimates and judgments based on sales or invoice data and historical experience. Amounts accrued for sales deductions are adjusted when trends, significant events, or actual results indicate that adjustment is appropriate. Revisions of estimates for sales deductions are charged to income in the period in which the information that gives rise to the revision becomes known.

Qsymia was approved by the U.S. Food and Drug Administration, or FDA, in July 2012. The Company sells Qsymia product in the U.S. to select pharmacies through a certified home delivery pharmacy services network, which are collectively, its customers. Under this arrangement, title and risk of loss transfer to the Company's customers upon delivery of the product to their distribution facilities. They in turn, sell directly to patients through their home delivery service.

The Company shipped initial orders of Qsymia to its customers in September 2012 and announced the availability of the product on September 17, 2012. Qsymia has a 24-month shelf life and the Company grants rights to its customers to return unsold product three months prior to and up to twelve months after product expiration and issue credits which may be applied against existing or future invoices. Given the Company's limited history of selling Qsymia and the lengthy return period, it has not been able to reliably estimate expected returns of Qsymia at the time of shipment, and therefore the Company recognizes revenue when units are shipped to patients through prescriptions, at which point, the product is not subject to return.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 1. Business and Significant Accounting Policies (Continued)

The Company will continue to recognize revenue for Qsymia based upon prescription sell-through until it has sufficient historical information to reliably estimate returns.

As of December 31, 2012, the Company had recorded deferred revenue of $1.2 million related to shipments of Qsymia, which represents product shipped to customers, but not yet shipped to patients through prescriptions. A corresponding accounts receivable is also recorded for this amount, as the payments from customers are not contingent upon the sale of product to patients.

Cost of goods sold

Cost of goods sold for units shipped to patients through prescriptions includes the inventory costs of APIs, third-party contract manufacturing costs, packaging and distribution costs, royalties, cargo insurance, freight, shipping, handling and storage costs, and overhead costs of the employees involved with production.

Research and Development Expenses

Research and development, or R&D, expenses include license fees, related compensation, consultants' fees, facilities costs, administrative expenses related to R&D activities and clinical trial costs incurred by clinical research organizations or CROs, and research institutions under agreements that are generally cancelable, among other related R&D costs. The Company also records accruals for estimated ongoing clinical trial costs. Clinical trial costs represent costs incurred by CRO and clinical sites and include advertising for clinical trials and patient recruitment costs. These costs are recorded as a component of R&D expenses and are expensed as incurred. Under the Company's agreements, progress payments are typically made to investigators, clinical sites and CROs. The Company analyzes the progress of the clinical trials, including levels of patient enrollment, invoices received and contracted costs when evaluating the adequacy of accrued liabilities. Significant judgments and estimates must be made and used in determining the accrued balance in any accounting period. Actual results could differ from those estimates under different assumptions. Revisions are charged to expense in the period in which the facts that give rise to the revision become known.

In addition, the Company has obtained rights to patented intellectual properties under several licensing agreements for use in research and development activities. Non-refundable licensing payments made for intellectual properties that have no alternative future uses are expensed to research and development as incurred.

Advertising Expenses

Advertising expenses are charged to expense as incurred. The Company incurred $16.1 million in 2012 in advertising and sales promotion costs related to its marketed product, Qsymia.

Share-Based Payments

The Company follows the fair value method of accounting for share-based compensation arrangements in accordance with FASB ASC topic 718, *Compensation—Stock Compensation*, or ASC 718. Compensation expense is recognized, using a fair-value based method, for all costs related to share-based payments including stock options and restricted stock units and stock issued under the employee stock purchase plan. The Company estimates the fair value of share-based payment awards

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 1. Business and Significant Accounting Policies (Continued)

on the date of the grant using an option-pricing model. The fair value of each option award is estimated on the grant date using a Black-Scholes option-pricing model. The expected term, which represents the period of time that options granted are expected to be outstanding, is derived by analyzing the historical experience of similar awards, giving consideration to the contractual terms of the share-based awards, vesting schedules and expectations of future employee behavior. Expected volatilities are estimated using the historical share price performance over the expected term of the option. The Company also considers other factors such as its planned clinical trials and other company activities that may affect the volatility of VIVUS' stock in the future but determined that at this time, the historical volatility was more indicative of expected future stock price volatility. The risk-free interest rate for the period matching the expected term of the option is based on the U.S. Treasury yield curve in effect at the time of the grant. The Black-Scholes Model also requires a single expected dividend yield as an input. The Company does not anticipate paying any dividends in the near future. The Company develops pre-vesting forfeiture assumptions based on an analysis of historical data.

Income Taxes

The Company makes certain estimates and judgments in determining income tax expense for financial statement purposes. These estimates and judgments occur in the calculation of certain tax assets and liabilities, which arise from differences in the timing of recognition of revenue and expense for tax and financial statement purposes.

As part of the process of preparing the Company's consolidated financial statements, the Company is required to estimate its income taxes in each of the jurisdictions in which the Company operates. This process involves the Company estimating its current tax exposure under the most recent tax laws and assessing temporary differences resulting from differing treatment of items for tax and accounting purposes. These differences result in deferred tax assets and liabilities, which are included in the Company's consolidated balance sheets.

The Company assesses the likelihood that it will be able to recover its deferred tax assets. The Company considers all available evidence, both positive and negative, including historical levels of income, expectations and risks associated with estimates of future taxable income and ongoing prudent and feasible tax planning strategies in assessing the need for a valuation allowance. If it is not more likely than not that the Company will recover its deferred tax assets, the Company will increase its provision for taxes by recording a valuation allowance against the deferred tax assets that the Company estimates will not ultimately be recoverable. As a result of the Company's analysis of all available evidence, both positive and negative, as of December 31, 2012, it was considered more likely than not that the Company's deferred tax assets would not be realized. However, should there be a change in the Company's ability to recover its deferred tax assets, the Company would recognize a benefit to its tax provision in the period in which the Company determines that it is more likely than not that it will recover its deferred tax assets.

The Company recognizes interest and penalties accrued on any unrecognized tax benefits as a component of its provision for income taxes.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 1. Business and Significant Accounting Policies (Continued)

FASB ASC topic 740, *Income Taxes* , or ASC 740, prescribes a recognition threshold and measurement attribute for the financial statement recognition and measurement of uncertain tax positions taken or expected to be taken in a company's income tax return, and also provides guidance on derecognition, classification, interest and penalties, accounting in interim periods, disclosure, and transition. ASC 740-10 utilizes a two-step approach for evaluating uncertain tax positions. Step one, Recognition, requires a company to determine if the weight of available evidence indicates that a tax position is more likely than not to be sustained upon audit, including resolution of related appeals or litigation processes, if any. Step two, Measurement, is based on the largest amount of benefit, which is more likely than not to be realized on ultimate settlement.

Contingencies and Litigation

The Company is periodically involved in disputes and litigation related to a variety of matters. When it is probable that the Company will experience a loss, and that loss is quantifiable, the Company records appropriate reserves. The Company records legal fees and costs as an expense when incurred.

Net Income (Loss) Per Share

The Company computes basic net income (loss) per share applicable to common shareholders based on the weighted average number of common shares outstanding during the period. Diluted net income (loss) per share is based on the weighted average number of common and common equivalent shares, which represent shares that may be issued in the future upon the exercise of outstanding stock options. Common share equivalents are excluded from the computation in periods in which they have an anti-dilutive effect. Stock options for which the price exceeds the average market price over the period have an anti-dilutive effect on net income per share and, accordingly, are excluded from the calculation. When there is a net loss, other potentially dilutive common equivalent shares are not included in the calculation of net loss per share since their inclusion would be anti-dilutive.

The computation of basic and diluted net loss per share for the years ended December 31, 2012, 2011 and 2010 are as follows:

	2012	2011	2010
	(In thousands, except per share data)		
Net loss	$ (139,881)	$ (46,140)	$ (66,065)
Net loss per share—basic and diluted	$ (1.42)	$ (0.55)	$ (0.82)
Shares used in the computation of net loss per share—basic and diluted	98,289	84,392	81,017

As the Company recognized a net loss from continuing operations for the years ended December 31, 2012, 2011 and 2010, 4,172,000, 5,357,000 and 4,384,000 potentially dilutive options outstanding were not included in the computation of diluted net loss, respectively, because the effect would have been anti-dilutive.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 1. Business and Significant Accounting Policies (Continued)

Recent Accounting Requirements

There have been no recent accounting pronouncements or changes in accounting pronouncements during the year ended December 31, 2012 that are of significance, or potential significance to the Company.

Note 2. Cash, Cash Equivalents and Available-for-Sale Securities

The fair value and the amortized cost of cash, cash equivalents, and available-for-sale securities by major security type at December 31, 2012 and 2011 are presented in the tables that follow.

As of December 31, 2012 (in thousands):

Cash and cash equivalents and available-for-sale securities	Amortized Cost	Gross Unrealized Gains	Gross Unrealized Losses	Estimated Fair Value
Cash and money market funds	$ 58,605	$ —	$ —	$ 58,605
U.S. Treasury securities	155,948	33	—	155,981
Total	214,553	33	—	214,586
Less amounts classified as cash equivalents	(58,605)	—	—	(58,605)
Total available-for-sale securities	$155,948	$ 33	$ —	$155,981

As of December 31, 2012, all of the Company's available-for-sale securities have a contractual maturity of less than one year.

As of December 31, 2011 (in thousands):

Cash and cash equivalents and available-for-sale securities	Amortized Cost	Gross Unrealized Gains	Gross Unrealized Losses	Estimated Fair Value
Cash and money market funds	$ 38,547	$ —	$ —	$ 38,547
U.S. Treasury securities	108,264	27	(2)	108,289
Total	146,811	27	(2)	146,836
Less amounts classified as cash equivalents	(39,554)	—	—	(39,554)
Total available-for-sale securities	$107,257	$ 27	$ (2)	$107,282

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 2. Cash, Cash Equivalents and Available-for-Sale Securities (Continued)

Fair Value Measurements

The following fair value hierarchy tables present information about the Company's assets (cash and cash equivalents and available-for-sale securities) measured at fair value on a recurring basis, classified as Level 1, as of December 31, 2012 and 2011 (in thousands):

	Balance at December 31, 2012		Balance at December 31, 2011	
	Level 1	Total	Level 1	Total
Cash and cash equivalents:				
Cash and money market funds	$ 58,605	$ 58,605	$ 38,547	$ 38,547
U.S. Treasury securities	—	—	1,007	1,007
Total cash and cash equivalents	$ 58,605	$ 58,605	$ 39,554	$ 39,554

	Balance at December 31, 2012		Balance at December 31, 2011	
	Level 1	Total	Level 1	Total
Available-for-sale securities:				
U.S. Treasury securities	$ 155,981	$ 155,981	$ 107,282	$ 107,282
Total available-for-sale securities	$ 155,981	$ 155,981	$ 107,282	$ 107,282

	December 31, 2012	December 31, 2011
Reported as:		
Cash and cash equivalents	$ 58,605	$ 39,554
Available-for-sale securities	155,981	107,282
Total	$ 214,586	$ 146,836

There were no assets or liabilities where Level 2 or Level 3 valuation techniques were used and there were no assets and liabilities measured at fair value on a non-recurring basis.

Note 3. Inventories

Inventories consist of (in thousands):

	Balance as of	
	December 31, 2012	December 31, 2011
Raw materials	$ 5,139	$ 3,107
Work in process	2,635	—
Finished goods	17,506	—
Deferred costs	73	—
Total	$ 25,353	$ 3,107

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 3. Inventories (Continued)

As of December 31, 2012 and 2011, the raw materials inventories consist primarily of the API for the commercialization of Qsymia. As of December 31, 2012, the finished goods inventory consists of both Qsymia and STENDRA ™ (avanafil) for commercialization, while the work in process and deferred costs inventories relate exclusively to Qsymia. The deferred costs represent the costs of Qsymia product shipped to customers, but not yet shipped to patients through prescriptions, and for which recognition of revenue has been deferred.

Note 4. Prepaid expenses and other assets

Prepaid expenses and other assets consist of (in thousands):

	Balance as of	
	December 31, 2012	December 31, 2011
Interest receivable	$ 743	$ 725
Prepaid insurance	6,979	672
Prepaid sales and marketing expenses	5,735	—
Manufacturing capacity commitment fees	2,300	—
Prepaid medical affairs expenses	1,782	—
Other prepaid expenses and assets	1,907	396
Total	$ 19,446	$ 1,793

The amounts included in prepaid expenses and other assets consist of interest receivable, deposits and prepayments for future services, primarily related to prepaid product commercialization costs for services relating to future periods in support of the commercial launch of Qsymia in the U.S., prepayments related to medical affairs activities for Qsymia and STENDRA, and manufacturing capacity commitment fees, and prepaid insurance. These amounts represent probable future economic benefits obtained or controlled by the Company as a result of past transactions or events, which meet the definition of an asset under FASB Concept Statement 6. As such, these costs have been deferred as prepaid expenses and other assets on the consolidated balance sheet and will be either (i) charged to expense accordingly when the related prepaid services are rendered to the Company, or (ii) converted to cash when the receivables are collected by the Company.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 5. Property and Equipment

Property and equipment consist of (in thousands):

	Balance as of	
	December 31, 2012	December 31, 2011
Computers and software	$ 2,056	$ 673
Furniture and fixtures	692	413
Manufacturing equipment	269	117
Leasehold improvements	351	272
	3,368	1,475
Accumulated depreciation	(1,417)	(1,155)
Property and equipment, net	$ 1,951	$ 320

Note 6. Accrued and other liabilities

Accrued and other liabilities consist of (in thousands):

	Balance as of	
	December 31, 2012	December 31, 2011
Accrued research and clinical expenses	$ 1,372	$ 1,425
Accrued employee compensation and benefits	3,859	3,693
Accrued manufacturing costs	4,135	—
Accrued sales and marketing expenses	2,908	—
Other accrued liabilities	1,503	1,274
Total	$ 13,777	$ 6,392

The amounts included in accrued and other liabilities consist of obligations for past services, primarily related to accrued manufacturing and product commercialization costs for services relating to past periods in support of the commercial launch of Qsymia in the U.S., accrued employee compensation and benefits, and accrued research and clinical expenses.

Note 7. Stockholders' Equity

Common Stock

The Company is authorized to issue 200 million shares of common stock. As of December 31, 2012 and 2011, there were 100,659,000 and 88,975,000 shares, respectively, issued and outstanding.

On March 6, 2012, the Company closed the underwritten public offering and sale of 9,000,000 shares of the Company's common stock. Gross proceeds to the Company from this sale totaled approximately $202.5 million before deduction of approximately $10.5 million in underwriting discounts and commissions and offering expenses. All of the shares of common stock were offered pursuant to the Company's effective shelf registration statement on Form S-3 (Registration No. 333-161948), including the prospectus dated September 16, 2009 (as amended on February 28, 2012) contained therein, as the same has been supplemented.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 7. Stockholders' Equity (Continued)

On August 24, 2011, the Company closed on the sale of a total of 6,889,098 shares of its common stock, at a price of $6.65 per share, pursuant to a previously-reported securities purchase agreement entered into on August 23, 2011 with certain investors in connection with a registered direct offering of the Company's common stock, or the Offering. Gross proceeds to the Company from the sale of the common stock in the Offering totaled approximately $45.8 million before deduction of approximately $529,000 in fees and expenses related to the Offering. All of the shares of common stock were offered pursuant to an effective shelf registration statement on Form S-3ASR (Registration No. 333-161948), including the prospectus dated September 16, 2009 contained therein.

On August 1, 2011, the Company filed a Form S-8 (File Number 333-175926) with the SEC registering 600,000 shares of common stock, par value $0.001 per share, under the 1994 Employee Stock Purchase Plan, as amended, or 1994 ESPP.

On July 14, 2010, the Company filed a Form S-8 (File Number 333-168106) with the SEC registering 16,615,199 shares of common stock, par value $0.001 per share, to be issued pursuant to the 2010 Equity Incentive Plan, and registering 400,000 shares of common stock, par value $0.001 per share, to be issued pursuant to the Stand-Alone Stock Option Agreement with Michael P. Miller, the Company's Senior Vice President and Chief Commercial Officer.

On February 16, 2010, the Company filed a Form S-8 (File Number 333-164921) with the SEC registering 1,000,000 shares of common stock, par value $0.001 per share, under the 2001 Stock Option Plan, as amended.

Preferred Stock

The Company is authorized to issue 5 million shares of undesignated preferred stock with a par value of $1.00 per share. As of December 31, 2012 and 2011, there were no preferred shares issued or outstanding. The Company may issue shares of preferred stock in the future, without stockholder approval, upon such terms as the Company's management and Board of Directors may determine.

Stockholder Rights Plan

On March 26, 2007, the Board of Directors of the Company adopted a Stockholder Rights Plan, or the Rights Plan, and amended its bylaws. Under the Rights Plan, the Company will issue a dividend of one right for each share of its common stock held by stockholders of record as of the close of business on April 13, 2007.

The Rights Plan is designed to guard against partial tender offers and other coercive tactics to gain control of the Company without offering a fair and adequate price and terms to all of the Company's stockholders. The Rights Plan is intended to provide the Board of Directors with sufficient time to consider any and all alternatives to such an action and is similar to plans adopted by many other publicly traded companies. The Rights Plan was not adopted in response to any efforts to acquire the Company and the Company is not aware of any such efforts.

Each right will initially entitle stockholders to purchase a fractional share of the Company's preferred stock for $26.00. However, the rights are not immediately exercisable and will become exercisable only upon the occurrence of certain events. If a person or group acquires, or announces a tender or exchange offer that would result in the acquisition of 15% or more of the Company's common stock while the Stockholder Rights Plan remains in place, then, unless the rights are redeemed

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 7. Stockholders' Equity (Continued)

by the Company for $.001 per right, the rights will become exercisable by all rights holders except the acquiring person or group for the Company's shares or shares of the third-party acquirer having a value of twice the right's then-current exercise price. The Rights will expire on the earliest of (i) April 13, 2017 (the final expiration date), or (ii) redemption or exchange of the Rights.

Note 8. Stock Option and Purchase Plans

Stock Option Plan

On March 29, 2010, the Company's Board of Directors terminated the 2001 Stock Option Plan. In addition, the Board of Directors adopted and approved a new 2010 Equity Incentive Plan, or the 2010 Plan, with 32,000 shares remaining reserved and unissued under the 2001 Plan, subject to the approval of the Company's stockholders. The 2001 Plan, however, continues to govern awards previously granted under it. On June 25, 2010, the Company's stockholders approved the 2010 Plan at the Company's 2010 Annual Meeting of Stockholders. The 2010 Plan provides for the grant of stock options, stock appreciation rights, restricted stock, restricted stock units, performance shares and performance units to employees, directors and consultants, to be granted from time to time as determined by the Board of Directors, the Compensation Committee of the Board of Directors, or its designees. The term of the option is determined by the Board of Directors on the date of grant but shall not be longer than 10 years. Options under this plan generally vest over four years, and all options expire after 10 years. The 2010 Plan's share reserve, which the stockholders approved, is 8,400,000 shares, plus any shares reserved but not issued pursuant to awards under the 2001 Plan as of the date of stockholder approval, or 99,975 shares, plus any shares subject to outstanding awards under the 2001 Plan that expire or otherwise terminate without having been exercised in full, or are forfeited to or repurchased by the Company, up to a maximum of 8,111,273 shares (which was the number of shares subject to outstanding options under the 2001 Plan as of March 11, 2010).

On April 30, 2010, the Company's Board of Directors granted an option to purchase 400,000 shares of the Company's common stock, or the Inducement Grant, to Michael P. Miller, the Company's Senior Vice President and Chief Commercial Officer. The Inducement Grant was granted outside of the Company's 2010 Plan and without stockholder approval pursuant to NASDAQ Listing Rule 5635(c)(4) and is subject to the terms and conditions of the Stand-Alone Stock Option Agreement between the Company and Michael P. Miller.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 8. Stock Option and Purchase Plans (Continued)

Restricted Stock Units

Beginning in 2012, the Company began issuing restricted units under the 2010 Plan on a limited basis. There were no restricted stock units outstanding in the prior years presented in this Form 10-K. A summary of restricted stock unit award activity under the 2010 Plan is as follows:

	Number of Restricted Stock Units	Weighted Average Grant Date Fair Value	Weighted Average Remaining Contractual Term (Years)	Aggregate Intrinsic Value
Restricted stock units outstanding December 31, 2011	—	—	—	—
Granted	35,000	$ 24.88		
Vested	—	—		
Forfeited	—	—		
Restricted stock units outstanding, December 31, 2012	35,000	$ 24.88	1.22	$ 469,700

A summary of stock option award activity under these plans is as follows:

	Years Ended December 31,					
	2012		2011		2010	
	Number of Shares	Weighted-Average Exercise Price	Number of Shares	Weighted-Average Exercise Price	Number of Shares	Weighted-Average Exercise Price
Balance at beginning of year	8,575,434	$ 6.17	7,919,013	$ 5.71	7,553,776	$ 4.74
Options:						
Granted	2,850,118	$ 17.80	1,289,790	$ 8.72	1,729,135	$ 9.37
Exercised	(2,648,882)	$ 5.00	(482,172)	$ 4.88	(982,594)	$ 4.34
Cancelled	(265,753)	$ 9.28	(151,197)	$ 8.32	(381,304)	$ 6.66
Balance at end of year	8,510,917	$ 10.33	8,575,434	$ 6.17	7,919,013	$ 5.71
Exercisable at end of year	4,781,301	$ 6.32	6,120,210	$ 5.38	5,171,827	$ 4.82
Weighted average grant-date fair value of options granted during the year		$ 11.91		$ 5.91		$ 5.74

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 8. Stock Option and Purchase Plans (Continued)

Summary of Stock Options

At December 31, 2012, stock options were outstanding and exercisable as follows:

	Options Outstanding			Options Exercisable	
Range of Exercise Prices	Number Outstanding at December 31, 2012	Weighted-Average Remaining Contractual Life	Weighted-Average Exercise Price	Number Exercisable December 31, 2012	Weighted-Average Exercise Price
$3.13 - $6.05	3,095,998	5.0 years	$ 4.67	3,060,143	$ 4.67
$6.10 - $12.04	3,945,660	8.0 years	$ 9.99	1,698,417	$ 9.08
$18.71 - $25.74	1,469,259	9.4 years	$ 23.16	22,741	$ 22.63
$3.13 - $25.74	8,510,917	7.2 years	$ 10.33	4,781,301	$ 6.32

The aggregate intrinsic value of outstanding options as of December 31, 2012 was $40.6 million, of which $34.1 million related to exercisable options.

At December 31, 2012, 4,745,966 options remain available for grant. On January 25, 2013, awards exercisable for 1,928,132 shares were granted pursuant to the 2010 Plan. During the year ended December 31, 2012, in accordance with the terms of the 2010 Plan, the Company transferred a net total of 142,210 expired plan shares to the 2010 Plan.

Employee Stock Purchase Plan

Under the 1994 Employee Stock Purchase Plan, or the ESPP, the Company reserved 800,000 shares of common stock for issuance to employees pursuant to the ESPP, under which eligible employees may authorize payroll deductions of up to 10% of their base compensation (as defined) to purchase common stock at a price equal to 85% of the lower of the fair market value as of the beginning or the end of the offering period.

At the annual meeting held on June 4, 2003, the stockholders approved amendments to the ESPP to (i) extend the original term of the ESPP by an additional 10 years such that the ESPP will now expire in April 2014 (subject to earlier termination as described in the ESPP) and (ii) increase the number of shares of common stock reserved for issuance under the ESPP by 600,000 shares to a new total of 1,400,000.

On June 17, 2011, the Company's stockholders approved amendments to the Company's ESPP to increase the number of shares reserved for issuance under the ESPP by 600,000 shares to a new total of 2,000,000, to remove the Plan's 20-year term, and to include certain changes consistent with Treasury Regulations relating to employee stock purchase plans under Section 423 of the Internal Revenue Code of 1986, as amended, and other applicable law.

As of December 31, 2012, 1,398,473 shares have been issued to employees and there are 601,527 shares available for issuance under the ESPP. The weighted average fair value of shares issued under the ESPP in 2012, 2011 and 2010 was $3.72, $3.21 and $3.60 per share, respectively.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 8. Stock Option and Purchase Plans (Continued)

Share-Based Compensation Expense

Total estimated share-based compensation expense, related to all of the Company's share-based awards, recognized for the years ended December 31, 2012, 2011 and 2010 was comprised as follows (in thousands, except per share data):

	2012	2011	2010
Continuing Operations:			
Research and development	$ 3,487	$ 1,917	$ 1,204
Selling, general and administrative	12,451	5,436	5,239
	15,938	7,353	6,443
Discontinued Operations:			
Cost of goods sold and manufacturing	—	—	810
Selling, general and administrative	—	—	160
	—	—	970
Share-based compensation expense before taxes	15,938	7,353	7,413
Related income tax benefits	—	—	—
Share-based compensation expense, net of taxes	$ 15,938	$ 7,353	$ 7,413

Included in the inventory carrying value as of December 31, 2012 is $196,000 of share-based compensation which has been absorbed into inventory.

The following table summarizes share-based compensation, net of estimated forfeitures associated with each type of award (in thousands):

	2012	2011	2010
Share-based compensation, net of taxes:			
Restricted stock units	$ 292	$ —	$ —
Stock options	15,531	7,259	7,272
Employee stock purchase plan	115	94	141
	$ 15,938	$ 7,353	$ 7,413

As of December 31, 2012, unrecognized estimated compensation expense totaled $569,000 related to non-vested restricted stock units, $19.9 million related to non-vested stock options and $123,000 related to the ESPP. The weighted average remaining requisite service period of the non-vested restricted stock units was 2.1 years, of the non-vested stock options was 1.2 years and of the ESPP was 4.5 months.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 8. Stock Option and Purchase Plans (Continued)

Valuation Assumptions

The fair value of each option is estimated on the date of grant using the Black-Scholes option pricing model, assuming no expected dividends and the following weighted average assumptions:

	2012	2011	2010
Expected life (in years)	5.54	5.93	5.82
Volatility	82.49%	77.46%	67.72%
Risk-free interest rate	1.00%	2.59%	2.59%
Dividend yield	—	—	—

Note 9. Commitments

Lease Commitments

In November 2006, the Company entered into a 30-month lease for its corporate headquarters located in Mountain View, California, or Castro Lease. On February 14, 2012, the Company entered into the most current, fourth amendment to the Castro Lease. Under the fourth amendment to the Castro Lease, the average base rent for the current premises is set at $2.50 per square foot or $45,015 per month. The fourth amendment also extended the lease term for the current premises for a period of twelve months commencing August 1, 2012 and terminating July 31, 2013 and provided us one additional option to extend the term of the Castro Lease of the current premises for one year from the expiration of the Castro Lease. In addition, the fourth amendment included a new lease on an additional 4,914 square feet of office space located at 1174 Castro Street, Mountain View, California, or the Expansion Space, which is adjacent to the Company's current corporate headquarters. The average base rent for the Expansion Space is approximately $2.75 per square foot or $13,513 per month. The new lease for the Expansion Space has a term of 60 months commencing March 15, 2012, with an option to extend the term for one year from the expiration of the new lease.

The Company entered into a lease effective as of December 11, 2012 with SFERS Real Estate Corp. U, or the Landlord, for new principal executive offices, consisting of an approximately 45,240 square foot building, located at 351 East Evelyn Avenue, Mountain View, California, or the Evelyn Lease. The Evelyn Lease has an initial term of approximately 84 months, commencing on the later of (i) May 1, 2013 and (ii) four months following delivery of the premises to the Company, and at a starting annual rental rate of $31.20 per rentable square foot (subject to agreed increases). The Company will be entitled to an abatement of the monthly installments of rent for months seven through twelve of the initial term subject to the conditions detailed in the Evelyn Lease. The Company has one option to renew the Evelyn Lease for a term of three years at the prevailing market rate as detailed in the Evelyn Lease. In addition, the Company has a one-time right to accelerate the termination date of the Evelyn Lease from the expiration of the 84th full calendar month of the term to the expiration of the 60th full calendar month of the term subject to the conditions detailed in the Evelyn Lease. If this acceleration of the termination date is exercised, the following will be payable to the Landlord: (i) six months of the monthly installments of rent and the Company's proportionate share of expenses and taxes subject to the fifth lease year and (ii) the unamortized portion of all of the following: (a) any leasing commissions and legal fees, (b) the initial alterations as detailed in the Evelyn Lease, and (c) Landlord's allowance towards the cost of performing the initial alterations, which is $7.00 per rentable square foot; provided that the amount payable to the Landlord will be increased by

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 9. Commitments (Continued)

the unamortized portion of any leasing commissions, tenant improvements and allowances, or other concessions incurred by the Landlord in connection with any additional space other than the premises leased by the Company and that is subject to acceleration under the Evelyn Lease. The Company expects to occupy its new principal executive offices in the spring of 2013.

Future minimum lease payments under operating leases at December 31, 2012 were as follows (in thousands):

2013	$ 1,639
2014	1,481
2015	1,999
2016	2,049
2017	1,899
Thereafter	4,458
	$ 13,525

Rent expense under operating leases in fiscal 2012, 2011 and 2010 was as follows (in thousands):

	Years Ended December 31,		
	2012	2011	2010
Rent expense	$ 912	$ 671	$ 676

Other Contractual Obligations

The following table summarizes the Company's other contractual obligations at December 31, 2012, excluding amounts already recorded on its consolidated balance sheet as accounts payable or accrued liabilities, and the effect such obligations are expected to have on the Company's liquidity and cash flow in future fiscal years. This table includes the Company's enforceable, non-cancelable, and legally binding obligations and future commitments as of December 31, 2012. The amounts below do not include contingent milestone payments or royalties, and assume the agreements and commitments will run through the end of terms, as such no early termination fees or penalties are included herein:

Other contractual obligations	Payments Due by Period		
	Total	2013	2014 - 2016
		(in thousands)	
Purchase obligations:			
Manufacturing agreements	$ 48,629	$ 48,318	$ 311
Other agreements	51,455	34,252	17,203
Total other contractual obligations	$ 100,084	$ 82,570	$ 17,514

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 9. Commitments (Continued)

Purchase Obligations

Purchase obligations consist of agreements to purchase goods or services that are enforceable and legally binding on us and that specify all significant terms, including: fixed or minimum quantities to be purchased; fixed, minimum or variable price provisions; and the approximate timing of the transaction. These include obligations for product manufacturing, sales and marketing services, including for the contract sales organization, and research and development.

Manufacturing agreements

The Company has purchase commitments for raw material supplies for Qsymia totaling $26.6 million at December 31, 2012. In addition, in July 2012, the Company entered into a manufacturing agreement with Catalent Pharma Solutions, LLC, or Catalent, to supply commercial inventory for Qsymia beginning in 2012 and ending in 2016. The remaining commitment under this agreement is to pay Catalent a minimum total of $12.5 million for the production of Qsymia in 2013.

The API and the tablets for STENDRA (avanafil) are currently manufactured by MTPC. There are no minimum purchase obligations for STENDRA under the agreement with MTPC. The Company has placed orders with MTPC for avanafil product testing and finished goods and the remaining commitment under these purchase obligations at December 31, 2012 totaled $9.5 million.

Other agreements

On May 22, 2012, the Company entered into a Dedicated Sales Team Agreement, or the Sales Team Agreement, with PDI, Inc., or PDI, to provide it with promotional and commercialization support services for Qsymia. The Sales Team Agreement is effective beginning on July 30, 2012 and ending on July 29, 2014. The Company has the option to extend the term of the agreement for two consecutive twelve-month periods. Under the terms of the Sales Team Agreement, PDI provides the Company with 150 full-time sales representatives, three full-time field liaison managers, and one full-time account manager. In addition, under the Sales Team Agreement, PDI provides the Company with program personnel to collect and capture physician information, including physician target call plan reach and frequency, deactivation information related to physician accounts and physician's behavioral or attitudinal response. As of December 31, 2012, the total obligation under the Sales Team Agreement is $44.2 million, including primarily compensation costs and administrative service fees. In addition, the Company has remaining commitments under other various sales and marketing services and research and development agreements totaling $7.3 million at December 31, 2012.

Additional Contingent Payments

The Company entered into development, license and supply agreements that contain provisions for payments upon completion of certain development, regulatory and sales milestones. Due to the uncertainty concerning when and if these milestones may be completed or other payments are due, The Company has not included these potential future obligations in the above table.

In 2001, the Company entered into a Development, Licensing and Clinical Trial and Commercial Supply Agreement, or the Agreement, with MTPC, formerly Tanabe, for the development of avanafil, an oral phosphodiesterase type 5, or PDE5, inhibitor investigational drug candidate for the treatment of erectile dysfunction. The Agreement contains a number of milestone payments to be made by the

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 9. Commitments (Continued)

Company based on various triggering events. Through December 31, 2012, under the terms of the Agreement, the Company has paid a total of $13.0 million to MTPC, including a $3.0 million milestone payment made in June 2012, upon FDA approval of STENDRA, or avanafil. In addition, during 2012, the Company purchased from MTPC $7.4 million of finished goods inventory under the supply portion of the Agreement in preparation for the commercial launch of STENDRA in the U.S. and certain other territories that use the U.S. approval.

The Company expects to make other substantial payments to MTPC in accordance with the Agreement as the Company continues to develop avanafil in its territories outside of the United States and, if approved for sale, commercialize avanafil for the oral treatment of male sexual dysfunction in those territories. Potential future milestone payments include $2.0 million upon the obtainment of the first regulatory approval in any major European country and $6.0 million upon achievement of $250.0 million or more in worldwide net sales during any calendar year.

The term of the MTPC agreement is based on a country-by-country and on a product-by-product basis. The term shall continue until the later of (i) 10 years after the date of the first sale for a particular product, or (ii) the expiration of the last-to-expire patents within the MTPC patents covering such product in such country. In the event that the Company's product is deemed to be (i) insufficiently effective or insufficiently safe relative to other PDE5 inhibitor compounds based on published information, or (ii) not economically feasible to develop due to unforeseen regulatory hurdles or costs as measured by standards common in the pharmaceutical industry for this type of product, the Company has the right to terminate the agreement with MTPC with respect to such product.

In August 2012, the Company entered into an amendment to the Agreement with MTPC which, among other matters, allows the Company to manufacture the API and STENDRA tablets for avanafil and expands its rights to develop and commercialize avanafil for all indications. The amendment permits the Company to manufacture the API and STENDRA tablets for avanafil itself or through a third-party supplier at any time; however, the transition away from MTPC supply will need to occur on or before June 2015. On February 21, 2013, the Company entered into the third amendment to its agreement with MTPC which, among other things, expands the Company's rights, or those of its sublicensees, to enforce the patents licensed under the MTPC agreement against alleged infringement, and clarifies the rights and duties of the parties and our sublicensees upon termination of the MTPC agreement. In addition, the Company is obligated to use its best commercial efforts to market STENDRA in the U.S. by December 31, 2013.

In October 2001, the Company entered into an assignment agreement, or the Assignment Agreement, with Thomas Najarian, M.D. for a combination of pharmaceutical agents for the treatment of obesity and other disorders, or the Combination Therapy, that has since been the focus of the Company's investigational drug candidate development program for Qsymia for the treatment of obesity, obstructive sleep apnea and diabetes. The Combination Therapy and all related patent applications, or the Patents, were transferred to the Company with worldwide rights to develop and commercialize the Combination Therapy and exploit the Patents. Pursuant to the Assignment Agreement, through December 31, 2012, the Company has paid a total of $1.2 million and has issued fully vested and exercisable options to purchase 60,000 shares of the Company's common stock to Dr. Najarian. In addition, the Assignment Agreement will require the Company to pay royalties on worldwide net sales of a product for the treatment of obesity that is based upon the Combination Therapy and Patents until the last-to-expire of the assigned Patents. To the extent that the Company

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 9. Commitments (Continued)

decides not to commercially exploit the Patents, the Assignment Agreement will terminate and the Combination Therapy and Patents will be assigned back to Dr. Najarian. In 2006, Dr. Najarian joined the Company as a part-time employee and currently serves as the Company's Principal Scientist.

Note 10. Income Taxes

Deferred income taxes result from differences in the recognition of expenses for tax and financial reporting purposes, as well as operating loss and tax credit carryforwards. Significant components of the Company's deferred income tax assets as of December 31, 2012 and 2011 are as follows (in thousands):

	2012	2011
Deferred tax assets:		
Net operating loss carry forwards	$ 154,865	$ 107,241
Research and development credit carry forwards	13,192	14,468
Stock based compensation	9,386	—
Accruals and other	5,528	13,197
Depreciation	185	790
Deferred revenue	420	—
	183,576	135,696
Valuation allowance	(183,576)	(135,696)
Total	$ —	$ —

The net increase in the valuation allowance for the years ended December 31, 2012, 2011 and 2010 was $47.9 million, $22.6 million and $22.1 million, respectively. As of December 31, 2012, the Company had no significant deferred tax liabilities.

For federal and state income tax reporting purposes, respective net operating loss, or NOL, carryforwards of approximately $449.0 million and $118.1 million are available to reduce future taxable income, if any. ASC 718 prohibits recognition of a deferred income tax asset for excess tax benefits due to stock option exercises that have not yet been realized through a reduction in income taxes payable. Post-adoption of ASC 718, the unrecognized deferred tax benefits totaled $16.0 million, of which $81,000 have been accounted for as a credit to additional paid-in capital, as they have been realized through a reduction in income taxes payable. For federal and state income tax reporting purposes, respective credit carryforwards of approximately $11.5 million and $2.6 million are available to reduce future taxable income, if any. These net operating loss and tax credit carryforwards, except for the California research and development credit, expire on various dates through 2032. The California research and development credits do not expire. The Internal Revenue Code of 1986, as amended, contains provisions that may limit the net operating loss and credit carryforwards available for use in any given period upon the occurrence of certain events, including a significant change in ownership interest. Utilization of the net operating loss and tax credit carry-forwards is subject to an annual limitation due to an ownership change, as defined by the IRS code section 382, that we believe to have occurred based on the preliminary results of the Company's section 382 analysis. Although the section 382 analysis is pending final review and conclusion, none of the net operating loss or tax credit carry-forwards is anticipated to expire as a result of the ownership change. Any future changes of ownership could result in the expiration of net operating losses or credits before utilization.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 10. Income Taxes (Continued)

The (benefit)/provision for income taxes is based upon (loss)/income from continuing operations before (benefit)/provision for income taxes as follows, for the years ended December 31, 2012, 2011 and 2010 (in thousands):

	2012	2011	2010
Loss before income taxes:			
Domestic	$ (138,599)	$ (46,836)	$ (75,425)
International	(1,107)	—	—
Loss before taxes	$ (139,706)	$ (46,836)	$ (75,425)

The (benefit)/provision for income taxes consists of the following components for the years ended December 31, 2012, 2011 and 2010 (in thousands):

Continuing Operations:

	2012	2011	2010
Current			
Federal	$ —	$ —	$ —
State	27	190	9
Foreign	—	—	—
Total current (benefit)/provision for income taxes	$ 27	$ 190	$ 9
Deferred			
Federal	$ —	$ —	$ —
State	—	—	—
Foreign	—	—	—
Total deferred benefit for income taxes	$ —	$ —	$ —
Total (benefit)/provision for income taxes from continuing operations	$ 27	$ 190	$ 9

Discontinued Operations:

	2012	2011	2010
Total (benefit)/provision for income taxes from discontinued operations	$ —	$ —	$ 29

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 10. Income Taxes (Continued)

Reconciliation between the U.S. federal statutory tax rate and the Company's effective tax rate from continuing operations is as follows, for the years ended December 31, 2012, 2011 and 2010:

	2012	2011	2010
Tax at U.S. federal statutory rate	(35)%	(35)%	(35)%
Change in valuation allowance	34	38	35
Permanent items	1	1	1
Extinguishment of debt	—	—	3
Tax credits	—	(4)	(4)
Effective tax rate	0%	0%	0%

The total gross unrecognized tax benefits as of December 31, 2012 is $1.2 million and relates to state tax exposures, of which $160,000 would affect the effective tax rate if recognized.

A reconciliation of the beginning and ending amount of unrecognized tax benefits in 2012 and 2011 is as follows (in thousands):

	2012	2011	2010
Unrecognized tax benefits as of January 1	$ 1,215	$ 1,171	$ —
Gross increase/(decrease) for tax positions of prior years	—	44	1,171
Gross increase/(decrease) for tax positions of current year	—	—	—
Settlements	—	—	—
Lapse of statute of limitations	—	—	—
Unrecognized tax benefits balance at December 31	$ 1,215	$ 1,215	$ 1,171

The total unrecognized tax benefits as of December 31, 2012 of $1.2 million includes approximately $1.1 million of unrecognized tax benefits that have been netted against the related deferred tax assets. The remaining balance recorded on the Company's consolidated balance sheets as of December 31, 2012 and 2011 is as follows (in thousands):

	2012	2011
Total unrecognized tax benefits	$ 1,215	$ 1,215
Amounts netted against deferred tax assets	(1,055)	(1,055)
Unrecognized tax benefits recorded on consolidated balance sheets	$ 160	$ 160

As of January 1, 2012, the Company had accrued $33,000 for payment of interest and penalties related to unrecognized tax benefits. To the extent accrued interest and penalties do not ultimately become payable, amounts accrued will be reduced and reflected as a reduction of the overall income tax provision in the period that such determination is made. During 2012, $6,000 of interest was recognized.

Although the Company files U.S. federal, various state, and foreign tax returns, the Company's only major tax jurisdictions are the U.S., California and New Jersey. The Company's income tax return for the year ended December 31, 2007 is currently under examination by the California Franchise Tax

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 10. Income Taxes (Continued)

Board. Based on the progress of the audit to date, the Company believes adjustments may be made in early years that will reduce tax attributes available to offset tax due in 2007. Therefore, the Company has $160,000 of unrecognized tax benefits recorded on its consolidated balance sheets as of December 31, 2012.

The Internal Revenue Service completed their audit of the Company's income tax return for the years ended December 31, 2007 and 2008 with no adjustments. The Company is currently under examination by the State of New Jersey for the years ended December 31, 2007 through 2009. Because the Company used net operating loss carryforwards and other tax attributes to offset its taxable income on its 2007 income tax returns for U.S. Federal and California, such attributes can be adjusted by these taxing authorities until the statute closes on the year in which such attributes were utilized. Tax years 1991 to 2012 remain subject to examination by the appropriate governmental agencies due to tax loss carryovers from those years.

The Company is in various stages of the examination process in connection with all of its tax audits and it is difficult to determine when these examinations will be settled. It is reasonably possible that over the next twelve-month period the Company may experience an increase or decrease in its unrecognized tax benefits. It is not possible to determine either the magnitude or range of any increase or decrease at this time.

Note 11. Concentration of Customers and Suppliers

Revenues from significant customers as a percentage of total revenues for the year ended December 31, 2012 is as follows:

	2012
CVS	50%
Walgreens	39%
Express Scripts, Inc.	10%

Accounts receivable at December 31, 2012 by significant customer as a percentage of the total gross accounts receivable balance are as follows:

	2012
CVS	51%
Walgreens	44%
Express Scripts, Inc.	1%

The Company relies on third-party sole-source manufacturers to produce its clinical trial materials, raw materials and finished goods. Catalent Pharma Solutions, LLC, or Catalent, who supplied the product for the Phase 3 program for Qsymia, is the Company's sole source of clinical and commercial supplies for Qsymia. MTPC is currently the Company's sole-source supplier for the API and the tablets for STENDRA (avanafil). In August 2012, the Company entered into an amendment to its agreement with MTPC that permits the Company to manufacture the API and STENDRA tablets for avanafil itself or through third-party suppliers at any time. The transition away from MTPC supply will need to occur on or before June 2015. The Company does not have any manufacturing facilities and intends to continue to rely on third parties for the supply of the starting materials, API and tablets. Third-party

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 11. Concentration of Customers and Suppliers (Continued)

manufacturers may not be able to meet the Company's needs with respect to timing, quantity or quality.

The Company has entered into an agreement with PDI, Inc., or PDI, a third-party contract sales organization, to assist with the hiring of sales representatives and the promotion of Qsymia to physicians. Although alternative third-party contract sales organizations exist, the Company would be adversely affected if PDI does not perform its obligations under the agreement.

During the year ended December 31, 2012, the Company incurred expenses for work performed by a third-party clinical research organization, or CRO, for Qsymia and STENDRA post-approval studies which accounted for 13% of total research and development expenses. During the year ended December 31, 2011, the Company did not have any third-party CROs who accounted for ten percent or more of total research and development expenses. In the year ended December 31, 2010, the Company incurred expenses for work performed by its CROs for Qsymia Phase 3 and avanafil Phase 3 studies and for clinical supplies and formulation work provided by its third-party manufacturer which accounted for ten percent or more of total research and development expenses as shown below:

	2010
Qsymia Phase 3 studies CRO	20%
Avanafil Phase 3 studies CRO	20%
Clinical supplies and formulation work	12%

Note 12. 401(k) Plan

All of the Company's full-time employees are eligible to participate in the VIVUS 401(k) Plan. Employer-matching contributions for the years ended December 31, 2012, 2011 and 2010 were $329,000, $181,000 and $353,000, respectively. In the year ended December 31, 2010, $158,000 of the $353,000 employer-matching contribution was related to discontinued operations.

Note 13. Discontinued Operations

On November 5, 2010, the Company closed on the sale to Meda AB, or Meda, of certain rights and assets related to MUSE, transurethral alprostadil, for the treatment of erectile dysfunction, or the MUSE Transaction. Meda had been the Company's European distributor of MUSE since 2002. The assets sold in the MUSE Transaction include the U.S. and foreign MUSE patents, existing inventory, and the manufacturing facility located in Lakewood, New Jersey. The Company retained all of the liabilities associated with the pre-closing operations and products of the MUSE business and the accounts receivable for pre-closing MUSE sales. Prior to the closing of the MUSE Transaction, the Company terminated all of the rights to MUSE and avanafil held by Deerfield Management Company, L.P. and affiliates and by Crown Bank, N. A. as collateral to the Company's notes payable. Under the terms of the MUSE Transaction, the Company received an upfront payment of $22.0 million upon the closing and is eligible to receive an additional $1.5 million based on future sales of MUSE, provided that certain sales milestones are reached. The Company has not received any sales milestones to date and does not anticipate that these sales milestones will be achieved in the near future. Post-closing, Meda is responsible for the manufacturing, selling and marketing of MUSE. Meda also assumed all post-closing expenses and liabilities associated with MUSE. The Company has agreed not

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 13. Discontinued Operations (Continued)

to develop, manufacture or sell any transurethral erectile dysfunction drugs for a period of three years following the closing of the MUSE Transaction.

The sale of the MUSE product and certain related assets has been reported as discontinued operations in the consolidated statements of operations for all periods presented, because (i) the MUSE product and related assets have identifiable cash flows that are largely independent of the cash flows of other groups of assets and liabilities, (ii) the Company does not have any significant continuing involvement with the product after the close of the transaction, and (iii) the cash milestone payment to be received upon achievement of certain sales levels is considered an indirect cash flow. There are no assets related to the MUSE operations for the periods presented. The liabilities related to the MUSE operations are reported as liabilities of discontinued operations in the consolidated balance sheets for all periods presented. The extinguishment of the largest liability of the discontinued operations, accrued product returns, will be settled in accordance with the returns policy and by cash payments made to former customers for the return of expired MUSE product sold by VIVUS. The return window for expired MUSE product will end in August 2013.

Note 14. Legal Matters

Securities Related Class Action Lawsuits

The Company and two of its officers were defendants in a putative class action lawsuit captioned *Kovtun v. Vivus, Inc., et al.* , Case No. 4:10-CV-04957-PJH, in the U.S. District Court, Northern District of California. The action, filed in November 2010, alleged violations of Section 10(b) and 20(a) of the federal Securities Exchange Act of 1934 based on allegedly false or misleading statements made by the defendants in connection with the Company's clinical trials and NDA for Qsymia as a treatment for obesity. In the Amended Class Action Complaint filed on April 4, 2011, the plaintiff alleged generally that the defendants misled investors regarding the prospects for Qsymia's NDA approval, and the drug's efficacy and safety. On June 3, 2011, the defendants filed a motion to dismiss, which, after briefing and argument was granted but extending plaintiff leave to amend. On November 9, 2011, plaintiff filed his Second Amended Class Action Complaint, again generally alleging that the defendants misled investors regarding the prospects for Qsymia's NDA approval, and Qsymia's efficacy and safety. On December 30, 2011, defendants filed a motion to dismiss the Second Amended Complaint. Briefing concluded in late March 2012, and the motion was argued to the Court on April 18, 2012. On September 27, 2012, Judge Phyllis J. Hamilton granted defendants' motion to dismiss the Second Amended Complaint and dismissed the action with prejudice. She entered final judgment for defendants the same day. On October 26, 2012, plaintiff filed a Notice of Appeal to the U.S. Court of Appeals for the Ninth Circuit. Plaintiff filed his opening appellate brief on February 19, 2013. Briefing is expected to continue into April 2013.

Additionally, certain of the Company's officers and directors are defendants in a shareholder derivative lawsuit captioned *Turberg v. Logan, et al.* , Case No. CV-10-05271-PJH, pending in the same federal court. In the plaintiff's Verified Amended Shareholder Derivative Complaint filed June 3, 2011, the plaintiff largely restated the allegations of the *Kovtun* action and alleged that the directors breached fiduciary duties to the Company by purportedly permitting the Company to violate the federal securities laws as alleged in the *Kovtun* action. The parties had agreed to stay the litigation pending resolution of the defendants' second motion to dismiss in the *Kovtun* action, but have now extended that stay through resolution of the appeal. The same individuals are also named defendants in

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 14. Legal Matters (Continued)

consolidated shareholder derivative suits pending in the California Superior Court, Santa Clara County under the caption *In re VIVUS, Inc. Derivative Litigation,* Master File No. 11 0 CV188439. The allegations in the state court derivative suits are substantially similar to the other lawsuits. The parties have agreed to stay these consolidated actions on the same terms as the federal derivative litigation.

Other Matters

In the normal course of business, the Company receives claims and makes inquiries regarding patent and trademark infringement and other related legal matters. The Company believes that it has meritorious claims and defenses and intends to pursue any such matters vigorously. Additionally, the Company in the normal course of business may become involved in lawsuits and subject to various claims from current and former employees including wrongful termination, sexual discrimination and employment matters. Employees may be more likely to file employment-related claims following termination of their employment. Employment-related claims also may be more likely following a poor performance review. Although there may be no merit to such claims or legal matters, the Company may be required to allocate additional monetary and personnel resources to defend against these type of allegations. The Company believes the disposition of the current lawsuit and claims is not likely to have a material effect on its financial condition or liquidity.

The Company and its directors believe that the various shareholder lawsuits are without merit, and they intend to vigorously defend the various actions.

Note 15. Subsequent Events (Unaudited)

On February 21, 2013, the Company entered into the third amendment to its agreement with MTPC which, among other things, expands the Company's rights, or those of its sublicensees, to enforce the patents licensed under the MTPC agreement against alleged infringement, and clarifies the rights and duties of the parties and our sublicensees upon termination of the MTPC agreement. In addition, the Company is obligated to use its best commercial efforts to market STENDRA in the U.S. by December 31, 2013.

On February 21, 2013, the CHMP confirmed its October 18, 2012 decision to deny the MAA for Qsiva (phentermine/topiramate ER) for the treatment of obesity in the EU.

VIVUS, INC.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS (Continued)

Note 16. Selected Financial Data (Unaudited)

Selected Quarterly Financial Data (in thousands)

	Quarter Ended,			
	March 31	June 30	September 30	December 31
2012				
Total revenue	$ —	$ —	$ 41	$ 1,971
Total gross profit	$ —	$ —	$ 37	$ 1,788
Operating expenses	$ 18,772	$ 24,317	$ 40,573	$ 58,255
Net loss from continuing operations	$ (18,762)	$ (24,266)	$ (40,476)	$ (56,229)
Net income (loss) from discontinued operations	$ (16)	$ 218	$ 80	$ (430)
Basic and diluted net income (loss) per share:				
Continuing operations	$ (0.20)	$ (0.24)	$ (0.40)	$ (0.56)
Discontinued operations	$ 0.00	$ 0.00	$ 0.00	$ 0.00
2011				
Operating expenses	$ 9,908	$ 16,338	$ 8,941	$ 11,889
Net loss from continuing operations	$ (9,867)	$ (16,304)	$ (8,812)	$ (12,043)
Net income from discontinued operations	$ 14	$ 107	$ 185	$ 580
Basic and diluted net income (loss) per share:				
Continuing operations	$ (0.12)	$ (0.20)	$ (0.10)	$ (0.14)
Discontinued operations	$ 0.00	$ 0.00	$ 0.00	$ 0.01

FINANCIAL STATEMENT SCHEDULE

The financial statement Schedule II—VALUATION AND QUALIFYING ACCOUNTS is filed as part of the Form 10-K.

VIVUS, Inc.
SCHEDULE II—VALUATION AND QUALIFYING ACCOUNTS
(in thousands)

Each of the following valuation and qualifying accounts are reported as assets and liabilities of continuing and discontinued operations in the consolidated balance sheets for all periods presented.

	Balance at Beginning of Period	Charged to Operations	Charges Utilized	Balance at End of Period
Allowance for Doubtful Accounts and Cash Discounts				
Fiscal year ended December 31, 2010	$ (114)	$ (285)	$ 399	$ —
Fiscal year ended December 31, 2011	—	—	—	—
Fiscal year ended December 31, 2012	—	53	4	57
Inventory Reserve				
Fiscal year ended December 31, 2010	1,574	(353)	(1,221)(1)	—
Fiscal year ended December 31, 2011	—	—	—	—
Fiscal year ended December 31, 2012	—	—	—	—
Accrued Product Returns				
Fiscal year ended December 31, 2010	3,026	906	(1,334)	2,598
Fiscal year ended December 31, 2011	2,598	(317)	(658)	1,623
Fiscal year ended December 31, 2012	1,623	(45)	(880)	698
Accrued Chargebacks Reserve				
Fiscal year ended December 31, 2010	1,617	3,103	(4,248)	472
Fiscal year ended December 31, 2011	472	(278)	(194)	—
Fiscal year ended December 31, 2012	$ —	$ 131	$ (131)	$ —

(1) The Company used $98,000 of its fully reserved component parts inventory and $367,000 of its fully reserved raw materials inventory in production. The fully reserved inventory is charged to cost of goods sold at a zero basis when used, which has a favorable impact on gross profit.

Item 9. ***Changes in and Disagreements with Accountants on Accounting and Financial Disclosure***

None.

Item 9A. ***Controls and Procedures***

(a.) Evaluation of disclosure controls and procedures. We maintain disclosure controls and procedures that are designed to ensure that information required to be disclosed in our Exchange Act reports is recorded, processed, summarized and reported within the timelines specified in the Securities and Exchange Commission's rules and forms, and that such information is accumulated and communicated to our management, including our Chief Executive Officer and Chief Financial Officer, as appropriate, to allow timely decisions regarding required disclosure. In designing and evaluating the disclosure controls and procedures, management recognized that any controls and procedures, no matter how well designed and operated, can only provide reasonable assurance of achieving the desired control objectives, and in reaching a reasonable level of assurance, management necessarily was required to apply its judgment in evaluating the cost-benefit relationship of possible controls and procedures.

As required by SEC Rule 13a-15(b), the Company carried out an evaluation, under the supervision and with the participation of the Company's management, including the Company's Chief Executive Officer and the Company's Chief Financial Officer, of the effectiveness of the design and operation of the Company's disclosure controls and procedures as of the end of the year covered by this report. Based on the foregoing, our Chief Executive Officer and Chief Financial Officer concluded that our disclosure controls and procedures were effective at the reasonable assurance level.

(b.) Changes in internal controls. To address changes in our business in conjunction with the commercial launch of Qsymia, we have deployed new processes and systems related to our inventory, cost of goods sold, revenue, cash receipts and receivables. In doing so, we have modified and enhanced our internal control over financial reporting (as such term is defined in Exchange Act Rule 13a-15(f)) during the period covered by this Annual Report on Form 10-K as a result of the implementation of these new processes and systems. Other than the above-mentioned changes, there have been no significant changes in our internal control over financial reporting that occurred during the period covered by this Annual Report on Form 10-K that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

Management's Annual Report on Internal Control Over Financial Reporting

Internal control over financial reporting refers to the process designed by, or under the supervision of, our Chief Executive Officer and Chief Financial Officer, and effected by our Board of Directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles, and includes those policies and procedures that:

(1) Pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of our assets;

(2) Provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that our receipts and expenditures are being made only in accordance with authorization of our management and directors; and

(3) Provide reasonable assurance regarding prevention or timely detection of unauthorized acquisitions, use or disposition of our assets that could have a material effect on the financial statements.

Internal control over financial reporting cannot provide absolute assurance of achieving financial reporting objectives because of its inherent limitations. Internal control over financial reporting is a process that involves human diligence and compliance and is subject to lapses in judgment and breakdowns resulting from human failures. Internal control over financial reporting also can be circumvented by collusion or improper management override. Because of such limitations, there is a risk that material misstatements may not be prevented or detected on a timely basis by internal control over financial reporting. However, these inherent limitations are known features of the financial reporting process. Therefore, it is possible to design into the process safeguards to reduce, though not eliminate, this risk. Management is responsible for establishing and maintaining adequate internal control over financial reporting for the company.

Management has used the framework set forth in the report entitled Internal Control—Integrated Framework published by the Committee of Sponsoring Organizations of the Treadway Commission, known as COSO, to evaluate the effectiveness of the Company's internal control over financial reporting. Based on this assessment, management has concluded that our internal control over financial reporting was effective as of December 31, 2012. OUM & Co. LLP, the independent registered public accounting firm that audited the consolidated financial statements included in the Annual Report on Form 10-K, has issued an attestation report on the effectiveness of our internal control over financial reporting as of December 31, 2012. This report, which expresses an unqualified opinion on the effectiveness of our internal controls over financial reporting as of December 31, 2012, is included herein.

There has been no change in our internal controls over financial reporting during our most recent fiscal quarter that has materially affected, or is reasonably likely to materially affect, our internal controls over financial reporting.

Item 9B. ***Other Information***

On February 20, 2013, the Company's Board of Directors approved the amendment in its entirety of Article II, Section 2.7 of the Company's Amended and Restated Bylaws to confirm and clarify that the required vote in the election of directors shall be a plurality rather than a majority of the shares voted, such that the nominees for director receiving the highest number of affirmative votes of the shares present or represented and entitled to vote for them shall be elected as directors whether or not such affirmative votes constitute a majority of the shares voted. Amendment No. 1 to the Amended and Restated Bylaws of the Company is filed herewith as Exhibit 3.3.

PART III

Item 10. *Directors, Executive Officers and Corporate Governance*

The information required by this item is hereby incorporated by reference from the information under the captions "Election of Directors," "Board Committees" and "Executive Officers" contained in the Company's definitive Proxy Statement, to be filed with the Securities and Exchange Commission no later than 120 days from the end of the Company's last fiscal year in connection with the solicitation of proxies for its 2013 Annual Meeting of Stockholders. The information required by Section 16(a) is incorporated by reference from the information under the caption "Section 16(a) Beneficial Ownership Reporting Compliance" in the Proxy Statement.

The Company has adopted a code of ethics that applies to its Chief Executive Officer, Chief Financial Officer, and to all of its other officers, directors, employees and agents. The code of ethics is available at the Corporate Governance section of the Investor Relations page on the Company's website at *www.vivus.com* . The Company intends to disclose future amendments to, or waivers from, certain provisions of its code of ethics on the above website within five business days following the date of such amendment or waiver.

Item 11. *Executive Compensation*

The information required by this item is incorporated by reference from the information under the caption "Compensation Committee Interlocks and Insider Participation," "Executive Compensation" and "Report of the Compensation Committee of the Board of Directors" in the Company's Proxy Statement referred to in Item 10 above.

Item 12. *Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters*

Equity Compensation Plans Approved by Stockholders

Information about our equity compensation plans at December 31, 2012 that were approved by our stockholders was as follows:

Plan Category	Number of Shares to be issued Upon Exercise of Outstanding Options and Rights(a)	Weighted Average Exercise Price of Outstanding Options	Number of Shares Remaining Available for Future Issuance(c)
Equity compensation plans approved by stockholders	8,220,917	$ 10.33	5,347,493
Equity compensation plans not approved by stockholders(b)	325,000	$ 10.19	—
Total	8,545,917	$ 10.32	5,347,493

(a) Consists of two plans: our 2001 Stock Option Plan and our 2010 Stock Option Plan.

(b) On April 30, 2010, the Company's Board of Directors granted an option to purchase 400,000 shares of the Company's common stock, or the Inducement Grant, to Michael P. Miller, the Company's Senior Vice President and Chief Commercial Officer. The Inducement Grant was granted outside of the Company's 2010 Plan and without stockholder approval pursuant to NASDAQ Listing Rule 5635(c)(4) and is subject to the terms and conditions of the Stand-Alone Stock Option Agreement between the Company and Michael P. Miller.

(c) Includes 4,745,966 shares for the 2010 Stock Option Plan and 601,527 shares for the 1994 Employee Stock Purchase Plan.

The information required by this item is incorporated by reference from the information under the caption "Security Ownership of Certain Beneficial Owners and Management" in the Company's Proxy Statement referred to in Item 10 above.

Item 13. ***Certain Relationships and Related Transactions, and Director Independence***

The information required by this item is incorporated by reference from the information under the caption "Certain Relationships and Related Transactions" and "Board Independence" in the Company's Proxy Statement referred to in Item 10 above.

Item 14. ***Principal Accounting Fees and Services***

The information required by this item is incorporated by reference from the information under the caption "Ratification of Appointment of Independent Registered Public Accounting Firm" in the Company's Proxy Statement referred to in Item 10 above.

PART IV

Item 15. ***Exhibits and Financial Statement Schedules***

(a) Documents filed as part of this report.

1. Financial Statements

The following Financial Statements of VIVUS, Inc. and Reports of Independent Registered Public Accounting Firm have been filed as part of this Form 10-K. See index to Financial Statements under Item 8, above:

Index to Consolidated Financial Statements

2. Financial Statement Schedules

The following financial statement schedule of VIVUS, Inc. as set forth on page 88 is filed as part of this Form 10-K and should be read in conjunction with the Financial Statements of VIVUS, Inc. incorporated by reference herein:

Schedule II—Valuation and Qualifying Accounts

All other schedules are omitted because they are not applicable or the required information is shown in the Financial Statements or the notes thereto.

3. Exhibits Refer to Item 15(b) immediately below.

(b) The exhibits required by Item 601 of Regulation S-K are listed in the Exhibit Index immediately preceding the exhibits and are incorporated herein.

SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the Registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized:

VIVUS, INC.,
a Delaware Corporation

By: /s/ LELAND F. WILSON

Leland F. Wilson
Chief Executive Officer
(Principal Executive Officer)

Date: February 26, 2013

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints each of Leland F. Wilson and Timothy E. Morris as his attorney-in-fact for him, in any and all capacities, to sign each amendment to this Report on Form 10-K, and to file the same, with exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, hereby ratifying and confirming all that said attorney-in-fact or his substitute or substitutes may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Exchange Act of 1934, this Report has been signed below by the following persons on behalf of the Registrant and in the capacities and on the dates indicated:

Signature	Title	Date
/s/ LELAND F. WILSON Leland F. Wilson	Chief Executive Officer (Principal Executive Officer) and Director	February 26, 2013
/s/ MARK B. LOGAN Mark B. Logan	Chairman of the Board and Director	February 26, 2013
/s/ PETER Y. TAM Peter Y. Tam	President and Director	February 26, 2013
/s/ TIMOTHY E. MORRIS Timothy E. Morris	Sr. Vice President Finance and Global Corporate Development, Chief Financial Officer (Principal Financial Officer)	February 26, 2013
/s/ LEE B. PERRY Lee B. Perry	Vice President and Chief Accounting Officer (Principal Accounting Officer)	February 26, 2013
/s/ ERNEST MARIO Ernest Mario	Director	February 26, 2013
/s/ CHARLES J. CASAMENTO Charles J. Casamento	Director	February 26, 2013
/s/ LINDA M. DAIRIKI SHORTLIFFE, M.D. Linda M. Dairiki Shortliffe, M.D.	Director	February 26, 2013

VIVUS, INC.
REPORT ON FORM 10-K FOR
THE YEAR ENDED DECEMBER 31, 2012
EXHIBIT INDEX

Exhibit Number	Description
2.1††	Asset Purchase Agreement between the Registrant and K-V Pharmaceutical Company dated as of March 30, 2007
3.1(1)	Amended and Restated Certificate of Incorporation of the Registrant
3.2(2)	Amended and Restated Bylaws of the Registrant
3.3	Amendment No. 1 to the Amended and Restated Bylaws of the Registrant
3.4(3)	Amended and Restated Certificate of Designation of Rights, Preferences and Privileges of Series A Participating Preferred Stock of the Registrant
4.1(4)	Specimen Common Stock Certificate of the Registrant
4.2(5)	Preferred Stock Rights Agreement dated as of March 27, 2007 between the Registrant and Computershare Investor Services, LLC
10.1(6)*	Form of Indemnification Agreement by and among the Registrant and the Directors and Officers of the Registrant
10.2(7)*	1994 Employee Stock Purchase Plan, as amended, Form of Subscription Agreement and Form of Notice of Withdrawal
10.3(8)*	2001 Stock Option Plan and Form of Agreement thereunder
10.4(9)*	2001 Stock Option Plan, as amended on July 12, 2006
10.5(10)*	Form of Notice of Grant and Restricted Stock Unit Agreement under the VIVUS, Inc. 2001 Stock Option Plan
10.6(11)*	2010 Equity Incentive Plan and Form of Agreement thereunder
10.7(12)*	Stand-Alone Stock Option Agreement with Michael P. Miller dated as of April 30, 2010
10.8(13)*	Employment Agreement dated December 20, 2007 between the Registrant and Leland F. Wilson
10.9(14)*	First Amendment dated January 23, 2009 to the Employment Agreement dated December 20, 2007 by and between the Registrant and Leland F. Wilson
10.10(15)*	Second Amendment dated January 21, 2011 to the Employment Agreement dated December 20, 2007 by and between the Registrant and Leland F. Wilson
10.11(16)*	Third Amendment dated January 27, 2012 to the Employment Agreement dated December 20, 2007 by and between the Registrant and Leland F. Wilson
10.12(17)*	Fourth Amendment dated January 25, 2013 to the Employment Agreement dated December 20, 2007 by and between the Registrant and Leland F. Wilson
10.13(18)*	Form of Change of Control and Severance Agreement by and between the Registrant and Certain of its Executive Officers
10.14(19)*	Change of Control and Severance Agreement dated April 30, 2010 by and between the Registrant and Michael P. Miller

Exhibit Number	Description
10.15††	Agreement effective as of December 28, 2000 between the Registrant and Tanabe Seiyaku Co., Ltd.
10.16(20)	Amendment No. 1 effective as of January 9, 2004 to the Agreement effective as of December 28, 2000 between the Registrant and Tanabe Seiyaku Co., Ltd.
10.17(21)	Termination and Release executed by Tanabe Holding America, Inc. dated May 1, 2007
10.18(22)†	Second Amendment effective as of August 1, 2012 to the Agreement dated as of December 28, 2000 between the Registrant and Mitsubishi Tanabe Pharma Corporation (formerly Tanabe Seiyaku Co., Ltd.)
10.19(23)††	Third Amendment effective as of February 21, 2013 to the Agreement dated as of December 28, 2000 between the Registrant and Mitsubishi Tanabe Pharma Corporation (formerly Tanabe Seiyaku Co., Ltd.)
10.20††	Settlement and Modification Agreement dated July 12, 2001 between ASIVI, LLC, AndroSolutions, Inc., Gary W. Neal and the Registrant
10.21(24)†	Assignment Agreement between Thomas Najarian, M.D. and the Registrant dated October 16, 2001
10.22(25)†	Testosterone Development and Commercialization Agreement dated as of February 7, 2004 between the Registrant, Fempharm Pty Ltd. and Acrux DDS Pty Ltd.
10.23(26)†	Estradiol Development and Commercialization Agreement dated as of February 12, 2004 between the Registrant, Fempharm Pty Ltd. and Acrux DDS Pty Ltd.
10.24(27)†	Master Services Agreement dated as of September 12, 2007 between the Registrant and Medpace, Inc.
10.25(28)†	Exhibit A: Medpace Task Order Number: 06 dated as of December 15, 2008 pursuant to that certain Master Services Agreement, between the Registrant and Medpace, Inc., dated as of September 12, 2007
10.26††	Asset Purchase Agreement dated October 1, 2010 between the Registrant, MEDA AB and Vivus Real Estate, LLC
10.27††	Transition Services Agreement dated November 5, 2010 between the Registrant and MEDA AB
10.28(29)†	Commercial Manufacturing and Packaging Agreement by and between the Registrant and Catalent Pharma Solutions, LLC dated as of July 17, 2012
10.29(30)	Lease Agreement effective November 1, 2006 by and between the Registrant and Castro Mountain View, LLC, Thomas A. Lynch, Trudy Molina Flores, Trustee of the Jolen Flores and Trudy Molina Flores Joint Living Trust dated April 3, 2001, E William and Charlotte Duerkson, The Duerkson Family Trust dated February 16, 1999, The Dutton Family Trust dated September 16, 1993, The Noel S. Schuurman Trust, The Duarte Family Partners, L.P., The Marie Antoinette Clough Revocable Living Trust dated January 11, 1989, Blue Oak Properties, Inc., and CP6CC, LLC
10.30(31)	First Amendment to Lease dated November 18, 2008 between Castro Mountain View, LLC, CP6CC, LLC and the Registrant
10.31(32)	Second Amendment to Lease effective November 12, 2009 between Castro Mountain View, LLC, CP6CC, LLC and the Registrant

Exhibit Number	Description
10.32(33)	Third Amendment to Lease effective December 3, 2010 between Castro Mountain View, LLC, CP6CC, LLC and the Registrant
10.33(34)	Fourth Amendment to Lease effective February 14, 2012 between Castro Mountain View, LLC, CP6CC, LLC and the Registrant
10.34	Lease Agreement effective December 11, 2012 by and between the Registrant and SFERS Real Estate Corp. U
21.1	Subsidiaries of the Registrant
23.1	Consent of OUM & Co. LLP, Independent Registered Public Accounting Firm
24.1	Power of Attorney (See signature page)
31.1	Certification of Chief Executive Officer pursuant to Rules 13a-14 and 15d-14 promulgated under the Securities Exchange Act of 1934, as amended
31.2	Certification of Chief Financial Officer pursuant to Rules 13a-14 and 15d-14 promulgated under the Securities Exchange Act of 1934, as amended
32.1	Certification of Chief Executive Officer and Chief Financial Officer pursuant to Section 18 U.S.C. 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002
101	The following materials from the Registrant's Quarterly Report on Form 10-K for the year ended December 31, 2012, formatted in Extensible Business Reporting Language (XBRL), include: (i) the Consolidated Balance Sheets, (ii) the Consolidated Statements of Operations, (iii) the Consolidated Statements of Comprehensive Loss, (iv) the Consolidated Statements of Cash Flows, and (v) related notes (furnished herewith).

† Confidential treatment granted.

†† Confidential portions of this exhibit have been redacted and filed separately with the Commission pursuant to a confidential treatment request in accordance with Rule 24b-2 of the Securities Exchange Act of 1934, as amended.

* Indicates management contract or compensatory plan or arrangement.

(1) Incorporated by reference to Exhibit 3.2 filed with the Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 1996 filed with the Commission on March 28, 1997.

(2) Incorporated by reference to the same numbered exhibit filed with the Registrant's Current Report on Form 8-K filed with the Commission on April 20, 2012.

(3) Incorporated by reference to Exhibit 3.3 filed with the Registrant's Registration Statement on Form 8-A filed with the Commission on March 28, 2007.

(4) Incorporated by reference to the same numbered exhibit filed with the Registrant's Annual Report on Form 10-K/A for the fiscal year ended December 31, 1996 filed with the Commission on April 16, 1997.

(5) Incorporated by reference to Exhibit 4.1 filed with the Registrant's Registration Statement on Form 8-A filed with the Commission on March 28, 2007.

(6) Incorporated by reference to Exhibit 10.11 filed with the Registrant's Form 8-B filed with the Commission on June 25, 1996.

(7) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on July 29, 2011.

(8) Incorporated by reference to Exhibit 10.44 filed with the Registrant's Registration Statement on Form S-8 filed with the Commission on November 15, 2001.

(9) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on July 13, 2006.

(10) Incorporated by reference to Exhibit 10.2 filed with the Registrant's Current Report on Form 8-K filed with the Commission on July 13, 2006.

(11) Incorporated by reference to Exhibit 10.7 filed with the Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2010 filed with the Commission on March 1, 2011.

(12) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on May 6, 2010.

(13) Incorporated by reference to Exhibit 10.63 filed with the Registrant's Current Report on Form 8-K filed with the Commission on December 24, 2007.

(14) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on January 29, 2009.

(15) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on January 26, 2011.

(16) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on January 27, 2012.

(17) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on January 30, 2013.

(18) Incorporated by reference to Exhibit 10.64 filed with the Registrant's Current Report on Form 8-K filed with the Commission on December 24, 2007.

(19) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on April 30, 2010.

(20) Incorporated by reference to Exhibit 10.42A filed with the Registrant's Quarterly Report on Form 10-Q for the quarter ended March 31, 2004 filed with the Commission on May 7, 2004.

(21) Incorporated by reference to Exhibit 10.61 filed with the Registrant's Current Report on Form 8-K filed with the Commission on May 4, 2007.

(22) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on August 10, 2012.

(23) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on February 25, 2013.

(24) Incorporated by reference to Exhibit 10.79 filed with the Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2009 filed with the Commission on March 10, 2010.

(25) Incorporated by reference to Exhibit 10.50 filed with the Registrant's Quarterly Report on Form 10-Q for the quarter ended March 31, 2004 filed with the Commission on May 7, 2004.

(26) Incorporated by reference to Exhibit 10.51 filed with the Registrant's Quarterly Report on Form 10-Q for the quarter ended March 31, 2004 filed with the Commission on May 7, 2004.

(27) Incorporated by reference to Exhibit 10.62 filed with the Registrant's Current Report on Form 8-K filed with the Commission on September 18, 2007.

(28) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K/A filed with the Commission on July 15, 2009.

(29) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on July 23, 2012.

(30) Incorporated by reference to Exhibit 10.60 filed with the Registrant's Current Report on Form 8-K filed with the Commission on November 7, 2006.

(31) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on December 18, 2008.

(32) Incorporated by reference to Exhibit 10.78 filed with the Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2009 filed with the Commission on March 10, 2010.

(33) Incorporated by reference to Exhibit 10.28 filed with the Registrant's Annual Report on Form 10-K for the fiscal year ended December 31, 2010 filed with the Commission on March 1, 2011.

(34) Incorporated by reference to Exhibit 10.1 filed with the Registrant's Current Report on Form 8-K filed with the Commission on February 16, 2012.

Exhibit 2.1

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

ASSET PURCHASE AGREEMENT

by and among

K-V PHARMACEUTICAL COMPANY

and

VIVUS, INC.

dated as of March 30, 2007

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[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

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ASSET PURCHASE AGREEMENT

This Asset Purchase Agreement (this " ***Agreement*** ") is made and entered into as of March 30, 2007, by and among K-V Pharmaceutical Company, a Delaware corporation (the " ***Acquiror*** "), and Vivus, Inc., a Delaware corporation (the " ***Seller*** ").

RECITALS

WHEREAS, Seller is engaged in researching, developing, marketing, and selling certain biopharmaceutical products, including Evamist;

WHEREAS, Seller will, by the terms of this Agreement, transfer or license to Acquiror Seller's tangible and intangible assets and rights used by Seller in the conduct of the Evamist Business and necessary for Acquiror to conduct the Evamist Business following the Closing; and

WHEREAS, Acquiror has agreed to assume the Assumed Liabilities on the terms and subject to the conditions set forth herein.

AGREEMENT

NOW, THEREFORE, in consideration of the premises, covenants, representations and warranties contained herein, and other good and valuable consideration, the adequacy and receipt of which are hereby acknowledged, the parties hereto, intending to be legally bound, agree as follows:

ARTICLE I.

DEFINITIONS

Section 1.1 Defined Terms . As used in this Agreement, the following defined terms shall have the meanings specified below:

" ***Accountants*** " means KPMG International; *provided* , *however* , that if KPMG International refuses such retention, Seller and Acquiror shall jointly select another independent accounting firm of recognized national standing; *provided* , *further* , that in the event that the Acquiror and the Seller are unable to agree on such an accounting firm within ten (10) Business Days, then the accounting firm shall be selected by lottery.

" ***Acquiror*** " has the meaning set forth in the preamble to this Agreement.

" ***Acquiror Material Adverse Effect*** " means any state of facts, change, development, event, occurrence, effect or condition that, individually or in the aggregate, has had or would be reasonably expected to have a material adverse effect on the business, assets (including intangible assets), results of operations, liabilities (contingent or otherwise) or conditions (financial or otherwise) of the Acquiror, except that any such state of facts, change,

development, event, occurrence, effect or condition resulting from or arising out of or in connection with any of the following, either alone or in combination, shall not be taken into consideration for purposes of determining whether an Acquiror Material Adverse Effect has occurred or arisen: (a) the announcement of this Agreement or the pendency of the transactions contemplated hereby, (b) the performance by the Acquiror of its obligations under this Agreement, (c) general economic conditions in any country where the Acquiror's business is conducted to the extent that they do not disproportionately affect the Acquiror relative to other industry participants, (d) general conditions in any industry in which the Acquiror's business is conducted to the extent that they do not disproportionately affect the Acquiror relative to other industry participants, (e) changes or conditions in economic, regulatory, political or capital markets conditions generally to the extent that they do not disproportionately affect the Acquiror relative to other industry participants, (f) any natural disaster or any acts of terrorism, sabotage, military action or war (whether or not declared) or any escalation or worsening thereof, (g) the Acquiror's failure to meet any financial projections in and of itself (it being understood that the facts or occurrences giving rise or contributing to such failure may be deemed to constitute, or be taken into account in determining whether there has been or will be, an Acquiror Material Adverse Effect) or (h) changes in Law or GAAP.

" ***Acrux License*** " means the Estradiol Development and Commercialization Agreement, dated February 12, 2004, by and among Fempharm Pty Ltd., Vivus, Inc. and Acrux DDS Pty Ltd., as amended.

" ***Acrux License Assignment Consent*** " means the written consent of Fempharm Pty Ltd. to the assignment and transfer of the Acrux License to the Acquiror as an Assumed Contract pursuant to Section 2.1(a) .

" ***Action or Proceeding*** " means any action, suit, claim, proceeding, arbitration, dispute, Order, inquiry, hearing, assessment with respect to fines or penalties or litigation (whether civil, criminal, administrative or investigative) commenced, brought, conducted or heard by or before, or otherwise involving, any Governmental or Regulatory Authority.

" ***Adverse Determination*** " has the meaning set forth in Section 12.1(i) .

" ***Affiliate*** " means, with respect to any Person, any other Person which Controls, is Controlled by or is under common Control with such Person.

" ***Agreement*** " has the meaning set forth in the preamble hereto.

" ***Androgen*** " has the meaning set forth in Section 2.5 .

" ***Applicable Period*** " has the meaning set forth in Section 8.7 .

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

" ***Assumed Contracts*** " means the Evamist Contracts set forth on Schedule 1.1(a)(1) . Notwithstanding the foregoing, the Assumed Contracts shall not include the Acrux License in the event that the Sublicense Agreement is required to be executed and delivered by the parties at the Closing pursuant to Section 2.7 .

" ***Assumed Liabilities*** " has the meaning set forth in Section 3.1(a) .

" ***Bill of Sale*** " means the Bill of Sale conveying the Purchased Assets from the Seller to the Acquiror, in a form to be mutually agreed upon by the parties prior to the Closing.

" ***Books and Records*** " means all books, records, files, documents, data, information and correspondence, including, without limitation, all records with respect to supply sources; all pre-clinical, clinical and process development data and reports relating to research or development of products or of any materials used in the research, development, manufacture, marketing or sale of products, including all raw data relating to clinical trials of products, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof) to analyze clinical data; all market research data, market intelligence reports, statistical programs (if any) used for marketing and sales research; promotional, advertising and marketing materials, sales forecasting models, medical education materials, sales training materials, web site content and advertising and display materials; all records, including vendor and supplier lists, manufacturing records, sampling records, standard operating procedures and batch records, related to the manufacturing process; all data contained in laboratory notebooks relating to products or relating to their biological, physiological, mechanical or formula properties; all adverse experience reports and files related thereto (including source documentation) and all periodic adverse experience reports and all data contained in electronic data bases relating to periodic adverse experience reports; all analytical and quality control data; and all correspondence, minutes or other communications with the FDA owned or held by Seller or any of its Subsidiaries as of the Closing Date.

" ***Business Day*** " means a day other than Saturday, Sunday or any day on which commercial banks located in New York are authorized or obligated by Law to close.

" ***Charter Documents*** " has the meaning set forth in Section 6.1 .

" ***Clinical Results Option*** " has the meaning set forth in Section 2.8 .

" ***Closing*** " has the meaning set forth in Section 5.1 .

" ***Closing Date*** " has the meaning set forth in Section 5.1 .

" ***Code*** " means the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

" ***Competing Product*** " has the meaning set forth in Section 8.7 .

" ***Confidentiality Agreement*** " means the Confidentiality Agreement, dated as June 2, 2006, by and between Seller and Acquiror.

" ***Contracts*** " means any and all written or legally binding oral commitments, contracts, purchase orders, sales orders, leases, subleases, licenses, easements, commitments, arrangements, undertakings, evidence of indebtedness, security or pledge agreements or other agreements.

" ***Control*** " means:

(a) ownership (directly or indirectly) of at least fifty percent (50%) of the shares or stock entitled to vote for the election of directors in the case of a company or corporation; or

(b) the ability otherwise to direct and control (whether directly or indirectly through one or more intermediaries) the actions of a Person.

" ***Corporate Name*** " means "VIVUS, Inc." and any and all derivatives thereof.

" ***Damages*** " has the meaning set forth in Section 11.2(a) .

" ***Data Package*** " has the meaning set forth in Section 2.8 .

" ***Default*** " means (i) a breach, default or violation, (ii) the occurrence of an event that with or without the passage of time or the giving of notice, or both, would constitute a breach, default or violation or cause an Encumbrance to arise, or (iii) with respect to any Contract, the occurrence of an event that with or without the passage of time or the giving of Notice, or both, would constitute a change of control or give rise to a right of termination, modification, renegotiation, acceleration, cancellation, or a right to receive Damages or a payment of penalties.

" ***Designated Acquiror Subsidiary*** " shall have the meaning set forth in Section 4.7 .

" ***DPT Laboratories*** " means the facilities of DPT Laboratories, Ltd. located at 307 E. Josephine Street, San Antonio 78215.

" ***Encumbrance*** " means any claim, mortgage, pledge, assessment, security interest, option, deed of trust, lease, lien, levy, license, restriction on transferability, defect in title, charge or other encumbrance of any kind, whether voluntarily incurred or arising by

operation of Law or any conditional sale or title retention agreement or other agreement to give any of the foregoing in the future.

" ***Environmental Laws*** " means any federal, state, local or non-U.S. Law and any judicial or administrative interpretation thereof, including any judicial or administrative order, consent decree, judgment, stipulation, injunction, permit, authorization, policy, opinion, or agency requirement, in each case having the force and effect of Law, relating to the pollution, protection, investigation or restoration of the environment or health and safety as affected by the environment or natural resources, including those relating to the use, handling, presence, transportation, treatment, storage, disposal, release, threatened release or discharge of Hazardous Materials or noise, odor, wetlands, pollution or contamination.

" ***ERISA Affiliate*** " means any entity which is (or at any relevant time was) a member of a "controlled group of corporations" with, under "common control" with, or a member of an "affiliated service group" with, Seller, as defined in Section 414(b), (c), (m) or (o) of the Code, or under "common control" with Seller, within the meaning of Section 4001(b)(1) of the Employee Retirement Income Security Act of 1974, as amended.

" ***Estradiol*** " means the compound with the chemical structure shown in Schedule 1.1(b) .

" ***Estrogen*** " means (i) any of the [***], [***] with [***] activity that are used for [***] for the treatment of [***], or any derivative of [***], including the [***] that are approved by the FDA in any form ([***]) for [***] or the treatment of [***] or (ii) any generic compound that is a [***].

" ***Evamist*** " means that pharmaceutical product consisting of an MDTS containing Estradiol, or any other Estrogen that is added to the Field (as defined under the Acrux License).

" ***Evamist Books and Records*** " means all of the Books and Records related to the Evamist Business owned by the Seller, but excluding the Excluded Books and Records, and, in the case of any of the Books and Records also relating to other businesses or assets of the Seller or its Subsidiaries, the Seller shall have the right to redact the same with respect to such other businesses and assets.

" ***Evamist Business*** " means the research, development, regulatory approval, manufacture, distribution, marketing, sale and promotion of Evamist in the Evamist Territory. For clarity, the Evamist Business shall exclude research, development or manufacturing (including process development) activities related generally to platforms (including MDTS) or other technologies not specific to Evamist.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

" ***Evamist Contracts*** " means all (i) Contracts pursuant to which Seller or its Subsidiaries purchases any materials from any third party for use solely in connection with the manufacture of Evamist, all of which Contracts in effect on the date hereof are set forth on Schedule 1.1(a)(2) , (ii) Contracts relating solely to any pre-clinical or clinical trial involving Evamist, all of which Contracts in effect on the date hereof are set forth on Schedule 1.1(a)(2) , (iii) Contracts constituting material transfer agreements solely involving the transfer of Evamist, all of which Contracts in effect on the date hereof are set forth on Schedule 1.1(a)(2) , (iv) Contracts relating solely to the marketing of Evamist or educational matters relating to the Evamist Business, all of which Contracts in effect on the date hereof are set forth on Schedule 1.1(a)(2) , (v) Contracts relating solely to the supply or manufacture of Evamist, all of which Contracts in effect on the date hereof are set forth on Schedule 1.1(a)(2) , (vi) Contracts constituting confidentiality agreements involving solely Evamist or the Evamist Business, all of which Contracts in effect on the date hereof are set forth on Schedule 1.1(a)(2) , (vii) Contracts involving any royalty, licensing, partnering or similar arrangement solely involving Evamist or the Evamist Business, all of which Contracts in effect on the date hereof are set forth on Schedule 1.1 (a)(2) , (viii) Contracts pursuant to which any services are provided to Seller or its Subsidiaries with respect solely to Evamist or the Evamist Business, including consultation agreements, all of which Contracts in effect on the date hereof are set forth on Schedule 1.1(a)(2) , (ix) Contracts pursuant to which any third party collaborates with Seller or its Subsidiaries in the performance of research or development solely of Evamist or the Evamist Business, all of which Contracts in effect on the date hereof are set forth on Schedule 1.1(a)(2) , and (x) Contracts entered into by Seller or its Subsidiaries from the date hereof to the Closing Date to the extent relating solely to Evamist, the Purchased Assets or the Evamist Business.

" ***Evamist Copyrights*** " means all copyrights, whether registered or unregistered, and applications, if any, owned or used under license by the Seller or any of its Subsidiaries exclusively related, or necessary and primarily related, to the Evamist Business, including without limitation those copyrights set forth on Schedule 1.1(c).

" ***Evamist FDA Submissions*** " means, collectively, the Evamist IND and Evamist NDA.

" ***Evamist Governmental Permits*** " means all governmental permits, licenses, registrations, NDAs, approvals and other governmental authorizations related solely to the operation of the Evamist Business that are held in the name of Seller or any of its Subsidiaries, and any applications therefor and all files related thereto.

" ***Evamist IND*** " means the IND for Evamist set forth on Schedule 1.1(d) as filed as of the date of this Agreement, and all documents, data, analyses, and files related thereto, in each case as may be updated in accordance with this Agreement.

" ***Evamist Intellectual Property*** " means (i) the Evamist Copyrights, (ii) the Evamist Patent Rights, (iii) the Evamist Know-How, (iv) the Seller Multi-Application Technology, (v) the Evamist Trademarks and (vi) any Software that is embedded in hardware included in the Purchased Assets.

" ***Evamist Inventory*** " means all inventories of Evamist in existence as of the Closing Date, together with all bulk active pharmaceutical ingredient, other raw materials, components, parts, work in process and packaging materials owned by Seller or any of its Subsidiaries as of the Closing Date for use solely in the operation of the Evamist Business. For clarity, Evamist Inventory shall exclude raw materials, components, parts, work in process and packaging materials not specific to Evamist.

" ***Evamist Know-How*** " means any and all Evamist Manufacturing Know-How and other product specifications, processes, product designs, plans, trade secrets, ideas, concepts, inventions, manufacturing, formulations, engineering and other manuals and drawings, standard operating procedures, formulae, flow diagrams, chemical, pharmacological, toxicological, pharmaceutical, physical, analytical, safety, quality assurance, quality control and clinical data, technical information, research records, and all other confidential or proprietary technical and business information that is currently owned or used under license by the Seller or any of its Subsidiaries and used exclusively in the Evamist Business as of the Closing Date. For the sake of clarity, none of the foregoing information shall be included in Evamist Know-How to the extent that such information is covered by any claim of any Evamist Patent. Notwithstanding the foregoing, Evamist Know-How shall exclude the Seller Multi-Application Technology.

" ***Evamist Manufacturing Know-How*** " means any information relating to the manufacture of Evamist owned or used under license by the Seller or its Subsidiaries, including without limitation the identity, amounts and assurance quality of ingredients, the manufacturing processes and controls, specifications, technology, inventions, assays, quality control and testing procedures, know-how and trade secrets used exclusively to manufacture, formulate, test and package Evamist for use, sale, marketing and distribution in the Evamist Territory as of the Closing Date. For the sake of clarity, none of the foregoing information shall be included in Evamist Manufacturing Know-How to the extent that such information is covered by any claim of any Evamist Patent Rights.

" ***Evamist NDA*** " means the NDA for Evamist set forth on Schedule 1.1(d) as filed as of the date of this Agreement, and all documents, data, analyses, and files related thereto, in each case as may be updated in accordance with this Agreement.

" ***Evamist NDA Approval*** " means approval of the Evamist NDA by the FDA allowing for the initiation of marketing and sale of Evamist in the United States for the treatment of vasomotor or any other similar symptoms associated with menopause.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

" ***Evamist NDA Approval Date*** " means the date upon which the FDA issues to Seller written notice of the Evamist NDA Approval.

" ***Evamist Patent Rights*** " means, to the extent owned or used under license by the Seller or any of its Subsidiaries, including those Patent Rights listed on Schedule 1.1(e) , together with all registrations, applications and renewals thereof, and any other Patents Rights that are owned or used under license by the Seller or any of its Subsidiaries and that would be infringed by the manufacture, sale, offer to sell or importation of Evamist in the Evamist Territory.

" ***Evamist Product Improvement*** " means (to the extent applicable), to the extent owned by Seller or any of its Subsidiaries, any: (i) line extension of Evamist; (ii) new indication of Evamist; (iii) composition of matter or article of manufacture consisting essentially of an Estrogen for dermal delivery, with or without a device suitable for dermal delivery of Estrogen; (iv) pharmaceutical combination containing an Estrogen for dermal delivery and another active ingredient; (v) new formulations comprising an Estrogen for dermal deliver; and/or (vi) compositions of matter or articles of manufacture constituting any of the foregoing or components thereof.

" ***Evamist Product Registrations*** " means (i) the exemptions, approvals or registrations which have been received by Seller or any of its Subsidiaries as of the date of this Agreement, or which are received by Seller or any of its Subsidiaries after the date of this Agreement but before the Closing Date, for the manufacturing, testing, investigation, sale, use, distribution and/or marketing of Evamist (including any NDAs or INDs), and (ii) all dossiers, reports, data and other written materials filed as part of or referenced in any applications for such approvals or registrations, or maintained by Seller or any of its Subsidiaries and relating to such approvals or registrations, in each case related exclusively to Evamist and to the extent owned by Seller or any of its Subsidiaries as of the Closing Date.

" ***Evamist Purchased Intellectual Property*** " means (i) the Evamist Copyrights, (ii) the Evamist Patent Rights, (iii) the Evamist Know-How and (iv) the Evamist Trademarks, in each case owned by the Seller or any of its Subsidiaries.

" ***Evamist Territory*** " means the United States, and its territories and protectorates.

" ***Evamist Trademarks*** " means all trademarks, trade names, trade dress, service marks, logos and slogans, in each case whether registered or unregistered, and all internet domain names, owned by the Seller or any of its Subsidiaries and used exclusively in the conduct of the Evamist Business and in any sales, promotional, marketing or advertising materials for Evamist in the Evamist Territory, and together with all registrations, applications and renewals thereof and the goodwill associated therewith, including without limitation those set forth on Schedule 1.1(f); *provided, however* , that Evamist Trademarks shall not include the Corporate Name of the Seller or its Subsidiaries.

" ***Excluded Assets*** " has the meaning set forth in Section 2.2 .

" ***Excluded Books and Records*** " means all Books and Records related to human resources and any other employee related files and records.

" ***Excluded Liabilities*** " has the meaning set forth in Section 3.1(b) .

" ***Excluded Tax Liability*** " has the meaning set forth in Section 3.1(b)(ii) .

" ***Facility Inspection Deadline*** " has the meaning set forth in Section 12.1(i) .

" ***FDA*** " means the United States Food and Drug Administration or any successor thereto.

" ***FDA Act*** " means the U.S. Food, Drug and Cosmetic Act of 1938, as it may be superseded or amended from time to time.

" ***FDA Milestone Payment*** " has the meaning set forth in Section 4.2(a) .

" ***FDA Transfer Letter*** " has the meaning set forth in Section 8.2(e)

" ***Financial Information*** " has the meaning set forth in Section 6.11 .

" ***First Commercial Sale*** " means the first commercial sale of Evamist for use in the Evamist Territory (other than for evaluation, research, testing or clinical trial purposes), which occurs after the Evamist NDA Approval Date, by the Acquiror or its Affiliates or sublicensees to an independent non-Affiliate third party in exchange for cash or some equivalent to which value can be assigned.

" ***GAAP*** " means United States generally accepted accounting principles.

" ***Governmental or Regulatory Authority*** " means any court, tribunal, arbitrator, authority, agency, commission, department, ministry, official or other instrumentality of the United States or other country, or any supra-national organization, or any foreign or domestic, state, county, city or other political subdivision.

" ***Hazardous Materials*** " means (A) any petroleum, petroleum products, byproducts or breakdown products, radioactive materials, asbestos-containing materials or polychlorinated biphenyls or (B) any chemical, material or other substance defined or regulated as toxic or hazardous or as a pollutant or contaminant or waste under any Environmental Law.

" ***HSR Act*** " means the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, together with any rules or regulations promulgated thereunder.

" ***IND*** " means (i) an Investigational New Drug Application, as defined in the FDA Act and the regulations promulgated thereunder, which is required to be filed with the FDA before beginning clinical testing of a product in human subjects, or any successor application or procedure, (ii) all supplements and amendments that may be filed with respect to the foregoing and (iii) all international equivalents of the foregoing.

" ***Indemnification Claim Notice*** " has the meaning set forth in Section 11.2(c) .

" ***Improvement*** " means (i) any improvement or modification to the design, materials, manufacturing and/or assembly of the metered dose transdermal spray application device reduced to practice by or on behalf of either party during the two (2) year period after the Closing Date and/or (ii) all ideas, concepts, inventions and the like created by either party pursuant to the services to be performed pursuant to the Transition Service Agreement.

" ***Indemnified Party*** " has the meaning set forth in Section 11.2(c) .

" ***Indemnitees*** " has the meaning set forth in Section 11.2(c) .

" ***Know-How*** " means any proprietary or nonproprietary information directly related to the manufacture, preparation, development (both research and clinical), or commercialization of a product, including, without limitation, product specifications, processes, product designs, plans, trade secrets, ideas, concepts, inventions, formulae, chemical, pharmacological, toxicological, pharmaceutical, physical, analytical, stability, safety, quality assurance, quality control and clinical information, technical information, research information, and all other confidential or proprietary technical and business information, whether or not embodied in any documentation or other tangible materials, but in no event shall the definition of "Know-How" include information properly in the public domain as of the Closing Date.

" ***Knowledge*** " with respect to (i) the Seller means the knowledge of officers or directors of the Seller, following reasonable inquiry, with responsibility for, or supervision of, the relevant matters, and (ii) the Acquiror means the knowledge of the officers, directors or senior managers, following reasonable inquiry, of the Acquiror with responsibility for supervision of the relevant matters.

" ***Law*** " means any federal, state, local or foreign law, statute, code or ordinance, or any rule or regulation promulgated by any Governmental or Regulatory Authority.

" ***Liability*** " means any direct or indirect liability, obligation, claim, deficiency, guarantee or commitment of any kind or nature (whether known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, or due or to become due), including any liability for Taxes.

" ***Liability Cap*** " means $1,250,000 unless and until the Seller receives payment of the FDA Milestone Payment pursuant to Section 4.2(a) , and thereafter shall be $18,750,000.

" ***Liability Threshold*** " has the meaning set forth in Section 11.3(a) .

" ***MDTS*** " means the metered dose transdermal spray system as described in Schedule 1.1(g) , and all improvements, derivatives and modifications of such system developed by or under authority of Seller, or Acrux DDS Pty. Ltd. or its Affiliate.

" ***Net Sales*** " shall mean, with respect to a fiscal year, the total gross invoices for Evamist sold by Acquiror and its Affiliates to independent, third party customers in the Evamist Territory, less (a) customary trade, quantity and/or cash discounts taken, (b) accrued rebates, adjustments and allowances, including those amounts credited by reason of rejections, return of goods, and any retroactive price reductions relating to Evamist, (c) amounts accrued resulting from mandated rebate programs of the government of the Evamist Territory (or any agency thereof), including but not limited to Medicaid and other federal, state or local rebates, (d) accrued third party rebates and chargebacks, or similar items, related to the sale of Evamist, (e) customs duties and sales or similar taxes, if any, directly related to the sale of Evamist, (f) amounts paid by Acquiror to its customers for defective Evamist returned to Acquiror from its customers, (g) shipping and freight costs and (h) any reasonable and customary provision for uncollectible accounts with respect to sales of Evamist *per se* , to the extent such reserve is determined in accordance with GAAP, consistently applied across all product lines of the Person making the sales, provided in the case of (e) and (g) such amounts are included within the gross invoiced amounts and separately itemized.

" ***NDA*** " means (i) a New Drug Application for any product, as appropriate, requesting permission to place a drug on the market in accordance with 21 C.F.R. Part 314, and all supplements or amendments filed pursuant to the requirements of the FDA, including all documents, data and other information concerning a product which are reasonably necessary for FDA approval to market a product in the United States and (ii) all international equivalents of the foregoing.

" ***Non-Assignable Asset*** " has the meaning set forth in Section 2.4(a) .

" ***No-Shop Period*** " has the meaning set forth in Section 8.10(a) .

" ***Notice*** " with respect to a party means notice actually received by an officer, director or senior manager of the Seller, in the case of the Seller, or of the Acquiror, in the case of the Acquiror, in each case with responsibility in the relevant area, or delivered in accordance with the terms of the document, Law or Order pursuant to which such notice was given.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

" ***Order*** " means any writ, judgment, decree, injunction or similar order, including consent orders, of any Governmental or Regulatory Authority (in each such case whether preliminary or final).

" ***Ordinary Course of Business*** " means an action or activity that is consistent in nature, scope and magnitude with the past practices of the Seller and its Subsidiaries with respect to the Evamist Business.

" ***Other Bid*** " has the meaning set forth in Section 8.10 .

" ***Patent Assignment Agreement*** " means the Patent Assignment Agreement to be dated as of the Closing Date by and between the Acquiror and Seller, in a form to be mutually agreed upon by the parties prior to the Closing.

" ***Patent Rights*** " means any patent application (including any provisionals, divisionals, continuations, continuations-in-part (to the extent claiming subject matter invented on or before the Closing Date) and substitutions thereof), patents issuing from or granted upon such patent application (including patents of addition (to the extent claiming subject matter invented on or before the Closing Date) and substitutions thereof), reissues, extensions, reexaminations, renewal applications, supplemental patent certificates or any confirmation patent or registration patent) and all foreign counterparts of any of the foregoing.

" ***Person*** " means any natural person, corporation, general partnership, limited partnership, limited liability company, proprietorship, joint venture, other business organization, trust, entity, union, association or Governmental or Regulatory Authority.

" ***Post-Closing Tax Period*** " means any Tax period beginning after the Closing Date and the portion of any Straddle Period beginning after the Closing Date.

" ***Pre-Closing Tax Period*** " means any Tax period ending on or before the Closing Date and the portion of any Straddle Period ending on the Closing Date.

" ***Properties*** " has the meaning set forth in Section 6.12 .

" ***Purchase Price*** " has the meaning set forth in Section 4.1(a) .

" ***Purchased Assets*** " has the meaning set forth in Section 2.1 .

" ***Registered Evamist Intellectual Property*** " means all Evamist Intellectual Property that has been registered, filed, certified or otherwise perfected or recorded with or by any Governmental or Regulatory Authority.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

"[***] ***Facilities*** " means the facilities of [***].

" ***Related Agreements*** " means the Trademark Assignment Agreement, Patent Assignment Agreement, Bill of Sale, Transition Services Agreement, Sublicense Agreement (only if the Sublicense Agreement is required to be executed and delivered pursuant to Section 2.7) and duly executed and attested assignments of transfer, or such other instruments of conveyance as may be required by Law, sufficient to permit the proper recordation of transfer of title ownership in all Registered Evamist Intellectual Property owned by the Seller from the Seller or its Subsidiaries to Acquiror in accordance with this Agreement.

" ***Required Permits*** " shall have the meaning set forth in Section 6.8(a) .

" ***Restricted Estrogens*** " means any of: Estradiol, 17-beta estradiol, 17-alpha estradiol, ethinyl estradiol or tibolone.

" ***Seller*** " has the meaning set forth in the preamble to this Agreement.

" ***Seller Disclosure Schedule*** " has the meaning set forth in the preamble to Article VI .

" ***Seller Governmental Consents*** " has the meaning set forth in Section 6.3(a) .

" ***Seller Material Adverse Effect*** " means any state of facts, change, development, event, occurrence, effect or condition that, individually or in the aggregate, (i) is materially adverse to the Purchased Assets or (ii) materially impairs or delays the ability of Seller to perform its obligation hereunder, except that any such state of facts, change, development, event, occurrence, effect or condition resulting from or arising out of or in connection with any of the following, either alone or in combination, shall not be taken into consideration for purposes of determining whether a Seller Material Adverse Effect has occurred or arisen: (a) the announcement of this Agreement or the pendency of the transactions contemplated hereby, (b) the performance by the Seller of its obligations under this Agreement, (c) general economic conditions in any country where the Evamist Business is conducted to the extent that they do not disproportionately affect the Seller relative to other industry participants, (d) general conditions in any industry in which the Evamist Business is conducted to the extent that they do not disproportionately affect the Seller relative to other industry participants, (e) changes or conditions in economic, regulatory, political or capital markets conditions generally to the extent that they do not disproportionately affect the Seller relative to other industry participants, (f) any natural disaster or any acts of terrorism, sabotage, military action or war (whether or not declared) or any escalation or worsening thereof, (g) the Seller's failure to meet any financial projections in and of itself (it being understood that the facts or occurrences giving rise or contributing to such failure may be deemed to constitute, or be taken into account in

determining, whether there has been or will be a Seller Material Adverse Effect) or (h) changes in Law or GAAP.

" ***Seller Multi-Application Technology*** " means [***] that is currently owned by the Seller or any of its Subsidiaries and used in both the [***] and [***] as of the Closing Date, which are summarized on [***].

" ***Seller Third Party Consents*** " has the meaning set forth in Section 6.3(b) .

" ***Software*** " means (to the extent applicable) computer programs, including any and all software implementations of algorithms, models and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, and all documentation, including user manuals and training materials, related to any of the foregoing; *provided* , *however* , that " ***Software*** " shall not include software that is readily purchasable or licensable and which has not been modified in a manner material to the use or function thereof (other than through user preferences).

" ***Straddle Period*** " means any Tax period beginning on or before and ending after the Closing Date.

" ***Sublicense Agreement*** " means the Sublicense Agreement, substantially in the form attached hereto as Exhibit A , to be effective as of the Closing Date, only if applicable pursuant to Section 2.7 , by and between Seller and Acquiror, whereby Seller agrees to grant to Acquiror an exclusive sublicense under the Licensed Intellectual Property (as defined in the Acrux License) solely to exploit, import, export, make, have made, develop, use, market, offer for sale and sell Evamist in the Field (as defined in the Acrux License) and subject to the other terms and conditions set forth therein.

" ***Subsidiary*** " of a Person means any entity Controlled by that Person.

" ***Superior Bid*** " means any unsolicited bona fide written offer made by a third party to consummate a proposal for a sale, spin-off or other disposition or similar transaction involving the Evamist Business and all or substantially all of the Purchased Assets on terms that the board of directors of the Seller determines in good faith, after consultation with its outside counsel and financial advisor, and after taking into account the purchase price and other terms and conditions of such proposal, the legal and regulatory aspects of such proposal and the Person making such proposal, (i) to be more favorable to the Seller's stockholders than the transactions contemplated by this Agreement and (ii) is likely to be consummated on its terms in a timely manner.

" ***Survival Period*** " shall have the meaning set forth in Section 11.1 .

" ***Taxes*** " means all of the following in connection with the operations of the Evamist Business or the transactions contemplated hereby: (i) any net income, alternative or add-on minimum tax, gross income, gross receipts, sales, use, value added, ad valorem, transfer, franchise, profits, license, excise, severance, stamp, occupation, premium, property, environmental or windfall profit tax, capital tax, customs duty or other tax, governmental fee or other like assessment imposed by any governmental, regulatory or administrative entity or agency responsible for the imposition of any such tax (domestic or foreign) including any interest, penalty or addition thereon, whether disputed or not; (ii) any Liability for the payment of any amounts of the type described in (i) as a result of being a member of any affiliated, consolidated, combined, unitary or other group for any Taxable period; and (iii) any Liability for the payment of any amounts of the type described in (i) or (ii) as a result of any express or implied obligation to indemnify any other Person.

" ***Tax Return*** " means any return, declaration, report, claim for refund, or information return or statement relating to Taxes, including any schedule or attachment thereto, and including any amendment thereof.

" ***Termination Date*** " has the meaning set forth in Section 12.1(b) .

" ***Third Party Claim*** " has the meaning set forth in Section 11.2(d) .

" ***Trademark Assignment Agreement*** " means the Trademark Assignment Agreement to be dated as of the Closing Date by and between the Acquiror and Seller, in a form to be mutually agreed upon by the parties prior to the Closing.

" ***Transfer Taxes*** " has the meaning set forth in Section 4.4 .

" ***Transition Services Agreement*** " means the Transition Services Agreement to be dated as of the Closing Date by and between Seller and Acquiror, substantially in the form attached hereto as Exhibit B , whereby Seller agrees to provide assistance to Acquiror in matters related to the Evamist Product Registrations and Evamist Business, including but not limited to making specified individuals identified in such agreement available to Acquiror for purposes of providing such assistance.

" ***Treasury Regulations*** " means the Treasury Regulations promulgated under the Code.

Section 1.2 Construction of Certain Terms and Phrases . Unless the context of this Agreement otherwise requires: (i) words of any gender include each other gender; (ii) words using the singular or plural number also include the plural or singular number, respectively; (iii) the terms "hereof," "herein," "hereby" and derivative or similar words refer to this entire Agreement; (iv) the terms "Article" or "Section" refer to the specified Article or Section of this

Agreement; (v) the term "or" has, except where otherwise indicated, the inclusive meaning represented by the phrase "and/or"; and (vi) the term "including" means "including without limitation." Whenever this Agreement refers to a number of days, such number shall refer to calendar days unless Business Days are specified.

ARTICLE II.

PURCHASE AND SALE OF ASSETS; GRANT OF LICENSES; SUBLICENSE AGREEMENT

Section 2.1 Purchase and Sale of Assets at the Closing . Upon the terms and subject to the conditions set forth in this Agreement, at the Closing, Seller shall, on behalf of itself and its Subsidiaries, sell, convey, assign, transfer and deliver to the Acquiror, and the Acquiror shall purchase and acquire from Seller, all of Seller's right, title and interest in and to the following assets, free and clear of all Encumbrances (collectively, the " ***Purchased Assets*** "):

(a) the Assumed Contracts;

(b) all Evamist Books and Records;

(c) all Evamist Inventory, excluding such Evamist Inventory Acquiror elects to exclude as designated in writing by Acquiror prior to the Closing Date;

(d) all Evamist Purchased Intellectual Property;

(e) all Evamist Product Registrations, excluding the Evamist FDA Submissions (subject to Section 8.5);

(f) all Evamist Governmental Permits, to the extent legally transferable (excluding the Evamist FDA Submissions, subject to Section 8.5);

(g) the Evamist FDA Submissions upon transfer pursuant to Section 8.5 ;

(h) any other assets related primarily to the research (including all pre-clinical and clinical studies), development, manufacture, formulation, use, distribution, marketing, sale and promotion of Evamist, *provided, however* , that:

(i) using the [***], the Acquiror, after the Closing, itself or through a contract manufacturer, shall use commercially reasonable efforts to, and subject to the terms of the manufacturing and supply contract to be entered into by and between the Acquiror and [***], manufacture or cause to be manufactured, on

behalf of and for delivery to the Seller up to 150,000 transdermal spray housings by January 1, 2008 and up to 150,000 transdermal spray housings by April 1, 2008, in each case subject to the Seller providing Acquiror a written purchase order for such quantities at least 120 calendar days in advance of the delivery date therefor and agreement to reimburse Acquiror for its actual cost therefor; *provided, however* , the Acquiror shall not be required to take any action under this Section 2.1(h)(i) that would interfere with, or be detrimental to, the Evamist Business as conducted by the Acquiror following the Closing, as determined by the Acquiror in good faith; and

(ii) with respect to the [***] and [***] located at [***], the Acquiror, for a period of 120 calendar days after the Closing, shall use commercially reasonable efforts to make such equipment available at its then current location for reasonable use on behalf of the Seller in connection with the manufacturing of its testosterone metered dose transdermal spray product, and the parties shall cooperate with respect to the scheduling of such use such that the Seller shall have reasonable access to such equipment as determined by the parties; *provided, however* , the Acquiror shall not be required to take any action under this Section 2.1(h)(ii) that would interfere with, or be detrimental to, the Evamist Business as conducted by the Acquiror following the Closing, as determined by the Acquiror in good faith; *provided, further* , the Seller shall use commercially reasonable efforts following the Closing to either purchase a [***] and [***] or find an alternative arrangement with a third party for use of such [***] and [***]; *provided, further* , that the Seller shall reimburse the Acquiror for any costs incurred by the Acquiror as a result of this Section 2.1(h)(ii) .

In addition, for clarity, the parties agree and acknowledge that, with the exception of the foregoing [***] and [***], the Purchased Assets shall exclude any assets used by the Seller solely in connection with its [***]; and

(i) all rights, claims and credits, including all guarantees, warranties, indemnities and similar rights in favor of Seller or any of its Affiliates or any of their respective employees to the extent relating to any Purchased Asset or any Assumed Liability.

Section 2.2 Excluded Assets . Notwithstanding anything to the contrary set forth in this Agreement, the Seller shall have no obligation to sell, convey, transfer, assign or otherwise deliver unto the Acquiror pursuant to this Agreement, and the Acquiror shall have no obligation to purchase or otherwise accept from the Seller pursuant to this Agreement, any of the right, title or interest of the Seller in or to any of the assets of the Seller other than the Purchased Assets (collectively, the " ***Excluded Assets*** "). Without limiting the generality of the foregoing,

the Excluded Assets shall expressly include (and, therefore, the Purchased Assets shall specifically exclude) the following:

(a) the Corporate Name;

(b) all human resource and other employee related files and records;

(c) all Books and Records, other than the Evamist Books and Records;

(d) subject to Section 8.11 , any insurance policies of Seller or its Subsidiaries or rights thereunder or proceeds thereof;

(e) the Evamist FDA Submissions (subject to Section 8.5);

(f) the Seller Multi-Application Technology;

(g) the right to a refund requested from the FDA for any or all of the Evamist NDA filing fee;

(h) all right, title and interest of the Seller in and to any real property, whether owned or leased by the Seller;

(i) all cash, cash equivalents, marketable securities and similar cash items of the Seller, whether or not arising from the Evamist Business;

(j) all refunds and rights to refunds related to Taxes; and

(k) all claims, actions, deposits, prepayments, refunds, causes of action, rights of recovery, rights of set off and rights of recoupment of any kind or nature (including any such item relating to Taxes) relating to the Excluded Assets.

Section 2.3 Retention of Assets . Notwithstanding anything to the contrary contained in this Agreement and without limiting *Section 2.8* , the Seller may retain, at its expense, one archival copy of all Assumed Contracts, Evamist Books and Records and other documents or materials conveyed hereunder, in each case, which the Seller in good faith determines it is reasonably likely to need access to in connection with performing its rights and obligations under this Agreement. Without limiting *Section 2.8* , access to such information shall be restricted to the Seller's legal counsel and such employees of the Seller who have a "need to know" such information in connection therewith. Upon the final performance of its rights and obligations hereunder, Seller shall (i) if such materials relate solely to the Evamist Business, destroy or deliver to the Acquiror such materials, and (ii) if such materials relate to both the Evamist Business and any other business of Seller, redact, to the extent practicable, any portion

of such materials that contain information relating solely to the Evamist Business, *provided, however* , if the Clinical Results Option is exercised, the Data Package will be excluded in the case of (i) and (ii) above.

Section 2.4 Assignability and Consents .

(a) Notwithstanding anything to the contrary contained in this Agreement, if the sale, conveyance, assignment, transfer or delivery or attempted sale, conveyance, assignment, transfer or delivery to the Acquiror of any Purchased Asset is (i) prohibited by any applicable Law or (ii) would require any authorizations, approvals, consents or waivers from a third Person and such authorizations, approvals, consents or waivers shall not have been obtained prior to the Closing Date (each, a " ***Non-Assignable Asset*** "), in either case, the Closing shall proceed (subject to the parties rights under Article IX and X , as applicable), but the Closing shall not constitute the sale, conveyance, assignment, transfer or delivery of such Non-Assignable Asset, and this Agreement shall not constitute a sale, conveyance, assignment, transfer or delivery of such Non-Assignable Asset unless and until such authorization, approval, consent or waiver is obtained. After the Closing, the Seller shall continue to use commercially reasonable efforts to obtain any Seller Third Party Consent.

(b) Once authorization, approval or waiver of or consent for the sale, conveyance, assignment, transfer or delivery of any such Non-Assignable Asset not sold, conveyed, assigned, transferred or delivered at the Closing is obtained, the Seller shall convey, assign, transfer and deliver such Non-Assignable Asset to the Acquiror at no additional cost to the Acquiror. Notwithstanding anything to the contrary contained in this Agreement, the Acquiror shall not assume any Liabilities with respect to a Non-Assignable Asset until it has been assigned to the Acquiror.

Section 2.5 License to Seller Multi-Application Technology . Effective as of the Closing, the Seller hereby grants, on behalf of itself and its Subsidiaries, to the Acquiror a fully paid, royalty free license in perpetuity under the Seller Multi-Application Technology solely to exploit, import, export, make, have made, develop, use, market, offer for sale and sell products (other than a product for transdermal delivery of any Androgen), which license shall be exclusive as to Evamist and non-exclusive as to any other product. For purposes of the foregoing and Section 2.6 below, " ***Androgen*** " means any of the following: testosterone, androstenediol, androstenedione, dehydroepiandrosterone, dihydrotestosterone, tibolone or any selective androgen receptor modulator.

Section 2.6 Licenses to Improvements . Effective as of the Closing:

(a) the Seller hereby grants to the Acquiror a worldwide, fully paid, royalty free, non-exclusive license in perpetuity under Improvements owned or controlled by the Seller to exploit, import, export, make, have made, develop, use, market, offer for sale and sell products other than a product for transdermal delivery of any Androgen; and

(b) the Acquiror hereby grants to the Seller a worldwide, fully paid, royalty free, non-exclusive license in perpetuity under Improvements owned or controlled by the Acquiror to exploit, import, export, make, have made, develop, use, market, offer for sale and sell products other than Competing Products.

Section 2.7 Sublicense Agreement . In the event that the Acrux License Assignment Consent has not been obtained as of the Closing, the Seller shall grant to the Acquiror an exclusive sublicense under the Licensed Intellectual Property (as defined in the Acrux License) pursuant to, and upon the terms and subject to the conditions set forth in, the Sublicense Agreement, effective as of the Closing.

Section 2.8 Clinical Results Option . Notwithstanding anything to the contrary set forth in this Agreement, in the event that the Acquiror so elects by giving written notice thereof to the Seller prior to the Closing (the " ***Clinical Results Option*** "), the Seller shall have the right to retain a copy of all pre-clinical and clinical trial data results obtained in the course of the development of Evamist and all Evamist Product Registrations (collectively, the " ***Data Package*** "), which Seller shall have the right to sell and transfer to a third party for such third party's use, modification, reference and disclosure solely in connection with such third party seeking regulatory approval to market and commercialize one or more pharmaceutical products consisting of MDTS containing Estradiol or any other Estrogen, which product is controlled or developed by or on behalf of such third party, in the European Union (the " ***Approved Uses*** "); *provided, however* , any such sale and transfer of the Data Package shall (i) be subject to standard and customary confidentiality obligations that limit the use thereof to the Approved Uses and to Persons subject to similar confidentiality obligations, except in the case of disclosure to Governmental or Regulatory Authorities which disclosure would as a matter of Law be maintained as confidential, and (ii) provide that the third party purchaser of such Data Package may not license, sell, dispose or otherwise transfer the Data Package to any other Person without the prior written consent of Acquiror (such consent not to be unreasonably withheld conditioned or delayed), except to the extent reasonably necessary to enable the Approved Uses (provided such usage does not involve a further transfer of ownership of the Data Package) and in all events subject to the confidentiality obligations described in clause (i) above. For clarity, Seller shall have the right to retain any and all consideration obtained from such sale and transfer of the Data Package.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

ARTICLE III.

ASSUMPTION OF LIABILITIES

Section 3.1 Assumption of Liabilities .

(a) Upon the terms and subject to the conditions set forth in this Agreement, as of the Closing Date, the Acquiror agrees to assume, satisfy, perform, pay and discharge each of the following Liabilities (the " ***Assumed Liabilities*** "):

(i) all Liabilities of Seller or any of its Subsidiaries under the Assumed Contracts (in the case of an Assumed Contract requiring third party consent to assignment, where such consent has been obtained), but only to the extent such Liabilities arise from any event, circumstance or condition occurring after the Closing;

(ii) all Liabilities with respect to the Evamist Governmental Permits that are Purchased Assets to the extent relating to the operation or conduct of the Evamist Business by or on the behalf of the Acquiror from and after the Closing, excluding the Evamist NDA;

(iii) all Liabilities for Taxes arising out of or relating to, directly or indirectly, the Purchased Assets (including Evamist) or the ownership, sale or lease of any of the Purchased Assets attributable to the Post-Closing Tax Period, other than the Excluded Tax Liabilities;

(iv) the Liability for fifty percent (50%) of the payment due to Fempharm Pty Ltd. pursuant to Section 3.2 (b) of the Acrux License; and

(v) all Liabilities after the Closing Date arising out of or related to the Acquiror's ownership of the Purchased Assets and operation and conduct of the Evamist Business by or for the benefit of the Acquiror.

(b) Notwithstanding anything contained in this Agreement to the contrary, from and after the Closing Date, the Seller shall retain all of the following Liabilities (" ***Excluded Liabilities*** "):

(i) all accounts payable and other similar Liabilities of the Seller and its Subsidiaries, excluding fifty percent (50%) of the payment due to Fempharm Pty Ltd. pursuant to Section 3.2(b) of the Acrux License;

(ii) any Liability incurred by the Seller in accordance with Section 8.5 in obtaining Evamist NDA Approval;

(iii) any Liability of Seller or any of its Subsidiaries, or any member of any consolidated, affiliated, combined or unitary group of corporations of which Seller or any of its Subsidiaries is or has been a member, for Taxes and any liabilities for Taxes attributable to the Purchased Assets for any Pre-Closing Tax Period ("Excluded Tax Liability");

(iv) all Liabilities of the Seller and its Subsidiaries arising out of any product liability, patent infringement, breach of warranty or similar claim for injury to person or property or any other claim related to the Purchased Assets or the Evamist Business arising prior to the Closing (including all proceedings relating to any such Liabilities);

(v) all Liabilities of the Seller and its Subsidiaries arising out of government seizures, field corrections, withdrawals or recalls of Evamist manufactured, transferred or sold prior to the Closing, which are claimed prior to, on or after the Closing Date;

(vi) all Liabilities of the Seller and its Subsidiaries with respect to any litigation or other claims related to the Evamist Business or Purchased Assets to the extent arising from any event, circumstance or condition occurring or alleged to have occurred prior to the Closing;

(vii) any Liability of the Seller related to any product or service of the Seller or any of its Subsidiaries other than Evamist or the operation or conduct by the Seller or any of its Subsidiaries of any business other than the Evamist Business;

(viii) any Liability or obligation of Seller or any of its Subsidiaries (A) arising out of any actual or alleged breach by Seller or any of its Subsidiaries of, or nonperformance by Seller or any of its Subsidiaries under, any Assumed Contract prior to the Closing or (B) accruing under any Assumed Contract prior to the Closing;

(ix) any Liability of the Seller to the extent arising out of (i) any suit, action or proceeding pending or, to the Knowledge of the Seller, threatened as of the Closing, with respect to claims which arise from facts, events or circumstances occurring prior to the Closing, or (ii) any actual or alleged violation by the Seller or any of its Affiliates of any Law applicable to the Seller or any of its Affiliates;

(x) any Liability of the Seller that relates to any Excluded Asset;

(xi) any Liability of Seller or any of its Subsidiaries or ERISA Affiliates under or relating to (A) any employee benefit plan, or relating to wages, bonuses, payroll, vacation, sick leave, workers' compensation, unemployment benefits, pension benefits, employee stock option or profit-sharing plans, health care plans or benefits, phantom stock, deferred compensation or other similar plan or arrangement, or any other employee plans or benefits of any kind, in each case, which Seller or any Subsidiary or ERISA Affiliate has entered into, maintains or administers or has maintained or administered, to which Seller or any Subsidiary or ERISA Affiliate contributes or has contributed or is or has been required to contribute, or under or with respect to which Seller or any ERISA Affiliate has or may have any Liability and (B) any actual or alleged violation by the Seller or any of its Affiliates of any equal employment or employment discrimination laws;

(xii) any Liability under Environmental Laws arising out of or relating to the operation or conduct of the Evamist Business or the use or ownership of the Purchased Assets in the Evamist Territory, in each case, before the Closing;

(xiii) any Liability of the Seller to any of its Affiliates; and

(xiv) any other Liability of Seller or any of its Subsidiaries or Affiliates that is not specifically listed as an Assumed Liability under Section 3.1(a) (including any Liability to the extent resulting from the ownership, use, operation or maintenance of the Purchased Assets by or on behalf of Seller prior to the Closing, or the operation or conduct of the Evamist Business by or on behalf of the Seller prior to the Closing).

ARTICLE IV.

PURCHASE PRICE AND PAYMENT

Section 4.1 Purchase Price . As consideration for the Purchased Assets, the grant of the license under the Seller Multi-Application Technology pursuant to Section 2.5 and, as applicable, the grant of the sublicense pursuant to the Sublicense Agreement, at the Closing, the Acquiror shall:

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

(a) assume the Assumed Liabilities; and

(b) pay to Seller an aggregate amount equal to the sum of $10,000,000 (the " ***Purchase Price*** ").

The Purchase Price shall be payable in cash by wire transfer of immediately available funds to an account designated by Seller to Acquiror in writing at least two (2) Business Days prior to Closing.

Section 4.2 Milestone Payments .

(a) Upon such date that the Evamist NDA Approval is granted by the FDA and the Evamist FDA Submissions and all rights associated therewith are transferred to Acquiror pursuant to Section 8.5 , Acquiror shall pay to Seller, within five (5) Business Days thereafter, $140,000,000 in cash (the " ***FDA Milestone Payment*** ").

(b) In the event that Net Sales of Evamist equal or exceed $100,000,000 in any fiscal year of the Acquiror, Acquiror shall pay to Seller, within ten (10) Business Days after the completion of the audit of the consolidated financial statements of Acquiror as of and for such fiscal year, but in no event later than sixty (60) days after the end of such fiscal year, $10,000,000 in cash. For the avoidance of doubt, the amount required to be paid pursuant to this Section 4.2(b) (if required to be paid) shall only be paid once and, for clarity, not with respect to every fiscal year that annual Net Sales of Evamist equal or exceed $100,000,000.

(c) In the event that Net Sales of Evamist equal or exceed $200,000,000 in any fiscal year of the Acquiror, Acquiror shall pay to Seller, within ten (10) Business Days after the completion of the audit of the consolidated financial statements of Acquiror as of and for such fiscal year, but in no event later than sixty (60) days after the end of such fiscal year, either (i) $20,000,000 in cash or (ii) if the Acquiror has given written notice to the Seller prior to the Closing of its election to exercise the Clinical Results Option, $10,000,000 in cash. For the avoidance of doubt, the amount required to be paid pursuant to this Section 4.2(c) (if required to be paid) shall only be paid once and, for clarity, not with respect to every fiscal year that Net Sales of Evamist equal or exceed $200,000,000. In addition, for the avoidance of doubt, the amounts required to be paid pursuant to Sections 4.2(b) and (c) , respectively, may be paid with respect to the same fiscal year in the event that Net Sales of Evamist equal or exceed both $100,000,000 and $200,000,000 for the first time in such fiscal year.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

(d) All payments paid to the Seller pursuant to this Section 4.2 , shall be by wire transfer of immediately available funds to an account designated by the Seller at least two (2) Business Days prior to the date on which such payment is required to be paid.

(e) Within five (5) Business Days after the completion of the audit of the consolidated financial statements of Acquiror as of and for such fiscal year, until such time as the Seller has received the applicable milestone payment pursuant to Section 4.2(c) , the Acquiror shall provide the Seller with a report, certified by the Acquiror's Chief Financial Officer, setting forth the Net Sales (including an itemized list of the deductions from the total gross invoices used in calculating such Net Sales) of Evamist during such fiscal year for each country within the Evamist Territory and the amount, if any, due pursuant to Section 4.2(b) and/or 4.2(c) with respect to such fiscal year. The Acquiror shall keep complete and accurate records in sufficient detail to make the reports required hereunder, to confirm its compliance with the provisions of this Section 4.2 , to properly reflect all Net Sales of Evamist and to verify the determination of all amounts payable hereunder.

(f) Upon the written request of the Seller, the Acquiror shall permit an independent certified public accounting firm of recognized national standing in the United States designated by the Seller and reasonably acceptable to the Acquiror to have access during normal business hours to such of the records of the Acquiror as may be reasonably necessary to verify the accuracy of any Net Sales reported and amounts payable under Section 4.2(b) and (c) of this Agreement. Each party shall submit such information in its possession or control to the accounting firm reasonably necessary for verification of Net Sales. Any such verification shall be carried out under customary conditions of confidentiality. If the accounting firm determines that additional amounts were payable, the Acquiror shall have ten (10) Business Days from the delivery of such accounting firm's written report to submit additional information to the accounting firm, and the accounting firm will take such additional information under consideration for a period not to exceed ten (10) Business Days. Thereafter, if the accounting firm finally determines that Acquiror owes any additional amounts to Seller, such amount shall be paid within ten (10) Business Days of such determination, plus interest on such amount (from the date such amount was originally due under this Agreement) at the six month LIBOR rate as reported by the East Coast Edition of the Wall Street Journal on the date such payment is due. The fees charged by such accounting firm shall be paid by the Seller, *provided, however* , that if the audit discloses that additional amounts were owed to the

Seller, then the Acquiror shall reimburse the Seller for the fees and expenses charged by such accounting firm.

Section 4.3 Allocation of Purchase Price . The Purchase Price shall be allocated among the Purchased Assets, the grant of the license under the Seller Multi-Application Technology pursuant to Section 2.5 and, as applicable, the grant of the sublicense pursuant to the Sublicense Agreement in accordance with Section 1060 of the Code and the Treasury Regulations promulgated thereunder, and the Acquiror and the Seller agree to (a) be bound by the allocation, (b) act in accordance with the allocation in the preparation of financial statements and filing of all Tax Returns (including, without limitation, filing Internal Revenue Service Form 8594 with their United States federal income Tax Return for the taxable year that includes the date of the Closing) and in the course of any Tax audit, Tax review or Tax litigation relating thereto, and (c) take no position and cause their Affiliates to take no position inconsistent with the allocation for income Tax purposes, including United States federal and state income Tax and foreign income Tax, unless otherwise required pursuant to a "determination" within the meaning of Section 1313(a) of the Code. The Acquiror shall initially determine and send written Notice to the Seller of the allocation of the Purchase Price within thirty (30) days after the Closing Date. The Seller will be deemed to have accepted such allocation unless it provides written Notice of disagreement to the Acquiror within ten (10) days after the receipt of the Seller's Notice of allocation. If the Seller provides such Notice of disagreement to the Acquiror, the parties shall proceed in good faith to determine the allocation in dispute. If, within ten (10) days after the Acquiror receive the Seller's Notice of disagreement, the parties have not reached agreement, the Accountants shall be engaged to determine the final allocation in dispute. The Seller and the Acquiror shall share equally the fees of such Accountants. Not later than thirty (30) days prior to the filing of their respective Internal Revenue Service Forms 8594 relating to this transaction, each party shall deliver to the other party a copy of its Internal Revenue Service Form 8594.

Section 4.4 Sales, Use and Other Taxes . All transfer, documentary, sales, use, valued-added, gross receipts, stamp, registration or other similar transfer taxes incurred in connection with the transfer and sale of the Purchased Assets as contemplated by the terms of this Agreement, including all recording or filing fees, notarial fees and other similar costs of Closing, that may be imposed, payable, collectible or incurred (" ***Transfer Taxes*** ") shall be timely paid by Seller. The parties hereto shall reasonably cooperate, to the extent reasonably requested and permitted by applicable law, in minimizing any such Transfer Taxes. The party required by law will file all necessary Tax Returns and other documentation with respect to any such Transfer Taxes within the time prescribed by applicable law, and the other party will join in the execution of any such Tax Returns and other documentation. All costs incurred in the filing of such Tax Returns will be paid by Seller. The Seller shall provide Acquiror with evidence satisfactory to Acquiror that such transfer Taxes have been timely paid by the Seller.

Section 4.5 Tax Withholding . All payments made by Acquiror to Seller pursuant to this Agreement shall be made free and clear of any withholding, deduction or offset.

Section 4.6 Risk of Loss . Until the Closing, the Seller shall bear the risk of any loss or damage to the Purchased Assets from fire, casualty or any other occurrence. Following the Closing, Acquiror shall bear the risk of any loss or damage to the Purchased Assets from fire, casualty or any other occurrence.

Section 4.7 Subsidiaries . Acquiror shall, upon ten (10) Business Days prior written notice to Seller, have the right to designate one or more of its wholly-owned direct or indirect Subsidiaries (each, a " ***Designated Acquiror Subsidiary*** ") to purchase all or any of the Purchased Assets or assume all or any of the Assumed Liabilities so long as Acquiror shall remain liable for all of its liabilities and obligations hereunder and under the Related Agreements; *provided* , *however* , that Acquiror shall not be permitted to make such a designation if such designation would, or would reasonably be expected to, (i) result in any material costs, or any material liabilities, to the Seller or its Subsidiaries (including but not limited to any liability for Taxes, regardless of materiality and whether withheld at the source or otherwise), (ii) materially delay or prevent the consummation of the transactions contemplated hereby, (iii) materially adversely affect the obtaining of consents and approvals in connection with the transactions contemplated hereby (or require that material consents and approvals be resolicited) or (iv) otherwise cause the conditions to Closing set forth in Articles IX and X hereof to not be satisfied.

ARTICLE V.

CLOSING

Section 5.1 Time and Place . Unless this Agreement is earlier terminated pursuant to Article XII , the closing of the transactions contemplated by this Agreement, including the purchase and sale of the Purchased Assets and the assumption of the Assumed Liabilities (the " ***Closing*** "), shall take place as promptly as practicable, but in no event later than five (5) Business Days following satisfaction or waiver of the conditions set forth in Articles IX and X , at 9:00 a.m., Pacific Standard time, at the offices of Latham & Watkins LLP, 650 Town Center Drive 20th Floor, Costa Mesa, California 92626, unless another time or place shall be agreed to by the parties (the " ***Closing Date*** ").

Section 5.2 Deliveries at Closing .

(a) Closing Deliveries by the Seller . At the Closing, the Seller shall deliver or cause to be delivered to the Acquiror:

(i) an original of each of the Trademark Assignment Agreement,

the Patent Assignment Agreement, the Bill of Sale, the Transition Services Agreement and the Sublicense Agreement (only if the Sublicense Agreement is required to be executed and delivered pursuant to Section 2.7), executed by the Seller, and copies of all documents required to be delivered by the Seller pursuant to the Related Agreements;

(ii) an unredacted, fully executed copy of each of the Assumed Contracts;

(iii) assignment and assumption agreements and/or subcontracts, as applicable, in form and substance reasonably acceptable to the Seller and the Acquiror, assigning to the Acquiror all rights of the Seller in and to the Assumed Contracts;

(iv) written evidence of the receipt of all Seller Governmental Consents set forth on Schedule 6.3(a) of the Seller Disclosure Schedule and Seller Third Party Consents set forth on Schedule 6.3(b) of the Seller Disclosure Schedule;

(v) written evidence (including duly executed UCC-3 forms, as applicable) that all liens and encumbrances related to the Purchased Assets, if any, have been released;

(vi) all forms, certificates and other documents referred to in Section 8.12(d) ; and

(vii) the certificates and other matters described in Article X .

(b) Closing Deliveries by the Acquiror . At the Closing, the Acquiror will deliver or cause to be delivered to the Seller:

(i) the Purchase Price in immediately available funds by wire transfer to an account or accounts that shall have been designated by the Seller not less than two (2) Business Days prior to the Closing Date;

(ii) an original of each of the Trademark Assignment Agreement, the Patent Assignment Agreement, the Bill of Sale, the Transition Services Agreement and the Sublicense Agreement (only if the Sublicense Agreement is required to be executed and delivered pursuant to Section 2.7), executed by the Acquiror, and copies of all documents required to be delivered by the Acquiror pursuant to the Related Agreements;

(iii) such instruments of assumption and other instruments or documents, in form and substance reasonably acceptable to the Seller and the Acquiror, as may be necessary to effect the Acquiror's assumption of the Assumed Liabilities and the Assumed Contracts; and

(iv) the certificates and other matters described in Article IX .

(c) Further Deliveries of the Seller . At or promptly following the Closing, but in no event later than thirty (30) days thereafter, the Seller shall deliver or cause to be delivered to Acquiror the following: (i) Evamist Governmental Consents, (ii) the Evamist Books and Records and (iii) any other Purchased Asset which was not delivered to Acquiror on the Closing Date.

ARTICLE VI.

REPRESENTATIONS AND WARRANTIES OF THE SELLER

Except as set forth in the disclosure schedule supplied by the Seller to the Acquiror and dated as of the date hereof (the " ***Seller Disclosure Schedule*** "), which Seller Disclosure Schedule identifies the Section (or, if applicable, subsection) to which such exception relates (*provided, however* , that such disclosure shall also apply to particular matters represented or warranted in other Sections and subsections to the extent that it is readily apparent from the text of such disclosure), the Seller represents and warrants to the Acquiror as follows:

Section 6.1 Organization, Etc . The Seller is duly incorporated, validly existing and, where applicable, in good standing under the laws of Delaware and has all requisite power and authority to own its assets, including the Purchased Assets, and carry on the Evamist Business as currently conducted by it. The Seller is duly authorized to conduct its business and is in good standing in each jurisdiction where such qualification is required to own the Purchased Assets or conduct the Evamist Business as they are now being conducted, except where the failure to be so qualified or in good standing would not be reasonably expected to have a Seller Material Adverse Effect. The certificate of incorporation, bylaws or other similar governing instruments and organizational documents (the " ***Charter Documents*** ") of the Seller that have been delivered to the Acquiror on or prior to the date hereof are effective under applicable Laws and are current, correct and complete. No Affiliates of the Seller are presently or have in the past been engaged in the development, manufacture, marketing or sale of Evamist or the operation or conduct of the Evamist Business.

Section 6.2 Authority of the Seller . The Seller has all necessary corporate power and authority and has taken all actions necessary to enter into this Agreement, to execute and deliver the Related Agreements to which it is or will be a party and carry out the transactions contemplated hereby and by the Related Agreements to which it is or will be a party. The board

of directors of the Seller has taken all action required by Law and the Charter Documents of the Seller and otherwise to be taken by it to duly authorize (i) the execution and delivery of this Agreement and the Related Agreements to which it is or will be a party and (ii) the consummation of the transactions contemplated hereby and by the Related Agreements to which it is or will be a party. No other corporate proceedings on the part of the Seller are necessary to authorize this Agreement and the Related Agreements and the transactions contemplated hereby and thereby. This Agreement has been duly and validly executed and delivered by the Seller and, when executed and delivered by the Acquiror, will constitute a legal, valid and binding obligation of the Seller, enforceable against it in accordance with its terms. When executed and delivered by the Seller, each Related Agreement will constitute a legal, valid and binding obligation of the Seller enforceable against it in accordance with its terms. Notwithstanding the matters set forth in this Section 6.2 , the enforceability of this Agreement and the Related Agreements may be limited by principles of public policy and the rules of law governing specific performance, injunctive relief or other equitable remedies.

Section 6.3 Consents and Approvals .

(a) Schedule 6.3(a) of the Seller Disclosure Schedule sets forth a complete and accurate list (the " ***Seller Governmental Consents*** ") of all consents, waivers, approvals, Orders, permits or authorizations of, or registrations, notifications, declarations, payments or filings with, any Governmental or Regulatory Authority that are required by or with respect to the Seller in connection with the execution and delivery of this Agreement and the Related Agreements by the Seller or the performance of its obligations hereunder and thereunder.

(b) Schedule 6.3(b) of the Seller Disclosure Schedule sets forth a complete and accurate list (the " ***Seller Third Party Consents*** ") of all material consents, waivers, approvals, or authorizations of, or notices to, any third party (other than a Governmental or Regulatory Authority) that are required by or with respect to the Seller in connection with the execution and delivery of this Agreement and the Related Agreements by the Seller or the performance of its obligations hereunder and thereunder.

Section 6.4 Non-Contravention . The execution and delivery by the Seller of this Agreement and the Related Agreements does not, and the performance by Seller of its respective obligations under this Agreement and the Related Agreements and the consummation of the transactions contemplated hereby and thereby will not:

(a) conflict with or result in a violation or breach of any of the terms, conditions or provisions of the Charter Documents of the Seller;

(b) assuming the receipt of all consents, waivers, approvals, Orders, permits or authorizations of Governmental and Regulatory Authorities, and the termination or expiration of any waiting periods thereunder (set forth in Schedule 6.4 (b) of the Seller Disclosure Schedule) required to be obtained by the Seller and the making of all registrations, notifications, declarations or filings with Governmental and Regulatory Authorities, and the termination or expiration of any waiting periods thereunder (set forth in Schedule 6.4(b) of the Seller Disclosure Schedule) required to be made by or with respect to the Seller, conflict with or result in a violation or breach of any term or provision of any Law applicable to the Seller, the Evamist Business or the Purchased Assets; or

(c) conflict with or result in (i) a Default under, (ii) the loss of any benefit under or (iii) the creation of any Encumbrance on any of the Purchased Assets (including any Assumed Contract).

Section 6.5 Contracts .

(a) All Contracts meeting the definition of "Evamist Contracts" are listed on Schedule 1.1(a)(2) . The Assumed Contracts are valid, binding and in full force and effect. Except as set forth on Schedule 6.5(a) of the Seller Disclosure Schedule, the Seller and, to the Knowledge of the Seller, any other party thereunder, has performed all obligations required to be performed by such party under the Assumed Contracts and is not in material breach or default under any Assumed Contract and, to the Knowledge of the Seller, no other party to any Assumed Contract is (with or without the lapse of time or the giving of notice, or both) in material breach or default thereunder. The Seller has not received any notice of the intention of any party to terminate any Assumed Contract. Complete and correct copies of all Assumed Contracts and amendments thereto have been made available to Acquiror.

(b) No Contracts other than the Evamist Contracts and the rights of Seller under the Related Agreements are necessary for the conduct of the Evamist Business.

Section 6.6 Intellectual Property Rights .

(a) Schedule 6.6(a) of the Seller Disclosure Schedule lists all Registered Evamist Intellectual Property that is owned by or licensed to the Seller.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

(b) To the Knowledge of the Seller, the operation of the Evamist Business, as has been and is now being conducted, does not presently infringe or constitute a misappropriation of any registered or unregistered patents, trademarks, copyrights, trade secrets or other proprietary rights of any Person, and the currently contemplated operation of the Evamist Business will not infringe or constitute a misappropriation thereof, and neither the Seller, nor any Subsidiary thereof, has received any written notice from any Person, or has Knowledge of, any actual or threatened claim or assertion to the contrary or of any facts or alleged facts which are likely to serve as the basis for any such claim or assertion.

(c) Any registration, maintenance and renewal fees due in connection with the Registered Evamist Intellectual Property have been paid in a timely manner and all necessary documents and certificates in connection with the Registered Evamist Intellectual Property have, for the purposes of maintaining such Registered Evamist Intellectual Property, been filed in a timely manner with the relevant Governmental or Regulatory Authorities, *provided, however* , that the foregoing representation and warranty is made only to the Knowledge of the Seller with respect to Registered Evamist Intellectual Property licensed to the Seller.

(d) The Evamist Intellectual Property set forth on Schedule 6.6(a) of the Seller Disclosure Schedule is free and clear of all Encumbrances and no Person other than the Seller and its Subsidiaries, including any current or former employee or consultant of the Seller and its Subsidiaries, has any proprietary, commercial or other interest in any of the Evamist Intellectual Property, *provided, however* , that the foregoing representation and warranty is made only to the Knowledge of the Seller with respect to Evamist Intellectual Property licensed to the Seller. There are no existing agreements, options, commitments, or rights with, of or to any Person to acquire or obtain any rights to, any of the Evamist Intellectual Property set forth on Schedule 6.6(a) of the Seller Disclosure Schedule, *provided, however* , that the foregoing representation and warranty is made only to the Knowledge of the Seller with respect to Evamist Intellectual Property licensed to the Seller.

(e) The Seller or its Subsidiaries have the unrestricted right to assign, transfer and/or grant to the Acquiror all rights in the Evamist Intellectual Property that are being assigned, transferred and/or granted to the Acquiror under this Agreement and the Related Agreements, in each case free of any rights or claims of any Person and without payment of any royalties, license fees or other amounts to any Person.

(f) To the Knowledge of the Seller, there is no unauthorized use or infringement of any of the Evamist Patent Rights by any Person.

(g) There are no Actions or Proceedings (including any inventorship challenges) pending or, to the Knowledge of the Seller, threatened with respect to any of the Evamist Intellectual Property nor have any such Actions or Proceedings been brought during the past three (3) years.

(h) Solely as it relates to Evamist, the Seller has not entered into any Contract (i) granting any Person the right to bring infringement actions with respect to, or otherwise to enforce rights with respect to, any of the Evamist Intellectual Property, or (ii) expressly agreeing to indemnify any Person against any charge of infringement of any of the Evamist Intellectual Property.

(i) The Seller has not entered into any Contract granting any Person the right to control the prosecution of any of the Evamist Patent Rights.

(j) None of the Evamist Trademarks are or have been the subject of any opposition, cancellation, abandonment or similar proceeding, and neither the Seller, nor any of its Subsidiaries, has received any written notice from any Person, or has Knowledge, of any actual or threatened claim or assertion to the contrary, or of any facts or alleged facts which are likely to serve as a basis for any such claim or assertion.

(k) To the Knowledge of the Seller, there are no trademarks or trademark registrations or applications of any Person that are interfering or potentially interfering with the Evamist Trademarks set forth on Schedule 1.1(g) or any other material Evamist Trademarks.

(l) To the Knowledge of the Seller, there is no unauthorized use or infringement of the Evamist Copyrights set forth on Schedule 1.1(c).

(m) Except as set forth on Schedule 6.6(m) of the Seller Disclosure Schedule, the Seller has not granted any licenses under or to any of the Evamist

Intellectual Property or entered into any distribution or marketing arrangements with respect to any Evamist Intellectual Property or Evamist.

Section 6.7 Litigation. Schedule 6.7 of the Seller Disclosure Schedule sets forth a list as of the date hereof of each pending or, to the Knowledge of the Seller, threatened suit, claim, action, proceeding or investigation, arising out of the conduct of the Evamist Business or against or affecting any Purchased Assets. Except as set forth in Schedule 6.7 of the Seller Disclosure Schedule, none of the suits, claims, actions, proceedings or investigations listed in Schedule 6.7 of the Seller Disclosure Schedule as to which there is at least a reasonable possibility of adverse determination would have, if so determined, individually or in the aggregate, a Seller Material Adverse Effect. Except as set forth in Schedule 6.7 of the Seller Disclosure Schedule, to the Knowledge of the Seller, there are no unasserted claims of the type that would be required to be disclosed in Schedule 6.7 of the Seller Disclosure Schedule if counsel for the claimant had contacted the Seller that if asserted would have at least a reasonable possibility of an adverse determination. To the Knowledge of the Seller, except as set forth in Schedule 6.7 of the Seller Disclosure Schedule, neither the Seller nor any of its Affiliates are a party or subject to or in Default under any Order applicable to the conduct of the Evamist Business or any Purchased Assets or Assumed Liability, and there are no outstanding Orders of any Governmental or Regulatory Authority that apply to the Purchased Assets that restricts the ownership, disposition or use of the Purchased Assets by the Seller or the conduct of the Evamist Business by the Seller, in each case, in any material respect. Except as set forth in Schedule 6.7 of the Seller Disclosure Schedule, there is not any suit, claim, action, proceeding or investigation by the Seller pending, or which the Seller intends to initiate, against any other Person arising out of the conduct of the Evamist Business. Except as set forth in Schedule 6.7 of the Seller Disclosure Schedule, to the Knowledge of the Seller, there is no pending or threatened investigation of, or affecting the conduct of the Evamist Business or any Purchased Assets or Assumed Liability.

Section 6.8 Permits; Compliance with Law .

(a) Schedule 6.8 of the Seller Disclosure Schedule sets forth a true and complete list of all material authorizations, licenses, permits, certificates, approvals, exemptions, consents, confirmations, orders, registrations, product registrations, concessions, franchises, waivers and clearances of an Governmental or Regulatory Authority (including all authorizations under the FDA Act, the Public Health Services Act, the Controlled Substances Act and the regulations of the FDA and the United States Drug Enforcement Agency promulgated thereunder) necessary for the Seller to use, test, manufacture, distribute, own, lease and operate the Purchased Assets and to carry on the Evamist Business as it is being conducted as of the date hereof (the " ***Required Permits*** "), and the Seller

is in possession of all Required Permits and all Required Permits are valid and in full force and effect.

(b) The Evamist Business has been and is conducted by the Seller and its Subsidiaries in material compliance with all Required Permits and applicable Law by which any Purchased Asset is bound.

(c) No Governmental or Regulatory Authority has notified the Seller or any of its Subsidiaries that the Evamist Business or the Purchased Assets were or are in violation of any Law or Required Permit or the subject of any investigation in any jurisdiction where the Evamist Business is conducted; and, to the Knowledge of the Seller, there are no grounds for the same.

(d) No Governmental or Regulatory Authority has notified the Seller or any of its Subsidiaries of any facts or circumstances which would lead to any suspension, loss of or material modification to any Required Permit or refusal by a Governmental or Regulatory Authority to renew or accept for filing any Required Permit on terms less advantageous, individually or in the aggregate, to the Seller and its Subsidiaries than the terms of those Required Permits currently in force and, to the Knowledge of the Seller, there are no facts or circumstances providing grounds for the same.

(e) (i) All applications, submissions, information, claims, reports and statistics, and other data and conclusions derived therefrom, utilized as the basis for or submitted in connection with any and all requests for a Required Permit of the FDA or other Governmental or Regulatory Authority relating to the Purchased Assets, when submitted to the FDA or other Governmental or Regulatory Authority were true, complete and correct in all material respects as of the date of submission and any legally necessary or required updates, changes, corrections or modifications to such applications, submissions, information, claims, reports or statistics have been submitted to FDA and other Governmental or Regulatory Authority.

(ii) All pre-clinical and clinical trials conducted by or under the authority of the Seller with regard to the Purchased Assets were and are being conducted in material compliance with experimental protocols, procedures and controls pursuant to accepted professional scientific standards and all applicable Laws promulgated by the FDA relating thereto, including without limitation the FDA Act and its applicable implementing regulations at 21 C.F.R. Parts 50, 54, 56 and 312, as amended.

(iii) There are no investigations, audits, actions or other proceedings pending with respect to a violation by the Seller or any of its Subsidiaries of the FDA Act or other applicable Law that would reasonably be expected to result in administrative, civil or criminal liability, and, to the Knowledge of the Seller, there are no facts or circumstances existing that would reasonably be expected to serve as a basis for such an investigation, audit, action or other proceeding, in each case with respect to the Evamist Business.

(iv) No Governmental or Regulatory Authority has commenced or threatened to initiate any action to withdraw the Evamist Product Registrations or request the recall of Evamist, or commenced or threatened to initiate any action to enjoin production of Evamist at any facility in the Evamist Territory, nor have the Seller or any of its Subsidiaries received any notice to such effect and, to the Knowledge of the Seller, there are no grounds for such action.

(v) None of the employees of the Seller, the Seller or any of its Subsidiaries, or their collective officers or agents, have been disqualified or debarred by the FDA for any purpose, or have been charged with or convicted under United States federal Law for conduct relating to the development or approval or otherwise relating to the regulation of any drug product under the Generic Drug Enforcement Act of 1992, the FDA Act or any other similar Law or have made an untrue statement of a material fact to any Governmental or Regulatory Authority with respect to Evamist (whether in any submission to such Governmental or Regulatory Authority or otherwise), or failed to disclose a material fact required to be disclosed to any Governmental or Regulatory Authority with respect to Evamist. Neither the Seller or any of its Subsidiaries are the subject of any pending or, to the Knowledge of the Seller, threatened investigation in respect of the Seller of any of its Subsidiaries or its products, by the FDA pursuant to its "Fraud, Untrue Statements of Material Facts, Bribery, and Illegal Gratuities" Final Policy set forth in 56 Fed. Reg. 46191 (September 10, 1991) and any amendments thereto.

Section 6.9 Evamist Inventory .

(a) All of the Evamist Inventory (i) is free of any material defect or deficiency and (ii) was produced or manufactured in accordance with the specifications for Evamist as set forth in the applicable Evamist Product Registrations and in compliance with applicable Law. The Seller at Closing will have good and marketable title to the Evamist Inventory free and clear of any Encumbrances.

ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

(b) The Initial Evamist Inventory Value represents the value of the Evamist Inventory as of February 28, 2007 and was calculated from the Seller's financial systems, based upon the historical costs of materials, determined in accordance with GAAP consistently applied, and as set forth in reasonable detail on Schedule 6.9(b) of the Seller Disclosure Schedule; *provided* , that for purposes of calculating the Initial Evamist Inventory Value, the inventory of the Evamist Business shall not include any Evamist Inventory that is damaged, defective, unusable or which otherwise fails to meet the requirements of Section 6.9(a). For clarity, none of the Evamist Inventory has been cleared for commercial sale and all human uses thereof are subject to appropriate exemptions.

Section 6.10 Suppliers. The Seller has used reasonable business efforts to maintain, and, to the Knowledge of the Seller, currently maintains, good working relationships with all of the suppliers to the Evamist Business. Schedule 6.10 of the Seller Disclosure Schedule also specifies for the year beginning January 1, 2006 to the date of this Agreement the names of the suppliers to the Evamist Business. None of such suppliers has given the Seller or any of its Subsidiaries notice terminating, canceling or threatening to terminate or cancel any Contract or relationship with the Seller or any of its Subsidiaries relating to the Evamist Business. To the Knowledge of Seller, such suppliers are manufacturing and otherwise operating in compliance with applicable FDA requirements with respect to the products and materials supplied to Seller.

Section 6.11 [Intentionally Deleted.]

Section 6.12 Environmental Matters .

Except as set forth on Section 6.12 of the Seller Disclosure Schedule:

(a) the Seller and its Subsidiaries, to the extent related to any property or facility owned, leased or operated by Seller in the conduct of the Evamist Business (the " ***Properties*** "), have obtained those Evamist Governmental Permits required by Environmental Law and necessary for the conduct of the Evamist Business, and the Seller and its Subsidiaries are in material compliance with such Evamist Governmental Permits and other requirements of Environmental Law;

(b) the Seller and its Subsidiaries, to the extent related to the Evamist Business or the Properties, have not received any written notice from any Governmental Entity or any other Person or entity alleging a violation of, or liability under, Environmental Laws related to any matter which has not been fully resolved; and

(c) no notice, registration, reporting or other filing or investigation, response or corrective action is required by the Seller or its Subsidiaries under any Environmental Law in connection with, or as a result of, the execution and delivery of this Agreement, or the consummation of the transactions contemplated hereby.

Section 6.13 Absence of Certain Changes or Events .

(a) Except as set forth on Schedule 6.13(a) of the Seller Disclosure Schedule, since December 31, 2006, there has not been a Seller Material Adverse Effect.

(b) Except as set forth in Schedule 6.13(b) of the Seller Disclosure Schedule or as otherwise expressly contemplated by this Agreement or the Related Agreements, since December 31, 2006 to the date of this Agreement, the Seller has conducted the Evamist Business in the Ordinary Course of Business, and the Seller has not, with respect to the Evamist Business or any of the Purchased Assets:

(i) subjected any of the Purchased Assets to any Encumbrances;

(ii) sold, transferred, leased, subleased, licensed or otherwise disposed of, to any third party, any Purchased Assets or assets necessary for the conduct of the Evamist Business;

(iii) sold, licensed or sublicensed or otherwise transferred any rights to any third party under any Purchased Assets;

(iv) entered into any Assumed Contract or accelerated, cancelled, modified or terminated any material Assumed Contract, other than in the Ordinary Course of Business;

(v) surrendered, revoked or otherwise terminated any Evamist Governmental Permits, except in connection with any renewal or reissuance thereof;

(vi) incurred Assumed Liabilities, other than in the Ordinary Course of Business;

(vii) waived, released or assigned any rights, which rights, but for such waiver, release or assignment, would have been classified as Purchased Assets, other than in the Ordinary Course of Business;

(viii) experienced any damage, destruction or casualty loss (whether or not covered by insurance) with respect to any Purchased Asset other than as a result of ordinary wear and tear, where applicable;

(ix) delayed or postponed the payment of any Assumed Liability outside the Ordinary Course of Business;

(x) with respect to the Purchased Assets or the Evamist Business, made any election or change to any election in respect to Taxes, adopted or changed any accounting method in respect to Taxes, entered into any Tax allocation agreement, Tax sharing agreement, Tax indemnity agreement or closing agreement, settled or compromised on any claim, notice, audit report or assessment in respect of Taxes, consented to any extension or waiver of the limitation period applicable to any claim or assessment in respect of Taxes, changed any annual Tax accounting period, filed any amended Tax Return, or surrendered any right to claim a Tax refund; or

(xi) agreed, whether in writing or otherwise, to do any of the foregoing, except as expressly contemplated by this Agreement.

Section 6.14 Title to Assets; Sufficiency of Assets .

(a) The Seller has, and at the Closing the Seller will deliver to Acquiror, good and valid title to or, in the case of licensed assets, a valid and binding license to the Purchased Assets free and clear of all Encumbrances, a valid and binding license under the Seller Multi-Application Technology pursuant to Section 2.5 and, as applicable, a valid and binding sublicense under the Licensed Intellectual Property (as defined in the Acrux License) pursuant to the Sublicense Agreement. Except as set forth on Schedule 6.14(a) of the Seller Disclosure Schedule, no Subsidiary of the Seller owns, beneficially or of record, or has any rights, title or interest in, to or under any Purchased Asset or conducts any part of the Evamist Business, and there are no employees of any Subsidiary of the Seller employed in the Evamist Business or who perform tasks that are necessary for the proper operation of the Evamist Business.

(b) The Purchased Assets (together with the rights of the Acquiror and its Affiliates under the Related Agreements), the rights granted pursuant to Section 2.5 and, as applicable, pursuant to the Sublicense Agreement constitute all of the assets, Contracts, Required Permits, rights and services required for the continued operation of the Evamist Business by the Acquiror as conducted by the Seller during the past twelve (12) months.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

(c) Each item of equipment which is a Purchased Asset (other than equipment set forth on Schedule 6.14(c) of the Seller Disclosure Schedule) is in good operating condition for the purposes for which it is currently being used, subject to ordinary wear and tear, is free from any material defect and has been maintained in all material respects in accordance with generally accepted industry practice.

(d) The Seller has not experienced any out-of-stock or back-order situation with respect to the Evamist Business

(e) The Seller does not own or control any Evamist Product Improvements, and has not granted to any third party or enabled any third party to make any Evamist Product Improvements.

Section 6.15 Disclosure . The Seller has made available to Acquiror all information to the Knowledge of the Seller concerning the safety, efficacy, side effects or toxicity of Evamist (in animals or humans), associated with or derived from any pre-clinical or clinical use, studies, investigations or tests of Evamist (in animals or humans) in all indications for Evamist that has been submitted to the FDA or studied by the Seller, whether or not determined to be attributed to Evamist.

Section 6.16 Taxes.

(a) Filing of Tax Returns . To the extent relating to the Purchased Assets or the Evamist Business, (i) the Seller has duly and timely filed (or caused to be filed) with the appropriate taxing authorities all Tax Returns required to be filed through the date hereof, (ii) all such Tax Returns filed are complete and accurate in all respects and (iii) all Taxes owed by the Seller (whether or not shown on any Tax Return) have been paid. The Seller is not currently the beneficiary of any extension of time within which to file any Tax Return with respect to the Purchased Assets or the Evamist Business.

(b) Liens . There are no liens for Taxes (other than for current Taxes not yet due and payable) on any of the Purchased Assets. None of the Purchased Assets are property that is required to be treated for Tax purposes as being owned by any other Person.

(c) Audits, Investigations, Disputes or Claims . No deficiencies for Taxes have been claimed, proposed or assessed by any taxing or other Governmental Authority against the Seller with respect to the Purchased Assets or the Evamist Business, and there are no pending or, to the Knowledge of the Seller, threatened audits, investigations, disputes or claims or other actions for or

relating to any Liability for Taxes with respect to the Purchased Assets or the Evamist Business, and there are no matters under discussion with any Governmental Authorities, or known to the Seller, with respect to Taxes that are likely to result in an additional Liability for Taxes with respect to the Purchased Assets or the Evamist Business. The Seller has delivered or made available to Acquiror complete and accurate copies of all examination reports and statements of deficiencies assessed against or agreed to by the Seller since December 31, 2004 with respect to the Purchased Assets or the Evamist Business. With respect to the Purchased Assets or the Evamist Business, the Seller has not waived any statute of limitations in respect of Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency.

(d) Tax Sharing Agreements . There are no Tax-sharing agreements or similar arrangements (including indemnity arrangements) with respect to or involving the Purchased Assets or the Evamist Business, and after the Closing Date, the Purchased Assets and the Evamist Business shall not be bound by any such Tax-sharing agreements or similar arrangements or have any Liability thereunder for amounts due in respect of periods prior to the Closing Date.

(e) No Withholding . The Seller has withheld and paid all Taxes concerning the Evamist Business required to have been withheld and paid in connection with amounts paid or owing to any employee, independent contractor, creditor, stockholder or other third party.

Section 6.17 Brokers . The Acquiror has no, and will have no, obligation to pay any brokers (including real estate brokers), finders, investment bankers, financial advisors or similar fees in connection with this Agreement or the transactions contemplated hereby by reason of any action taken by or on behalf of the Seller or any of its Subsidiaries.

ARTICLE VII.

REPRESENTATIONS AND WARRANTIES OF THE ACQUIROR

Except as set forth in the disclosure schedule supplied by the Acquiror to the Seller and dated as of the date hereof (the "***Acquiror Disclosure Schedule***"), which the Acquiror Disclosure Schedule identifies the Section (or, if applicable, subsection) to which such exception relates (*provided, however* , that such disclosure shall also apply to particular matters represented or warranted in other Sections and subsections to the extent that it is readily apparent from the text of such disclosure), the Acquiror represents and warrants to the Seller as follows:

Section 7.1 Corporate Organization . The Acquiror is duly incorporated, validly existing and, where applicable, in good standing under the laws of Delaware and has all

requisite power and authority to own its assets and carry the Evamist Business as contemplated by this Agreement and the Related Agreements and is duly authorized to conduct its business and is in good standing in each jurisdiction where such qualification is required to own the Purchase Assets or conduct the Evamist Business as contemplated by this Agreement and the Related Agreements, except where the failure to be so qualified or in good standing would not be reasonably expected to have an Acquiror Material Adverse Effect. The Charter Documents of the Acquiror are effective under the applicable Laws and are current, correct and complete.

Section 7.2 Authority of the Acquiror . The Acquiror has all necessary power and authority and has taken all actions necessary to enter into this Agreement, to carry out the transactions contemplated hereby and to conduct the Evamist Business as contemplated by this Agreement and the Related Agreements. The board of directors of the Acquiror has taken all action required by Law, its Charter Documents or otherwise to be taken by it to authorize the execution and delivery by the Acquiror of this Agreement and the Related Agreements to which the Acquiror is or will be a party and the consummation of the transactions contemplated hereby and thereby. This Agreement has been duly and validly executed and delivered by the Acquiror and, when executed and delivered by the Seller, will constitute a legal, valid and binding obligation of the Acquiror enforceable against it in accordance with its terms. When executed and delivered by the Acquiror, each Related Agreement to which the Acquiror is or will be a party will constitute a legal, valid and binding obligation of the Acquiror enforceable against it in accordance with its terms. Notwithstanding the matters set forth in this Section 7.2 , the enforceability of this Agreement and the Related Agreements may be limited by principles of public policy and the rules of law governing specific performance, injunctive relief or other equitable remedies.

Section 7.3 Non-Contravention . The execution and delivery by the Acquiror of this Agreement and each of the Related Agreements does not, and the performance by it of its obligations under this Agreement and each of the Related Agreements and the consummation of the transactions contemplated hereby and thereby will not:

(a) conflict with or result in a violation or breach of any of the terms, conditions or provisions of the Charter Documents of the Acquiror;

(b) assuming the receipt of all consents, waivers, approvals, Orders or authorizations of Governmental and Regulatory Authorities required to be obtained by the Acquiror and the making of all registrations, declarations or filings with Governmental and Regulatory Authorities required to be made by the Acquiror, conflict with or result in a violation or breach of any term or provision of any Law applicable to the Acquiror; or

(c) conflict with or result in a Default under any Contract to which the Acquiror is a party or by which the Acquiror or any of its assets is bound or to conduct the Evamist Business as contemplated by this Agreement and the Related Agreements.

Section 7.4 Litigation. There are no Actions or Proceedings pending, or to the Knowledge of the Acquiror, threatened, against or in connection with (i) this Agreement or any Related Agreement or (ii) the transactions contemplated by this Agreement. The Acquiror is not subject to any Order that could reasonably be expected to materially impair or delay the ability of the Acquiror to perform its obligations hereunder.

Section 7.5 Brokers. The Acquiror has no, and will have no, obligation to pay any brokers, finders, investment bankers, financial advisors or similar fees in connection with this Agreement or the transactions contemplated hereby by reason of any action taken by or on behalf of the Acquiror.

Section 7.6 Financing. The Acquiror has, or has available to it, sufficient financial resources so as to enable the Acquiror to satisfy its financial obligations under this Agreement without recourse to any outside financing other than such outside financing as the Acquiror has already secured access to as of the date of this Agreement.

ARTICLE VIII.

COVENANTS OF THE PARTIES

Section 8.1 Operation of the Evamist Business.

(a) Between the date of this Agreement and the Closing Date, except as expressly permitted by this Agreement, the Seller shall conduct the Evamist Business only in the Ordinary Course of Business in substantially the same manner as previously conducted (including with respect to research and development efforts, advertising, manufacturing, capital expenditures and inventory levels) and use commercially reasonable efforts to keep intact the Purchased Assets and the Evamist Business, and preserve the relationships of the Evamist Business with customers, suppliers, licensors, licensees, distributors, regulatory authorities and other Persons, in each case, who are material to the Evamist Business. Without limiting the generality of the foregoing, from the date of this Agreement to the Closing, the Seller shall:

(i) notify the Acquiror prior to implementing material operational decisions relating to the Evamist Business;

(ii) keep in full force and effect, without amendment, all material rights relating to the Evamist Business;

(iii) comply in all material respects with all requirements of Law and contractual obligations, in each case applicable to the operation of the Evamist Business;

(iv) maintain all Evamist Books and Records;

(v) maintain the Purchased Assets in good operating order and condition, reasonable wear and tear excepted; and

(vi) upon any damage, destruction or loss of any Purchased Asset, apply any and all insurance proceeds received with respect thereto to the prompt repair, replacement and restoration thereof to the condition of such Purchased Asset before such event or, if required, to such other (better) condition as may be required by applicable Law.

(b) Without limiting the generality of the lead-in paragraph of Section 8.1(a), and except as set forth in Schedule 8.1(b) or as otherwise expressly permitted by the terms of this Agreement, from the date of this Agreement to the Closing, without the prior written consent of the Acquiror (which shall not be unreasonably withheld), the Seller shall not:

(i) subject any Purchased Assets to any Encumbrances;

(ii) sell, transfer, lease, sublease, license or otherwise dispose of or grant any option or rights in, to or under any Purchased Assets;

(iii) enter into any Contract that would have been required to be set forth on Schedule 1.1(a)(2) if such Contract had existed as of the date hereof, or terminate, extend or amend any Assumed Contract set forth in Schedule 1.1(a)(1) ;

(iv) abandon or terminate any clinical trials relating to Evamist (other than for safety concerns or in accordance with the terms of existing agreements with respect to such clinical trials) or terminate the Seller's support of clinical trials sponsored by clinical investigators with respect to Evamist;

(v) commence, sponsor or commit to participate in any clinical trials or investigator sponsored trials with respect to Evamist or provide any clinical grants with respect to Evamist;

(vi) abandon any patents or patent filings or any litigation seeking to enforce the Seller's interest in any Evamist Intellectual Property used in the conduct of the Evamist Business;

(vii) take any action that would, or that could reasonably be expected to, result in any of the conditions to the purchase and sale of the Purchased Assets set forth in Article IX not being satisfied;

(viii) to the extent that doing so would adversely affect the Purchased Assets or the Evamist Business, make any election or change to any election in respect to Taxes, adopt or change any accounting method in respect to Taxes, enter into any Tax allocation agreement, Tax sharing agreement, Tax indemnity agreement or closing agreement, settle or compromise on any claim, notice, audit report or assessment in respect of Taxes, consent to any extension or waiver of the limitation period applicable to any claim or assessment in respect of Taxes, change any annual Tax accounting period, file any amended Tax Return, or surrender any right to claim a Tax refund; or

(ix) agree, whether in writing or otherwise, to do any of the foregoing set forth in clauses (i) through (viii) above.

(c) The Seller shall promptly advise Acquiror in writing of the occurrence of any matter or event that is material to the business, assets, condition (financial or otherwise), prospects or results of the operations of the Evamist Business.

Section 8.2 Reasonable Efforts .

(a) Subject to Sections 8.2(b) , and following the date hereof, each of the parties hereto shall use its commercially reasonable efforts to take, or cause to be taken, all action, or to do, or cause to be done, all things necessary, proper or advisable under applicable Laws to consummate and make effective the transactions contemplated by this Agreement and the Related Agreements and to cause the conditions to the obligations of the other party hereto to consummate the transactions contemplated hereby to be satisfied at the Closing, including obtaining all consents and approvals of all Persons and Governmental or Regulatory Authorities and removing any injunctions or other Encumbrances on the Purchased Assets, impairments or delays the obtaining or removal of which are necessary, proper or advisable to the consummation of the transactions contemplated by this Agreement and the Related Agreements. The parties hereto shall cooperate with each other in connection with the taking of all actions referenced in the preceding sentence, including providing (i) such reasonable

assistance as the other party may request in connection with its preparation of any required filings or submissions and (ii) copies of all such filings and submissions to the non-filing party and its advisors prior to filing or submission and, if requested, to accept all reasonable additions, deletions or changes suggested in connection therewith. The Seller and the Acquiror shall have the right to review in advance, and, to the extent practicable, each shall consult the other on, all the information relating to the Seller or the Acquiror, as the case may be, that appears in any filing made with, or written materials submitted to, any third party and/or any Governmental Entity in connection with the transactions contemplated by this Agreement (including any filing contemplated by this Section 8.2(a)). The Seller and the Acquiror may, as each deems reasonably advisable and necessary, designate any competitively sensitive information provided to the other under this section as "outside counsel only." Such information shall be given only to outside counsel of the recipient. In addition, the Seller and the Acquiror may redact any information from such documents shared with the other party or its counsel that is not pertinent to the subject matter of the filing or submission.

(b) The Acquiror and the Seller shall each: (i) take all actions necessary to make the filing required of such party or any of its Affiliates under the HSR Act within ten (10) Business Days after the date hereof; (ii) comply at the earliest practicable date with any request for additional information or documentary material received by such party or any of its Affiliates from the Federal Trade Commission or the Antitrust Division of the Department of Justice pursuant to the HSR Act; and (iii) cooperate with the other party in connection with any filing under the HSR Act and in connection with resolving any investigation or other inquiry concerning the transactions contemplated under this Agreement commenced by either the Federal Trade Commission or the Antitrust Division of the Department of Justice or state attorneys general. Each of the Seller, on one hand, and the Acquiror, on the other hand, shall be responsible for its own legal fees for preparing its portion of the HSR Act filings. For the avoidance of doubt, the Acquiror and Seller shall share equally any required filing fees under the HSR Act.

(c) In furtherance and not in limitation of the other covenants of the parties contained herein, each party shall use commercially reasonable efforts to resolve such objections, if any, as may be asserted with respect to the consummation of the transactions contemplated hereby under any antitrust Law. If any administrative, judicial or legislative Action or Proceeding is instituted (or threatened to be instituted) challenging the sale and purchase of any of the Purchased Assets or any other transaction as violative of any antitrust Law, each party shall cooperate and use commercially reasonable efforts to vigorously

contest and resist any such Action or Proceeding, and to have vacated, lifted, reversed or overturned any decree, judgment, injunction or other Order that is in effect and that restricts, prevents or prohibits consummation of the sale and purchase of the Purchased Assets or any other transaction contemplated under this Agreement; *provided , however* , that nothing in this Agreement shall require the Acquiror or its Subsidiaries to commit to any divestitures, licenses or hold separate or similar arrangements with respect to its assets or conduct of business arrangements, whether as a condition to obtaining any approval from a Governmental and Regulatory Authority or any other Person for any other reason.

(d) Each party shall promptly inform the other parties of any material communication received by such party from the Federal Trade Commission or the Antitrust Division of the Department of Justice regarding any of the transactions contemplated under this Agreement. Each party shall advise the other party promptly of any understandings, undertakings or agreements that such party proposes to make or enter into with the Federal Trade Commission or the Antitrust Division of the Department of Justice in connection with the transactions contemplated under this Agreement.

(e) The Seller shall (i) permit the Acquiror and its Subsidiaries to correspond and meet with the FDA to discuss the acquisition by the Acquiror of all Evamist Product Registrations and the transfer of manufacturing and distribution of Evamist to the Acquiror, (ii) include the Acquiror in any discussions with the FDA regarding any Evamist Product Registration, (iii) if reasonably requested by the Acquiror, upon reasonable notice, attend meetings or conference calls involving the Acquiror or one of its Subsidiaries and the FDA related to any of the foregoing and (iv) cooperate with Acquiror by submitting a transfer letter to the FDA, in a form to be mutually agreed upon by the parties prior to the Closing (the " **FDA Transfer Letter** "), to have the FDA transfer all Evamist Product Registrations to one of Acquiror's Subsidiaries or to Acquiror at such time as requested by the Acquiror in accordance with Section 8.5 .

(f) Notwithstanding anything in this Agreement to the contrary, the Acquiror shall not be required to expend money, commence any litigation or offer or grant any accommodation (financial or otherwise) to any third party in connection with obtaining any consent, substitution, approval or amendment required to assign or transfer any Purchased Asset to the Acquiror. In the event any such consent, substitution, approval or amendment is not obtained prior to the Closing, the Seller shall continue to use commercially reasonable efforts to obtain such consent, waiver or approval after the Closing.

(g) Without limiting any other rights and obligations under this Section 8.2 , following the date hereof, each of the parties hereto shall use its commercially reasonable efforts to obtain the Acrux License Assignment Consent prior to the Closing. In the event that the Acrux License Assignment Consent is not obtained prior to the Closing, each of the parties hereto shall continue to use commercially reasonable efforts to obtain the Acrux License Assignment Consent after the Closing. In the event that the Acrux License Assignment Consent is obtained after the Closing, the parties hereto agree that the Sublicense Agreement shall terminate, and is hereby terminated, as of the effectiveness of the Acrux License Assignment Consent.

Section 8.3 Access; Confidentiality .

(a) From the date hereof until the Closing, the Seller shall permit the Acquiror and its representatives to have reasonable access, during regular business hours and upon reasonable advance notice of no less than one (1) Business Day , to all the personnel, properties, Contracts, Tax Returns, the Evamist Books and Records, the Assumed Liabilities or the Evamist Business, and the Seller shall furnish promptly to the Acquiror such information in the Seller's possession concerning the Purchased Assets, the Assumed Liabilities or the Evamist Business as the Acquiror may reasonably request; *provided , however* , that any such access shall be conducted in a manner as not to unreasonably interfere with the operation of the Evamist Business and the Seller shall not be required to provide any financial, operating or other information that is not currently available through the Seller's existing business processes and the creation of which would be unduly burdensome on the Seller. The Seller may redact such portions of its books and records that do not relate to the Purchased Assets, the Assumed Liabilities or the Evamist Business. The Seller shall instruct its respective employees, counsel and financial advisors to provide reasonable cooperation to the Acquiror in its investigation of the Evamist Business.

(b) The Seller shall implement procedures to keep confidential, and cause its Affiliates and its and their officers, directors, employees, representatives and advisors to keep confidential, all information relating to the Purchased Assets, Assumed Liabilities and Evamist Business, except as required by Law and except for information which is or becomes generally available to the public other than as a result of a disclosure by the Seller or its Affiliates and its and their officers, directors, employees, representatives or agents. The Seller shall not disseminate any such information other than to those employees of the Seller who have a business need to access such information (i) in connection with the preparation of the Seller's accounting records, (ii) in connection with the preparation of any Tax

Returns or with any Tax audits, (iii) in connection with any suit, claim, action, proceeding or investigation relating to the Purchased Assets, the Assumed Liabilities or the Evamist Business or (iv) in connection with the operation of the Evamist Business in the Ordinary Course of Business prior to the Closing. Effective upon Closing, upon written request of the Acquiror, from time to time, the Seller shall (at the Acquiror's sole cost and expense) use reasonable efforts to enforce the Seller's rights with respect to the use and maintenance of confidential information relating to the Evamist Business under all confidentiality agreements between the Seller and any other potential acquiror of the Evamist Business that were entered into in contemplation of the sale of the Evamist Business. The Seller shall not waive or release its rights under such confidentiality agreements with respect to the use and maintenance of such confidential information with respect to the Evamist Business.

(c) Information within the Purchased Assets disclosed to the Acquiror pursuant to this Agreement (including in the Seller Disclosure Schedule and the other Schedules delivered pursuant to this Agreement) shall be held as Confidential Information (as defined in the Confidentiality Agreement) and shall be subject to the Confidentiality Agreement to the extent such information is Confidential Information as of the date hereof.

(d) The parties hereto, or any of their respective Affiliates or any of their respective officers or directors, shall cooperate as may be reasonably required in connection with the investigation and defense of any suit, action, claim, proceeding or investigation, in each case that is adverse to a third party, relating to the Purchased Assets, the Assumed Liabilities or the Evamist Business; *provided , however* , that the requesting party shall reimburse the non-requesting party promptly for all reasonable out-of-pocket costs and expenses incurred in connection with any such requests, including reasonable legal fees and costs.

(e) Following the Closing, for so long as such information is retained by the Seller (which shall be for a period of at least three (3) years), the Seller shall permit the Acquiror and its authorized representatives to have reasonable access and duplicating rights during normal business hours, upon reasonable prior notice, to the Seller and its books, records and personnel to the extent relating to the Purchased Assets, the Assumed Liabilities or the Evamist Business, to the extent such access may reasonably be required: (i) in connection with the preparation of the Acquiror's accounting records or with any audits thereof, (ii) in connection with any suit, claim, action, proceeding or investigation relating to the Purchased Assets, the Assumed Liabilities or the Evamist Business (other than such a suit, claim, action, proceeding or investigation that is adverse to the Seller)

or (iii) in connection with any required regulatory filing relating to the Purchased Assets, the Assumed Liabilities or the Evamist Business; *provided* that the Acquiror shall reimburse the Seller promptly for all reasonable and necessary out-of-pocket costs and expenses incurred by the Seller in connection with any such request. Notwithstanding the foregoing, the Seller need not disclose to the Acquiror any information: (i) relating to pricing or other matters that are highly sensitive if (I) providing such portions of documents or information, in the good faith opinion of the Seller's counsel, would reasonably be expected to result in antitrust difficulties for the Seller and (II) the Seller designates such information as "outside counsel and retained experts only" and discloses such information to Acquiror's outside counsel and retained experts; or (ii) which the Seller is prohibited from disclosing by applicable Law. If any material is withheld by the Seller pursuant to the immediately preceding sentence, the Seller shall inform the Acquiror as to the general nature of what is being withheld. The Seller may redact such portions of such books and records that do not relate to the Purchased Assets, the Assumed Liabilities or the Evamist Business.

(f) Following the Closing, for so long as such information is retained by Acquiror (which shall be for a period of at least three (3) years), the Acquiror shall permit the Seller and its authorized representatives to have reasonable access and duplicating rights during normal business hours, upon reasonable prior notice, to the Acquiror and the Books and Records included in the Purchased Assets and the employees of the Acquiror or its Subsidiaries, to the extent that such access may reasonably be required: (i) in connection with the preparation of the Seller's accounting records or with any audits thereof, (ii) in connection with any suit, claim, action, proceeding or investigation relating to the Purchased Assets, the Assumed Liabilities or the Evamist Business (other than such a suit, claim, action, proceeding or investigation that is adverse to the Acquiror) or (iii) in connection with any required regulatory filing relating to the Purchased Assets, the Assumed Liabilities or the Evamist Business; provided that the Seller shall reimburse the Acquiror promptly for all reasonable and necessary out-of-pocket costs and expenses incurred by the Acquiror in connection with any such request, including reasonable attorney fees and costs. Notwithstanding the foregoing, the Acquiror need not disclose to the Seller any information: (A) relating to pricing or other matters that are highly sensitive if (I) providing such portions of documents or information, in the opinion of the Acquiror's counsel, might reasonably result in antitrust difficulties for the Acquiror and (II) the Acquiror designates such information as "outside counsel and retained experts only" and discloses such information to the Seller's outside counsel and retained experts or (B) which the Acquiror is prohibited from disclosing by applicable Law. If any material is withheld by the Acquiror pursuant to the immediately preceding sentence, the

Acquiror shall inform the Seller as to the general nature of what is being withheld. The Acquiror may redact such portions of such Books and Records that do not relate to the Purchased Assets, the Assumed Liabilities or the Evamist Business.

Section 8.4 Public Announcements; Confidentiality . Except as otherwise required by applicable Law or applicable stock exchange requirements, prior to the Closing, neither the Acquiror nor the Seller shall, and each of them shall cause their respective Affiliates, representatives and agents not to, issue or cause the publication of any press release or public announcement with respect to the transactions contemplated by this Agreement without the express prior written approval of the other party, which approval shall not be unreasonably withheld or delayed; *provided* , that each of the Seller and the Acquiror may make any public statement in response to questions by the press, analysts, investors or those attending industry conferences or financial analyst calls, or issue press releases, so long as any such public statement or press release is not inconsistent with prior public disclosures, press releases or public statements approved by the other party pursuant to this Section 8.4 and which do not reveal non-public information about the other party. The parties hereto agree to issue separate individual press releases, each in a form approved by the other party, to announce the execution of this Agreement and the payment of the FDA Milestone Payment pursuant to Section 4.2(a) .

Section 8.5 Regulatory Matters .

(a) Prosecution of Evamist NDA . Until the Evamist NDA Approval Date, the Seller shall control the prosecution of the Evamist NDA before the FDA, subject to the terms and conditions of this Section 8.5 . Unless and until the Evamist FDA Submissions are assigned to the Acquiror pursuant to Section 8.5(b) , the Seller shall use efforts (consistent with the past practices of the Seller with respect to the Evamist NDA and other NDAs of the Seller), at its expense, to obtain Evamist NDA Approval as soon as practicable. In connection therewith, the Seller shall continue to be the party of record with respect to the Evamist NDA and, following the Closing, shall keep the Acquiror fully informed with respect to the prosecution of the Evamist NDA and (i) promptly provide to the Acquiror or its designee any correspondence from the FDA with respect thereto and (ii) no later than ten (10) Business Days prior to the submission thereof provide to the Acquiror or its designee any proposed correspondence to the FDA with respect thereto, including copies of any and all underlying data to accompany any such correspondence. Following the Closing, the Seller shall consider in good faith any comments of the Acquiror or its designee with respect to such correspondence and include any reasonable comments proposed by the Acquiror. Following the Closing, the Seller shall also notify the Acquiror of any meetings with the FDA with respect to the Evamist NDA, and the Acquiror or its designee shall have the right to participate in such meetings and any internal pre-

meetings with respect thereto. The Acquiror agrees and acknowledges that, following the Closing until the Evamist NDA Approval Date, the Seller shall have the right to use any and all Purchased Assets solely and to the extent necessary for carrying out the Seller's right hereunder to prosecute the Evamist NDA and obtain the Evamist NDA Approval. Without limiting any other obligation of the Acquiror under this Agreement, the Acquiror shall cooperate with the Seller in the Seller's efforts to obtain Evamist NDA Approval, including providing to the Seller all relevant data, information and material reasonably requested by the Seller which the Seller shall not disclose to any third Person or use except solely and to the extent necessary for prosecuting the Evamist NDA and obtaining the Evamist NDA Approval.

(b) Optional Assignment of Evamist FDA Submissions Prior to Evamist NDA Approval. In the event that the Seller fails to use efforts (consistent with the past practices of the Seller with respect to the Evamist NDA and other NDAs of the Seller), to obtain Evamist NDA Approval as soon as practicable, and the Acquiror provides at least ten (10) Business Days' prior written notice thereof to the Seller, the Seller shall promptly assign to the Acquiror the Evamist FDA Submissions and all related files, which assignment shall be effected by the Seller submitting the FDA Transfer Letter to the FDA. The Seller shall cooperate with Acquiror in obtaining the assignment and shall take all actions reasonably requested by Acquiror necessary, proper or advisable to effectuate the assignment. Thereafter, the Acquiror shall (i) be the party of record with respect to the Evamist NDA and (ii) use efforts (consistent with the past practices of the Acquiror with respect to other NDAs of the Acquiror), at its expense, to obtain Evamist NDA Approval as soon as practicable and (iii) provide to the Seller or the third party purchaser of the Data Package, as applicable, such information as is necessary for implementing Section 2.8. In connection therewith, the Seller shall reasonably cooperate with the Acquiror in accordance with the Transition Services Agreement and the Acquiror shall keep the Seller reasonably informed with respect to the prosecution of the Evamist NDA and consider in good faith the Seller's comments with respect thereto and include any reasonable comments proposed by the Seller. Without limiting any other obligation of the Seller under this Agreement, the Seller shall cooperate with the Acquiror in the Acquiror's efforts to obtain Evamist NDA Approval, including providing to the Acquiror all relevant data, information and material reasonably requested by the Acquiror which the Acquiror shall not disclose to any third Person or use except solely and to the extent necessary for prosecuting the Evamist NDA and obtaining the Evamist NDA Approval. The Seller agrees and acknowledges that, following the Closing, the Acquiror shall have reasonable access to and the right to use any and all materials of Seller, whether or not such

materials are Purchased Assets, solely and to the extent necessary for carrying out the Acquiror's right hereunder to prosecute the Evamist NDA and obtain the Evamist NDA Approval in accordance with this Section 8.5 .

(c) Assignment of Evamist FDA Submissions upon Evamist NDA Approval . Unless previously assigned to the Acquiror pursuant to Section 8.5(b) , the Seller shall transfer and assign, within five (5) Business Days of the NDA Approval Date, to the Acquiror (A) the Evamist FDA Submissions (including all associated rights) together with (B) all files related thereto. Thereafter, the Acquiror shall have all rights and responsibilities with respect to such Evamist FDA Submissions. The foregoing transfer and assignment shall be effected by the Seller submitting the FDA Transfer Letter to the FDA.

(d) FDA Contacts . From and after the transfer by the Seller to the Acquiror of each Evamist Product Registration held by the Seller or any of its Subsidiaries pursuant to the terms hereof, except as required by applicable Law, the Acquiror shall be solely responsible and liable for (i) taking all actions, paying all fees and conducting all communication with the appropriate Governmental or Regulatory Authority required by Law in respect of such Evamist Product Registration, including preparing and filing all reports (including adverse drug experience reports) and responding to and answering all questions and complaints requested by the appropriate Governmental or Regulatory Authority, (ii) taking all actions and conducting all communication with third parties in respect of Evamist manufactured, tested, used or distributed pursuant to such Evamist Product Registration (whether manufactured, tested, used or distributed before or after transfer of such Evamist Product Registration), including responding to all complaints in respect thereof, including complaints related to tampering or contamination, and (iii) investigating all complaints and adverse drug experiences in respect of Evamist manufactured, tested, used or distributed pursuant to such Evamist Product Registration (whether manufactured, tested, used or distributed before or after transfer of such Evamist Product Registration, as set forth in Section 8.5(e) below). It is understood and agreed that Seller shall be responsible for all foregoing obligations listed in this Section 8.5(d) prior to the transfer of the Evamist Product Registrations and shall use commercially reasonable efforts to timely and appropriately fulfill such obligations.

(e) Adverse Experience Reports . From and after the transfer of the Evamist FDA Submissions, the Acquiror shall be responsible for the investigation, analysis and reporting to the FDA of any adverse experience report or complaint in connection with the Product received by either the Acquiror or the Seller from and after the Closing from any source (including any patient, health

care professional or other customer of the Evamist Business), regardless of whether the Product involved in any such adverse experience report or complaint was manufactured, tested, used or distributed by the Seller or Acquiror. Any adverse experience report or complaint received by the Seller relating to the Product after the Closing shall be reported by the Seller to Acquiror, within a sufficient time period to allow the Acquiror to comply with its obligations to the FDA, after receipt of such adverse experience report or complaint by the Seller. The Seller shall cooperate with the Acquiror in connection with the investigation and analysis of all adverse experience reports or complaints that relate to the period before the date of the assignment of the Evamist FDA Submissions. It is understood and agreed that the Seller shall be responsible for all foregoing obligations listed in this Section 8.5(e) prior to the transfer of the Evamist FDA Submissions and shall use commercially reasonable efforts to timely and appropriately fulfill such obligations.

Section 8.6 Bulk Transfer Laws. The Acquiror hereby waives compliance by the Seller and its Subsidiaries with the provisions of any so-called "bulk transfer law" of any jurisdiction in connection with the sale of the Purchased Assets to the Acquiror.

Section 8.7 Covenant Not to Compete.

(a) The Seller understands that Acquiror shall be entitled to protect and preserve the going concern value of the Evamist Business following the Closing to the extent permitted by Law and that the Acquiror would not have entered into this Agreement absent the provisions of this Section 8.7 and, therefore, for the period from the date hereof until [***] ([***]) [***] following the First Commercial Sale by or under authority of the Acquiror of Evamist in the Evamist Territory (the "***Applicable Period***"), the Seller and its Subsidiaries shall not, directly or indirectly, market, promote, sell or import any Competing Products for use in the Evamist Territory. As used herein, "***Competing Product***" means any product that is [***] and is marketed, promoted, or sold (i) for the [***], or any other [***] delivered by such product, or (ii) for the [***] of any [***] delivered by such product, in each case to [***], excluding from the foregoing products of the Seller or its Subsidiaries involving application of an [***], provided that such direct [***] that would be effective for treating [***]. For clarity, [***] is not a Competing Product. The Seller and its Subsidiaries shall not provide funding during the Applicable Period to third parties for the specific purpose of, or grant a license or other authorization to any third party for, marketing, selling, promoting or importing any Competing Product for use in the Evamist Territory.

(b) If a court determines that the foregoing restrictions are too broad or otherwise unreasonable under applicable Law, including with respect to time or space, the court is hereby requested and authorized by the parties to revise the foregoing restriction to include the maximum restrictions allowable under applicable Law. Each of the parties acknowledges, however, that this Section 8.7 has been negotiated by the parties and that the Evamist Territory and the Applicable Period are reasonable in light of the circumstances pertaining to the parties.

(c) Notwithstanding any other provision of this Agreement, it is understood and agreed that the remedy of indemnity payments pursuant to Article XI and other remedies at law would be inadequate in the case of any breach of the covenants contained in Section 8.7 , and, accordingly, the Acquiror shall be entitled to equitable relief, including the remedy of specific performance, with respect to any breach or attempted breach of such covenants.

(d) For the avoidance of doubt, if any Person acquires Control of the Seller, whether by stock purchase, merger or other transaction, no provision of this Section 8.7 shall apply to such acquiror or its Affiliates so long as no assets of the Seller are used to further the marketing, sale or promotion of a Competing Product by such acquiror, or any of its Affiliates.

Section 8.8 Further Assurances .

(a) On and after the Closing Date, the Seller shall from time to time, at the reasonable request of the Acquiror, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, such further conveyances, notices and assumptions and such other instruments, and take such other actions as the Acquiror may reasonably request, in order to more effectively consummate the transactions contemplated hereby and to transfer fully to the Acquiror good and marketable title to the Purchased Assets and all of the titles, rights, interests, remedies, powers and privileges intended to be conveyed under this Agreement and the Related Agreements (including assistance in the collection or reduction to possession of any of the Purchased Assets).

(b) On and after the Closing Date, the Acquiror shall from time to time, at the reasonable request of the Seller, take such actions as the Seller may reasonably request, in order to more effectively consummate the transactions contemplated hereby, including the Acquiror's assumption of the Assumed Liabilities and to conduct the Evamist Business as contemplated by this Agreement and the Related Agreements.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Section 8.9 Cooperation Regarding Financial Statements; Taxes, Etc . In the event that the Acquiror is required to include any audited financial statements with respect to the Evamist Business in any filing to be made by the Acquiror under the Securities Act of 1933, as amended, or the Securities Exchange Act of 1934, as amended, with respect to or as a result of the transactions contemplated by this Agreement, the Seller shall, at the Acquiror's sole cost and expense, (i) use commercially reasonable efforts to provide the Acquiror with the financial statements and other information and documents pertaining to the Evamist Business that the Acquiror will be required by applicable rules and regulations of the Securities and Exchange Commission to include in its filings and (ii) use commercially reasonable efforts to cause the accountants for the Seller to promptly deliver such information and provide access to files and work papers in connection therewith as the Acquiror may reasonably request. For the avoidance of doubt, the Acquiror acknowledges that the Seller has not prepared any separate financial statements specific to the Evamist Business and is not obligated by any provision of this Agreement to prepare or deliver any such separate financial statements specific to the Evamist Business.

Section 8.10 No Solicitation .

(a) From the date of this Agreement to the earliest to occur of (i) the Closing, (ii) the termination of this Agreement or (iii) 11:59 p.m. (EST) on the sixtieth (60th) day following the date of this Agreement (the " ***No-Shop Period*** "), the Seller shall not, and shall cause its Subsidiaries and its and its Subsidiaries' officers, directors, advisors and representatives not to, directly or indirectly, (I) solicit, initiate or encourage any Other Bid (as defined below), (II) enter into any agreement with respect to any Other Bid or (III) participate in any discussions or negotiations regarding, or furnish to any person any information with respect to, or take any other action to facilitate any inquiries or the making of any proposal that constitutes, or may reasonably be expected to lead to, any Other Bid. In the event that the Seller (or any of its Subsidiaries) receives any Other Bid, the Seller shall promptly advise the Acquiror of such proposal. As used in this Section 8.10 , " ***Other Bid*** " means any proposal for a sale, spin-off or other disposition or similar transaction involving the Evamist Business or any of the Purchased Assets, other than the transactions contemplated by this Agreement.

(b) Notwithstanding the foregoing or anything in this Agreement to the contrary, if the Seller receives an unsolicited Superior Bid after the expiration of the No Shop Period under circumstances that do not arise out of a breach of the terms of Section 8.10(a) , and such Superior Bid has not been withdrawn, nothing in this Agreement shall prevent the board of directors of the Seller or any committee thereof from participating in any discussions or negotiations regarding or furnishing to any person any information with respect to such Superior Bid

pursuant to a confidentiality agreement which contains terms that are no less restrictive than those contained in the Confidentiality Agreement; provided that all such information had been or is provided on prior or concurrent basis to Acquiror.

(c) The Seller shall promptly (and in any event within forty-eight (48) hours) notify Acquiror of any Other Bid, any material modifications thereto or any request for non-public information relating to the Evamist Business or for access to the properties, books or records of the Seller by any third party that has made an Other Bid. The Seller shall provide notice orally and in writing and shall identify the third party making and the material terms and conditions of, any such Other Bid. The Seller shall keep Acquiror informed on a reasonably current basis of the status and details (including any material changes to the Other Bid) of any such Other Bid or request and shall provide the Acquiror with the written materials related to the Other Bid.

Section 8.11 Insurance . In the event that prior to the Closing Date any Purchased Asset suffers any damage, destruction or other loss as a result of a casualty event, the Seller shall, after the Closing Date, (i) promptly pay to the Acquiror all insurance proceeds received by the Seller with respect to such damage, destruction or other loss, less any proceeds applied to the physical restoration of such asset, and (ii) assign to the Acquiror all rights of the Seller against third parties (other than against its insurance carriers) with respect to any causes of action, whether or not litigation has commenced as of the Closing Date, in connection with such damage, destruction or other loss; *provided , however* , that the proceeds of such insurance shall be subject to (and recovery thereon shall be reduced by the amount of) any applicable deductibles and co-payment provisions or any payment or reimbursement obligations of the Seller in respect thereof; *provided , further* , that the Seller shall not be required to pay any insurance proceeds under any insurance policy which constitutes "self-insurance."

Section 8.12 Tax Matters .

(a) Books & Records; Cooperation . The Acquiror, on one hand, and the Seller, on the other hand, agree to furnish or cause to be furnished to the other, upon request, as promptly as practicable, such information and assistance relating to the Purchased Assets, including, without limitation, access to books and records, as is reasonably necessary for the filing of all Tax Returns by the Acquiror or the Seller, the making of any election relating to Taxes, the preparation for any audit by any taxing authority, and the prosecution or defense of any claim, suit or proceeding relating to any Taxes. Each of the Acquiror, on one hand, and the Seller, on the other hand, shall retain all books and records with respect to Taxes pertaining to the Purchased Assets, for a period of at least six (6)

years following the Closing Date. At the end of such period, each party shall provide the other with at least ten (10) days prior written notice before transferring, destroying or discarding any such books and records, during which period the party receiving such notice can elect to take possession, at its own expense, of such books and records. The Acquiror, on one hand, and the Seller, on the other hand, shall cooperate fully with the other in the conduct of any audit, litigation or other proceeding relating to Taxes involving the Purchased Assets. The Acquiror, on one hand, and the Seller, on the other hand, further agree, upon request, to use their commercially reasonable efforts to obtain any certificate or other document from any governmental authority or any other Person as may be necessary to mitigate, reduce or eliminate any Tax that could be imposed (including, but not limited to, with respect to the transactions contemplated hereby).

(b) Allocation of Taxes . Except as otherwise provided in Section 4.4 hereof relating to Transfer Taxes, the Seller shall be responsible for and shall promptly pay when due all Taxes levied with respect to the Purchased Assets attributable to the Pre-Closing Tax Period. All Taxes levied with respect to the Purchased Assets for any Straddle Period shall be apportioned between the Pre-Closing Tax Period and the Post-Closing Tax Period, as follows:

(i) in the case of any Taxes other than Taxes based upon or related to income or receipts, the portion allocable to the Pre-Closing Tax Period shall be deemed to be the amount of such Tax for the entire Straddle Period multiplied by a fraction the numerator of which is the number of days in the Tax period ending on the Closing Date and the denominator of which is the number of days in the entire Straddle Period, and

(ii) in the case of any Tax based upon or related to income or receipts, the portion allocable to the Pre-Closing Tax Period shall be deemed equal to the amount which would be payable if the relevant Straddle Period ended on the Closing Date.

Upon receipt of any bill for such Taxes relating to the Purchased Assets, the Acquiror, on one hand, and the Seller, on the other hand, shall present a statement to the other setting forth the amount of reimbursement to which each is entitled under this Section 8.12 together with such supporting evidence as is reasonably necessary to calculate the proration amount. The proration amount shall be paid by the party owing it to the other within ten (10) days after delivery of such statement. In the event that the Acquiror or the Seller shall make any payment for which it is entitled to reimbursement under this Section 8.12 , the applicable party shall make such reimbursement promptly but in no event later than ten (10) days after the presentation of a

statement setting forth the amount of reimbursement to which the presenting party is entitled along with such supporting evidence as is reasonably necessary to calculate the amount of reimbursement.

(c) Notices . The Seller shall promptly notify the Acquiror in writing upon its receipt of notice of any pending or threatened federal, state, local or foreign Tax audits or assessments relating to the income, properties or operations of Seller that reasonably may be expected to relate to the Purchased Assets.

(d) Withholding . At the Closing, the Seller shall deliver to Acquiror all necessary forms and certificates complying with applicable law, duly executed and acknowledged, certifying that the transactions contemplated hereby are exempt from withholding under Section 1445 of the Code.

(e) Characterization of Payments . Any payments made to any Indemnified Party pursuant to this Agreement shall constitute an adjustment of the consideration paid for the Purchased Assets for Tax purposes and shall be treated as such by the Acquiror and the Seller on their Tax Returns to the extent permitted by Law.

Section 8.13 Financial Resources . The Acquiror shall maintain financial resources consisting of cash, cash equivalents and/or available credit facilities sufficient to enable the Acquiror to satisfy its financial obligations under this Agreement as and when such financial obligations become due and payable pursuant to this Agreement.

ARTICLE IX.

CONDITIONS TO THE OBLIGATIONS OF THE SELLER FOR THE CLOSING

The obligation of the Seller to effect the Closing is subject to the satisfaction (or waiver by the Seller), at or before the Closing, of each of the following conditions:

Section 9.1 Representations, Warranties and Covenants . The representations and warranties of the Acquiror contained in Article VII of this Agreement (other than the representations and warranties of the Acquiror made with reference to a specified date (such as the date hereof), which shall be true and correct as of such date) that are qualified by materiality shall be true and correct in all respects and, to the extent not so qualified, shall be true and correct in all material respects, at and as of the Closing Date as if made at and as of such time. The Acquiror shall have performed in all material respects all agreements and covenants required by this Agreement or any Related Agreements to be performed by it prior to or on the Closing Date. The Seller shall have received a certificate as to satisfaction of the conditions set forth in

this Section 9.1 dated as of the Closing Date and executed by a duly authorized officer of the Acquiror.

Section 9.2 No Actions or Proceedings . No Orders prohibiting the transactions contemplated hereby shall have been instituted and not settled or otherwise terminated. No Law shall have been enacted, entered, promulgated or enforced by any Governmental or Regulatory Authority that is in effect and has the effect of making the purchase and sale of the Purchased Assets illegal or otherwise prohibiting the consummation of such purchase and sale. The waiting period (including any extensions thereof) applicable to the consummation of the transactions contemplated by this Agreement required pursuant to the HSR Act shall have expired or been terminated.

Section 9.3 No Material Adverse Effects . No Acquiror Material Adverse Effect shall have occurred and the be continuing.

Section 9.4 No Proceedings . There shall not be pending any Action or Proceeding seeking (i) to prohibit or restrain the transactions contemplated by this Agreement or (ii) seeking to impose or confirm limitations on the Acquiror or any of its Subsidiaries to effectively exercise full ownership of the Evamist Business or the Purchased Assets after the Closing and to conduct the Evamist Business as contemplated in the Agreement and the Related Agreements.

Section 9.5 Deliveries . The Acquiror shall have delivered or caused to be delivered to the Seller each of the documents, materials or funds as specified in Section 5.2(b) .

ARTICLE X.

CONDITIONS TO THE OBLIGATIONS OF THE ACQUIROR FOR THE CLOSING

The obligation of the Acquiror to effect the Closing is subject to the satisfaction (or waiver by the Acquiror), at or before the Closing, of each of the following conditions:

Section 10.1 Representations, Warranties and Covenants . The representations and warranties of the Seller contained in Article VI of this Agreement (other than the representations and warranties of the Seller made with reference to a specified date (such as the date hereof), which shall be true and correct as of such date) that are qualified by materiality shall be true and correct in all respects and, to the extent not so qualified, shall be true and correct in all material respects, at and as of the Closing Date as if made at and as of such time. The Seller shall have performed in all material respects all agreements and covenants required by this Agreement or any Related Agreement to be performed by it prior to or on the Closing Date. The Acquiror shall have received a certificate as to satisfaction of the conditions set forth in this Section 10.1 dated as of the Closing Date and executed by a duly authorized officer of the Seller.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Section 10.2 No Actions or Proceedings . No Orders prohibiting the transactions contemplated hereby shall have been instituted and not settled or otherwise terminated. No Law shall have been enacted, entered, promulgated or enforced by any Governmental or Regulatory Authority that is in effect and has the effect of making the purchase and sale of the Purchased Assets illegal or otherwise prohibiting the consummation of such purchase and sale. The waiting period (including any extensions thereof) applicable to the consummation of the transactions contemplated by this Agreement required pursuant to the HSR Act shall have expired or been terminated.

Section 10.3 Consents .

(a) All Seller Governmental Consents set forth on Schedule 6.3(a) of the Seller Disclosure Schedule shall have been obtained or made.

(b) The Acquiror shall have received all Seller Third Party Consents and all Required Permits necessary to effect the transactions contemplated by this Agreement and the Related Agreements (which shall include the consents and permits set forth on Schedules 6.3(b) and 6.8 of the Seller Disclosure Schedule, excluding the Evamist FDA Submissions).

Section 10.4 No Material Adverse Effects. No Seller Material Adverse Effect shall have occurred and be continuing.

Section 10.5 Deliveries. The Seller shall have delivered or caused to be delivered to the Acquiror each of the documents specified in Section 5.2(a) .

Section 10.6 Proceedings . There shall not be pending any action, litigation or proceeding by any Governmental or Regulatory Authority seeking to (i) prohibit or restrain the transactions contemplated by this Agreement or (ii) seeking to impose or confirm limitations on the ability of Acquiror or any of its Subsidiaries to effectively exercise full rights of ownership of the Evamist Business or the Purchased Assets after the Closing.

ARTICLE XI.

INDEMNIFICATION

Section 11.1 Survival of Representations, Warranties, Covenants, Etc . The representations and warranties of the parties contained in Articles VI and VII hereof and in the Related Agreements (if any) shall survive the Closing until the second anniversary of the Closing Date; *provided, however* , that the representations and warranties of the Seller in Sections 6.2 , 6.14(a) and 6.16 hereof shall survive the Closing until sixty (60) days following the expiration of the applicable statute of limitations (with extensions, if any) with respect to the matters

addressed in such sections. The period of time a representation or warranty survives the Closing pursuant to the preceding sentence shall be the "***Survival Period***" with respect to such representation or warranty. The covenants and agreements of the parties hereto contained herein shall survive in accordance with their respective terms. So long as an Indemnified Party gives an Indemnification Claim Notice for such claim on or before the expiration of the applicable Survival Period, such Indemnified Party shall be entitled to pursue its rights to indemnification under Sections 11.2(a) or (b) hereof, as applicable. In the event notice of any claim for indemnification under Section 11.2(a) or (b) hereof shall have been given within the applicable Survival Period and such claim has not been finally resolved by the expiration of such Survival Period, the representations and warranties that are the subject of such claim shall survive the end of the Survival Period of such representations or warranties until such claim is finally resolved, but such representations and warranties shall only survive with respect to such asserted claim.

Section 11.2 Indemnification.

(a) By the Seller. Subject to Sections 11.1 and 11.3, from and after the Closing, the Seller shall indemnify, reimburse, defend and hold harmless the Acquiror, its Affiliates and their respective officers, directors, employees, agents, successors and assigns from and against any and all costs, losses, Liabilities, damages, including fines, penalties, interest, judgments, lawsuits, deficiencies, claims, expenses (including reasonable fees and disbursements of attorneys and other professionals, including third party consultants) (collectively, "***Damages***") incurred in connection with, arising out of, resulting from or incident to (i) any breach of, or inaccuracy in, any representation or warranty of the Seller set forth in this Agreement, any Related Agreement or any certificate of the Seller delivered to Acquiror at the Closing, without giving effect to any "materiality" or "Seller Material Adverse Effect" or Knowledge qualifier therein, (ii) the failure to perform any covenant or agreement of the Seller set forth in this Agreement or in any of the Related Agreements, (iii) any Excluded Asset, (iv) any Excluded Liability and (v) the Seller's breach of the terms and conditions of the Acrux License, whether or not such breach is based on facts or circumstances in existence as of the date hereof.

(b) By the Acquiror. Subject to Sections 11.1 and 11.3, from and after the Closing, the Acquiror shall indemnify, defend and hold harmless the Seller, its Affiliates and their respective officers, directors, employees, agents, successors and assigns from and against any and all Damages incurred in connection with, arising out of, resulting from or incident to (i) any breach of any representation or warranty of the Acquiror set forth in this Agreement, any Related Agreement or any certificate of the Acquiror delivered to the Seller at Closing, without giving effect to any "materiality" or "Acquiror Material Adverse Effect" or Knowledge

qualifier therein, (ii) the failure to perform any covenant or agreement of the Acquiror set forth in this Agreement or in any of the Related Agreements, or (iii) any Assumed Liabilities.

(c) Procedure for Claims . The Indemnified Party shall give the indemnifying party prompt written notice (an " ***Indemnification Claim Notice*** ") of any Damages or discovery of fact upon which such Indemnified Party intends to base a request for indemnification under Section 11.2(a) or Section 11.2(b) . Failure to give any such Indemnification Claim Notice shall not constitute a waiver of any right to indemnification or reduce in any way the indemnification available hereunder, except to the extent the indemnifying party demonstrates that such failure to notify directly increases the amount to be indemnified hereunder. Each Indemnification Claim Notice must contain a description of the claim and the nature and amount of such Damages (to the extent that the nature and amount of such Damages are known at such time). The Indemnified Party shall furnish promptly to the indemnifying party copies of all papers and official documents received in respect of any Damages. All indemnification claims in respect of a party, its Affiliates or their respective directors, officers, employees and agents (collectively, the " ***Indemnitees*** " and each an " ***Indemnitee*** ") shall be made solely by such party to this Agreement (the " ***Indemnified Party*** ").

(d) Third Party Claims . The obligations of an indemnifying party under this Section 11.2(d) with respect to Damages arising from claims of any third party that are subject to indemnification as provided for in Section 11.2(a) or Section 11.2(b) (a " ***Third Party Claim*** ") shall be governed by and be contingent upon the following additional terms and conditions:

(i) At its option, the indemnifying party may assume the defense of any Third Party Claim by giving written Notice to the Indemnified Party within ten (10) days after the indemnifying party's receipt of an Indemnification Claim Notice. The assumption of the defense of a Third Party Claim by the indemnifying party shall be construed as an acknowledgment that the indemnifying party is liable to indemnify any Indemnitee in respect of the Third Party Claim. Upon assuming the defense of a Third Party Claim, the indemnifying party may appoint as lead counsel in the defense of the Third Party Claim any legal counsel selected by the indemnifying party; *provided , however* , that such counsel is reasonably acceptable to the Indemnified Party, *provided , further* , that in the event that (i) a conflict of interest arises between the indemnifying party and the Indemnified Party such that such legal counsel cannot represent both the indemnifying party and the Indemnified Party or (ii) the Indemnitee has been advised in writing by counsel that there may be one or more

legal defenses available to the Indemnitee Party that are different from or in addition to that of the indemnifying party, the Indemnitee may retain its own legal counsel at the expense of the indemnifying party and the indemnifying party and its counsel shall cooperate with the Indemnified Party and its counsel, as may be reasonably requested. Except as set forth above, should the indemnifying party assume the defense of a Third Party Claim, the indemnifying party shall not be liable to the Indemnified Party or any other Indemnitee for any legal expenses subsequently incurred by such Indemnified Party or other Indemnitee in connection with the analysis, defense or settlement of the Third Party Claim.

(ii) Without limiting Section 11.2(d)(i), any Indemnitee shall be entitled to participate in, but not control, the defense of such Third Party Claim and to employ counsel of its choice for such purpose; *provided , however* , that such employment shall be at the Indemnitee's sole cost and expense, except as described in Section 11.2(d)(i) , unless (A) the employment thereof has been specifically authorized by the indemnifying party in writing, or (B) the indemnifying party has failed to assume the defense and employ counsel in accordance with Section 11.2(d)(i) (in which case the Indemnified Party shall control the defense).

(iii) With respect to any Damages relating solely to the payment of money damages in connection with a Third Party Claim and that will not result in the Indemnitee's or the Indemnified Party's becoming subject to injunctive or other relief for other than money damages, and as to which the indemnifying party shall have acknowledged in writing the obligation to indemnify the Indemnitee hereunder, the indemnifying party shall have the sole right to consent to the entry of any judgment, enter into any settlement or otherwise dispose of such Damages, on such terms as the indemnifying party, in its sole discretion, shall deem appropriate, *provided* that, as a result of or in connection with any such settlement each Indemnitee or Indemnified Party shall receive a full release with respect to such claim. The indemnifying party shall not be liable for any settlement or other disposition of Damages by an Indemnitee or Indemnified Party that is reached without the written consent of the indemnifying party, which consent shall not be unreasonably withheld. If the indemnifying party chooses to defend or prosecute any Third Party Claim, no Indemnitee or Indemnified Party shall admit any liability with respect to, or settle, compromise or discharge, any Third Party Claim without the prior written consent of the indemnifying party, which consent shall not be unreasonably withheld.

(iv) Notwithstanding the foregoing, the indemnifying party shall not be entitled to assume the defense of any Third Party Claim (and shall be liable

for the reasonable fees and expenses of counsel incurred by the Indemnified Party in defending such Third Party Claim) if the Third Party Claim seeks an order, injunction or other equitable relief or relief for other than money damages against the Indemnified Party that the Indemnified Party reasonably determines cannot be separated from any related claim for money damages. If such equitable relief or other relief portion of the Third Party Claim can be so separated from that for money damages, the indemnifying party shall be entitled to assume the defense of the portion relating to money damages.

(v) Regardless of whether the indemnifying party chooses to defend or prosecute any Third Party Claim, the Indemnified Party and the indemnifying party shall, and shall cause each other Indemnitee or Affiliate of the indemnifying party, as applicable, to, cooperate in the defense or prosecution thereof and shall furnish such records, information and testimony, provide such witnesses and attend such conferences, discovery proceedings, hearings, trials and appeals as may be reasonably requested in connection therewith. Such cooperation shall include access during normal business hours afforded to the indemnifying party or Indemnified Party, as applicable, to, and reasonable retention by each such Person of, records and information that are reasonably relevant to such Third Party Claim, and making each such Person and other employees and agents available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder, and the indemnifying party shall reimburse each such Person for all its reasonable out-of-pocket expenses in connection therewith.

(e) Other Claims . In the event any Indemnified Party has a claim against any indemnifying party under Section 11.2(a) or 11.2(b) that does not involve a Third Party Claim being asserted against or sought to be collected from such Indemnified Party, the Indemnified Party shall deliver an Indemnification Claim Notice regarding such claim with reasonable promptness to the indemnifying party. The failure by any Indemnified Party so to notify the indemnifying party shall not relieve the indemnifying party from any liability that it may have to such Indemnified Party under Section 11.2(a) or 11.2(b), except to the extent that the indemnifying party demonstrates that such failure to notify directly increased the amount to be indemnified hereunder. If the indemnifying party does not notify the Indemnified Party within ten (10) calendar days following its receipt of such notice that the indemnifying party disputes its liability to the Indemnified Party under Section 11.2 (a) or 11.2(b), such claim specified by the Indemnified Party in such notice shall be conclusively deemed a Liability of the indemnifying party under Section 11.2(a) or 11.2(b) and the indemnifying party shall pay the amount of such Liability to the Indemnified

Party on demand or, in the case of any notice in which the amount of the claim (or any portion thereof) is estimated, on such later date when the amount of such claim (or such portion thereof) becomes finally determined.

(f) Effect of Investigation or Knowledge . Any claim by the Acquiror or its Affiliates or any of their respective directors, officers, employees or agents for indemnification shall not be adversely affected by any investigation by or opportunity to investigate afforded to the Acquiror, nor shall such a claim be adversely affected by the Acquiror's Knowledge on or before the Closing Date of any breach of the type specified in this Section 11.2 or of any state of facts that may give rise to such a breach. The waiver of any condition based on the accuracy of any representation or warranty, or on the performance of or compliance with any covenant or obligation, will not adversely affect the right to indemnification, payment of Damages or other remedy based on such representations, warranties, covenants or obligations.

Section 11.3 Limitations .

(a) In no event shall the Seller or the Acquiror be liable for any Damages pursuant to Section 11.2(a) or 11.2 (b), as applicable, unless and until the aggregate amount of all such Damages exceeds $100,000 (the " ***Liability Threshold*** "), in which case the Seller or the Acquiror, as applicable, shall be liable for all such Damages in excess of the Liability Threshold, and then not for any Damages in excess of the then applicable Liability Cap for all claims made under such Section 11.2(a) or 11.2(b), as applicable, in the aggregate; *provided* , *however* , that: (A) for purposes of claims made by the Acquiror under Sections 11.2(a)(iii), 11.2(a)(iv) or 11.2(a)(v) , the Seller shall be liable for all Damages suffered by the Acquiror without regard to the Liability Threshold or Liability Cap; (B) for purposes of claims made by the Seller under Section 11.2(b)(iii), the Acquiror shall be liable for all Damages suffered by the Seller without regard to the Liability Threshold or Liability Cap; and (C) for purposes of claims made by a party due to the other party's fraud or willful misconduct, such party shall be liable for all Damages suffered by the other party without regard to the Liability Threshold or Liability Cap.

(b) Each party agrees that it shall, and shall cause the applicable Indemnitees to, use its or their commercially reasonable efforts to secure payment from insurance policies available and in existence that provide coverage with respect to any Damages to be indemnified. The amount of any Damages recoverable by a party under Section 11.2 shall be reduced by the amount of any

ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

insurance proceeds actually paid to the Indemnified Party or the Indemnitee, as applicable, relating to such claim.

(c) THE INDEMNIFICATION OBLIGATIONS OF THE PARTIES HERETO SHALL NOT EXTEND TO PUNITIVE DAMAGES OR TO ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL OR INDIRECT DAMAGES, INCLUDING BUSINESS INTERRUPTION, LOSS OF FUTURE REVENUE, DIMINUTION IN VALUE, PROFITS OR INCOME, OR LOSS OF BUSINESS REPUTATION OR OPPORTUNITY.

Section 11.4 Exclusive Remedy . Except in the event of fraud or willful misconduct, the sole and exclusive remedy of each party with respect to any and all claims for any breach of any representation, warranty, covenant or other claim arising out of or relating to this Agreement, whether arising in contract, tort or otherwise, shall be the indemnification provisions of this Article XI, *provided, however* , that the provisions of this Article XI shall not restrict the right of any party to seek specific performance or other equitable remedies in connection with any breach of any of the covenants contained in this Agreement or any of the Related Agreements.

ARTICLE XII.

TERMINATION

Section 12.1 Methods of Termination . Prior to the Closing, this Agreement may be terminated at any time:

(a) by mutual written agreement of the Seller and the Acquiror;

(b) by either the Seller or the Acquiror if the Closing shall not have occurred by June 1, 2007; *provided, however,* that the right to terminate the Agreement pursuant to this Section 12.1(b) shall not be available to a party if such party's failure to perform in all material respects any of their material obligations under this Agreement or any Related Agreement results in the failure of the Closing to occur by such time;

(c) by either the Seller or the Acquiror, if there shall be in effect any Law that prohibits the Closing or if the Closing would violate any non-appealable Order, issued by a competent Governmental Entity, that permanently restrains, enjoins or prohibits the consummation of the transactions contemplated by this Agreement;

(d) by either the Seller or the Acquiror, if the other party has breached

any material representation, warranty, covenant or agreement hereunder, such breach has not been waived by the non-breaching party, and the breach has not been cured within a period of thirty (30) days following the terminating party's written notice of such breach and the breaching party is diligently proceeding to cure such breach, unless such breach is not capable of cure, in which event the non-breaching party may terminate immediately;

(e) by the Acquiror, if a Seller Material Adverse Effect shall have occurred since the date of this Agreement;

(f) by the Seller, if an Acquiror Material Adverse Effect shall have occurred since the date of this Agreement;

(g) by the Seller, if (i) it is not in material breach of the terms of Section 8.10(a) or (c) , (ii) the board of directors of the Seller has authorized the Seller to enter into a definitive agreement for a transaction that constitutes a Superior Bid, (iii) the Seller has notified the Acquiror in writing that the Seller has received a Superior Bid and intends to enter into a definitive agreement with respect to such Superior Bid pursuant to Section 8.10(b) , (iv) five (5) Business Days have passed since the Acquiror has received such written notice and (v) the Other Bid remains a Superior Bid after any amendments to this Agreement; *provided, however* , that the Seller shall not have the right to terminate this Agreement pursuant to this Section 12.1(g) prior to the expiration of the No-Shop Period.

(h) by the Acquiror, if prior to the Closing, the Seller has breached the terms and conditions of the Acrux License in a manner giving rise to a right of termination under the Acrux License by Fempharm Pty Ltd. and/or Acrux DDS Pty Ltd., whether or not such breach is based on facts or circumstances in existence as of the date hereof; or

(i) by Acquiror, on or before the earlier of (i) 11:59 p.m. (Eastern Daylight Saving Time) fourteen (14) calendar days following the date hereof or (ii) 11:59 p.m. (Eastern Daylight Saving Time) on the fifth (5th) Business Day following the date of Acquiror's inspection of the facilities of [***], located at [***] (the " Facility Inspection Deadline "), if Acquiror determines in good faith that [***] is unable to manufacture quantities of the pump component for Evamist meeting the specifications therefor (as set forth in the Evamist NDA) to support the launch of Evamist or provide continuity of commercial supply as contemplated by the parties as of the date hereof (the " Adverse Determination "); *provided, however* , if Acquiror makes the Adverse Determination it shall

promptly notify Seller thereof, then upon written request of either party to the other party (i) the parties shall promptly meet (whether in person or teleconference) and discuss in good faith possible resolutions to the Adverse Determination over a period of seven (7) calendar days and (ii) Acquiror's ability to terminate this Agreement pursuant to this Section 12.1(i) shall be extended by a period of seven (7) calendar days following the Facility Inspection Deadline.

Section 12.2 Procedure upon Termination . In the event of termination of this Agreement under Section 12.1 , written Notice thereof shall forthwith be given to the other party, and the transactions contemplated by this Agreement shall be terminated and abandoned, without further action by the parties hereto. If this Agreement is terminated as provided herein:

(a) each party, if requested, will redeliver all documents, work papers and other material of the other party and its Affiliates relating to the transactions contemplated hereby, whether so obtained before or after the execution hereof, to the party furnishing the same; and

(b) no party hereto and none of their respective directors, officers, stockholders, Affiliates or Controlling Persons shall have any further liability or obligation to any other party to this Agreement, other than Section 12.2 and Article XIII ; *provided , however* , that nothing in this Section 12.2(b) shall prejudice any rights, claims, or causes of action that may have accrued hereunder or with respect hereto prior to the date of such termination, including for breach of this Agreement (whether based upon the termination or otherwise).

ARTICLE XIII.

MISCELLANEOUS

Section 13.1 Notices . All Notices, requests and other communications hereunder must be in writing and will be deemed to have been duly given only if delivered personally against written receipt or by facsimile transmission with answer back confirmation or mailed (postage prepaid by certified or registered mail, return receipt requested) or by nationally recognized overnight courier that maintains records of delivery to the parties at the following addresses or facsimile numbers:

If to the Acquiror to:

K-V Pharmaceutical Company
2503 S. Hanley Road
St. Louis, Missouri 63144
Facsimile: (314) 645-4705

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Attention: Vice President, Business Development
General Counsel

With copies to:

Latham & Watkins LLP
650 Town Center Drive, 20th Floor
Costa Mesa, California 92626-1925
Facsimile: (714) 755-8290
Attention: Charles K. Ruck, Esq.

If to the Seller to:

Vivus, Inc.
112 Castro Street, Suite 200
Mountain View, California 94040
Facsimile: (650) 934-5389
Attention: Leland F. Wilson

With copies to:

Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
Facsimile: (650) 493-6811
Attention: Ian B. Edvalson, Esq.

All such Notices, requests and other communications will (i) if delivered personally to the address as provided in this Section 13.1 , be deemed given upon receipt, (ii) if delivered by facsimile to the facsimile number as provided in this Section 13.1 , be deemed given upon receipt by the sender of the answer back confirmation and (ii) if delivered by mail in the manner described above or by overnight courier to the address as provided in this Section 13.1 , be deemed given upon receipt (in each case regardless of whether such Notice, request or other communication is received by any other Person to whom a copy of such Notice, request or other communication is to be delivered pursuant to this Section 13.1) . Any party from time to time may change its address, facsimile number or other information for the purpose of Notices to that party by giving Notice specifying such change to the other party hereto in accordance with the terms of this Section 13.1 .

Section 13.2 Entire Agreement . This Agreement (and all Exhibits and Schedules attached hereto and all other documents delivered in connection herewith) supersedes all prior discussions and agreements, both oral and written, among the parties with respect to the

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subject matter hereof and contains the sole and entire agreement among the parties hereto with respect to the subject matter hereof. Further, the parties agree and acknowledge that the Confidentiality Agreement shall remain in effect until, but shall terminate effective as of, the Closing.

Section 13.3 Waiver . Any term or condition of this Agreement may be waived at any time by the party that is entitled to the benefit thereof, but no such waiver shall be effective unless set forth in a written instrument duly executed by or on behalf of the party waiving such term or condition. No waiver by any party hereto of any term or condition of this Agreement, in any one or more instances, shall be deemed to be or construed as a waiver of the same or any other term or condition of this Agreement on any future occasion. All remedies, either under this Agreement or by Law or otherwise afforded, will be cumulative and not in the alternative.

Section 13.4 Amendment . This Agreement may be amended, supplemented or modified only by a written instrument mutually agreed upon and duly executed by each party hereto.

Section 13.5 Third Party Beneficiaries . The terms and provisions of this Agreement are intended solely for the benefit of each party hereto and their respective successors or permitted assigns and it is not the intention of the parties to confer third party beneficiary rights upon any other Person, except as achieved through the indemnification clause set forth in Section 11.2 .

Section 13.6 Assignment; Binding Effect . Neither this Agreement nor any rights, interests or obligations hereunder shall be transferred, assigned or delegated by any party hereto without the prior written consent of the other party hereto and any attempt to make any such transfer assignment or delegation without such consent shall be null and void; *provided , however* , that (i) without the consent of the Acquiror, the Seller may (in whole or in part) transfer, assign and delegate its rights, interests and obligations to one or more of its Affiliates (ii) without the consent of the Seller, the Acquiror may (in whole or in part) transfer, assign and delegate its rights, interests and obligations to any Affiliate of the Acquiror (including pursuant to Section 4.7 hereof), and (iii) without the consent of the Seller, the Acquiror may transfer and assign its rights to indemnity, in whole or in part, to any purchaser of all or substantially all of the Evamist Business; *provided , further* , this Agreement is binding upon, inures to the benefit of and is enforceable by the parties hereto and their respective successors and permitted assigns and no transfer, assignment or delegation shall limit, affect or discharge the assignor's obligations hereunder. In addition, notwithstanding the foregoing, either party hereto may assign this Agreement, without the prior written consent of the other party hereto, to a Person that succeeds to all or substantially all of such party's business or assets related to this Agreement, whether by

sale, merger, operation of law or otherwise, provided that such assignee or transferee agrees in writing to be bound by the terms and conditions of this Agreement.

Section 13.7 Headings. The headings used in this Agreement have been inserted for convenience of reference only and do not define or limit the provisions hereof.

Section 13.8 Severability. If any provision of this Agreement is held to be illegal, invalid or unenforceable under any present or future law, and if the rights or obligations of any party hereto under this Agreement will not be materially and adversely affected thereby, (i) such provision will be fully severable, (ii) this Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part hereof, (iii) the remaining provisions of this Agreement will remain in full force and effect and will not be affected by the illegal, invalid or unenforceable provision or by its severance herefrom, and (iv) in lieu of such illegal, invalid or unenforceable provision, there will be added automatically as a part of this Agreement a legal, valid and enforceable provision as similar to the terms of such illegal, invalid or unenforceable provision as may be possible and reasonably acceptable to the parties herein.

Section 13.9 Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF DELAWARE APPLICABLE TO CONTRACTS EXECUTED AND PERFORMED IN SUCH STATE, WITHOUT GIVING EFFECT TO CONFLICTS OF LAWS PRINCIPLES. ALL DISPUTES UNDER, OR PERTAINING TO, THIS AGREEMENT SHALL BE RESOLVED EXCLUSIVELY IN THE STATE OR FEDERAL COURTS OF THE STATE OF DELAWARE.

Section 13.10 Expenses. Except as otherwise provided in this Agreement, each party hereto shall pay its own expenses and costs incidental to the preparation of this Agreement and to the consummation of the transactions contemplated hereby.

Section 13.11 Counterparts. This Agreement may be executed in any number of counterparts and by facsimile, each of which will be deemed an original, but all of which together will constitute one and the same instrument. A facsimile copy shall be a sufficient proof of signature, without it being necessary to produce the original copy.

[SIGNATURES ON FOLLOWING PAGE]

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IN WITNESS WHEREOF, this Agreement has been executed by the parties hereto all as of the date first above written.

SELLER:

Vivus, Inc.
a Delaware corporation

By: /s/ Leland F. Wilson

Name: Leland F. Wilson

Title: President and Chief Executive Officer

ACQUIROR:

K-V Pharmaceutical Company,
a Delaware corporation

By: /s/ Gerald R. Mitchell

Name: Gerald R. Mitchell

Title: Vice President and Chief Financial Officer

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EXHIBIT A
Form of Sublicense Agreement

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EXHIBIT A

SUBLICENSE AGREEMENT

This SUBLICENSE AGREEMENT (the " **Agreement** ") executed as of [,] 2007 (the " **Effective Date** ") by and between KV Pharmaceutical Company, a Delaware corporation (" **KVP** "), and VIVUS Inc., a Delaware corporation (the " **VIVUS** "). KVP and VIVUS are each referred to herein by name or, individually, as a " **Party** " or, collectively, as " **Parties** ."

BACKGROUND

A. KVP and VIVUS are parties to that certain Asset Purchase Agreement dated as of March 30, 2007 (the " **APA** ") pursuant to which KVP purchased certain assets of VIVUS related to Evamist™, all on the terms and conditions set forth therein.

B. VIVUS is the licensee of certain patents and know-how related to Evamist™ pursuant to that certain Estradiol Development and Commercialization Agreement by and among VIVUS, FemPharm Pty Ltd. and Acrux DDS Pty Ltd. effective February 12, 2004, as amended July 2, 2004 (the " **Acrux License** ") and attached hereto as Attachment 1 .

C. VIVUS and KVP have agreed pursuant to the APA to enter into this Agreement pursuant to which VIVUS grants to KVP certain sublicenses under the Acrux License, all as set forth herein below.

NOW, THEREFORE, in consideration of the mutual covenants and agreements provided herein below and other consideration the receipt and sufficiency of which is hereby acknowledged, KVP and VIVUS hereby agree as follows:

ARTICLE 1
DEFINITIONS

1.1 Imported Definitions . Capitalized terms not otherwise defined in this Article 1 or elsewhere in this Agreement shall have the meanings given such terms in the Acrux License.

1.2 " **Acrux** " means Acrux DDX Pty Limited, Australian Company No 088 778 009.

1.3 " **Affiliate** " has the meaning given thereto in the APA.

1.4 " **Closing Date** " has the meaning given thereto in the APA.

1.5 " **Evamist** " means any Product consisting of any MDTS containing Estradiol, or any other Estrogen that is added to the Field, as its sole active ingredient.

1.6 " **FemPharm** " means FemPharm Pty Ltd., Australian Company No 088 778 018.

1.7 " **Law** " has the meaning given therein in the APA.

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1.8 " **Other Intellectual Property** " means that Intellectual Property that is licensed to VIVUS by FemPharm and Acrux pursuant to Section 2.1(b) of the Acrux License.

1.9 " **Purchased Assets** " has the meaning given thereto in the APA.

1.10 " **Transition Services Agreement** " has the meaning given thereto in the APA.

1.11 Additional Definitions . Each of the following definitions shall have the meanings defined in the corresponding sections of this Agreement indicated below:

Definitions	Section
Acrux License	Background
Agreement	Preamble
APA	Background
Auditing Party	3.3.1
Bankruptcy Code	12.7
Confidential Information	8.1
Effective Date	Preamble
Indemnify	9.4.1

JAMS	11.2
KVP	Preamble
KVP Indemnitees	9.4.1
Losses	9.4.1
Parties	Preamble
Party	Preamble
Prior CDA	8.3
Term	10.1
Third-Party Claim	9.4.1
VIVUS	Preamble
VIVUS Indemnitees	9.4.2

1.12 Interpretation . In this Agreement: (i) words denoting the singular number include the plural and vice versa; (ii) words denoting any gender include all genders; (iii) words denoting natural persons include corporations, firms, unincorporated associations, partnerships, trusts and any other entities or groups recognized by Law; (iv) references to any Law or to any provision thereof includes any amendment, modification, consolidation or re-enactment of, or any provision substituted for, and all regulations and statutory instruments issued under such Law or such provision; (v) the words "written" and "in writing" include any means of visible reproduction of words in a tangible and permanently visible form; (vi) references to Articles, Sections, clauses and Attachments are references to the Articles, Sections, clauses and Agreement of this Agreement, unless expressly stated to the contrary; (vii) references to any Party includes such Party's successors and permitted assigns; (viii) where a word or phrase is defined, other grammatical forms of that word or phrase have corresponding meanings; (ix) no rule of construction applies to the disadvantage of a Party because that Party was responsible for

the preparation of this Agreement or any part of it; (x) the headings to Articles, Sections and Attachments are for ease of reference only and do not form part of this Agreement or affect its interpretation; (xi) if any day appointed or specified by this Agreement for the payment of any money or the doing of any act falls on a day which is not a Business Day, the day appointed or specified will be the next Business Day; (xii) a reference to a time or date in connection with the performance of an obligation by a Party is a reference to the time and date in San Francisco, California, USA even if the obligation is to be performed elsewhere; and (xiii) the words "including" and "includes" will be interpreted non-restrictively to mean "including without limitation …".

ARTICLE 2
SUBLICENSE GRANTS

2.1 Sublicense Grants . Subject to the terms of this Agreement and the APA, VIVUS hereby grants to KVP as of the Effective Date the sole and exclusive (including with respect to VIVUS) sublicense, under all of VIVUS's interest in:

2.1.1 Licensed Intellectual Property, solely to exploit, import, export, make, have made, develop, use, market, offer for sale and sell Evamist for use in the Field in the Territory; and

2.1.2 Other Intellectual Property to export, make, and have made Evamist outside the Territory solely for importation, sale, use and other exploitation in the Field in the Territory pursuant to Section 2.1.1. In addition, VIVUS will cooperate with KVP, at KVP's request and expense, to seek the permission by FemPharm, for KVP to include in the license granted under this Section 2.1.2 the right to conduct specific development activities in particular countries outside the Territory, solely to develop data to be used in the Regulatory Materials in the Territory for Evamist in the Field, and marketing of Evamist in the Field in the Territory.

2.2 Further Sublicenses . The sublicenses granted under Section 2.1 include the right to grant sublicenses within the scope of the licenses; provided that any such sublicensee agrees to be bound by terms and conditions materially identical to the provisions of Sections 2.5, 2.6, 9.4.2 and 9.5 herein. Additionally, KVP shall disclose to FemPharm in advance of any such grant of a sublicense the identity of the proposed sublicensee and shall discuss and consider in good faith any reasonable concerns FemPharm may have with regard to granting a sublicense to such entity, and shall consider in good faith FemPharm's suggestions to address any of its reasonable concerns. Notwithstanding any sublicense granted hereunder KVP shall remain fully responsible for all of its obligations hereunder and KVP shall be responsible for the actions of any of its sublicensees hereunder (direct or indirect), and if any such sublicensee breaches any KVP obligation under the Agreement, such breach will be deemed a breach by KVP.

2.3 Other .

2.3.1 The Parties acknowledge that FemPharm and Acrux reserved for themselves non-exclusive rights under the Licensed Intellectual Property in the Territory, for

FemPharm, Acrux or the Acrux Controlled Affiliates or any of their respective licensees to export, make, and have made Evamist in the Territory solely for importation, sale, use and other exploitation in the Field in a country or jurisdiction outside the Territory. In addition, VIVUS reserves the right to permit FemPharm to conduct specific development activities in the Territory, solely to develop data to be used in the Regulatory Materials outside the Territory for Evamist in the Field, and marketing of Evamist in the Field outside the Territory; provided that VIVUS shall grant such permission only as agreed in writing by the Parties, such agreement not to be unreasonably withheld.

2.3.2 KVP shall have the sole right to exercise the following rights and licenses granted to VIVUS under the Acrux License: the rights granted to VIVUS under Section 2.5(b) of the Acrux License, the rights granted to VIVUS under Section 2.7 of the Acrux License, the rights granted to VIVUS under Section 5.2 of the Acrux License, and the rights granted to VIVUS under Section 5.17 of the Acrux License.

2.4 No Other Rights . Each Party acknowledges that the rights and licenses granted under Section 2.1 and elsewhere in this Agreement are limited to the scope expressly granted. Accordingly, except for the rights expressly granted under this Agreement and the APA, no right, title, or interest of any nature whatsoever is granted whether by implication, estoppel, reliance, or otherwise, by either Party to the other Party. All rights with respect to Intellectual Property or technology rights that are not specifically granted herein are reserved to the owner thereof.

2.5 Exclusivity . Until termination of this Agreement or [***] ([***]) [***] after the First Commercial Sale of Evamist, KVP hereby agrees not to market, promote, sell or import, directly or indirectly, any Competitive Product for use in the Territory.

2.6 Ex-Territory Sales . KVP shall not directly or indirectly market, sell, or distribute Evamist in the Territory to any third party, including its Affiliates, if KVP knows, or has been provided reasonable evidence, that such Evamist provided directly or indirectly by KVP to such third party is being marketed, distributed or sold for use outside the Territory, provided that the sale of such Evamist in the Territory infringes a Valid Claim in the FemPharm Patents or embodies information that is at the then-current time a trade secret of FemPharm.

ARTICLE 3
PAYMENTS

3.1 Payment Amounts . In accordance with the provisions of Section 3.2:

3.1.1 KVP shall pay to VIVUS all amounts (including any interest, penalties or otherwise) that may become payable to FemPharm under the Acrux License after the Effective Date as a result of any activities by or under authority of KVP hereunder or from any requests of KVP hereunder, including all royalties that may become payable pursuant to Article 4 of the Acrux License as a result of Net Sales of Evamist by or under authority of KVP, its Affiliates

and sublicensees, provided that KVP shall only pay One Million Five Hundred Thousand Dollars ($1,500,000) pursuant to Section 3.2(b) of the Acrux License.

3.1.2 For clarity, KVP shall pay VIVUS the One Million Five Hundred Thousand Dollars ($1,500,000) of the Three Million Dollars ($3,000,000) payable to FemPharm upon occurrence of the condition set forth in Section 3.2(b) of the Acrux License.

3.2 Payment Terms and Reports . KVP shall pay all amounts under Section 3.1 at least three (3) Business Days prior to the corresponding amount becoming payable to FemPharm under the applicable provision of the Acrux License. In addition, KVP shall provide all reports required to be provided to FemPharm (which reports shall meet all of the applicable requirements therefore as set forth in the Acrux License) with respect to such payments at least three (3) Business Days prior to the corresponding report becoming due to FemPharm under the applicable provision of the Acrux License including Section 4.7 of the Acrux License. It is understood that VIVUS shall have the right to provide a copy of all such reports to FemPharm under and in accordance with the Acrux License. Notwithstanding the foregoing in lieu of payment of amounts to VIVUS hereunder, KVP may upon written notice to VIVUS elect to pay amounts otherwise due hereunder directly to FemPharm in accordance with the Acrux License, provided that and without limiting Section 9.7 KVP shall copy VIVUS on all correspondence and reports with respect thereto.

3.3 Audits .

3.3.1 VIVUS or FemPharm (the " **Auditing Party** ") may at its cost have any report referred to in Section 3.2 verified as set forth below by a reputable firm of chartered accountants or certified public accountants nominated by Auditing Party, and reasonably acceptable to KVP, provided the Auditing Party completes such verification within thirty-six (36) months of the end of the Royalty Period to which the verification relates. Upon not less than ten (10) Business Days' prior written notice given by the Auditing Party to KVP, KVP will provide the accountants with access during KVP's normal business hours to the revenue and sales records of KVP and its Affiliates sufficient for the purposes of verifying the reports referred to in Section 3.2 and for the purpose of verifying the amount of royalties paid hereunder. KVP may request that, at its expense, a representative or agent familiar with its record keeping systems be present at the audit to assist in the audit. A copy of the auditor's report shall be provided to KVP at the same time it is provided to the Auditing Party. Such audits will be at the expense of the Auditing Party, except that if such audit establishes that the amount owed by KVP for the audited period exceeds the amount actually paid by more than [***] ([***]), then KVP will pay the Auditing Party's actual out of pocket costs of such audit.

3.3.2 The accountants appointed under Section 3.3.1 are not authorized to, and will not, disclose to the Auditing Party any information other than the accuracy or inaccuracy of the reports to be verified and will be required to execute a reasonable confidentiality agreement with KVP. In addition, the Auditing Party may share any such report of the auditor in confidence with FemPharm or VIVUS, as applicable.

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3.3.3 Should it be established from any report and verification referred to in this Section 3.3 that the royalties which should have been paid in respect of any Royalty Period to which the report and verification relates are more or less than the royalties actually paid then the difference will be remitted:

(a) to VIVUS (in the case of the royalty paid being less than that which should have been paid) within seven (7) Business Days; or

(b) to KVP (in the case of the royalty paid being more than that which should have been paid) within three (3) Business Days of VIVUS's receipt from FemPharm.

ARTICLE 4
TRANSFER OF INFORMATION / DEVELOPMENT OF EVAMIST

4.1 Transfer . Within sixty (60) days after the Effective Date, VIVUS shall transfer to KVP without charge (except as provided in the Transition Services Agreement) copies of all Licensed Know-How with respect to Evamist transferred by FemPharm to VIVUS pursuant to Section 5.2 of the Acrux License on or before the Effective Date. Thereafter, VIVUS shall promptly transfer to KVP without charge (except as provided in the Transition Services Agreement) copies of any additional Licensed Know-How with respect to Evamist that VIVUS receives from FemPharm pursuant to Section 5.2 of the Acrux License.

4.2 Development Responsibilities . Except as otherwise determined by the Parties in writing or as set forth in the APA or the Transition Services Agreement, KVP will be solely responsible for conducting, at its own expense, all activities relating to the clinical development, regulatory approval and commercialization of Evamist in the Territory in the Field, using diligent, commercially reasonable efforts.

4.3 Committees . VIVUS shall designate as its representatives to the Development Committee under Section 5.4 of the Acrux License two (2) individuals designated by KVP from time to time in writing. Likewise, VIVUS shall designate as its representative to the Steering Committee under Section 5.7 of the Acrux License an individual designated by KVP from time to time in writing. In the event a Global Development Committee is established pursuant to Section 5.14, KVP shall have the right to designate VIVUS's appointee to such Global Development Committee. VIVUS shall exercise its final decision right pursuant to Section 5.8 of the Acrux License with respect to Evamist only as KVP designates in writing. For clarity, the KVP designees shall fulfill the various rights and obligations for such committees as set forth in Sections 5.9 — 5.13 of the Acrux License and KVP shall bear the costs and expenses of its designees in their attendance and participation of any meeting of the committees and other fulfillment of their responsibilities with respect thereto.

4.4 Development Plan . To the extent a Development Plan is required to be submitted to the Development Committee pursuant to Section 5.5 of the Acrux License, KVP shall prepare such Development Plan and associated budget (as required in Section 5.6 of the Acrux License) and may submit it directly to the Development Committee through its designees to the

Development Committee; provided that prior to KVP's payment of the amount in accordance with Section 4.2(a) of the APA for approval of an NDA for Evamist, KVP shall provide such Development Plan to VIVUS for its prior review and comment and incorporate VIVUS's reasonable comments to such Development Plan.

4.5 Data . KVP shall provide copies of all Data and Regulatory Materials to FemPharm pursuant to Section 5.16 of the Acrux License for FemPharm's use in accordance therewith.

4.6 Development Diligence . Except as otherwise provided in the APA and the Transition Services Agreement, KVP shall use diligent, commercially reasonable efforts to perform all the tasks and responsibilities assigned to it in the Development Plan with respect to Evamist in accordance with the development schedule set forth in the Development Plan, in an effort to obtain all necessary regulatory approvals to launch Evamist in the Territory.

ARTICLE 5
REGULATORY MATTERS

5.1 Regulatory Materials .

5.1.1 Except as otherwise provided in the APA and the Transition Services Agreement, KVP shall be solely responsible for preparing and filing all Regulatory Materials for the development of Evamist in the Territory, including carrying out all registration and approval procedures necessary to comply with all appropriate Laws relating to the manufacture, packaging, import, promotion, advertising and sale of Evamist in the Territory. All costs incurred by KVP with respect to such registrations and approvals shall be borne by KVP. KVP acknowledges that FemPharm has the right to review and comment on all such Regulatory Materials prepared by KVP, including application for registration and regulatory approval (to the extent disclosure of same does not violate confidentiality obligations) and to the extent reasonably practicable KVP will consider all such comments provided to KVP in advance of filing. Similarly, to the extent that VIVUS has the right to review and comment on all Regulatory Materials for Evamist developed by or under authority of FemPharm or an Acrux Controlled Affiliate in the Field outside the Territory (to the extent disclosure of same does not violate confidentiality obligations, VIVUS shall promptly provide KVP with a reasonable opportunity to provide comments and promptly provide (or facilitate KVP to provide directly) to FemPharm any such comments.

5.1.2 KVP acknowledges that FemPharm and its Affiliates and licensees (subject to the last sentence of Section 5.16 of the Acrux License) have a right of reference (at no cost to them) to the NDA and other Regulatory Materials filed by VIVUS or KVP for Evamist in the Field and Territory, which right of reference shall be solely for Australia and New Zealand as part of the development, approval and commercialization of Evamist in the Field for such countries.

5.2 Relationship with Regulatory Authorities . Except as otherwise provided in the APA and the Transition Services Agreement, KVP shall have the sole right and responsibility for interacting with all regulatory authorities in the Territory with respect to Evamist in the Field, including meetings with such regulatory authorities, and responding to inquiries of and conducting other communications with such regulatory authorities, with regard to such Regulatory Materials or Evamist. Further except as otherwise provided in the APA and the Transition Services Agreement, KVP shall have the sole authority and responsibility for all regulatory obligations regarding Evamist in the Field in the Territory, including, but not limited to, the regulatory approval applications and registrations and related materials, all promotional materials, labeling, responding to medical inquiries, and complaints relating to Evamist in the Territory, except as otherwise provided in the Development Plan, or determined by the Development Committee. KVP shall provide FemPharm with reasonable advance notice of, and any preparatory material for, any hearing before, or meeting with, any regulatory authority regarding Evamist in the Territory. KVP acknowledges that FemPharm may request to have two (2) of its employees attend such hearings or meetings at its own cost, and KVP will endeavor to include them as reasonably practicable under the circumstances. Similarly, VIVUS shall notify KVP of any corresponding notice from FemPharm with respect to any preparatory material for, any hearing before, or meeting with, any regulatory authority regarding Evamist outside the Territory and to the extent that VIVUS has the right to do so, it shall allow KVP's designees to attend such hearings or meetings, at KVP's cost.

5.3 Pharmacovigilence . KVP shall coordinate adverse event reporting with respect to Evamist with FemPharm as may be agreed from time to time in good faith between KVP and FemPharm.

ARTICLE 6
COMMERCIALIZATION / MANUFACTURE

6.1 General . KVP shall have the exclusive rights, subject to the terms of this Agreement, to promote, market, distribute and sell Evamist for use in the Field throughout the Territory, itself and/or through its Affiliates and sublicensees. In connection with the foregoing, KVP agrees to fulfill on behalf of VIVUS all of VIVUS's obligations under Sections 8.2 — 8.5 of the Acrux License with respect to Evamist accruing on or after the Effective Date.

6.2 Manufacture .

6.2.1 Except as otherwise provided in the APA and the Transition Services Agreement, KVP shall be solely responsible for the manufacture (itself or through third parties) of all Evamist for development hereunder and commercialization thereof in the Field in the Territory.

6.2.2 KVP shall agree to supply to FemPharm needed amounts of Evamist (in final finished and packaged form, according to the specifications of KVP in the Territory) for use by FemPharm in developing and commercializing Evamist in the Field in Australia and New Zealand under a mutually acceptable supply agreement on terms that are customary and

reasonable and consistent with Sections 8.6 and 14.5(a)(v) of the Acrux License. Such Evamist supplied by KVP shall be used solely for FemPharm to develop and sell Evamist in the Field in New Zealand and Australia. KVP shall have no obligation to supply any Evamist other than that being developed or commercialized by KVP under this Agreement at the then current time. The transfer price for such Evamist shall be (i) [***] ([***]) above KVP's actual purchase price if such Product is purchased by KVP from a contract manufacturer; and (ii) [***] ([***]) above KVP's fully burdened manufacturing costs, as determined consistent with KVP's standard practices applied consistently across all its operations, if KVP manufactures Evamist.

ARTICLE 7
PATENT MATTERS

7.1 FemPharm Patents . To the extent VIVUS receives information with respect to the FemPharm Patents relating to Evamist from FemPharm (whether pursuant to Sections 12.1 or 12.3 of the Acrux License or otherwise), it shall promptly provide such information to KVP. VIVUS shall exercise its rights (i) to comment thereon with respect to Evamist in accordance with Section 12.1 of the Acrux License as directed by KVP or (ii) participate in any defense of the FemPharm Patents pursuant to Section 12.3 of the Acrux License as directed by KVP using counsel designated by KVP, all at KVP's expense. In addition, if VIVUS has the right to prepare, file, prosecute or maintain any FemPharm Patents relating to Evamist pursuant to Section 12.1 of the Acrux License, it shall notify KVP and at KVP's request and expense, VIVUS shall exercise such rights as directed by KVP using patent counsel designated by KVP. Further, VIVUS shall promptly notify KVP of any infringement of the FemPharm Patents, and to the extent VIVUS has the right to control the enforcement thereof with respect to Evamist, VIVUS shall exercise such rights as directed by KVP using patent counsel designated by KVP at KVP's expense. Without limiting the foregoing, VIVUS shall pay to KVP all recoveries otherwise retained (net of amounts payable to FemPharm) or received from FemPharm from the enforcement of the FermPharm Patents with respect to Evamist.

7.2 Joint Patents . VIVUS shall promptly provide KVP with information related to Joint Patents related to Evamist, including any such information received from FemPharm. In addition, VIVUS shall exercise its rights with respect to Joint Patents related to Evamist, as requested by KVP at KVP's expense. For clarity, KVP shall pay VIVUS all amounts reimbursable by VIVUS to FemPharm with respect to Joint Patents pursuant to Section 12.2 of the Acrux License at least five (5) Business Days in advance of the date such payments are due to FemPharm. Further, VIVUS shall promptly notify KVP of any infringement of the Joint Patents, and to the extent VIVUS has the right to control the enforcement thereof with respect to Evamist, VIVUS shall exercise such rights as directed by KVP using patent counsel designated by KVP at KVP's expense. Without limiting the foregoing, VIVUS shall pay to KVP all recoveries otherwise retained (net of amounts payable to FemPharm) or received from FemPharm from the enforcement of the Joint Patents with respect to Evamist.

ARTICLE 8
CONFIDENTIALITY

8.1 Confidentiality; Exceptions . Except to the extent expressly authorized by this Agreement, the APA, the Transition Services Agreement or otherwise agreed by the Parties in writing, the Parties agree that the receiving Party shall keep confidential and shall not publish or otherwise disclose or use for any purpose other than as provided for in this Agreement any confidential or proprietary information or materials furnished to it by the other Party pursuant to this Agreement that are clearly marked as "CONFIDENTIAL" or similar designation (collectively, " **Confidential Information** "); provided that, all Purchased Assets shall be deemed the Confidential Information of KVP (subject to the limitations set forth in Sections 8.1.2 and 8.1.3). Notwithstanding the foregoing, Confidential Information shall not be deemed to include information or materials to the extent that it can be established by written documentation by the receiving Party that such information or material:

8.1.1 was already known to or possessed by the receiving Party, other than under an obligation of confidentiality (except to the extent such obligation has expired or an exception is applicable under the relevant agreement pursuant to which such obligation was established), at the time of disclosure;

8.1.2 was generally available to the public or otherwise part of the public domain at the time of its disclosure to the receiving Party;

8.1.3 became generally available to the public or otherwise part of the public domain after its disclosure and other than through any act or omission of the receiving Party in breach of this Agreement;

8.1.4 was independently developed by the receiving Party as demonstrated by documented evidence prepared contemporaneously with such independent development; or

8.1.5 was disclosed to the receiving Party, other than under an obligation of confidentiality, by a third party who had no obligation to the disclosing Party not to disclose such information to others.

8.2 Authorized Use and Disclosure . Each Party may use and disclose Confidential Information of the other Party as follows: (i) under appropriate confidentiality provisions substantially equivalent to those in this Agreement, in connection with the performance of its obligations or exercise of rights granted to such Party in this Agreement or the APA, (ii) to the extent such disclosure is reasonably necessary in filing for, prosecuting or maintenance of patents, copyrights and trademarks (including applications therefor), prosecuting or defending litigation, complying with applicable governmental regulations or otherwise required by applicable Law, provided, however, that if a Party is required by Law to make any such disclosure of the other Party's Confidential Information it will, except where impracticable for necessary disclosures (for example, in the event of medical emergency), give reasonable advance notice to the other Party of such disclosure requirement and, except to the extent inappropriate in the case of patent applications, will use its reasonable efforts to secure confidential treatment of such Confidential Information required to be disclosed, (iii) in communication with existing and potential investors, consultants, advisors (including financial advisors, lawyers and accountants)

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

and others on a need to know basis, in each case under appropriate and customary confidentiality provisions under the circumstances, (iv) by VIVUS only to Acrux and FemPharm to the extent reasonably necessary in complying with the terms of the Acrux License, and (v) by KVP to the extent reasonably necessary in filing for, conducting preclinical or clinical trials for, obtaining and maintaining regulatory approvals for and manufacturing and commercializing Evamist in accordance with the terms hereof.

8.3 Prior Agreement . This Article 8 supersedes the Confidentiality Agreement between the Parties dated June 2, 2006 (the " **Prior CDA** ") with respect to confidential information disclosed thereunder. All information disclosed by VIVUS under the Prior CDA shall be deemed Confidential Information of VIVUS (except to the extent comprising Purchased Assets, which shall be deemed the Confidential Information of KVP subject to the limitations set forth in Sections 8.1.2 and 8.1.3) and shall be subject to the terms of this Article 8.

8.4 Confidential Terms . Each of the Parties agrees not to disclose to any third party the terms and conditions of this Agreement without the prior approval of the other Party, except to advisors (including financial advisors, attorneys and accountants), potential and existing investors, and others (including in the case of KVP, potential and actual sublicensees under the Licensed Intellectual Property) on a need to know basis, in each case under circumstances that reasonably protect the confidentiality thereof, or to the extent necessary to comply with the terms of agreements with third parties (including the Acrux License), or to the extent required by applicable Law.

ARTICLE 9
REPRESENTATIONS, WARRANTIES AND COVENANTS; INDEMNIFICATION

9.1 General Representations and Warranties . Each Party represents and warrants to the other that:

9.1.1 it is duly organized and validly existing under the Laws of the jurisdiction of its incorporation, and has full corporate power and authority to enter into this Agreement and to carry out the provisions hereof;

9.1.2 it is duly authorized to execute and deliver this Agreement and to perform its obligations hereunder, and the person executing this Agreement on its behalf has been duly authorized to do so by all requisite corporate action;

9.1.3 this Agreement is legally binding upon it and enforceable in accordance with its terms and the execution, delivery and performance of this Agreement by it does not conflict with any agreement, instrument or understanding, oral or written, to which it is a party or by which it may be bound, nor violate any material applicable Law;

9.1.4 it has not granted, and shall not grant during the Term, any right to any third party which would conflict with the rights granted to the other Party hereunder; and

9.1.5 it is not aware of any action, suit or inquiry or investigation instituted by any Person which questions or threatens the validity of this Agreement.

9.2 VIVUS's Warranties . VIVUS represents and warrants that as of the Effective Date:

9.2.1 the Acrux License as set forth on Attachment 1 is a true, correct and complete copy of the Acrux License;

9.2.2 the Acrux License is in full force and effect;

9.2.3 VIVUS, and to its knowledge FemPharm and Acrux are not in breach of any material provision of the Acrux License, and VIVUS has neither given to, nor received from, FemPharm or Acrux notice of any such breach except as provided in the Schedule of Exceptions attached herein as Attachment 2 ; and

9.2.4 VIVUS has not received notice that it has failed to comply with, and it has not failed to comply with any Law, in either case in a manner that will have a material adverse affect on the rights granted to KVP under this Agreement;

9.2.5 to VIVUS's knowledge (i) the FemPharm Patents are in full force and effect and not subject to any pending re-examination, opposition, interference or claim of invalidity, (ii) the FemPharm Patents are not subject to any litigation or similar proceedings seeking the invalidity or unenforceability thereof and there is no threat of such proceedings, (iii) there is no basis for any of the FemPharm Patents to be held invalid or unenforceable; and

9.2.6 to VIVUS's knowledge, there is no infringement of any FemPharm Patents.

9.3 Disclaimer of Warranties . EXCEPT AS SET FORTH IN THIS ARTICLE 9 OR OTHERWISE IN THE APA, VIVUS AND KVP EXPRESSLY DISCLAIM ANY WARRANTIES OR CONDITIONS, EXPRESS, IMPLIED, STATUTORY OR OTHERWISE, WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT (INCLUDING THE LICENSED INTELLECTUAL

PROPERTY), INCLUDING ANY WARRANTY OF MERCHANTABILITY, NONINFRINGEMENT, OR FITNESS FOR A PARTICULAR PURPOSE, AND NONINFRINGEMENT OF THE INTELLECTUAL PROPERTY RIGHTS OF THIRD PARTIES.

9.4 Indemnification .

9.4.1 Indemnification by VIVUS . VIVUS hereby agrees to defend, hold harmless and indemnify (collectively, " **Indemnify** ") KVP and its Affiliates, and its and their agents, directors, officers and employees (the " **KVP Indemnitees** ") from and against any liability or expense (including reasonable legal expenses and attorneys' fees) (collectively, " **Losses** ") resulting from suits, claims, actions and demands, in each case brought by a third party (each, a " **Third-Party Claim** ") arising out of (i) VIVUS's negligence or willful

misconduct, or (ii) VIVUS's breach of either this Agreement or the Acrux License. VIVUS's obligation to Indemnify the KVP Indemnitees pursuant to this Section 9.4 shall not apply to the extent that any such Losses (A) arise from the gross negligence or intentional misconduct of any KVP Indemnitee; (B) arise from any breach by KVP of this Agreement; or (C) are Losses for which KVP is obligated to Indemnify the VIVUS Indemnitees pursuant to Section 9.4.2.

9.4.2 Indemnification by KVP. KVP hereby agrees to Indemnify VIVUS and its Affiliates, and its and their agents, directors, officers and employees (the " **VIVUS Indemnitees** ") from and against any and all Losses resulting from Third-Party Claims arising out of: (i) KVP's negligence or willful misconduct; (ii) KVP's breach of this Agreement; or (iii) the development, manufacture, commercialization or other exploitation of Evamist or other exercise of the licenses granted hereunder by or under authority of KVP. KVP's obligation to Indemnify the VIVUS Indemnitees pursuant to this Section 9.4 shall not apply to the extent that any such Losses (A) arise from the gross negligence or intentional misconduct of any VIVUS Indemnitee; (B) arise from any breach by VIVUS of this Agreement; or (C) are Losses for which VIVUS is obligated to Indemnify the KVP Indemnitees pursuant to Section 9.4.1.

9.4.3 Procedure. To be eligible to be Indemnified hereunder, the indemnified Party shall provide the indemnifying Party with prompt notice of the Third-Party Claim giving rise to the indemnification obligation pursuant to this Section 9.4 and the exclusive ability to defend (with the reasonable cooperation of the indemnified Party) or settle any such claim; provided, however, that the indemnifying Party shall not enter into any settlement that admits fault, wrongdoing or damages without the indemnified Party's written consent, such consent not to be unreasonably withheld or delayed. The indemnified Party shall have the right to participate, at its own expense and with counsel of its choice, in the defense of any claim or suit that has been assumed by the indemnifying Party.

9.5 Insurance. Without limiting Section 6.1, KVP shall obtain and maintain, during the Term for a period of six (6) years thereafter, comprehensive general liability insurance, including products liability insurance and coverage for clinical trials, with reputable and financially secure insurance carriers, or self insurance in a form and at levels consistent with industry standards based upon KVP's activities and indemnification obligations hereunder. Such liability insurance or self-insurance shall be maintained on an occurrence basis to provide such protection after expiration or termination of the policy itself or this Agreement. KVP shall furnish to VIVUS on request certificates issued by the insurance company setting forth the amount of the liability insurance (or evidence of self insurance) and a provision that VIVUS shall receive thirty (30) days' written notice prior to termination or material reduction to the level of coverage.

9.6 Acrux License. During the Term and subject to KVP fulfilling its obligations hereunder including the payment of amounts in accordance with Article 3, VIVUS shall keep the Acrux License in full force and effect. Accordingly, except as KVP may otherwise agree, VIVUS shall not provide any notice of breach to FemPharm under the Acrux License or otherwise terminate the Acrux License. VIVUS shall not, without the written approval of KVP, agree to any amendment or modification of or to the Acrux License or waive any of its rights or

the obligations of FemPharm or Acrux thereunder, in each such case that would likely have an adverse effect with respect to any of the rights of KVP hereunder. Further and without limiting any other provision herein, VIVUS shall promptly provide a copy of any and all notices received by VIVUS under the Acrux License related to the subject matter hereof or that is likely to adversely affect any of KVP's rights or licenses hereunder. Without limiting the foregoing, if VIVUS receives a notice of breach from FemPharm pursuant to the Acrux License, then unless VIVUS (i) disputes such breach in accordance with Section 15.10 of the Acrux License or (ii) provides KVP prompt evidence of cure of such breach, KVP shall have the right to cure such breach on behalf of VIVUS and VIVUS shall be responsible for all costs and expenses incurred by KVP in connection with effecting such cure.

9.7 Certification . With respect to those obligations hereunder which KVP owes directly to FemPharm hereunder, KVP shall provide to VIVUS on or before January 1 and July 1 of each calendar year during the Term a certificate of compliance signed by an officer of KVP stating that KVP has complied with all such obligations.

9.8 Liquidated Damages . In the event that VIVUS breaches Section 9.6 as a result of VIVUS's termination of the Acrux License and at such time KVP is not in material breach of this Agreement, then VIVUS shall pay as liquidated damages an amount equal to the amounts paid to VIVUS under the APA. The Parties intend that such liquidated damages approximate the damages that KVP would sustain as a result of such termination. Accordingly in such event, the liquidated damages set forth in this Section 9.8 shall be KVP's sole and exclusive remedy for VIVUS's termination of the Acrux License.

9.9 Disclaimer of Liability. Except with respect to a breach of Section 9.1 through 9.4 or the exclusivity in Section 2.1 or in the event of fraud or willful misconduct,, in no event shall either party be liable to the other based upon this agreement for any special, consequential, indirect, or incidental damages arising out of or related to this agreement, however caused, on any theory of liability and whether or not such party has been advised or is aware of the possibility of such damages.

ARTICLE 10
TERM AND TERMINATION

10.1 Term . This Agreement shall become effective as of the Effective Date and, unless earlier terminated pursuant to the other provisions of this Article 10, shall continue in full force and effect until KVP has no remaining payment obligations hereunder (i.e., VIVUS's payment obligations under the Acrux License with respect to Evamist have expired) (the " **Term** "). Upon the expiration, but not earlier termination, the licenses granted pursuant to Section 2.1 shall become non-exclusive, fully-paid up and irrevocable.

10.2 Termination by KVP . KVP may terminate this Agreement upon seventy-five (75) days written notice to VIVUS referencing this Section 10.2. If at any time Acrux agrees to an assignment of the Acrux License to KVP in place of VIVUS, VIVUS consents to such

assignment and to the assumption of all rights and responsibilities under the Acrux Agreement by KVP.

10.3 Cross Termination. This Agreement shall terminate upon the effective date of a termination of the Acrux License, unless in the event of such a termination by FemPharm KVP provides written notice to FemPharm agreeing to be bound by and perform to the same extent as required of VIVUS under the Acrux Agreement.

10.4 General Effects of Expiration or Termination

10.4.1 Accrued Obligations. Expiration or termination of this Agreement for any reason shall not release either Party from any obligation or liability which, at the time of such expiration or termination, has already accrued to the other Party or which is attributable to a period prior to such expiration or termination.

10.4.2 General Survival. Articles 1, 8, 11 and 12 and Section 9.4 and Section 9.5 (for the period set forth therein) shall survive expiration or termination of this Agreement for any reason. Except as otherwise provided in this Article 10, all rights and obligations of the Parties under this Agreement shall terminate upon expiration or termination of this Agreement for any reason.

10.4.3 Return of Materials. Within fifteen (15) Business Days after the effective date of a termination, each Party shall destroy all tangible items comprising, bearing or containing any Confidential Information of the other Party in its possession or control, and provide written certification of such destruction, or prepare such tangible items of Confidential Information for shipment to the other Party, as such other Party may direct, at the other Party's expense; provided that the first Party may retain one copy of such Confidential Information for its legal archives solely for use in determining its ongoing obligations under this Agreement.

ARTICLE 11
DISPUTE RESOLUTION

11.1 Disputes. If the Parties are unable to resolve any dispute or other matter arising out of or in connection with this Agreement, either Party may, by written notice to the other, have such dispute referred to the Chief Executive Officers of the Parties for attempted resolution by good faith negotiations within ten (10) Business Days after such notice is received. In such event, each Party shall cause its Chief Executive Officers to meet (face-to-face or by teleconference) and be available to attempt to resolve such issue. If the Parties should resolve such dispute or claim, a memorandum setting forth their agreement will be prepared and signed by both Parties if requested by either Party. The Parties shall cooperate in an effort to limit the issues for consideration in such manner as narrowly as reasonably practicable in order to resolve the dispute.

11.2 Arbitration. In the event that the Parties are unable to resolve any such matter pursuant to Section 11.1, then either Party may initiate arbitration pursuant to this Section 11.2.

Any arbitration under this Section 11.2 shall be conducted by Judicial Arbitration and Mediation Services (" **JAMS** ") in San Jose, California in accordance with the then current Comprehensive Arbitration Rules and Procedures of JAMS by a single arbitrator and shall be binding upon the Parties. In such arbitration, the arbitrator shall select an independent expert with significant experience relating to the subject matter of such dispute to advise the arbitrator with respect to the subject matter of the dispute. If the Parties are unable to agree on an arbitrator, the arbitrator shall be selected by the senior executive of the San Jose office of JAMS. The costs of such arbitration (including the arbitrator and expert) shall be shared equally by the Parties, and each Party shall bear its own expenses in connection with the arbitration. The Parties shall use good faith efforts to complete arbitration under this Section 11.2 within sixty (60) days following the initiation of such arbitration. The arbitrator shall establish reasonable additional procedures to facilitate and complete such arbitration within such sixty (60) day period. Nothing in this Agreement shall limit the right of either Party to seek to obtain in any court of competent jurisdiction any equitable or interim relief or provisional remedy, including injunctive relief.

ARTICLE 12
MISCELLANEOUS

12.1 Governing Law . This Agreement and any dispute arising from the performance or breach hereof shall be governed by and construed and enforced in accordance with the Law of the State of Delaware, without reference to conflicts of laws principles.

12.2 Assignment . This Agreement shall not be assignable by either Party to any third party without the written consent of the other Party and any such attempted assignment shall be void. Notwithstanding the foregoing, either Party may assign this Agreement, without the written consent of the other Party, to an entity that acquires all or substantially all of the business or assets of such Party to which this Agreement pertains (whether by merger, reorganization, acquisition, sale or otherwise) and agrees in writing to be bound by the terms and conditions of this Agreement. No assignment or transfer of this Agreement shall be valid and effective unless and until the assignee/transferee agrees in writing to be bound by the provisions of this Agreement. The terms and conditions of this Agreement shall be binding on and inure to the benefit of the permitted successors and assigns of the Parties. Except as expressly provided in this Section 12.2, any attempted assignment or transfer of this Agreement shall be null and void

12.3 Notices . Any notice, request, delivery, approval or consent required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been sufficiently given if delivered in person, transmitted by facsimile (receipt verified) or by express courier service (signature required) or five (5) days after it was sent by registered mail, return receipt requested (or its equivalent), provided that no postal strike or other disruption is then in effect or comes into effect within two (2) days after such mailing, to the Party to which it is directed at its address or facsimile number shown below or such other address or facsimile number as such Party will have last given by notice to the other Party.

If to VIVUS, addressed to: VIVUS Inc.
112 Castro Street, Suite 200

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Mountain View, California
Attention: Leland F. Wilson
Facsimile: (650) 934-5389

With a copy to:

Wilson Sonsini Goodrich & Rosati
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Attention: Ian B. Edvalson, Esq.
Facsimile: (650) 493-6811

If to KVP, addressed to:

K-V Pharmaceutical Company
2503 S. Hanley Road
St. Louis, Missouri 63144
Attention: Vice President, Business Development and General Counsel
Facsimile: (314) 645-4705

With a copy to:

Kenyon & Kenyon LLP
One Broadway
New York, New York 10004
Attention: Charles Weiss, Esq.
Facsimile: (212) 425-5288

12.4 Waiver. Neither Party may waive or release any of its rights or interests in this Agreement except in writing. 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. No waiver by either Party of any condition or term in any one or more instances shall be construed as a continuing waiver of such condition or term or of another condition or term.

12.5 Severability. If any provision hereof should be held invalid, illegal or unenforceable in any jurisdiction, the Parties shall negotiate in good faith a valid, legal and enforceable substitute provision that most nearly reflects the original intent of the Parties and all other provisions hereof shall remain in full force and effect in such jurisdiction and shall be liberally construed in order to carry out the intentions of the Parties as nearly as may be possible. Such invalidity, illegality or unenforceability shall not affect the validity, legality or enforceability of such provision in any other jurisdiction.

12.6 Entire Agreement/Modification. This Agreement, including its Attachment (together with the APA and Transition Services Agreement), sets forth all the covenants, promises, agreements, warranties, representations, conditions and understandings between the Parties and supersedes and terminates all prior agreements and understandings between the Parties including the Prior CDA and that certain Letter of Intent for Discussion Purposes

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between the Parties dated February 14, 2007. No subsequent alteration, amendment, change or addition to this Agreement shall be binding upon the Parties unless reduced to writing and signed by the respective authorized officers of the Parties.

12.7 Bankruptcy. All rights and licenses granted under or pursuant to this Agreement by each Party as a licensor are, and shall otherwise be deemed to be, for purposes of Section 365(n) of Title 11, U.S. Code (the " **Bankruptcy Code** "), licenses of rights to "intellectual property" as defined under section 101(35A) of the Bankruptcy Code. The Parties agree that each licensee of such rights under this Agreement shall retain and may fully exercise all rights and elections it would have in the case of a licensor bankruptcy under the Bankruptcy Code. Each Party agrees during the term of this Agreement to create or maintain current copies, or if not amenable to copying, detailed descriptions or other appropriate embodiments, of all such intellectual property licensed to the other Party.

12.8 Relationship of the Parties. The Parties agree that the relationship of VIVUS and KVP established by this Agreement is that of independent contractors. Furthermore, the Parties agree that this Agreement does not, is not intended to, and shall not be construed to, establish an employment, agency or any other relationship. Except as may be specifically provided herein, neither Party shall have any right, power or authority, nor shall they represent themselves as having any authority, to assume, create or incur any expense, liability or obligation, express or implied, on behalf of the other Party, or otherwise act as an agent for the other Party for any purpose.

12.9 Force Majeure. Except with respect to payment of money, neither Party shall be liable to the other for failure or delay in the performance of any of its obligations under this Agreement for the time and to the extent such failure or delay is caused by earthquake, riot, civil commotion, war, terrorist acts, strike, flood, or governmental acts or restriction, or other cause that is beyond the reasonable control of the respective Party. The Party affected by such force majeure will provide the other Party with full particulars thereof as soon as it becomes aware of the same (including its best estimate of the likely extent and duration of the interference with its activities), and will use commercially reasonable efforts to overcome the difficulties created thereby and to resume performance of its obligations as soon as practicable.

12.10 Compliance with Laws. Notwithstanding anything to the contrary contained herein, all rights and obligations of VIVUS and KVP are subject to prior compliance with, and each Party shall comply with, all applicable Laws, including obtaining all necessary approvals required by the applicable agencies of the governments of the United States and foreign jurisdictions.

12.11 Counterparts. This Agreement may be executed in two counterparts, each of which shall be deemed an original, and all of which together, shall constitute one and the same instrument.

[The remainder of this page intentionally left blank; the signature page follows.]

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

IN WITNESS WHEREOF , the Parties have executed this Agreement in duplicate originals by their duly authorized representatives as of the Effective Date.

VIVUS INC.		**K-V PHARMACEUTICAL COMPANY**	
By:	_____	By:	_____
Name:	_____	Name:	_____
Title:	_____	Title:	_____

Attachments:
Attachment 1 : Acrux License, as amended
Attachment 2 : Schedule of Exceptions

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

ATTACHMENT 1
UNDERLYING LICENSE AGREEMENT (as amended)

[Previously filed as Exhibit 10.51 with the Registrant's Annual Report on Form 10-K for the year ended December 31, 2004.]

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ATTACHMENT 2
SCHEDULE OF EXCEPTIONS

[Schedule of Exceptions has been omitted. A copy will be provided upon request by the Commission.]

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EXHIBIT B
Form of Transition Services Agreement

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EXHIBIT B

TRANSITION SERVICES AGREEMENT

THIS TRANSITION SERVICES AGREEMENT (the " ***Agreement*** ") is entered into as of , 2007 (the " ***Effective Date*** ") by and between K-V Pharmaceutical Company, a Delaware corporation, having an office at 2503 S. Hanley Road, St. Louis, Missouri 63144 (together with its Affiliates, " ***Recipient*** "), and Vivus, Inc., a Delaware corporation, having an office at 112 Castro Street, Suite 200, Mountain View, California 94040 (together with its Affiliates, " ***Service Provider*** "). Recipient and Service Provider may be referred to herein individually as a " ***Party*** " or collectively as the " ***Parties*** ."

RECITALS

WHEREAS , pursuant to an Asset Purchase Agreement, dated March 30, 2007, by and between Recipient and Service Provider (the " ***APA*** "), the Parties have entered into an agreement for the purchase by Recipient of certain assets of Service Provider related to the product known as Evamist™, all on the terms and conditions set forth therein; and

WHEREAS , to facilitate the transfer of assets relating to such product to Recipient, Service Provider has agreed to provide to Recipient certain technology transition services.

NOW, THEREFORE , the Parties agree as follows:

1. DEFINITIONS . The following terms, when used herein with initial capital letters, will have the meanings ascribed to such terms in this Section 1 . Capitalized terms not defined herein shall have the meanings set forth in the APA or Acrux License, as applicable.

1.1 " ***Acrux License*** " means the Estradiol Development and Commercialization Agreement by and among Service Provider, Fempharm and Acrux DDS Pty Ltd. effective February 12, 2004, as amended July 2, 2004.

1.2 " ***Affiliate*** " means (i) any corporation or other legal entity owning, directly or indirectly, fifty percent (50%) or more of the voting capital shares or similar voting securities of a Vivus, Inc. or K-V Pharmaceutical Company; (ii) any corporation or other legal entity fifty percent (50%) or more of the voting capital shares or similar voting rights of which is owned, directly or indirectly, by a Party; or (iii) any corporation or other legal entity fifty percent (50%) or more of the voting capital shares or similar voting rights of which is owned, directly or indirectly, by a corporation or other legal entity which owns, directly or indirectly, fifty percent (50%) or more of the voting capital shares or similar voting securities of such Party. Solely for purposes of this Agreement, each Party will be deemed not to be an Affiliate of the other Party.

1.3 " ***FemPharm*** " means FemPharm Pty Ltd.

1.4 " ***Pass Through Expenses*** " means the reasonable and actual out-of-pocket expenses (including travel expenses) incurred by Service Provider in performing the Services,

but not including any overhead costs, wages, salaries or benefit costs of Service Provider's officers or employees or other mark-ups.

1.5 " ***Recipient Personnel*** " means all employees, agents, subcontractors, and representatives of Recipient.

1.6 " ***Recipient's Facility*** " means the facility located at , or such other location that Recipient shall notify Service Provider of in writing.

1.7 " ***Service Provider Personnel*** " means all employees of Service Provider who perform Services under this Agreement.

1.8 " ***Services*** " means reasonable services related to the development, regulatory approval, clinical testing, manufacturing and commercialization of Evamist including but not limited to the services as described on Schedule A and requested from time to time by Recipient during the term of this Agreement.

2. TRANSFER OF TECHNOLOGY

2.1 Transfer of Initially Transferred Materials. As soon as practicable after the Effective Date, Service Provider shall deliver at no cost to Recipient at the Recipient's Facility the information, documents, equipment, software and materials set forth in Schedule B to this Agreement, which constitute some, but not all, of the Licensed Know-How (as defined in the Acrux License) with respect to the Evamist Business transferred by FemPharm to Service Provider pursuant to Section 5.2 of the Acrux License (" ***Initially Transferred Materials*** ").

2.2 Transfer of Future Transferred Materials. After the transfer of the Initially Transferred Materials, Service Provider shall promptly transfer to Recipient without charge (except as provided herein) to a location specified by Recipient copies of any additional Licensed Know-How licensed under the Acrux License with respect to Evamist™ that Service Provider receives from FemPharm pursuant to Section 5.2 of the Acrux License (the " ***Future Transferred Materials*** ").

3. SERVICES

3.1 Provision of Services . Service Provider will provide the Services to Recipient during the term of this Agreement as set forth in this Section 3.1. Except as otherwise expressly provided in this Agreement, Service Provider will be responsible for providing appropriate personnel and other resources required for performance of the Services.

(a) During the Term, Service Provider will provide up to eight (8) hours of Services per week as requested by Recipient without charge, subject to reimbursement of Service Provider for Pass Through Expenses pursuant to Section 4.2 . Any unused hours (out of the eight (8) hour budget for a given week) will be carried over to successive weeks. Any additional hours of Services provided in a given week (in excess of the eight (8) hour budget plus any additional hours carried over from previous weeks), other than for Services related to clinical development

and regulatory approval processes provided prior to the Evamist NDA Approval Date), will be charged to Recipient at the rate of $250 per hour.

(b) Notwithstanding anything to the contrary herein, prior to the Evamist NDA Approval Date, Service Provider will provide all reasonably requested Services related to clinical development and regulatory approval processes without charge, subject to reimbursement of Service Provider for Pass Through Expenses pursuant to Section 4.2 .

(c) Notwithstanding anything to the contrary herein, following the Evamist NDA Approval Date and for up to three (3) months thereafter (but in no event beyond December 31, 2007), Service Provider will provide up to eight (8) hours per week of Services related to the transfer of the Evamist FDA Submissions and related books and records, as requested by Recipient, without charge, subject to reimbursement of Service Provider for Pass Through Expenses pursuant to Section 4.2 .

(d) Any travel required in connection with performance of the Services must be requested of and coordinated with Service Provider at least three (3) Business Days in advance, unless exigent circumstances necessitate a shorter notice period. In addition, travel time will not be counted toward chargeable hours.

3.2 General Standards of Performance . Service Provider will provide the Services to Recipient with at least the same level of skill, quality, care, timeliness, and cost-effectiveness as such services, functions, and tasks were performed for Service Provider's own purposes prior to the date of execution of the APA. At a minimum, Service Provider will perform the Services in a timely and professional manner and in accordance with industry standards for services of the type performed. Service Provider will comply with all applicable international, federal, state, and local laws and regulations, and will obtain all applicable permits and licenses, in connection with its obligations under this Agreement.

3.3 Preferred Providers . If requested by Recipient, Service Provider will provide to Recipient a list of Service Provider's preferred providers of services related to the transferred Evamist Business, and Recipient may in its discretion engage such providers to provide services directly to Recipient.

3.4 Assistance with Initially Transferred Materials. Upon delivery of the Initially Transferred Materials pursuant to Section 2.1 above, and at Recipient's reasonable request, Service Provider will provide to Recipient consultation, assistance, and information as reasonably requested by Recipient in order to, and otherwise perform the Services so as to, effect a smooth transition of the transferred Evamist Business and related business to Recipient's Facility and to assist Recipient in understanding, using and practicing the Initially Transferred Materials.

3.5 Assistance with Future Transferred Materials. Upon delivery of the Future Transferred Materials pursuant to Section 2.2 , and at the reasonable request of Recipient, Service

Provider shall assist Recipient in understanding, using and practicing the Future Transferred Materials.

3.6 Additional Consulting Agreement . If Recipient so elects by written notice to Service Provider during the Term, the Parties shall enter into a separate consulting agreement, on commercially reasonable terms and in a mutually acceptable form, with a term effective as of January 1, 2008 and ending on December 31, 2008, providing that Service Provider shall render additional reasonable consulting services to Service Provider related to Evamist in the amount of up to eight (8) hours per week in exchange for a consulting fee of $250 per hour (with any travel time not counted toward chargeable hours).

4. COMPENSATION

4.1 Charges. For any Services provided hereunder, Recipient agrees to pay Service Provider the applicable service fees set forth in Section 3.1 for the performance of such Services. Recipient will not be required to pay any amounts for the Services provided hereunder other than as set forth in Section 3.1 , unless approved by Recipient in advance in writing.

4.2 Pass Through Expense Reimbursement . Recipient agrees to reimburse Service Provider for Pass Through Expenses incurred by Service Provider in performing the Services and invoiced to Recipient in accordance with this Section 4 . Each such invoice will be accompanied by such supporting documentation and vouchers as Recipient may reasonably require. Such invoices will be due and payable within forty-five (45) days after Recipient's receipt of the invoice.

4.3 Invoicing and Payment . Service Provider will invoice Recipient monthly at the end of each month for the amount due under this Agreement for that month. Such invoices will clearly specify amounts due for each of the Services. Each such invoice will be accompanied by such supporting documentation and vouchers as Recipient may reasonably require. Such invoices will be due and payable within forty-five (45) days after Recipient's receipt of the invoice.

5. CONFIDENTIALITY

5.1 Confidential Information . Each Party shall use and disclose Confidential Information (as defined in the Sublicense Agreement) of the other Party obtained under this Agreement as set forth in Article 8 of the Sublicense Agreement.

5.2 Safeguarding Confidential Information . During the term of this Agreement, each Party will maintain environmental, safety, and facility procedures, data security procedures and other safeguards against the destruction, loss, or alteration of the other Party's Confidential Information (as defined in the Sublicense Agreement) in its possession which are no less rigorous than those maintained by such Party for its own information of a similar nature.

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5.3 Access to Computer Systems . If Service Provider is given access to any of Recipient's equipment, computer, software, network, electronic files, or electronic data storage system, Service Provider shall limit such access and use solely to perform Services for Recipient and shall not access or attempt to access any equipment, computer, software, network, electronic files, or electronic data storage system, other than those specifically required to accomplish the Services. Service Provider shall limit such access to those Service Provider Personnel with an express requirement to have such access in connection with this Agreement, shall advise Recipient in writing of the name of each such employee who will be granted such access, and shall strictly follow all Recipient security rules and procedures for use of Recipient's electronic resources. All user identification numbers and passwords disclosed to Service Provider and any information obtained by Service Provider as a result of their access to and use of Recipient's equipment, computers, software, networks, electronic files, and electronic data storage systems, shall be deemed to be, and shall be treated as, Confidential Information (as defined in the Sublicense Agreement) under applicable provisions of this Agreement. Service Provider agrees to cooperate with Recipient in the investigation of any apparent unauthorized access by Service Provider to Recipient's equipment, computer, software, network, electronic file, or electronic data storage systems, or any apparent unauthorized release of Recipient's Confidential Information (as defined in the Sublicense Agreement) by Service Provider Personnel.

6. [INTENTIONALLY DELETED]

7. PERSONNEL

7.1 Service Provider Services Manager . Service Provider hereby designates CJ Wang as the initial "Services Manager" hereunder. In addition, Service Provider shall make available its Senior Director of Contract Manufacturing (currently Ted Broman) to provide Services related to manufacturing and such other Service Provider Personnel as appropriate to perform other applicable Services provided to Recipient hereunder. The Services Manager will be an employee of Service Provider, will devote reasonable time and effort to managing the Services, will serve as the initial point of contact to Recipient for all matters related to the Services, and will have day-to-day authority for ensuring performance of the Services in accordance with the terms of this Agreement. Any replacement of the Services Manager will be subject to Recipient's reasonable approval. Service Provider may replace the Services Manager only if the Services Manager is unable to continue fulfilling his or her responsibilities as such due to death, disability, or termination of employment with Service Provider, or as otherwise agreed by the Parties.

7.2 Compensation and Benefits. All Service Provider Personnel providing Services under this Agreement will be deemed to be employees solely of Service Provider for purposes of all compensation and employee benefits and not to be employees or representatives of Recipient. Service Provider will be solely responsible for payment of (a) all income, disability, withholding, and other employment taxes and (b) all wages, salaries, medical benefit premiums, vacation pay, sick pay, or other fringe benefits for any employees, agents, or contractors of Service Provider who perform Services with Sections 8.2 and 8.3 governing any such indemnification. Service Provider will indemnify, defend and hold Recipient as an Indemnitee

(as defined in Section 8.1) harmless against any of the foregoing and any liability for premiums, contributions or taxes payable under workers' compensation, unemployment compensation, disability benefit, old age benefit, or tax withholding for which Recipient may be adjudged liable as an employer with respect to any Service Provider Personnel who perform Services. All Service Provider Personnel will be under the direction, control, and supervision of Service Provider, and Service Provider will have the sole right to exercise all authority with respect to the employment, termination, assignment, and compensation of such Service Provider Personnel.

8. INDEMNIFICATION AND INSURANCE

8.1 Indemnification. Each Party (the " ***Indemnitor*** ") will hold harmless and indemnify the other Party directors, officers, employees and agents (collectively, the " ***Indemnitees*** ") from and against, and will compensate and reimburse each of the Indemnitees for, any damages that are suffered or incurred by any of the Indemnitees or to which any of the Indemnitees may otherwise becomes subject at any time that relate to any claim by a third party and that arises from or results from, or is connected with, any gross negligence or intentional misconduct of the Indemnitor or the Indemnitor's personnel in the course of its performance under this Agreement or breach of this Agreement by the Indemnitor.

8.2 Obligations. The Indemnitor will have control of the defense, litigation, and, subject to the conditions set forth below, settlement of any third party claims or suits that are subject to Sections 7.3 and 8.1 . An Indemnitee will have the right (subject to the conditions set forth below), but not the obligation, to select counsel of its choice to participate in the defense of such third party claims or suits, in which case the Indemnitee will pay the fees and expenses of its own legal counsel unless, in the reasonable opinion of Indemnitee's legal department, separate legal counsel for the Indemnitee and the Indemnitor is necessary or advisable due to an actual or potential conflict of interest (in which case the Indemnitor will pay the fees and expenses of the Indemnitee's legal counsel). The Indemnitor will not accept a settlement of any such third party claim without the prior written consent of the Indemnitee, which consent will not be unreasonably withheld if such settlement involves solely the payment of money by the Indemnitor and the Indemnitor has the ability to pay the amount required by the settlement.

8.3 Cooperation. If any claim is made against an Indemnitor within the scope of the indemnity set forth in Sections 7.3 and 8.1 , the Indemnitee will: (a) provide prompt written notice of such third party claim to the Indemnitor; (b) provide the Indemnitor with such assistance as the Indemnitor may reasonably request in connection with the defense and settlement of such claim, provided that all costs and expenses incurred by either Party will borne by the Indemnitor; and (c) promptly comply with all terms of any resolution or settlement of such claim at the Indemnitor's expense. Failure by the Indemnitee to comply with the obligations under this Section 8.3 will relieve the Indemnitor of its obligations under Sections 8.1 and 8.2 only if and to the extent that the Indemnitor can show that its ability to defend the claim or settle the claim on favorable terms was materially prejudiced by the Indemnitee's failure to comply with its obligations under this Section 8.3 .

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8.4 Insurance. During the term of this Agreement each Party will maintain insurance of the types and with the policy limits as are appropriate for transactions of the type contemplated by this Agreement.

8.5 Disclaimer of Consequential Damages. IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE OR CONSEQUENTIAL DAMAGES, WHETHER BASED UPON A CLAIM OR ACTION OF CONTRACT, WARRANTY, NEGLIGENCE, STRICT LIABILITY OR OTHER TORT, OR OTHERWISE ARISING OUT OF THIS AGREEMENT.

9. TERM AND TERMINATION

9.1 Term . The term of this Agreement will commence on the Effective Date and will continue until December 31, 2007 (the " ***Term*** ").

9.2 Survival . The following provisions of this Agreement will survive the termination or expiration of this Agreement: Sections 1 , 5 , 8 , 9 , and 10 .

10. GENERAL

10.1 Integration. This Agreement, together with the APA, the Related Agreements and the Acrux License, supersedes all other agreements and understandings between the Parties with respect to the subject matter discussed herein.

10.2 Further Assurances . Each Party agrees to take such actions and execute such documents as are reasonably requested by the other Party (including providing executed documents in such recordable form as is deemed required or necessary by the other Party) to effect the purposes of this Agreement.

10.3 Continued Performance . Each Party agrees to continue performing its obligations under this Agreement while any dispute is being resolved unless and until the term of this Agreement ends.

10.4 Notices. Any notice or other communication required or permitted to be delivered to any Party under this Agreement must be in writing and will be deemed properly delivered, given and received (a) when delivered by hand, or (b) two (2) business days after sent by registered mail, by courier or express delivery service or by facsimile, in each case to the address or facsimile telephone number set forth beneath the name of such Party below (or to such other address or facsimile telephone number as such Party will have specified in a written notice given to the other Parties hereto):

if to Service Provider:

112 Castro Street, Suite 200
Mountain View, California 94040

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Attention: President
Facsimile: (650) 934-5389

if to Recipient:

2503 S. Hanley Road
St. Louis, Missouri 63144
Attention: Vice President, Business Development
General Counsel
Facsimile: (314) 645-4705

10.5 Headings. Paragraph headings are inserted for convenience of reference only and do not form a part of this Agreement.

10.6 Counterparts. This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, and all of which together shall constitute the Agreement. Signatures may be transmitted via facsimile, thereby constituting the valid signature and delivery of this Agreement.

10.7 Relationship of the Parties . Each Party will be deemed to be an independent contractor and not an agent, joint venturer, or representative of the other Party. Neither Party may create any obligations or responsibilities on behalf of or in the name of the other Party. Neither Party will hold itself out to be a partner, employee, franchisee, representative, servant, or agent of the other Party.

10.8 Governing Law; Venue

(a) This Agreement will be construed in accordance with, and governed in all respects by the laws of the State of Delaware (without giving effect to principles of conflicts of laws).

(b) Except as otherwise provided in this Agreement, any proceeding relating to this Agreement or the enforcement of any provision of this Agreement (each a **"Proceeding"**) will be brought or otherwise commenced in any state or federal court located in the County of New Castle, Delaware. Each Party to this Agreement:

(i) expressly and irrevocably consents and submits to the jurisdiction of each state and federal court located in the County of New Castle, Delaware (and each appellate court located in the State of Delaware) in connection with any such Proceeding;

(ii) agrees that each state and federal court located in the County of New Castle, Delaware will be deemed to be a convenient forum; and

(iii) agrees not to assert (by way of motion, as a defense or otherwise), in any such Proceeding commenced in any state or federal court located in the County of New Castle, Delaware, any claim that such Party is not subject personally to the

jurisdiction of such court, that such Proceeding has been brought in an inconvenient forum, that the venue of such proceeding is improper or that this Agreement or the subject matter of this Agreement may not be enforced in or by such court.

10.9 Successors and Assigns; Parties in Interest . Neither Party may assign this Agreement, in whole or in part, without the consent of the other Party, such consent not to be unreasonably withheld, provided however that the consent of the other Party shall not be required for Vivus, Inc. or K-V Pharmaceutical Company to assign this Agreement to an Affiliate, or to its successor in interest in connection with the transfer or sale to such third party successor of all or substantially all of the business of such Party to which this Agreement relates, whether by merger, sale of stock, sale of assets or otherwise. Any purported assignment not in accordance with this Section 10.9 shall be void.

10.10 Remedies Cumulative; Specific Performance. The rights and remedies of the Parties hereto will be cumulative (and not alternative). Each Party agrees that: (a) in the event of any breach or threatened breach by the other Party of any covenant, obligation or other provision set forth in this Agreement, such Party will be entitled (in addition to any other remedy that may be available to it) to pursue (i) a decree or order of specific performance or mandamus to enforce the observance and performance of such covenant, obligation or other provision, and (ii) an injunction restraining such breach or threatened breach; and (b) no Person will be required to provide any bond or other security in connection with any such decree, order or injunction or in connection with any related Proceeding.

10.11 Amendment, Waiver. This Agreement may be amended, modified, superseded or canceled, and any of the terms may be waived, only by a written instrument executed by each Party or, in the case of waiver, by the Party or Parties waiving compliance. The delay or failure of any Party at any time or times to require performance of any provisions shall in no manner affect the rights at a later time to enforce the same. No waiver by either Party of any condition or of the breach of any term contained in this Agreement, whether by conduct, or otherwise, in any one or more instances, shall be deemed to be, or considered as, a further or continuing waiver of any such condition or of the breach of such term or any other term of this Agreement.

10.12 Severability. If any provision of this Agreement is or becomes invalid or is ruled invalid by any court of competent jurisdiction or is deemed unenforceable, it is the intention of the Parties that the remainder of the Agreement shall not be affected so long as the essential benefits of this Agreement remain enforceable and obtainable.

10.13 No Third Party Beneficiaries. No third party, including any employee of any Party to this Agreement, shall have or acquire any rights by reason of this Agreement. Nothing contained in this Agreement shall be deemed to constitute the Parties partners with each other or any third party.

10.14 Construction

(a) For purposes of this Agreement, whenever the context requires: the singular number will include the plural, and vice versa; the masculine gender will include the feminine and neuter genders; the feminine gender will include the masculine and neuter genders; and the neuter gender will include the masculine and feminine genders.

(b) The Parties hereto agree that any rule of construction to the effect that ambiguities are to be resolved against the drafting Party will not be applied in the construction or interpretation of this Agreement.

(c) As used in this Agreement, the words “include” and “including,” and variations thereof, will not be deemed to be terms of limitation, but rather will be deemed to be followed by the words “without limitation.”

(d) Except as otherwise indicated, all references in this Agreement to “Sections” are intended to refer to Sections of this Agreement.

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The Parties to this Agreement have caused this Agreement to be executed and delivered as of the Effective Date.

K-V PHARMACEUTICAL COMPANY		**VIVUS, INC.**	
By:	_____	By:	_____
Name:	_____	Name:	_____
Title:	_____	Title:	_____

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Schedule A

Manufacturing Support Services

Service Provider will provide reasonable support for the manufacture and supply of Evamist™ as requested by Recipient, including, but not limited to:

- assistance in the negotiation and finalization of supply and manufacturing agreements/arrangements related to Evamist
- supporting any inspections by Recipient or regulatory authorities with respect to the pharmaceutical active ingredient-related inspections at [***] or DPT
- consulting with Recipient regarding the process line setup completed at DPT, including the conduct of validation trials
- supporting completion and validation of the new applicator design
- supporting the ordering of automated equipment for new applicator design and validation of such equipment
- supporting resolution of the [***] pump and actuator issues
- assistance in technology transfers from DPT and/or [***]
- assistance with all FDA or any other regulatory body CMC questions or the like
- assistance in all ongoing product development work, including the pad labeling at the time of closing of the APA
- Support for any deficiency that might arise during the manufacture of the initial validation and launch quantity batches.
- Consulting with Recipient regarding the process line setup completed at DPT, [***] and [***], including the conduct of validation trails at DPT
- Consulting and technical support for label application, qualification and FDA approval.
- Support for any deficiency that might arise due to manufacture of any component (applicator, actuator or vial) that might arise during the manufacture of the initial validation and launch quantity batches.
- **Clinical Services**

- Service Provider will provide reasonable support for the clinical development and regulatory approval processes related to Evamist™ as requested by Recipient, including, but not limited to:

- supporting Recipient in answering queries by the FDA (or other governmental regulatory authority) including but not limited to queries regarding labeling responses or changes, chemistry, manufacturing, and controls, clinical data results, or the clinical development, testing, manufacturing of Evamist™.

- supporting clinical data results for Evamist™.

- assisting Recipient in the transfer of clinical data, reports, case report forms, stability reports, batch records, manufacturing feasibility studies and other relevant clinical and development information to Recipient's control

- support for any FDA audits at the clinical sites

- providing consulting advice time for any post-approval FDA (or other governmental regulatory authority) commitments for further Phase IV (or equivalent) studies that Recipient may need to conduct

Sales and Marketing Support :

Service Provider will provide counsel and consulting support relating to the commercial launch and sales and marketing of Evamist™ as requested by Recipient

Intellectual Property Support:

Service Provider will provide reasonable counsel and consulting support relating to transfer and registration of the intellectual property related to Evamist as requested by Recipient.

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Schedule B

Initially Transferred Materials

Service Provider will transfer to Recipient the following materials:

- New applicator design materials for Evamist™
- manufacturing stability reports and batch records for Evamist™
- manufacturing feasibility studies for Evamist™
- FDA submissions and correspondence relating to Evamist™
- clinical data, reports, protocols and results
- automated line equipment

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Exhibit 3.3

AMENDMENT NO. 1
TO THE AMENDED AND RESTATED BYLAWS OF
VIVUS, INC.

February 20, 2013

The Amended and Restated Bylaws of VIVUS, Inc., a Delaware corporation (the " **Company** "), initially adopted by the Board of Directors of the Company on May 16, 1996 and as amended and restated on April 18, 2012 (the " **Bylaws** "), are hereby amended by this Amendment No. 1 (this " **Amendment** ") pursuant to Article IX thereof as set forth below.

1. **Amendment** . Article II, Section 2.7 of the Bylaws is hereby amended by deleting such Article II, Section 2.7 in its entirety and replacing such Section with the following new Article II, Section 2.7:

   "The holders of a majority in voting power of the stock issued and outstanding and entitled to vote thereat, present in person or represented by proxy, shall constitute a quorum at all meetings of the stockholders for the transaction of business except as otherwise provided by applicable law, the certificate of incorporation or these bylaws. If, however, such quorum is not present or represented at any meeting of the stockholders, then either (i) the chairman of the meeting or (ii) the holders of a majority of the voting power of the shares entitled to vote, who are present in person or represented by proxy, shall have power to adjourn the meeting. If a quorum be initially present, the stockholders may continue to transact business until adjournment, notwithstanding the withdrawal of enough stockholders to leave less than a quorum.

   Except as otherwise provided by the certificate of incorporation, directors shall be elected by a plurality of the votes cast by stockholders present in person or represented by proxy at the meeting and entitled to vote on the election of directors. Except as otherwise provided by applicable law, the certificate of incorporation or these bylaws, every matter other than the election of directors shall be decided by the affirmative vote of a majority of the votes cast by stockholders present in person or represented by proxy at the meeting and entitled to vote on such matter."

2. **Miscellaneous** . Except as modified by this Amendment, which shall be effective as of the date first written above, the Bylaws shall remain in full force and effect.

[*Signature Page Follows*]

IN WITNESS WHEREOF , to record adoption of this Amendment by the Board of Directors of the Company as of the date first written above, the Company has caused its authorized officer to execute this Amendment as of the date first written above.

By: /s/ Leland F. Wilson
Name: Leland F. Wilson
Title: Chief Executive Officer

Exhibit 10.15

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

AGREEMENT

This Agreement made as of this 28th day of December, 2000 (hereinafter referred to as "EFFECTIVE DATE"), between TANABE SEIYAKU CO., LTD., a Japanese corporation having its principal office at 2-10 Dosho-machi 3-chome, Chuo-ku, Osaka, Japan (hereinafter referred to as "TANABE") and VIVUS, INC., a corporation having its principal office at 1172 Castro Street, Mountain View, CA 94040, USA (hereinafter referred to as "VIVUS"). TANABE and VIVUS are sometimes referred to herein individually as a "Party" or collectively as "Parties".

WITNESSETH:

WHEREAS, TANABE is the owner of all right, title and interest in certain patents and know-how relating to a selective phosphodiesterase type-5 inhibitor compound referred to by TANABE as "T-1790", and TANABE desires a collaborator to develop and market such compound;

WHEREAS, VIVUS has extensive capabilities in the development, manufacture and marketing of pharmaceutical products in the USA;

WHEREAS, TANABE and VIVUS have entered into the Secrecy Agreement effective as of the 19th day of June, 2000 (hereinafter referred to as "SECRECY Agreement"), under which TANABE has disclosed to VIVUS data and information relating to the aforesaid compound;

WHEREAS, after reviewing and taking into consideration aforesaid information, VIVUS desires to obtain the right to develop and to market the product containing the aforesaid compound; and

WHEREAS, TANABE is willing to grant the desired right to VIVUS subject to the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the covenants and obligations expressed herein, and intending to be legally bound, the Parties agree as follows:

1. Definitions .

1.1 "ADVERSE DRUG REACTION" means any adverse drug reaction as defined in the then current edition of ICH Guidelines and any other relevant regulatory guidelines, whether the ADVERSE DRUG REACTION occurs in the conduct of clinical trials or is reported during post-marketing surveillance or any other means.

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1.2 "AFFILIATE" means any corporation or other business entity which directly or indirectly controls, or is controlled by, or under common control with a Party hereto. For the purpose of this definition, "control" means that an entity owns or controls other entity by means of fifty percent (50%) or more of the equity conferring voting rights, or otherwise has the ability to direct the business affairs of other entity.

1.3 "BULK DRUG TABLETS" means formulated tablets containing COMPOUND in bulk form which if appropriately packaged and labeled would constitute PRODUCT, and which shall be supplied by TANABE pursuant to Section 7.1, and which excludes RAPIDLY DISINTEGRATED TABLET unless otherwise agreed by the Parties.

1.4 "BULK DRUG SUBSTANCE" means COMPOUND in bulk form which, if appropriately formulated and finished, would constitute PRODUCT, and which shall be supplied by TANABE pursuant to Section 7.1.

1.5 "CALENDAR QUARTER" means the respective period of three (3) consecutive calendar months as used by VIVUS for financial reporting ending on or about March 31, June 30, September 30 and December 31.

1.6 "CALENDAR YEAR" means the respective period of about a year as used by VIVUS for financial reporting commencing on January 1 and ending on December 31.

1.7 "CLINICAL STUDIES" means PHASE I CLINICAL STUDIES, PHASE II CLINICAL STUDIES and PHASE III CLINICAL STUDIES.

1.8 "COMPOUND" means all the compounds which are selective phosphodiesterase type-5 inhibitor, which compounds are contained within a claim of any unexpired TANABE PATENT no matter when filed or in a claim of a pending application for a TANABE PATENT no matter when filed which is being prosecuted in good faith by or on behalf of TANABE or its AFFILIATE, including without limitation the compound coded as T-1790 by TANABE, chemically known as [***].

1.9 "CONTROL" or "CONTROLLED" means the right to grant a license or sublicense to intangible property rights (including patent rights, know-how and trade secret INFORMATION), and the right to provide access to or cross-reference to regulatory filings, in each case to the extent not in violation of the terms of any pre-existing agreement or other arrangement with any THIRD PARTY. "CONTROL" expressly includes the right of ownership, in whole or in part.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

1.10 "DATE OF FIRST SALE" means the date on which the PRODUCT is first sold in a country in the TERRITORY by VIVUS to a THIRD PARTY (other than 3 VIVUS' SUBLICENSEES) in a commercial arms length transaction.

1.11 "DEVELOPMENT PLAN" means the plan for development of the COMPOUND into a PRODUCT in the TERRITORY which is established pursuant to Section 5.6 .

1.12 "DEVELOPMENT WORK" means all activities relating to obtaining REGULATORY APPROVAL, and activities relating to manufacture of the BULK DRUG SUBSTANCE and PRODUCTS, including but not limited to activities relating to preclinical test, toxicology, pharmacokinetics, CLINICAL STUDIES, manufacturing process, formulation, quality assurance, quality control and regulatory affairs.

1.13 "DRUG APPROVAL APPLICATION" means an application for product license approvals, health registrations, marketing authorizations, regulatory submissions, notices of compliance and other licenses and permits (NDA and the like) required to be approved before commercial sale or use of a PRODUCT as a drug in a regulatory jurisdiction.

1.14 "EFFECTIVE DATE" means the date first written above.

1.15 "EMEA" means The European Agency for the Evaluation of Medicinal Products or any successor entity.

1.16 "EUROPEAN UNION" means a part of or all of the countries which are then current members of the European Union.

1.17 "FIELD" means treatment of male erectile dysfunction or female sexual dysfunction in humans.

1.18 "FDA" means the United States Food and Drug Administration or any successor entity.

1.19 "IND" means an Investigational New Drug Application filed with the FDA or a corresponding application filed with a regulatory agency with respect to development of a COMPOUND into a PRODUCT in the FIELD applicable in any country in the TERRITORY.

1.20 "INFORMATION" means all information, techniques, data, inventions, practices, methods, knowledge, know-how, skill, experience, patent applications or test data, generally not known to the public, relating to the FIELD, which is owned or

CONTROLLED by a Party relating to the COMPOUND or a PRODUCT which includes (but not limited to), pharmacological, toxicological, preclinical and clinical test data, analytical and quality control data, packaging, marketing, pricing, distribution, sales and manufacturing data or descriptions, 4 compositions-of-matter of the COMPOUND, assays and biological materials related thereto.

1.21 "MAJOR EUROPEAN COUNTRY" means the United Kingdom, Germany, France, Italy and Spain.

1.22 "MANUFACTURING COST" shall mean the manufacturing cost of the BULK DRUG SUBSTANCE, which is manufactured by or on behalf of TANABE (or the PRODUCT manufactured and supplied by or on behalf of VIVUS under Section 8.5), and which includes the following:

(a) Materials Cost, which means the price paid for raw material components and finished goods which are purchased from outside vendors as well as any freight and duty where applicable.

(b) Direct Labor Costs, which means the employment costs attributable to manufacturing the BULK DRUG SUBSTANCE including, without limitation, salary and employee benefits within the relevant manufacturing operating unit.

(c) Overhead Costs, which means the cost of specific activities attributable to manufacturing the BULK DRUG SUBSTANCE that are provided by support functions and are performed at a frequency which is in correlation with the production. Overhead Costs includes, expenses associated with quality assurance testing, batch review, equipment maintenance costs, manufacturing utilities, waste removal, management and administrative expenses, general facilities costs, environmental engineering, property taxes and insurance.

(d) Equipment Depreciation, which means the amortization of the costs of specific manufacturing facility, machinery or equipment dedicated either solely or partly (on a pro rata basis) to the production, calculated in accordance with the applicable generally accepted accounting practices.

It is understood and agreed that the definition of MANUFACTURING COST shall be consistently applied during the term of the Agreement.

1.23 "NDA" means a New Drug Application submitted to the FDA in the United States for the PRODUCT.

1.24 "NET SALES" means:

(a) with respect to a PRODUCT, the amount invoiced by VIVUS, its AFFILIATES and their SUBLICENSEES for sales of a PRODUCT to a THIRD PARTY in the TERRITORY in a commercial arms length 5 transaction, less estimates which will be adjusted to actual on a periodic basis of: (i) discounts, including cash discounts, rebates paid, credit accrued or actually taken, and retroactive price reductions or allowances actually allowed or granted from the billed amount, and commercially reasonable and customary fees paid to distributors (other than to a distributor that is an AFFILIATE of VIVUS), (ii) credits or allowances actually granted upon claims, rejections or returns of such sales of PRODUCT, including recalls, regardless of VIVUS requesting such recalls, and (iii) taxes, duties or other governmental charges levied on or measured by the billing amount when included in billing, as adjusted for the items of (i) and (ii) above.

(b) It is understood and agreed that sales or transfers of PRODUCTS between VIVUS, its AFFILIATES and their SUBLICENSEES shall not constitute a "NET SALES" unless such party is an end-user of such product.

(c) For the avoidance of doubt, even if the NON-ORAL PRODUCT is sold in combination with any other active ingredient than the COMPOUND, full NET SALES for such combination NON-ORAL PRODUCT shall be applicable for the calculation of supply price under Section 11.

1.25 "NON-ORAL PRODUCT" means the PRODUCT other than the ORAL PRODUCT, which NON-ORAL PRODUCT includes, without limitation, the transurethral product and the topical product.

1.26 "ORAL PRODUCT" means the PRODUCT in oral formulation.

1.27 "PDE5 INHIBITOR" means a phosphodiesterase type-5 inhibitor.

1.28 "PHASE I CLINICAL STUDIES" means that portion of the clinical DEVELOPMENT PLAN or DEVELOPMENT WORK which provides for the first introduction into humans of a COMPOUND or PRODUCT including one or more small scale clinical studies conducted in normal volunteers or patients to get INFORMATION on PRODUCT safety, tolerability, pharmacological activity or pharmacokinetics as more fully defined in 21 C.F.R. 312.21(a).

1.29 "PHASE II CLINICAL STUDIES" means that portion of the clinical DEVELOPMENT PLAN or DEVELOPMENT WORK, which provides for the

definitive, well controlled clinical trials of a COMPOUND or PRODUCT in patients, including one or more clinical studies conducted in patients and designed to indicate clinical efficacy and safety for a PRODUCT for one or more indications, as well as to obtain an indication of the dosage regimen required, as more fully defined in 21 C.F.R. 312.21(b).

1.30 "PHASE III CLINICAL STUDIES" means that portion of the clinical 6 DEVELOPMENT PLAN or DEVELOPMENT WORK which provides for one or more large scale clinical studies conducted in a sufficient number of patients to establish a PRODUCT's clinical efficacy and safety for one or more indications, as more fully defined in 21 C.F.R. 312.21(c).

1.31 "POST REGISTRATION STUDIES" means clinical studies which are conducted in a particular country after the obtainment of REGULATORY APPROVAL from the appropriate regulatory agency in that country, which studies are conducted for the purpose of enhancing commercial acceptability of a PRODUCT.

1.32 "PRODUCT" means any product which has been manufactured into a final dosage form, packaged and labeled for use in the FIELD, and which contains the COMPOUND as an active ingredient.

1.33 "RAPIDLY DISINTEGRATED TABLET" means the COMPOUND in bulk tablet formulation which, if appropriately packaged and finished, would constitute the PRODUCT, which has the feature of disintegrating in the mouth and can be administered without the use of water.

1.34 "REGULATORY APPROVAL" means all official approvals by government, pricing or health authorities in a country (or supra-national organizations, such as the EMEA) which are required for first sale, including, importation or manufacture of a PRODUCT in such country where required.

1.35 "SPECIFICATIONS" means the specifications for the supply of the BULK DRUG SUBSTANCE and BULK DRUG TABLETS to VIVUS, a draft of which is attached hereto as Appendix-E, and which shall be amended from time to time as agreed by the Parties and in accordance with the terms of this Agreement.

1.36 "STEERING COMMITTEE" means representatives from TANABE and VIVUS who are designated respectively by each Party to review the development and marketing of the PRODUCT in the TERRITORY pursuant to Article 4.

1.37 "SUBLICENSEE" means, with respect to a particular PRODUCT, a THIRD PARTY to whom VIVUS or TANABE has granted a license or sublicense under any

TANABE PATENTS, VIVUS PATENTS or INFORMATION to make and sell such PRODUCT.

1.38 "TANABE KNOW-HOW" means all INFORMATION that TANABE discloses to VIVUS under this Agreement and is within the CONTROL of TANABE. It is understood and agreed that TANABE KNOW-HOW does not include TANABE PATENTS.

1.39 "TANABE PATENT" means the patent which is attached hereto as Appendix A, 7 and any other valid U.S. and foreign patents relating thereto, including without limitation, all substitutions, reissues, renewals, reexaminations, patents of addition, extensions, registrations, confirmations, and all pending patent applications, (including provisional applications, continuations, divisionals and continuation-in-part), which is owned or CONTROLLED by TANABE or its AFFILIATES as of the EFFECTIVE DATE or during the term of this Agreement. The "TANABE PATENT" shall include but not be limited to patents directed to new uses of the compounds claimed within the TANABE PATENT in the FIELD, and patents directed to manufacturing and formulation of the compounds claimed within the TANABE PATENT in the FIELD unless otherwise set forth herein. Notwithstanding anything herein to the contrary, the "TANABE PATENT" shall expressly exclude any claims within patents directed to formulations of the RAPIDLY DISINTEGRATED TABLET whether made by or on behalf of TANABE or its AFFILIATES before or after the EFFECTIVE DATE.

1.40 "TERRITORY" means all the countries in the world excluding Japan, Democratic People's Republic of Korea (North Korea), Republic of Korea (South Korea), People's Republic of China (PRC including Hong Kong and Macao), Republic of China (Taiwan), Singapore, Indonesia, Malaysia, Thailand, Vietnam and the Philippines.

1.41 "THIRD PARTY" means any entity other than TANABE or VIVUS or their respective AFFILIATES.

1.42 "TRADEMARK" means the trademark which shall be used for the marketing of the PRODUCT in the TERRITORY, which trademark may be the same or different from the trademark used for the marketing of the PRODUCT outside the TERRITORY.

1.43 "VIVUS KNOW-HOW" means all INFORMATION which VIVUS discloses to TANABE under this Agreement and is within the CONTROL of VIVUS. It is understood and agreed that VIVUS KNOW-HOW does not include VIVUS PATENTS.

1.44 VIVUS PATENT" means valid U.S. and foreign patents, including without limitation, all substitutions, reissues, renewals, reexaminations, patents of addition, extensions, registrations, confirmations, and all pending patent applications, (including provisional applications, continuations, divisionals and continuation-in-part), which, absent rights thereunder, would be infringed by the research, development, manufacture, use, importation, sale or offer for sale of a COMPOUND or a PRODUCT in the FIELD, and is owned or CONTROLLED by VIVUS or its AFFILIATE as of the EFFECTIVE DATE or during the term of this Agreement. The "VIVUS PATENT" shall include but not limited to patents directed to new uses of the COMPOUND or PRODUCT in the FIELD, and 8 patents directed to formulating the PRODUCT in the FIELD.

2. Grant of Right .

2.1 Grant of License under TANABE PATENT and TANABE KNOW-HOW . TANABE hereby grants to VIVUS, and VIVUS hereby accepts, an exclusive license, with the right to grant and authorize sublicenses pursuant to Section 2.3, to develop, manufacture, have manufactured, use, import, sell, offer to sell, register and market the PRODUCT (or the COMPOUND where applicable) in the FIELD in the TERRITORY under the TANABE PATENT and the TANABE KNOW-HOW. However, it is expressly understood between the Parties that VIVUS shall not have the right to manufacture the BULK DRUG SUBSTANCE or BULK DRUG TABLETS unless otherwise agreed.

2.2 Extension of the License to AFFILIATE . VIVUS shall have the right to extend its rights under the license granted hereunder to one or more of its AFFILIATES, provided, that VIVUS shall (i) notify TANABE the names of such AFFILIATE reasonably prior to such extension, (ii) retain control over that portion of DEVELOPMENT WORK which such AFFILIATE is performing and (iii) remain responsible to TANABE for such AFFILIATE's compliance with all obligations under this Agreement which apply to such AFFILIATE.

2.3 Sublicense . VIVUS may grant sublicenses under the license granted under Section 2.1 to one or more THIRD PARTIES; provided, VIVUS: (i) notifies and consults with TANABE with respect to the selection of SUBLICENSEES, (ii) uses its reasonable efforts to sublicense to a THIRD PARTY that will maximize the sale of PRODUCTS, and (iii) uses its best efforts to include in any such sublicense the obligation that such SUBLICENSEE not develop or commercialize or in-license another PDE5 INHIBITOR compound for a period of five (5) years following the effective date of such sublicense agreement. VIVUS shall (i) retain control over that portion of DEVELOPMENT WORK which such SUBLICENSEE is performing, if any, and (ii) remain responsible to TANABE for such SUBLICENSEE's compliance

with all obligations under this Agreement which apply to such SUBLICENSEE. In case of sublicense to a THIRD PARTY, the performance of the obligations of any such SUBLICENSEE shall be deemed guaranteed by VIVUS.

2.4 Tanabe's Co-Promotion Right . Notwithstanding the foregoing Section 2.1, TANABE shall have the option to obtain the right to co-promote with VIVUS or its SUBLICENSEE up to [***] of the promotional efforts in the TERRITORY for the ORAL PRODUCT, such option to be exercised and negotiated within five (5) months following VIVUS' disclosure to TANABE of the data and report for such ORAL PRODUCT following completion of the first successful PHASE II CLINICAL STUDY for such ORAL PRODUCT. The terms of such agreement shall be negotiated in good faith and reasonably agreed by both parties. The promotional efforts of each Party shall be determined by 9 market potential as well as the marketing strength of each Party and its AFFILIATES (or SUBLICENSEE in case of VIVUS) in that country or region.

2.5 License under VIVUS PATENT and VIVUS KNOW-HOW to TANABE for PRODUCT . VIVUS hereby grants to TANABE the following right under VIVUS PATENT and VIVUS KNOW-HOW:

(a) for the term of this Agreement and thereafter, an exclusive and royalty-free license to develop, make, have made, use, import, sell, offer to sell, register and market any ORAL PRODUCT being developed or sold hereunder by VIVUS, with a right to sublicense, solely outside the TERRITORY in the FIELD.

(b) during the term of this Agreement, an exclusive option to obtain an exclusive license to develop, use, import, sell, offer to sell, register and market any NON-ORAL PRODUCT being developed or sold hereunder by VIVUS, with a right to sublicense, outside the TERRITORY in the FIELD for the term of this Agreement and thereafter. The terms and conditions of such license shall be negotiated in good faith and shall be based on reasonable terms common in the pharmaceutical industry, including a reasonable royalty payable to VIVUS for using the VIVUS PATENT and VIVUS KNOW-HOW relating to such NON-ORAL PRODUCT.

(c) during the term of this Agreement and thereafter, a semi-exclusive and royalty-free license to use, import, sell, offer to sell, register and co-promote any COMPOUND or PRODUCT being developed or sold hereunder by VIVUS in the TERRITORY, solely to the extent that TANABE elects and is granted the right to perform co-promotion of such PRODUCT pursuant to Section 2.4.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Should royalties be due to a THIRD PARTY under any sublicense granted to TANABE hereunder, TANABE shall be obligated to pay such royalties and comply with all terms and conditions of such THIRD PARTY license.

2.6 Non-compete . VIVUS agrees not to develop, market, in-license or out-license any PDE5 INHIBITOR compounds other than the COMPOUNDS, for use in the FIELD during the term of this Agreement. TANABE shall have the right to in-license and/or conduct pre-clinical work on any PDE5 INHIBITOR compounds, other than the COMPOUNDS, for use in the FIELD (each a "Next Generation Compound"); provided, TANABE shall grant to VIVUS an exclusive right of first refusal to conduct clinical studies in order to develop and commercialize within the TERRITORY such Next Generation Compounds owned or CONTROLLED by TANABE. Such right may be exercised by VIVUS within four (4) years after first commercial sale of a PRODUCT by VIVUS. The terms of such agreement shall be negotiated in good faith and mutually agreeable to both Parties; provided, in no event shall VIVUS be required to pay any upfront licensing fee and any milestone fees for the rights to such Next Generation 10 Compound, which fees it has already paid under the terms of this Agreement for the COMPOUND (e.g. if VIVUS elects to license in a Next Generation Compound after it has already paid the PHASE II CLINICAL STUDY milestone for a COMPOUND, then it shall have no obligation to pay a milestone payment upon commencement of PHASE II CLINICAL STUDIES for such Next Generation Compound). It is understood and agreed that during such period (i.e. four (4) years after first commercial sale of a PRODUCT by VIVUS), TANABE and its AFFILIATES may not grant a THIRD PARTY the right to conduct clinical studies on Next Generation Compounds in any country in the world; provided, if VIVUS exercises its right of first refusal to a particular Next Generation Compound pursuant to this Section, TANABE shall have the right to grant a THIRD PARTY the right to conduct clinical studies on such Next Generation Compound solely outside TERRITORY.

3. Disclosure and Exchange of INFORMATION .

3.1 Disclosure of INFORMATION . Within forty five (45) days following the EFFECTIVE DATE, TANABE shall disclose and make available to VIVUS without charge, all preclinical, clinical or regulatory INFORMATION, including copies of all preclinical and clinical reports, (i) which is known by TANABE, (ii) which directly concerns the COMPOUND or the PRODUCT and (iii) which TANABE in its commercially reasonable sole discretion considers to be useful or necessary for VIVUS to exercise the license granted under Article 2. Thereafter, during the term of the Agreement, each Party shall disclose and make available to the other Party without charge, all relevant INFORMATION, including copies of all preclinical and

clinical reports, known by such Party which in its commercially reasonable sole discretion it considers to be useful or necessary for the other Party to exercise the rights and licenses expressly granted herein. The exchanges of INFORMATION hereunder shall be undertaken in written or oral form as soon as reasonably possible after the obtainment thereof, as necessary, and through regular meetings. The initial disclosure and the exchanges of INFORMATION hereunder shall be (i) made in English, (ii) undertaken in written form as soon as reasonably possible after the obtainment thereof, (iii) treated as confidential information of the Party disclosing such INFORMATION subject to Article 18 and (iv) made in the following manner:

(a) the Party disclosing the INFORMATION (hereinafter referred to as the "Disclosing Party") shall provide to the other Party (hereinafter referred to as the "Receiving Party") the list of the INFORMATION in English.

(b) promptly upon the receipt of such list, the Receiving Party shall indicate to the Disclosing Party, in writing, the items in the list, of which it desires to receive the content from the Disclosing Party, and (c) promptly after the receipt of the notice indicating the items from the Receiving Party, the Disclosing Party shall provide to the Receiving Party 11 the content of the items which were indicated pursuant to foregoing Section 3.1(b).

Each Party agrees not to use INFORMATION disclosed by the other Party, other than for the rights and licenses expressly granted herein. Notwithstanding the foregoing, INFORMATION relating to the manufacture of the BULK DRUG SUBSTANCE or BULK DRUG TABLETS need not be disclosed by TANABE, except as required for regulatory filings, submissions, approvals and/or audits.

3.2 TANABE INFORMATION Disclosure Prior to the EFFECTIVE DATE . TANABE represents and warrants that it has produced or provided access to VIVUS prior to the EFFECTIVE DATE all material INFORMATION relating to the safety of the COMPOUND or the PRODUCT, including, but not limited to, material INFORMATION concerning ADVERSE DRUG REACTION, toxicity or sensitivity reactions and incidents and the severity thereof with respect to any tests or studies conducted by TANABE or its contractors relating to the COMPOUND or the PRODUCT. In addition, TANABE represents and warrants that it has provided access to VIVUS prior to the EFFECTIVE DATE, all material INFORMATION, relating to the efficacy of the COMPOUND and the PRODUCT and preclinical and clinical work and studies relating to the COMPOUND and the PRODUCT.

3.3 Disclosure of INFORMATION from THIRD PARTY . In case either Party hereto intends to have the research, development, manufacture, use or marketing of the COMPOUND or the PRODUCT conducted by any THIRD PARTY or otherwise

license such right to any THIRD PARTY (to the extent permitted under this Agreement), such Party shall include in the agreement to be concluded with such THIRD PARTY a provision allowing such Party to disclose to and have used by the other Party any and all information, techniques, data, inventions, practices, methods, knowledge, know-how, skill, experience or test data relating to COMPOUND or PRODUCT for use in the FIELD which is disclosed to such Party by such THIRD PARTY.

4. STEERING COMMITTEE .

The STEERING COMMITTEE shall have the primary role in ensuring the success of the PRODUCT, during the development and marketing in the TERRITORY. The STEERING COMMITTEE will operate in accordance with the STEERING COMMITTEE Guidelines attached hereto as Appendix-C.

5. Development .

5.1 DEVELOPMENT WORK. VIVUS shall, at its own cost and expense, conduct the DEVELOPMENT WORK to seek REGULATORY APPROVAL of the PRODUCTS in the TERRITORY. VIVUS shall not, however, be responsible for DEVELOPMENT WORK as it relates to seeking REGULATORY APPROVAL of the PRODUCTS outside the TERRITORY or the manufacturing scale-up and 12 production of validation batches of the BULK DRUG TABLETS (or the BULK DRUG SUBSTANCE where applicable). Rather, such shall be TANABE's responsibility at its own costs and expense. Such work as the manufacturing scale-up, production of validation batches and the manufacture of the BULK DRUG TABLETS and BULK DRUG SUBSTANCE shall be carried out by TANABE using reasonable commercial efforts and in a timely manner in accordance with the DEVELOPMENT PLAN so as not to delay VIVUS' initiation of CLINICAL STUDIES, filing of DRUG APPROVAL APPLICATIONS or launch of the PRODUCTS. It is understood and agreed by the Parties that VIVUS may conduct its activities under this Article 5 by itself or through its designees, subject to TANABE's prior approval, such approval not to be unreasonably withheld. TANABE agrees to act promptly in evaluating potential designees and in no case shall take more than ten (10) business days to render its decision.

5.2 CLINICAL STUDIES Protocols . VIVUS shall inform TANABE, in writing, of the draft protocol for such CLINICAL STUDIES for TANABE's review and consideration, before commencement of any CLINICAL STUDIES for the COMPOUND or the PRODUCTS conducted by it in the TERRITORY. Once so informed, TANABE will have ten (10) business days to review and provide comments on the draft protocol. In addition, should TANABE request any change or

addition to such draft protocol for the purpose of using the data generated under the DEVELOPMENT WORK in the TERRITORY for TANABE's development outside the TERRITORY, then TANABE shall promptly notify VIVUS to such effect, and VIVUS shall accommodate such request to the extent such request is reasonably acceptable by VIVUS. If such request causes additional costs to VIVUS, TANABE shall reimburse such additional costs to VIVUS in full.

5.3 DRUG APPROVAL APPLICATION and REGULATORY APPROVAL . VIVUS shall use commercially reasonable efforts to undertake the compilation, submission and prosecution, in timely manner, of all necessary data, documents and DRUG APPROVAL APPLICATION in a format acceptable to the applicable regulatory authorities in the TERRITORY, including but not limited to the FDA and the EMEA, required to obtain REGULATORY APPROVAL for the PRODUCTS for use in the FIELD. This shall include obtaining all necessary labeling for the PRODUCTS. In addition, VIVUS shall use commercially reasonable efforts to maintain the REGULATORY APPROVAL obtained under this Section 5.3 VIVUS shall solely own all such DRUG APPROVAL APPLICATION and REGULATORY APPROVAL in the TERRITORY. VIVUS shall collaborate with TANABE to the extent legally permitted, in order to enable TANABE to prepare, if necessary, DRUG APPROVAL APPLICATION in the FIELD, and obtain, if necessary, REGULATORY APPROVALS for the PRODUCTS outside the TERRITORY.

5.4 Costs and Expense . VIVUS shall be fully responsible for bearing all costs and expense associated with undertaking and completing said registration activities in the TERRITORY, including but not limited to the costs of preparing and prosecuting DRUG APPROVAL APPLICATION and fees payable to regulatory agencies in obtaining and maintaining REGULATORY APPROVAL. TANABE shall be fully responsible for bearing all costs and expense associated with undertaking and completing said registration activities outside of the TERRITORY, including but not limited to the costs of preparing and prosecuting DRUG APPROVAL APPLICATION and fees payable to regulatory agencies in obtaining and maintaining REGULATORY APPROVAL.

5.5 Diligence . VIVUS shall use such diligence as giving the first or top priority to the development of the COMPOUND into the PRODUCT and the obtainment of its REGULATORY APPROVAL, among those products which are then developed by its clinical development team for urinary diseases. If TANABE in its reasonable judgment concludes that VIVUS has failed with respect to such diligence, it shall notify VIVUS in writing and VIVUS shall have ninety (90) days to cure such failure. If VIVUS has not cured such failure within such time, and if such failure cannot be justified in a commercially reasonable manner consistent with the pharmaceutical business and scientific judgment (which cause includes but not limited to such case

where the result of the CLINICAL STUDIES negatively and drastically affects the commercial potential of the PRODUCT), such failure may constitute a breach of this Agreement and TANABE may terminate this Agreement pursuant to the terms of Section 20.2. It is understood and agreed that any dispute arising out of the interpretation or enforcement of this Section shall be settled by arbitration pursuant to the provisions of Article 28.

5.6 DEVELOPMENT PLAN . VIVUS shall prepare, in consultation with TANABE, and provide to the STEERING COMMITTEE, within sixty (60) days after the EFFECTIVE DATE , a reasonably detailed DEVELOPMENT PLAN proposal pursuant to which the DEVELOPMENT WORK will be performed. The STEERING COMMITTEE shall review such proposal and approve an initial DEVELOPMENT PLAN, with such changes as the STEERING COMMITTEE agree to the plan proposed by VIVUS, no later than thirty (30) days after its submission by VIVUS, such initial DEVELOPMENT PLAN to be attached hereto as Exhibit B. The STEERING COMMITTEE shall review and update the DEVELOPMENT PLAN from time to time as necessary.

5.7 Development Milestone . If any of the following milestones is in jeopardy of not being met in the United States or in any of the MAJOR EUROPEAN COUNTRY, the STEERING COMMITTEE shall discuss and determine the action plan to catch up with such milestone in jeopardy.

Milestone		Timing
(a)	Commencement of the first PHASE II CLINICAL STUDIES for any PRODUCT.	*Date, which represents six (6) months after the commencement of PHASE II CLINICAL STUDIES set forth in the initial DEVELOPMENT PLAN, to be provided once the DEVELOPMENT PLAN is agreed upon pursuant to Section 5.6.*
(b)	Commencement of the first PHASE III CLINICAL STUDIES for any PRODUCT.	*Date, which represents six (6) months after the commencement of PHASE III CLINICAL STUDIES set forth in the initial DEVELOPMENT PLAN, to be provided once the DEVELOPMENT PLAN is agreed upon pursuant to Section 5.6.*

5.8 Submission of the Files relating to the REGULATORY APPROVAL . VIVUS shall promptly furnish TANABE with copies of all the files submitted to the competent authorities to apply for the REGULATORY APPROVAL, copies of the certificates of the REGULATORY APPROVAL obtained, and any communications received from or decisions made by the competent authorities.

6. Marketing .

6.1 Marketing Efforts . VIVUS agrees to use (i) commercially reasonable efforts consistent with its normal business practices to maximize the market potential of the PRODUCT and (ii) at least the same efforts in any and all aspects including without limitation, call number, budget and promotional cost, as it uses to market its own products. VIVUS agrees to use its best commercial efforts to market the PRODUCT within six (6) months of REGULATORY APPROVAL for such PRODUCT in each country in the TERRITORY.

With respect to any country in the TERRITORY, if VIVUS does not launch a PRODUCT within three (3) years after the earliest DATE OF FIRST SALE of such PRODUCT in the United States or any MAJOR EUROPEAN COUNTRY, VIVUS agrees that the license granted hereunder in such country for such PRODUCT shall revert to TANABE upon request by TANABE, unless VIVUS can reasonably justify that, with respect to such country in the TERRITORY, (i) the launch of such PRODUCT within three (3) years would be detrimental to the global development and commercial viability of such PRODUCT or (ii) the launch of the PRODUCT

within three (3) years has not been achieved due to the REGULATORY APPROVAL not being obtained in spite of VIVUS' continuous efforts pursuant to Section 5.5 and the foregoing provisions of the first paragraph of this Section 6.1, or (iii) the launch of the PRODUCT within three (3) years has not been achieved due to other governmental constraints and/or controls.

6.2 POST-REGISTRATION STUDIES . VIVUS shall have the right to conduct by itself or through its designee POST-REGISTRATION STUDIES in the TERRITORY for PRODUCTS sold by VIVUS, its AFFILIATES or its SUBLICENSEES. If VIVUS decides to conduct POST-REGISTRATION STUDIES, VIVUS shall inform TANABE and shall take TANABE's opinion into due consideration in conducting such studies. The results of such POST-REGISTRATION STUDIES will be fully shared with TANABE. ADVERSE DRUG REACTIONS and all other safety INFORMATION occurring in POST-REGISTRATION STUDIES will be reported as described in Article 19.

6.3 Pricing, Pricing Approvals and PRODUCT Distribution . To the extent reasonably possible and beneficial for the marketability of the PRODUCT, VIVUS shall use its reasonable efforts to obtain the optimum pricing or reimbursement price for PRODUCTS. VIVUS shall set all optimum prices for all PRODUCTS in the TERRITORY and shall be responsible for distribution of each PRODUCT in the TERRITORY and shall record all sales for PRODUCTS in the TERRITORY.

6.4 Product Recalls . If VIVUS believes that a recall of a PRODUCT sold by it is necessary, VIVUS shall promptly undertake such recall following notification to TANABE. The decision of VIVUS concerning such recall shall be final. Likewise, if TANABE believes that a recall of a PRODUCT sold by it outside of the TERRITORY is necessary, TANABE may promptly undertake such recall following notification to VIVUS. The decision of TANABE concerning such recall shall be final.

6.5 Advertising and Promotion . With respect to printed promotional materials (including advertisements appearing in journals or internets), printed educational materials, PRODUCT labeling, and documentary INFORMATION, TANABE's name shall appear on such materials and reference to TANABE shall be in the form that references TANABE as the licensor, provided such is permitted by the applicable laws and regulations. All promotional and advertising materials to be used by VIVUS for the PRODUCT to be sold by it which includes but not limited to the materials mentioned above, shall be prepared by VIVUS or its designee at their own costs and expense. VIVUS shall send to TANABE copies of such materials for the PRODUCT to be sold by it prior to its use.

6.6 Sales Forecast and Marketing Strategies . VIVUS shall inform TANABE, six (6) months in advance, of a sales forecast as well as marketing strategies for the PRODUCT for each CALENDAR YEAR. TANABE may give VIVUS opinions and suggestions to assist VIVUS' activities for marketing of the PRODUCT. Such forecasts may be adjusted quarterly by VIVUS.

6.7 Reports on Marketing . VIVUS shall promptly render to TANABE the following reports:

(a) Semi-annual reports on the sales of the PRODUCT sold by VIVUS in terms of units and value, (b) Semi-annual reports on the quantities of the BULK DRUG SUBSTANCE and the PRODUCT held by VIVUS in their inventories, and (c) Reports, when requested by TANABE, outlining the situation of competitors' products and other market information relating to the PRODUCT in the TERRITORY.

7. Manufacture and Supply of the BULK DRUG TABLETS and BULK DRUG SUBSTANCE .

7.1 Manufacture and Supply of the BULK DRUG TABLETS and BULK DRUG SUBSTANCE . TANABE shall use its commercially reasonable efforts to manufacture and supply to VIVUS, either by itself or by a THIRD PARTY manufacturer, BULK DRUG TABLETS for the ORAL PRODUCT and BULK DRUG SUBSTANCE for the formulation and manufacturing of NON-ORAL PRODUCTS. Detailed conditions for manufacture and supply of the BULK DRUG TABLETS and BULK DRUG SUBSTANCE shall be set forth in Appendix-D.

7.2 Supply during CLINICAL STUDIES . TANABE shall supply the BULK DRUG SUBSTANCE reasonably needed by VIVUS for pre-clinical studies and CLINICAL STUDIES. The BULK DRUG SUBSTANCE shall be supplied, (i) free of charge, for all pre-clinical studies, PHASE I CLINICAL STUDIES and PHASE II CLINICAL STUDIES, and (ii) at the price of [***] per kilogram [***] (FCA place of manufacture, Incoterms 2000) for all PHASE III CLINICAL STUDIES, or to the extent necessary, validation for manufacture of the PRODUCTS.

7.3 Manufacture of the BULK DRUG SUBSTANCE and BULK DRUG TABLETS by a THIRD PARTY . In the event TANABE fails to supply BULK DRUG SUBSTANCE and/or BULK DRUG TABLETS to VIVUS (i) for conducting CLINICAL STUDIES, or (ii) that meet the SPECIFICATIONS, or (iii) for fulfilling market demand for the PRODUCTS, the Parties shall meet and discuss in good faith a remedy for such failure. In the event that TANABE is unable to cure such failure within a reasonable period of time, VIVUS shall have the right to designate a THIRD PARTY

manufacturer, reasonably acceptable to TANABE, to manufacture and supply the BULK DRUG SUBSTANCE and/or BULK DRUG TABLETS, as applicable, to VIVUS. In such event, TANABE shall provide reasonable assistance to VIVUS and such THIRD PARTY manufacturer to ensure that supply of the BULK DRUG SUBSTANCE and/or BULK DRUG TABLETS to VIVUS is not unreasonably disrupted. TANABE shall maintain a commercially reasonable quantity of BULK DRUG SUBSTANCE and BULK DRUG TABLETS at two remote locations in order to ensure a continuous adequate supply of each to VIVUS.

8. Manufacture of the PRODUCT .

8.1 Manufacture of the PRODUCT . VIVUS shall be responsible for manufacturing the PRODUCT using the BULK DRUG SUBSTANCE and BULK DRUG TABLETS supplied by TANABE pursuant to Article 7. It is understood and agreed that VIVUS' manufacture of the PRODUCT using BULK DRUG TABLETS shall be limited to packaging and labeling of such PRODUCTS.

8.2 Inspection of Samples by TANABE . TANABE shall have the right to be provided with reasonable quantities of free of charge samples of the PRODUCT in order to inspect the packaging of the PRODUCT, such quantities to be mutually agreed by the Parties.

8.3 Manufacture of the PRODUCT by a THIRD PARTY . In case VIVUS wishes to have manufactured the PRODUCT hereunder from the BULK DRUG SUBSTANCE or BULK DRUG TABLETS by a THIRD PARTY manufacturer, VIVUS shall inform TANABE of the name of such THIRD PARTY. TANABE shall have the right to approve or reject within sixty (60) days after receipt of such written notification indicating the name of such THIRD PARTY, such approval not to be unreasonably withheld, provided that in the event VIVUS does not receive a written answer from TANABE indicating its approval or rejection of such THIRD PARTY within such sixty (60) days period, TANABE shall be deemed to have approved the appointment of such THIRD PARTY.

8.4 Inspection of the Plants . Each Party may upon reasonable notice to the other Party inspect the plant and premises used by, and processes and records of the packaging or storage employed by a Party (or THIRD PARTY manufacturer where applicable) in connection with the BULK DRUG SUBSTANCE, BULK DRUG TABLETS, or the PRODUCT, as applicable.

8.5 Supply of the NON-ORAL PRODUCT to TANABE . If TANABE wishes to purchase the NON-ORAL PRODUCT manufactured by or on behalf of VIVUS pursuant to Section 8.1 for use in its development, registration, use, sale or marketing outside the

TERRITORY and in the FIELD, VIVUS shall supply TANABE, to the extent possible, with the NON-ORAL PRODUCT on terms to be negotiated pursuant to Section 2.5(b) of this Agreement.

9. Down Payment upon Signing .

In consideration of the licenses granted by TANABE to VIVUS hereunder, VIVUS shall make the following payments to TANABE:

(a) a non-refundable and non-creditable signing down payment to TANABE of [***], within one (1) week after the later effective date of signature of this Agreement by both Parties; and

(b) a non-refundable and non-creditable payment to TANABE of [***], by February 28, 2001, subject to VIVUS satisfaction of the results of (i) its due diligence review of the INFORMATION provided by TANABE and (ii) Dr. [***] experiments with T-1790 (VIVUS shall provide the results of Dr. [***] experiments with T-1790 to TANABE). If VIVUS is not satisfied with such results or fails to make such payment, this Agreement shall terminate.

10. Milestone Payments .

In further consideration of the licenses granted by TANABE to VIVUS hereunder, VIVUS shall make the following non-refundable and non-creditable milestone payments to TANABE as such milestones are achieved:

(a) For the ORAL PRODUCT for male erectile dysfunction:

(1) [***], upon the enrollment of the first patient in the first PHASE II CLINICAL STUDIES in the TERRITORY.
(2) [***], upon the enrollment of the first patient in the first PHASE III CLINICAL STUDIES in the TERRITORY,
(3) [***], upon the first submission of a NDA (or any equivalent license in the TERRITORY),
(4) [***], upon obtainment of REGULATORY APPROVAL in the United States, and
(5) [***] upon obtainment of the first REGULATORY APPROVAL in any MAJOR EUROPEAN COUNTRY.

(b) For the NON-ORAL PRODUCT for male erectile dysfunction:

(1) [***], upon the enrollment of the first patient in the first PHASE II CLINICAL STUDIES in the TERRITORY,
(2) [***], upon the first submission of a NDA (or any equivalent license in the TERRITORY), and
(3) [***], upon obtainment of REGULATORY APPROVAL in the United States, and [***] upon obtainment of the first REGULATORY APPROVAL in any MAJOR EUROPEAN COUNTRY.

(c) For the ORAL PRODUCT for female sexual dysfunction:

(1) [***], upon the first submission of a NDA (or any equivalent license) in the TERRITORY, and
(2) [***] upon obtainment of REGULATORY APPROVAL in the United States, and [***], upon obtainment of the first REGULATORY APPROVAL in any MAJOR EUROPEAN COUNTRY.

(d) For the NON-ORAL PRODUCT for female sexual dysfunction:

(1) [***], upon the enrollment of the first patient in the first PHASE III CLINICAL STUDIES in the TERRITORY,
(2) [***], upon the first submission of a NDA (or any equivalent license) in the TERRITORY, and
(3) [***] upon obtainment of REGULATORY APPROVAL in the United States, and [***], upon obtainment of any REGULATORY APPROVAL in any MAJOR EUROPEAN COUNTRY.

(e) [***], when the total NET SALES during any CALENDAR YEAR for the ORAL PRODUCT sold by VIVUS, its AFFILIATES and its SUBLICENSEES exceed [***], the amount of which shall be calculated using the currency conversion method consistent with the method set forth in Section 12.3.

VIVUS shall notify TANABE in writing within thirty (30) days upon the achievement of each milestone, such notice to be accompanied by the appropriate milestone payment. It is understood and agreed that each milestone payment in Section 10 (a) through (e) above shall be paid only once upon achievement of the particular milestone.

11. Supply Price .

11.1 Supply Price for ORAL PRODUCT . The supply price (FCA place of manufacture, Incoterms 2000) to be paid to TANABE by VIVUS for its commercial use of the BULK DRUG TABLETS for ORAL PRODUCT shall be calculated based on a

percentage of annual (CALENDAR YEAR basis) total NET SALES in the TERRITORY according to the following:

Annual Total NET SALES in the TERRITORY	Supply Price
For the portion up to [***]	[***] of the NET SALES
For the portion in excess of [***] and up to [***]	[***] of the NET SALES
For the portion in excess of [***]	[***] of the NET SALES

11.2 Supply Price for NON-ORAL PRODUCT . The supply price (FCA place of manufacture, Incoterms 2000) to be paid to TANABE by VIVUS for its commercial use of the BULK DRUG SUBSTANCE for the formulation and manufacture of NON-ORAL PRODUCT shall be calculated based on a percentage of annual (CALENDAR YEAR basis) total NET SALES in the TERRITORY according to the following:

Annual Total NET SALES in the TERRITORY	Supply Price
For the portion up to [***]	[***] of the NET SALES
For the portion in excess of [***] and up to [***]	[***] of the NET SALES
For the portion in excess of [***]	[***] of the NET SALES

11.3 Revision of Supply Price . Notwithstanding the foregoing Section 11.1 and 11.2, in case either Party cannot obtain a reasonable profit from the PRODUCT business, the Parties shall discuss in good faith to revise the supply price, taking into consideration (i) their MANUFACTURING COST, (ii) NET SALES per one (1) treatment and (iii) the balance of the profit of the Parties, provided however that, in no event TANABE shall be obliged to supply the BULK DRUG TABLETS or the BULK DRUG SUBSTANCE at the price less than their MANUFACTURING COST.

11.4 Retroactive Adjustment . The supply price shall be determined based on the average NET SALES of the immediately preceding CALENDAR QUARTER; provided, however, that if the actual amount of the NET SALES is not available, an estimated NET SALES shall be used for the calculation of the supply price and the necessary retroactive adjustment shall be made immediately after the actual amount of the NET SALES becomes available.

11.5 Cash Remittance . For all purchases of the BULK DRUG SUBSTANCE from TANABE, VIVUS shall pay to TANABE by means of cash remittance (by bank transfer) payable within sixty (60) days after the date of TANABE's invoice.

12. Payment of the Down Payment, Milestone Payments and Supply Price Payments .

The following Sections 12.1 through 12.7 shall apply to the supply price payments under Article 11, and the applicable parts of Sections 12.1 through 12.7 shall apply also to the down payment under Article 9 and milestone payments under Article 10:

12.1 Report of Sales Amount . Within sixty (60) days from the end of each CALENDAR QUARTER, VIVUS shall send TANABE the reports of such CALENDAR QUARTER describing the invoiced sales amount of the PRODUCT and the NET SALES in such CALENDAR QUARTER along with its calculation. VIVUS shall keep accurate records in sufficient detail to enable any payment payable hereunder to be determined.

12.2 Payment Account . All payments including down payment, milestone payments and supply price payment shall be made by wire transfer, if possible, to an account designated by TANABE from time to time; provided, however, that in the event TANABE fails to designate such account, VIVUS may remit such payments to TANABE to the address applicable for the receipt of notices hereunder; provided, further, that any notice by TANABE of such account or change in such account, shall not be effective until thirty (30) days after receipt thereof by VIVUS, except for the initial down payment under Article 9 which shall be notified to VIVUS reasonably prior to or upon the later effective date of signature of this Agreement by both Parties.

12.3 Currency . The supply price payment shall be made in United States Dollars or any successor currency. The method of currency conversion from local currency into United States Dollars shall be made by using the exchange rate for the purchase of United States Dollars reported by the Wall Street Journal on the last business day of the CALENDAR QUARTER to which such payments relate.

12.4 Right to Audit . TANABE shall have the right, upon prior notice to VIVUS, not more than once in any CALENDAR YEAR, through an independent certified public accountant selected by TANABE and acceptable to VIVUS, which acceptance shall not be unreasonably refused, to have access during normal business hours to those records of VIVUS as may be reasonably necessary to verify the accuracy of the reports required to be furnished by VIVUS pursuant to Section 12.1. If such independent certified public accountant's report correctly shows any underpayment of

supply price by VIVUS, VIVUS shall remit to TANABE within thirty (30) days after VIVUS' receipt of such report:

(a) the amount of such underpayment;

(b) interest on the underpayment which shall be calculated pursuant to Section 12.5; and

(c) the reasonably necessary fees and expenses of such independent certified public accountant performing the audit, if such underpayment exceeds five (5%) percent of the total supply price payment owed for the CALENDAR YEAR then being reviewed. Otherwise, TANABE's accountant's fees and expenses shall be borne by TANABE. Any overpayment of supply price payment shall be fully creditable against future supply price payment payable in any subsequent periods. Upon the expiration of thirty-six (36) months following the end of any CALENDAR YEAR, the calculation of supply price payment payable with respect to such CALENDAR YEAR shall be binding and conclusive on TANABE and VIVUS, unless an audit for such CALENDAR YEAR is initiated before expiration of such thirty-six (36) months.

Should VIVUS not agree with the report, VIVUS may submit its own report within ninety (90) days of receiving TANABE's report. If the two reports differ, the Parties shall meet and discuss how to resolve the discrepancy. If the Parties fail to reach agreement, the Parties will resolve the dispute as recited in Article 28.

12.5 Overdue Payment . In the event any payment due hereunder is not made when due, the payment shall accrue interest (beginning on the date such payment is due) calculated at the rate of one (1%) percent per month and such payment when made shall be accompanied by all interest so accrued.

12.6 Record of Sales . Notwithstanding anything herein to the contrary, VIVUS shall keep, or cause to be kept, records of the sales of the PRODUCT under this Agreement for a period of seven (7) years after the expiration of each CALENDAR YEAR. Upon the request by TANABE, VIVUS shall supply TANABE with such records which may be submitted to the tax authority, and shall give TANABE any reasonable assistance in relation thereto.

12.7 Taxes . TANABE shall pay any and all taxes levied on account of down payment, milestone payments and supply price payments it receives under this Agreement. If laws or regulations require that taxes be withheld, VIVUS will (i) deduct those taxes from the otherwise remittable payments, (ii) timely pay the taxes to the proper taxing

authority, and (iii) give TANABE any reasonable assistance, which shall include the provision of such documentation as may be required by the tax authority to enable TANABE to claim exemption from or obtain a repayment of or reduction of tax.

13. Inventory .

VIVUS shall maintain commercially reasonable quantities of the BULK DRUG SUBSTANCE and the PRODUCT. Such inventories shall be commercially reasonably sufficient to meet the market requirements.

14. Maintenance and Abandonment of Patent .

Each Party shall use its reasonable efforts to prosecute and maintain its respective patents worldwide (the TANABE PATENTS with respect to TANABE and the VIVUS PATENTS with respect to VIVUS); provided TANABE shall reimburse VIVUS' patent costs for prosecuting and maintaining the VIVUS PATENTS outside the TERRITORY, such reimbursement creditable against any payments due by TANABE under any license obtained pursuant to Section 2.5(b). TANABE shall promptly give notice to VIVUS of the grant, lapse, revocation, surrender, invalidation or abandonment of any TANABE PATENT. VIVUS shall promptly give notice to TANABE of the grant, lapse, revocation, surrender, invalidation or abandonment of any VIVUS PATENT. In the event that applicable law in any country of TERRITORY provides for the extension of the term of any TANABE PATENT which TANABE is prosecuting or maintaining, TANABE shall apply for and use its reasonable efforts to obtain such an extension and VIVUS agrees to cooperate with TANABE in obtaining such extension. In the event that applicable law in any country of TERRITORY provides for the extension of the term of any VIVUS PATENT which VIVUS is prosecuting or maintaining, VIVUS shall apply for and use its reasonable efforts to obtain such an extension and TANABE agrees to cooperate with VIVUS in obtaining such extension.

15. Infringement

15.1 THIRD PARTY Infringement . If VIVUS or TANABE becomes aware of any activity that it believes represents a substantial infringement of the TANABE PATENT, the Party obtaining such knowledge shall promptly advise the other of all relevant facts and circumstances pertaining to the potential infringement. VIVUS and TANABE shall thereafter consult and cooperate fully to determine a course of action, including but not limited to, the commencement of legal action to terminate any infringement of the TANABE PATENT. However, TANABE shall have the first right to initiate and prosecute such legal proceedings, at its own expense and in the name of TANABE, and to control the defense of any declaratory judgment action relating to the

TANABE PATENT. VIVUS shall cooperate with TANABE in such effort, including being joined as a party to such action if necessary.

15.2 VIVUS Right to Pursue THIRD PARTY Infringers . If TANABE does not proceed, within sixty (60) days after receiving notice from VIVUS of a potential infringement of TANABE PATENT or within sixty (60) days after providing VIVUS with notice of such infringement, either (i) in terminating such infringement or (ii) in instituting an action to prevent continuation thereof, or if TANABE notifies VIVUS that it does not plan to terminate the infringement of TANABE PATENT or to institute any such action, then VIVUS shall have the right to do so. TANABE shall cooperate with VIVUS in such effort, including being joined as a party to such action if necessary.

15.3 Updating . Each Party shall keep informed of development in any action or proceeding relating to the TANABE PATENT or VIVUS PATENT including, to the extent permissible by law, the state of any settlement negotiations and the terms of any offer related thereto.

15.4 Damage Award or Settlement Payments . Any damage award or settlement payments made in connection with any action relating to infringement of TANABE PATENT in the TERRITORY, whether obtained by judgment, settlement or otherwise shall belong to the Party which instituted the action in accordance with this Article 15; provided, where such lawsuit or action was initiated by TANABE and VIVUS has joined and actively participated thereto, any recovery from such lawsuit shall be used to: (i) first reimburse TANABE for expenses actually incurred by TANABE in connection with such lawsuit (including attorneys fees and professionals fees), (ii) then to reimburse VIVUS for expenses actually incurred by VIVUS in connection with such lawsuit (including attorneys fees and professionals fees), and (iii) then the remainder, if any, shall be allocated between TANABE and VIVUS on a [***] basis respectively.

15.5 Defense of THIRD PARTY Claims .

(a) If a THIRD PARTY asserts that a patent or other right owned by it is infringed by the development, manufacture, use or sale of any PRODUCT, VIVUS shall be solely responsible for defending against, or at is option settling, any such assertions at its cost and expense (so long as VIVUS has the right to sell such PRODUCT hereunder), excluding any claims subject to TANABE's defense obligations under the following Section 15.5(b).

(b) If a THIRD PARTY asserts that a patent or other right owned by it is infringed by (i) the manufacture of any BULK DRUG SUBSTANCE or BULK DRUG TABLETS by or on behalf of TANABE, or (ii) the sale of any

PRODUCT sold or transferred by or on behalf of TANABE outside the TERRITORY, TANABE shall be solely responsible for defending against, or at is option settling, any such assertions at its cost and expense, excluding any claims subject to VIVUS' defense obligations under the foregoing Section 15.5(a).

(c) With respect to any claim of infringement alleged under this Section, the Parties shall meet and discuss the appropriate action to take to address such claim, including without limitation, (i) replacing or modifying the allegedly infringing PRODUCT, BULK DRUG SUBSTANCE OR COMPOUND or parts thereof, with other suitable and reasonably equivalent technology or parts so that they become non-infringing (ii) defending such action, or (iii) settling such action, including obtaining a license from a THIRD PARTY to manufacture, use or sell, as appropriate, such PRODUCT, BULK DRUG SUBSTANCE, or COMPOUND.

16. Warranties and Indemnification .

16.1 Warranties of Each Party . Each Party hereto represents to the other that it has the right to enter into this Agreement and to carry out all of the provisions hereof.

16.2 Encumbrances . TANABE expressly warrants and represents that it has no outstanding encumbrances or agreements, either written, oral, or implied, in connection herewith, and that it has not granted and will not grant during the term of this Agreement or any renewal hereof, any rights, license, consent or privilege that conflict with the rights granted herein. TANABE further represents and warrants, to the best of its knowledge as of the EFFECTIVE DATE, that (i) the TANABE PATENTS, TANABE KNOW-HOW and INFORMATION are not currently being infringed by a THIRD PARTY, and (ii) that other than [***] and [***] and any corresponding patent application claiming priority thereto (excluding any new matter contained within such corresponding patent application), under which the patent owners may allege infringement, the development, manufacture, use and/or sale of the BULK DRUG SUBSTANCE, BULK DRUG TABLETS, COMPOUND and/or PRODUCT do not infringe any property rights of any THIRD PARTY.

16.3 Authorization . Each Party hereby warrants that the execution, delivery and performance of this Agreement has been duly approved

and authorized by all necessary corporate or partnership actions of itself; does not require any shareholder or partnership approval which has not been obtained or the approval and consent of any trustee or the holders of any indebtedness of itself; does not contravene any law, regulation, rules or order binding on itself, and does not contravene the provisions of

or constitute a default under any indenture, mortgage, contract or other agreement or instrument to which it is a signatory.

16.4 No Liability for Consequential Damages and Limitation of Liability . Neither Party shall be liable to the other for incidental or consequential damages arising out of or related to the subject matter of this Agreement.

16.5 Indemnification .

(a) Subject to compliance by TANABE or its AFFILIATES with its obligations set forth in Section 16.6, VIVUS shall defend, indemnify, and hold harmless TANABE, its AFFILIATES and their respective directors, officers, employees and agents (each a "TANABE Indemnitee"), from and against any and all THIRD PARTY claims, demands, losses, liabilities, expenses, and damages including reasonable attorneys' fees (collectively, the "Liabilities") which such TANABE Indemnitee may suffer, pay, or incur to the extent resulting from (i) any breach of a representation, warranty, covenant or obligation of VIVUS under this Agreement, (ii) any negligent or more culpable act of VIVUS under this Agreement, or (iii) any and all personal injury (including death) and property damage to the extent caused by development, manufacture, use or marketing of BULK DRUG TABLETS, BULK DRUG SUBSTANCE, COMPOUND, and/or PRODUCT by VIVUS, its AFFILIATES or their SUBLICENSEES, excluding, however, any Liabilities subject to TANABE's indemnification obligation under the following Section 16.5(b). VIVUS' obligations under this Section 16.5(a) shall survive the expiration or termination of this Agreement for any reason.

(b) Subject to compliance by VIVUS with its obligations set forth in Section 16.6, TANABE shall defend, indemnify and hold harmless VIVUS, its AFFILIATES and their SUBLICENSEES and their respective directors, officers, employees and agents (each a "VIVUS Indemnitee"), from and against any and all Liabilities which such VIVUS Indemnitee may suffer, pay or incur to the extent resulting from (i) any breach of a representation, warranty, covenant or obligation of TANABE under this Agreement, (ii) any negligent or more culpable act of TANABE under this Agreement, or (iii) any and all personal injury (including death) and property damage to the extent caused by development, manufacture, use or marketing of BULK DRUG TABLETS, BULK DRUG SUBSTANCE, COMPOUND and/or PRODUCT by TANABE, its AFFILIATES or their SUBLICENSEES, excluding, however, any Liabilities subject to VIVUS' indemnification obligation under Section 16.5(a) above. TANABE's obligations under this Section 16.5(b) shall survive expiration or termination of this Agreement for any reason.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

16.6 Indemnification Procedures . In the event a Party intends to claim indemnification under Section 16.5 for itself or its indemnitee (the "Indemnitee"), such Party shall promptly notify the other Party (the "Indemnitor") in writing of any matter in respect of which the Indemnitee intends to claim such indemnification. The Indemnitee shall permit the Indemnitor, at its discretion, to settle any such matter and agrees to the complete control of such defense or settlement by the Indemnitor; provided, however, that such settlement does not adversely (i) affect the Indemnitee's rights under this Agreement or (ii) impose any material obligations on the Indemnitee in addition to those set forth herein in order for Indemnitee to exercise rights under this Agreement. No settlement of any such matter which materially and adversely affect the Indemnitee's rights under this Agreement or impose any material obligations on the Indemnitee in addition to those set forth herein in order for Indemnitee to exercise rights under this Agreement may be made by the Indemnitor without the prior written consent of the Indemnitee. The Indemnitee shall not be responsible for any legal fees or other costs incurred other than as provided herein. The Indemnitee and its directors, officers and employees shall cooperate fully with the Indemnitor and its legal representatives in the investigation and defense of any matter covered by the applicable indemnification. The Indemnitee shall have the right, but not the obligation, to be represented by counsel of its own selection and at its own expenses in connection with any matter that is subject to indemnification. It is understood that only a Party may claim indemnity under this Section 16 (on its own behalf or on behalf of its Indemnitee), and other TANABE Indemnitees and VIVUS Indemnitees may not directly claim indemnity hereunder.

17. TRADEMARK .

VIVUS shall be responsible for the selection and registration of all TRADEMARKS which it employs in connection with PRODUCT in the TERRITORY. VIVUS shall obtain a written consent of TANABE prior to the registration of TRADEMARK, which consent shall not be unreasonably withheld or delayed. TANABE shall have the right to register and use the same TRADEMARK exclusively and free of charge in connection with the marketing of the ORAL PRODUCT outside the TERRITORY; provided, such TRADEMARK shall be used by TANABE solely with the ORAL PRODUCT and not with any other product. It is understood and agreed that additional marks may be used with the PRODUCTS, including without limitation the VIVUS mark, and that such additional marks shall not be subject to the assignment provisions of Sections 21.1 or 21.2.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

18. Confidentiality and Publication .

18.1 Confidentiality . Each Party hereto shall treat all the information received from the other Party in connection with this Agreement (including the information disclosed before the execution of this Agreement) as confidential, not to be disclosed to any other person, company or firm and not to be used for any other purpose than for the purpose of this Agreement either before or after the expiration or termination of this Agreement except the following information:

(a) information which at the time of the disclosure is part of the public knowledge;

(b) information which, after the disclosure, becomes part of the public knowledge by publication or otherwise, except through acts or omissions of the receiving Party;

(d) information which the receiving Party can establish by competent proof was in the receiving Party's possession at the time of the disclosing Party's disclosure;

(e) information which was otherwise developed independently by the receiving Party, as demonstrated by written records kept in the ordinary course of business; and

(e) information which the receiving Party lawfully receives from a THIRD PARTY; provided, however, that such information was not obtained by said THIRD PARTY directly or indirectly from disclosing Party under a confidential obligation.

Notwithstanding the foregoing, each Party, may disclose confidential INFORMATION to the governmental or other regulatory authorities to the extent that such disclosure (i) is necessary for the filing, prosecution and enforcement of patents, or authorizations to conduct preclinical studies, CLINICAL STUDIES or POST REGISTRATION STUDIES to commercially market PRODUCT, provided such Party is then otherwise entitled to engage in such activities in accordance with the provisions of this Agreement, or (ii) is legally required.

18.2 Publication . Each Party shall submit to the other Party any proposed scientific publication containing confidential INFORMATION of the other Party at least thirty (30) days in advance of submission thereof for the public disclosure to allow that Party to review such proposed disclosure. The reviewing Party shall promptly review such proposed scientific publication and make any objections that it may have to the publication of the confidential INFORMATION contained therein. Should the reviewing Party make an objection to the publication of the confidential

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INFORMATION, then the Parties will discuss the merits of publishing; provided, however, that in any case, no publication of confidential INFORMATION shall take place under this Section 18.2 without the disclosing Party's prior written approval thereof or unless the obligations of confidentiality as to such confidential INFORMATION shall be waived pursuant to Section 18.1 or disclosure of confidential INFORMATION is authorized under Section 18.1. Parties agree that review of scientific abstracts will take place on an expedited basis, with the reviewing Party having seven (7) business days to submit comments and make objections.

18.3 Publicity . Each Party agrees that the other Party may issue a press release concerning the entering into of this Agreement, with the content of such releases to be approved by the non-issuing Party (which consent shall not be unreasonably withheld or delayed). In all other respects, except as required by law, neither Party shall publicly use the name of the other Party or any logos or symbols associated with the other Party without the prior written approval of such other Party. Except as provided above, such as wherein VIVUS is permitted to use TANABE's name and logo in connection with the PRODUCT neither Party shall publicly disclose the terms of this Agreement or issue any publicity release with regard thereto unless expressly authorized to do so by the other Party. Once a particular disclosure has been approved for disclosure, either Party may make disclosures which do not differ materially therefrom without any need for further consents.

19. Reports on ADVERSE DRUG REACTION .

Within one-hundred and eighty (180) days after the EFFECTIVE DATE, the STEERING COMMITTEE shall meet and prepare a plan for sharing and submitting INFORMATION and filing reports to various governmental agencies on PRODUCT under CLINICAL STUDIES and marketed PRODUCT, including without limitation safety related information and ADVERSE DRUG REACTION information.

20. Term and Termination

20.1 Term . On a country-by-country and on a PRODUCT-by-PRODUCT basis, the term of this Agreement shall continue until the later of (i) ten years after the DATE OF FIRST SALE for a particular PRODUCT, or (ii) expiration of the last to expire patents within the TANABE PATENTS covering such PRODUCT in such country.

20.2 Termination due to Breach . Without prejudice to any remedy or claims it may have against the other Party for material breach of this Agreement, either Party shall be entitled to terminate this Agreement by giving the other Party at least thirty (30) days' prior notice in writing if the other Party should materially breach any of the provisions or conditions of this Agreement and if after having been given a written

warning the other Party should fail to discontinue or should fail to make good such material breach within ninety (90) days after receipt of the warning.

20.3 Termination due to Insolvency or Bankruptcy . In the event of insolvency or bankruptcy of either Party or appointment of a trustee or receiver for either Party, it shall immediately notify the other Party to that effect. In any such event, the Party so notified shall have the right to terminate this Agreement at any time.

20.4 Permissive Termination . In the event that a PRODUCT is deemed to be (i) insufficiently effective or insufficiently safe relative to other PDE5 INHIBITOR compounds based on published information, or (ii) not economically feasible to develop due to unforeseen regulatory hurdles or costs as measured by standards common in the pharmaceutical industry for this type of product, VIVUS shall have the right to terminate this Agreement with respect to such PRODUCT.

21. Rights and Duties on Expiration and Termination

21.1 Rights and Duties on Expiration . Following Sections shall apply to the case of expiration of this Agreement, pursuant to Section 20.1:

(a) VIVUS agrees to transfer to TANABE, free of charge, its ownership of the TRADEMARK as VIVUS used for the ORAL PRODUCT, provided, however, that the Parties shall, upon request of VIVUS, execute a simple TRADEMARK license agreement under which VIVUS continues to use on an exclusive basis said TRADEMARK for the ORAL PRODUCT in the TERRITORY as long as VIVUS continues the marketing of the ORAL PRODUCT in the TERRITORY. Under such TRADEMARK license agreement, VIVUS shall pay to TANABE a royalty equal to two percent (2%) of the NET SALES of the ORAL PRODUCT marketed with such TRADEMARK for the first three (3) years following expiration of this Agreement, and a royalty equal to one percent (1%) of the NET SALES of the ORAL PRODUCT marketed with such TRADEMARK for two additional years thereafter. Thereafter, VIVUS shall be free to use such TRADEMARK in conjunction with the marketing and sale of ORAL PRODUCTS free of charge.

(b) Upon expiration of this Agreement in a particular country, VIVUS shall have a perpetual, irrevocable, fully paid-up license to practice the TANABE KNOW-HOW in such country.

21.2 Rights and Duties on Termination . Following Sections shall apply to the case of termination of this Agreement pursuant to Sections 20.2 and 20.3 due to VIVUS'

breach or insolvency or to the case of termination of this Agreement with respect to a particular PRODUCT pursuant to Section 20.4 (except, the following Sections shall only apply, as applicable, with respect to such particular PRODUCT and not with respect to any other PRODUCT):

(a) VIVUS agrees to transfer to TANABE, free of charge, its ownership of the TRADEMARK as VIVUS used for the PRODUCT, and VIVUS shall immediately stop using such TRADEMARK. Thereafter, VIVUS shall not use any trademark which is similar to or confusing with the TRADEMARK.

(b) VIVUS shall, upon TANABE's request, if applicable, provide to TANABE or its nominee, free of charge, all the DRUG APPROVAL APPLICATION and REGULATORY APPROVAL for the PRODUCTS (in the event VIVUS has not applied for DRUG APPROVAL APPLICATION or REGULATORY APPROVAL for a particular PRODUCT in a particular country, VIVUS shall provide to TANABE all the INFORMATION VIVUS reasonably would have included in such application or approval). TANABE shall only use the VIVUS INFORMATION contained with such DRUG APPROVAL APPLICATION or REGULATORY APPROVAL for applying for and obtaining regulatory approval for the PRODUCTS, and not for any other use.

(c) TANABE or its nominee(s) shall have the optional rights to take over all or any part of the remaining stocks of the BULK DRUG SUBSTANCE and the PRODUCT in the warehouses and factories of VIVUS at such prices as may be agreed between the Parties. VIVUS shall not thereafter market or manufacture any PRODUCT covered by this Agreement. In case TANABE or its nominee(s) do not exercise the optional rights to take over the stocks of the BULK DRUG SUBSTANCE and the PRODUCT pursuant to this Section 21.2(c), VIVUS shall have the right to sell the residual salable or usable stocks of the PRODUCT for the term of six (6) months after the termination of this Agreement, provided that the payment defined in this Agreement for such remaining stocks shall be made accordingly.

21.3 Rights and Duties on Expiration and Termination . The following Sections shall apply to the case of expiration under Section 20.1 and termination under Sections 20.2, 20.3, and 20.4 of this Agreement:

(a) Neither Party shall be entitled to claim from the other Party any sum in respect of compensation whether for loss of profits or otherwise for the cessation of the benefits of this Agreement, and either Party expressly waives all rights (if any) which it may have to any such compensation.

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(b) Termination of this Agreement for any reason shall not release any Party hereto from any liability which, at the time of such termination, has already accrued to the other Party or which is attributable to a period prior to such termination nor preclude either Party from pursuing any rights and remedies it may have hereunder or at law or in equity with respect to any breach of, or default under, this Agreement. It is understood and agreed that monetary damages may not be a sufficient remedy for any breach of this Agreement and that the non-breaching Party may be entitled to injunctive relief as a remedy for any such breach..

(c) Except as required to exercise their respective surviving rights as set forth in Sections 20.4 or 21.3(d), each Party shall surrender to other Party all written INFORMATION of the other Party, except those which have to be retained by such Party according to the laws or regulations, and shall not thereafter use or disclose any confidential INFORMATION of the other Party.

(d) Sections 2.5, 12.1, 12.4, 12.5, 12.6, 16.5, and 20.1, and Articles 1, 18, 19, 21, 24, 26, 27, 28, 29, 30, 31, 32 and 33 and such provisions hereof as are required for the interpretation or enforcement of those Articles and Sections, shall survive and remain valid thereafter. Except as provided in this Section 21.3 (d) all other provisions of this Agreement shall terminate upon the expiration or termination of this Agreement.

22. TANABE Change in Control .

In the event TANABE Change in Control occurs during the term of this Agreement, VIVUS shall have the right, exercisable upon written notice to TANABE delivered at any time within sixty (60) days after the effective date of such TANABE Change in Control, to eliminate from this Agreement, TANABE's right to co-promote the PRODUCT in the TERRITORY as provided in Section 2.4. For purposes of this Agreement, "TANABE Change in Control" shall mean any transaction or series of related transactions by which a THIRD PARTY pharmaceutical company acquires or becomes the beneficial owner of (i) fifty percent (50%) or more of the outstanding voting securities of TANABE or the surviving entity, whether by merger, consolidation, reorganization, tender offer or other similar means, or (ii) all or substantially all of the assets of TANABE.

23. VIVUS Change in Control

In the event VIVUS Change in Control occurs during the term of this Agreement and the policy, strategy or priority of VIVUS relating to the DEVELOPMENT WORK or the marketing of the PRODUCT has been or is reasonably expected to materially fail to meet its obligations as provided in Article 5 and 6, TANABE shall have the right, exercisable

upon written notice to VIVUS delivered at any time within four (4) months after the effective date of such VIVUS Change in Control, to terminate this Agreement. For purposes of this Agreement, "VIVUS Change in Control" shall mean any transaction or series of related transactions by which a THIRD PARTY pharmaceutical company acquires or becomes the beneficial owner of (i) fifty percent (50%) or more of the outstanding voting securities of VIVUS or the surviving entity, whether by merger, consolidation, reorganization, tender offer or other similar means, or (ii) all or substantially all of the assets of VIVUS.

24. Assignment and Transfer

24.1 Either Party may, at its sole discretion, but with reasonable prior notice to the other Party, designate and cause its AFFILIATE to perform all or part of its obligations under this Agreement or to have the benefit of all or part of its rights under this Agreement. In any such event, the name "TANABE" or "VIVUS" appearing herein shall be deemed to be the name of such AFFILIATE to the extent necessary to carry out the intent of this Section 24.1, and the performance of the obligations of such AFFILIATE shall be deemed guaranteed by the Party which has made such designation. In addition to the foregoing, either Party may assign this Agreement, without the consent of the other Party to a party that acquires all or substantially all of its business or assets, whether by merger, acquisition, sale or otherwise.

24.2 This Agreement shall be binding upon and inure to the benefit of TANABE and VIVUS and their successors or assignees, provided that any such successor or assignee shall have acquired all or substantially all of the stock or assets of the predecessor by merger, purchase, or otherwise. Otherwise, the rights and obligations set forth in this Agreement shall be not assignable (except to the limited extent provided in the foregoing Section 24.1) without the prior consent in writing of the other Party hereto, such consent not to be unreasonably withheld.

Any acquiring entity shall provide to the non-assigning party, a written commitment that it will use the same efforts, commensurate with the assigning party's efforts, to fully perform under this Agreement, including without limitation, to adhere to the current DEVELOPMENT PLAN (timing, budget and milestones) then in effect.

25. Force Majeure .

Neither Party shall be responsible for a failure or delay in performance of any of its obligations hereunder due to force majeure such as war, insurrection, strikes, acts of God, governmental action, or any other contingency beyond its control. However, the Party which is affected by any force majeure shall contact the other Party for discussion of possible emergency measures.

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26. Notice .

Any and all notices required to be given under this Agreement shall be made by registered airmail and shall be addressed to the Parties at their respective offices first above referred to, except that either Party may change such office by notice in accordance with this Article 26.

27. Governing Law .

This Agreement and any dispute, including without limitation any arbitration, arising from performance or breach hereof shall be governed by and construed and enforced in accordance with the following: (i) if a dispute is filed in court or in arbitration by VIVUS, the laws of Japan shall govern such dispute, and (ii) if a dispute is filed in court or in arbitration by TANABE, the laws of the state of California shall govern such dispute, in each case without reference to conflicts of law principles.

28. Arbitration .

All disputes, controversies, or differences which may arise between the Parties, out of or in relation to or in connection with this Agreement or the breach thereof, shall be finally settled by arbitration pursuant to the then obtaining Rule of Arbitration of the International Chamber of Commerce, by which each Party hereto agrees to be bound. Such arbitration shall be held in Osaka, Japan, if initiated by VIVUS, and in Palo Alto, California if initiated by TANABE. The Parties shall, however, attempt in good faith to amicably settle the disputes, controversies or differences by negotiations before having recourse to the arbitration procedure. It is understood and agreed that the filing by a Party of an action that is subject to this Section, whether in court or in arbitration, shall constitute an "initiation" of arbitration. Each Party agrees that any such action filed in court shall be stayed pending the outcome of the related arbitration.

Notwithstanding the then obtaining Rule of Arbitration of the International Chamber of Commerce, any arbitration shall be conducted by a panel of three arbitrators (the "Panel"). Each Party shall have the right to appoint one (1) member to the Panel, with the third member of the Panel to be mutually agreed to by the two Panel members appointed by the Parties. All Panel members shall be selected from a pool of independent arbitrators. Each Party shall make its appointment within thirty (30) days of receipt of a written request by a Party to initiate arbitration, and the third Panel member shall be selected by the two Panel members with thirty (30) days of the selection of the first two Panel members. All arbitration proceedings, including without limitation the filing of any documents, papers, and/or motions relating thereto, shall be made in the English language. In the event of any dispute concerning the construction or meaning of such

documents, papers and/or motions, reference shall be made only to such documents, papers and/or motions as written in English and not to any translation into any other language.

29. Authentic Text .

This Agreement is entered into in the English language. In the event of any dispute concerning the construction or meaning of this Agreement, reference 34 shall be made only to this Agreement as written in English and not to any translation into any other language.

30. Interpretation .

Unless expressly set forth, the use of the singular form of terms herein shall include the plural and the use of the plural form of terms herein shall include the singular. Headings are for reference only and shall not be used to interpret this Agreement.

31. No Waiver .

The failure of either Party to enforce any provision of this Agreement at any time shall not be construed as a present or future waiver of such or any other provision of this Agreement. The express waiver by either Party of any provision or requirement hereunder shall neither be deemed nor operate as a future waiver of such or any other provision or requirement.

32. Entire Agreement .

This Agreement represents the entire agreement and understanding, as of the EFFECTIVE DATE, between the Parties with respect to the subject matter hereof and shall supersede all prior agreements, negotiations, understanding, representations, statements, and writings between the Parties relating thereto. No modification, alteration, waiver or change in any term or provision of this Agreement shall be valid or binding upon the Parties unless made in writing and duly executed by each of the Parties.

33. Severability .

Any provision of this Agreement which is invalid or unenforceable shall be invalid or unenforceable only to the extent of such invalidity or unenforceability, and the validity or enforceability of any other provision of this Agreement shall not be affected. The Parties shall replace such invalidated or unenforceable provision by valid and enforceable provision which will achieve, to the extent possible, the economic, business and other purposes of the replaced provision.

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34. Injunctive Relief .

Each Party acknowledges and agrees that without resorting to prior mediation or arbitration, either Party, in addition to any other remedies that may be available in law, in equity or otherwise, shall be entitled to seek temporary and permanent injunctive relief in order to enforce its rights under this Agreement, without the necessity of proving actual damages or the posting of any bond.

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IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed by their respective officers as of the EFFECTIVE DATE.

TANABE SEIYAKU CO., LTD.	VIVUS, INC.
/s/ Toshio Tanaka	/s/ Leland F. Wilson
By: Toshio Tanaka	By: Leland F. Wilson
Title: President and Chief Executive Officer Representative Director	Title:
Date: January 21, 2001	Date: January 21, 2001

Attachment:
Appendix-A = List of the TANABE PATENT which covers the COMPOUND as of the EFFECTIVE DATE

Appendix-B = DEVELOPMENT PLAN

Appendix-C = STEERING COMMITTEE Guidelines

Appendix-D = Manufacture of the BULK DRUG SUBSTANCE

Appendix-E = Draft SPECIFICATIONS

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Appendix-A

List of the TANABE PATENT
which covers the COMPOUND as of the EFFECTIVE DATE

[***]

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Appendix-B

DEVELOPMENT PLAN
[To be attached here]

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Appendix-C
STEERING COMMITTEE Guidelines

STEERING COMMITTEE shall be responsible for managing all aspects of the relationship between the Parties to the extent not set forth in this Agreement, including but not limited to: (i) reviewing study protocols and making decisions on any proposed changes to the agreed DEVELOPMENT PLAN; (ii) monitoring and assisting progress of DEVELOPMENT WORK according to the agreed DEVELOPMENT PLAN; (iii) assessing the results of the CLINICAL STUDIES and non-clinical studies, (iv) discussing and resolving any drug supply and regulatory issue and (v) monitoring and supervising marketing, publications and publicity strategies and plans, in the TERRITORY. The STEERING COMMITTEE may adopt and revise policies under which VIVUS shall manage the agreed DEVELOPMENT PLAN.

1. Composition .

Within one (1) month of the EFFECTIVE DATE, each Party shall, by notice hereunder to the other, appoint one (1) chief representative and one (1) project manager to serve on the STEERING COMMITTEE to the extent it has not already done so. Each chief representative shall represent each Party and be responsible for performing the objectives of the STEERING COMMITTEE. Each project manager shall maintain regular communications between the Parties, serving as each Party's liaison and shall be responsible for organizing a development sub-committee and a marketing sub-committee (collectively, "Sub-Committees"). Subject to the requirements of the preceding sentence, at any time during the term of this Agreement, either Party may, by notice hereunder to the other, change or replace any of its chief representative or project manager on the STEERING COMMITTEE as it sees fit. Each Party's Sub-Committees shall have that Party's scientific, technical and regulatory expertise relating to the DEVELOPMENT WORK, and marketing and business development expertise relating to the PRODUCT. In addition, the STEERING COMMITTEE may invite either Party's or outside non-voting experts as the need arises.

2. Meetings .

The STEERING COMMITTEE shall hold its first official meeting within one (1) month of the EFFECTIVE DATE unless otherwise agreed by the Parties. At this first (1st) meeting, the STEERING COMMITTEE shall decide the scheduling of meetings. The STEERING COMMITTEE shall meet at least two (2) times per year, at places and on dates selected by each Party in turn.

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3. Voting .

Each Party shall have one (1) vote on the STEERING COMMITTEE. Upon unanimous vote (except as provided in Section 4 below) all decisions of the STEERING COMMITTEE shall be binding on the Parties.

4. Dispute Resolution .

Both TANABE and VIVUS are mutually responsible for ensuring the success of this Agreement in accordance herewith. Therefore, TANABE and VIVUS hereby agree to frankly discuss and attempt to resolve in good faith any conflicts which arise in ways which will promote the continuing goodwill between the Parties. If the members of the STEERING COMMITTEE cannot resolve any disagreement after good faith attempts to resolve such disagreement in a commercially reasonable fashion, then either of the Parties may refer the disagreement to a personal face-to-face meeting between the head of Research and Development of TANABE (or nearest equivalent) and the head of Research and Development of VIVUS (or nearest equivalent). If such persons cannot resolve the disagreement within one (1) month after such personal face-to-face meeting, then VIVUS will cast the deciding vote taking due consideration of TANABE's opinion.

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Appendix-D
Manufacture and supply of the
BULK DRUG SUBSTANCE and BULK DRUG TABLETS

1. General Supply Terms .

The following terms are applicable to both supplies for development and commercial use. It is understood and agreed that for this Appendix D, the use of the term BULK DRUG SUBSTANCE shall mean the BULK DRUG SUBSTANCE and/or BULK DRUG TABLETS, as applicable.

1.1 Order Forecast . At least eight (8) months prior to the beginning of each month, VIVUS shall provide to TANABE an order forecast for the supply during such month of the BULK DRUG SUBSTANCE.

1.2 Firm Order . VIVUS shall place with TANABE a firm order at least one-hundred and twenty (120) days before the desired shipping date. Such firm order shall fall within the range from ninety percent (90%) to one hundred and twenty percent (120%) of such order forecast. TANABE shall accept all such orders.

1.3 Form of Order . VIVUS' orders shall be made in writing and shall provide for shipment in accordance with reasonable delivery schedules. No terms contained in any firm order, order acknowledgment or similar standardized form shall be construed to amend or modify the terms of this Agreement and in event of a conflict, this Agreement shall control unless otherwise expressly agreed in writing.

1.4 Delivery . TANABE agrees to ship quantities of the BULK DRUG SUBSTANCE ordered in accordance with Paragraph 1.2 on or about (but not later than seven (7) business days after the specified date) the dates specified in VIVUS' firm orders. The BULK DRUG SUBSTANCE shall be delivered to a carrier designated by VIVUS (FCA Place of Manufacture, Incoterms 2000). The packaging for shipment shall be sufficiently protective toward the BULK DRUG SUBSTANCE.

1.5 Invoice . TANABE shall send a single invoice upon delivery of each lot of the BULK DRUG SUBSTANCE to VIVUS at the address to be specified by it in writing on its firm order.

1.6 Duty . Any duty incurred, imposed or levied after the shipping point of the BULK DRUG SUBSTANCE shall be borne solely by VIVUS. TANABE shall use reasonable efforts to cooperate with VIVUS in eliminating all duties.

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1.7 Quality Control . In order to ensure the quality of the PRODUCTS, including maximizing the PRODUCT shelf life, the Parties shall meet and agree upon when BULK DRUG SUBSTANCE shall be delivered to VIVUS after their manufacture by TANABE.

1.8 Acceptance or Rejection of the BULK DRUG SUBSTANCE

(a) VIVUS shall examine each lot of the BULK DRUG SUBSTANCE for compliance with SPECIFICATIONS and any damage, defects or shortage, not later than thirty (30) days of receipt thereof. If VIVUS believes that any of such lot does not comply with the SPECIFICATIONS or is defective or damaged, VIVUS shall promptly, but not later than said thirty (30) days after receipt of such lot, notify TANABE and, if appropriate, send a sample of such lot to TANABE. Failure of VIVUS to reject a lot of the BULK DRUG SUBSTANCE in the manner set forth above shall constitute acceptance thereof.

(b) Any claim notified by VIVUS pursuant to preceding Paragraph 1.8(a) shall be accompanied by a report of analysis, including an adequate sample of such lot of the BULK DRUG SUBSTANCE analyzed, and shall be handled as hereafter set forth in this Paragraph 1.8.

(c) Should VIVUS reject any lot of the BULK DRUG SUBSTANCE under Paragraph 1.8(a) and TANABE agrees that such rejection is justified, TANABE shall promptly reimburse VIVUS for the supply price payment invoiced and paid for such lot of the BULK DRUG SUBSTANCE or cancel the invoice (if not yet paid) and replace the shipment or remedy the deficiency promptly.

(d) Should VIVUS reject any lot pursuant to Paragraph 1.8(a), and TANABE and VIVUS, after good faith negotiation, fail to agree that such rejection is justified, the Parties shall mutually agree on an independent THIRD PARTY to evaluate all documentation relating to such lot of the BULK DRUG SUBSTANCE, which include but not limited to, certificate of analysis, certificate of compliance and report of analysis, and other relevant INFORMATION developed by either or both of the Parties relating thereto to ascertain whether the rejection is justified. If the THIRD PARTY determines that VIVUS' rejection is justified, TANABE shall pay for the costs of the independent THIRD PARTY's review, and the rejected BULK DRUG SUBSTANCE shall be handled as described in preceding Paragraph 1.8(c). If the THIRD PARTY determines that VIVUS' rejection is not justified, VIVUS shall pay for the costs of the independent THIRD

PARTY's review, and the rejected BULK DRUG SUBSTANCE shall be accepted by VIVUS.

1.9 Hidden Defect .

If a defect is found in any lot of the BULK DRUG SUBSTANCE shipped by TANABE, which could not reasonably be expected to have been found by diligent and adequate inspection by VIVUS pursuant to its obligations under the Paragraph 1.8 (a), such as stability, and if such defect is claimed to TANABE within six (6) months from the date of the receipt thereof, any such claim by VIVUS shall be handled pursuant to the Paragraphs 1.8(b), (c) and (d).

2. Manufacture .

2.1 SPECIFICATIONS . TANABE shall manufacture and package the BULK DRUG SUBSTANCE which conform to the SPECIFICATIONS. A draft of SPECIFICATIONS shall be attached to the Agreement as Appendix-E and may be modified from time to time by prior written agreement between TANABE and VIVUS.

2.2 CGMP Manufacture . TANABE shall carry out all manufacturing, packaging and quality control operations in accordance with the current requirements of United States and European Good Manufacturing Practice (the "CGMP"). TANABE shall maintain an appropriate manufacturing authorization and thus maintain adequate premises, equipment, knowledge, and experienced and competent personnel to perform the work in compliance with the CGMP applicable to the particular country within the TERRITORY. TANABE shall refrain from any activity which adversely affects the quality of the BULK DRUG SUBSTANCE.

2.3 Manufacturing Records . TANABE shall keep full and complete records of every production lot in accordance with generally accepted industry practices including, but not limited to, the lot production records for each lot supplied (hereinafter referred to as "Records").

2.4 Audit . VIVUS may, at periodic intervals, audit the TANABE operation to ensure that the principles of CGMP continue to be followed. TANABE shall inform VIVUS from time to time and whenever requested by VIVUS, of the location of the Records, and shall permit VIVUS' representatives, for the purpose of quality audit, to have all reasonable access to the Records, TANABE's manufacturing, warehousing, packaging and laboratory areas, during normal business hours, to the extent VIVUS notifies TANABE in writing reasonably prior to the audit. Should VIVUS, after its audit, notify TANABE of any deficiencies, TANABE

shall provide VIVUS with a response with proposed corrective actions within thirty (30) days of such notice and then promptly thereafter rectify any deficiencies noted during the course of audit by VIVUS, provided TANABE agrees with VIVUS' comments, which agreement shall not be unreasonably withheld or delayed. In addition, VIVUS shall have the right to audit TANABE's Records and documentation as it relates to the manufacture of the BULK DRUG SUBSTANCE, during normal business hours, to the extent such audit is needed to comply with CGMP and any applicable regulatory requirements.

2.5. THIRD PARTY Manufacture . TANABE may sub-contract any work relating to the manufacture of the BULK DRUG SUBSTANCE, provided, however, the manufacturing so sub-contracted shall be subject to the same terms and conditions as recited herein including but not limited to the right to audit the Records and inspect facilities. VIVUS shall have the right to approve such sub-contractor prior 43 to the selection, in case such sub-contracting is related to the final stage of the manufacture of the BULK DRUG SUBSTANCE, which approval shall not be unreasonably withheld or delayed.

2.6. Regulatory Inspections . In case TANABE receives advance notice of any proposed inspection by regulatory agencies such as the FDA or EMEA of its facility involving the BULK DRUG SUBSTANCE, TANABE shall promptly notify VIVUS to that effect. In case the inspections conducted by such regulatory agencies involve the BULK DRUG SUBSTANCE, TANABE shall inform VIVUS of the summary of such results. At VIVUS' request, TANABE shall cooperate in the investigation of any query or complaint concerning the BULK DRUG SUBSTANCE, and TANABE agrees to permit VIVUS to review and comment upon any response to the inspection that TANABE shall submit prior to the response to the regulatory agencies. VIVUS' review and comment shall be made promptly upon the receipt of TANABE's informing the content of the response.

2.7. Testing . TANABE shall test or cause to be tested each lot of the BULK DRUG SUBSTANCE before delivery to VIVUS. Each test shall set forth the items tested, SPECIFICATIONS and test results in a certificate of analysis for each lot delivered to VIVUS under this Agreement. TANABE shall send such certificate of analysis together with a certificate of compliance along with the delivery of the BULK DRUG SUBSTANCE. TANABE warrants that such tests are conducted diligently, the level of which is no less strict than the standard used for other goods or products which are manufactured and sold by TANABE itself.

2.8. Packing and Marking . Each lot of the BULK DRUG SUBSTANCE shall be shipped in accordance with TANABE's standard

operating procedure and in

accordance with instructions and specifications provided by VIVUS and accepted by TANABE which acceptance shall not be unreasonably withheld or delayed. All shipments shall be accompanied by a packing slip which describes the articles, states the order number and shows the shipment destination. TANABE agrees to promptly forward the original bill of lading or other shipping receipt for each shipment of the BULK DRUG SUBSTANCE in accordance with VIVUS' instructions to the extent such instructions are reasonable.

2.9. Qualification/Validation . TANABE shall be responsible for ensuring that an appropriate qualification/validation data is generated for any changes in processes, test methods and SPECIFICATIONS. TANABE shall supply VIVUS with the proposed protocols for qualification/validation, in advance of work conducted, for VIVUS' approval which shall not be reasonably withheld or delayed. TANABE shall supply VIVUS with a copy of the qualification/validation report.

2.10. Compliance with Laws . TANABE shall observe and comply with all laws, ordinances, codes and regulations of government agencies which are applicable to the place where the manufacture of the BULK DRUG SUBSTANCE is carried out. In no event, shall TANABE be forced to maintain its facility or manufacture the BULK DRUG SUBSTANCE in a manner which violates the applicable laws and regulations.

3. Representation and Warranties .

3.1 Manufacturing Warranty . TANABE represents and warrants that the BULK DRUG SUBSTANCE manufactured by TANABE for VIVUS pursuant to the Agreement shall be manufactured in accordance with any applicable regulations pertaining to the CGMP.

3.2 No Warranty by TANABE . Except for the express warranty set forth in Paragraph 3.1 or otherwise set forth in the Agreement, TANABE grants no other warranties, express or implied, by statute or otherwise, regarding the BULK DRUG SUBSTANCE including their merchantability and their fitness for any use, and VIVUS shall defend, indemnify and hold harmless TANABE, its AFFILIATE's and their respective directors, officers, employees and agents, from any THIRD PARTY loss, claim, action, damage, expense or liability, including defense costs and attorneys' fees arising out of or related to the handling, possession or use of the BULK DRUG SUBSTANCE by VIVUS.

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Appendix-E
Draft SPECIFICATIONS
Tentative SPECIFICATION and Testing Methods of BULK DRUG SUBSTANCE

[***]

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Tentative SPECIFICATION and Testing Methods of BULK DRUG SUBSTANCE

[***]

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Exhibit 10.20

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SETTLEMENT AND MODIFICATION AGREEMENT

THIS SETTLEMENT AND MODIFICATION AGREEMENT (the "Settlement Agreement"), effective as of the date upon which all parties have signed below (the "Effective Date"), is by and between ASIVI, LLC, a Delaware limited liability company, with offices at 1172 Castro Street, Mountain View, California 94040 ("ASIVI"), VIVUS, INC., a Delaware corporation with a principal place of business at 1172 Castro Street, Mountain View, California 94040 ("VI"), ANDROSOLUTIONS, INC., a Tennessee corporation with a principal place of business at Suite 309, 200 Fort Sanders West Blvd., Knoxville, TN 37922 (collectively with its Affiliates, "ASI"), and Gary W. Neal, M.D., a natural person residing at 4701 Guinn Road, Knoxville, TN 37931 ("GWN").

BACKGROUND

WHEREAS, the parties have commenced arbitration proceedings before the American Arbitration Association captioned VIVUS, Inc. v. AndroSolutions, Inc.;

WHEREAS, the parties, without admitting liability, wish to settle their dispute by terminating and/or modifying the following agreements previously entered into by the parties and by entering into this Settlement Agreement: the Memorandum of Understanding dated October 14, 1999 ("MOU"); the Confidentiality and Non-Disclosure Agreement dated December 16, 1999 (the "Confidentiality Agreement"); the ASIVI, LLC Operating Agreement dated February 29, 2000 ("Operating Agreement"); the License Agreement dated February 29, 2000 ("License Agreement"); and the Manufacture and Supply Agreement dated February 29, 2000 ("Manufacture and Supply Agreement");

WHEREAS, ASI and VI formerly owned certain intellectual property consisting of issued patents and/or pending patent applications relating to, inter alia, the design, development, manufacture and use of products containing a prostaglandin and/or other vasodilator for the treatment of female sexual dysfunction ("FSD") which VI and ASI each assigned to ASIVI;

WHEREAS, VI desires to obtain, and ASIVI desires to assign, the FSD IP (as defined below) to develop and commercialize Products (as defined below) for the treatment of FSD, on the terms and conditions herein;

WHEREAS, VI desires to obtain, and ASI desires to assign, ASI's entire interest in ASIVI;

WHEREAS, VI desires to obtain, and ASI desires to assign, the Supplemental FSD IP (as defined below); and

WHEREAS, VI, in partial consideration for the assignment of the FSD IP, the Supplemental FSD IP, and assignment of ASI's interest in ASIVI, and in order to settle the

dispute which is the subject of the arbitration with ASI, is willing to make an upfront payment, certain milestone payments, and royalty payments to ASI, and ASI is willing to accept such payments on the terms and conditions herein.

NOW, THEREFORE, in consideration of the mutual covenants and undertakings set out herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, ASIVI, VI, ASI and GWN agree as follows:

1. DEFINITIONS

1.1. " Affiliate " shall mean any corporation or other entity that controls, is controlled by or is under common control with a party. For purposes of this definition only, "control" shall mean ownership or control, directly or indirectly, of more than fifty percent (50%) of the shares or other rights of the subject entity entitled to vote in the election of directors (or, in the case of an entity that is not a corporation, to the election of the corresponding managing authority).

1.2. " Commercially Reasonable Efforts " shall, with respect to a Product, mean efforts and resources equivalent to those normally employed by entities in the biopharmaceutical marketplace, substantially comparable to VI, to develop, manufacture, market or sell a product of similar market potential at a similar stage in its product life, taking into account for example the establishment of the Product in the marketplace, the competitiveness of alternative products, the proprietary position of the Product, the likelihood of regulatory approval, including consideration of safety and efficacy, for the Product given the regulatory authority and structure involved, the profitability of the Product and VI's available resources. Commercially Reasonable Efforts shall be determined on a market-by-market basis for each Product.

1.3. " Confidential Information " shall mean only such information of another party to this Settlement Agreement that may be reasonably understood from legends or oral designations, the nature of the information itself or the circumstances of such information's disclosure, to be confidential or proprietary to another party or to a third party to which another party owes a duty of non-disclosure.

1.4. " First Commercial Sale " shall mean, with respect to each Product in each country, the first bona fide commercial sale of such Product in such country by or under authority of VI.

1.5. " FDA " shall mean the U.S. Food and Drug Administration, or any successor agency.

1.6. " FSD IP " shall mean the Know How and Patent Rights, in each case that are owned or controlled by ASIVI as of the Effective Date, and all U.S. and foreign patents and patent applications claiming priority to the Patent Rights.

1.6.1. " Patent Rights " shall mean all United States and foreign patents (including all reissues, extensions, substitutions, re-examinations, supplementary protection certificates, and the like, and patents of addition) and pending patent applications (including without limitation all continuations, continuations-in-part and divisionals thereof) relating to, inter alia, the design, development, manufacture, and use of products containing a prostaglandin and/or other vasodilator for the treatment of FSD.

1.6.2. " Know How " shall mean the Confidential Information owned or controlled by ASIVI pursuant to the terms of the MOU and/or the Operating Agreement necessary for the exercise of the Patent Rights, including technical data, protocols and methods.

1.7. " IP Information " shall mean [***] the FSD IP formerly owned by ASI, and assigned to ASIVI pursuant to the Assignment Agreement executed by ASI and included in Exhibit 2 to the Operating Agreement along with the [***]. IP Information shall include [***] in the FSD IP.

1.8. " Licensee " shall mean a third party to whom VI has granted a license or other right under the FSD IP to make, have made, import, have imported, export, have exported, distribute, have distributed, sell, have sold, use, or offer for sale Products.

1.9. " NDA " shall mean a New Drug Application submitted to the FDA.

1.10. " Net Sales ."

1.10.1. " Net Sales by Licensees " shall mean the amount invoiced by VI's Licensees (for purposes of this definition, as applicable, the "Selling Party") for the sale of Products to bona fide independent third parties throughout the world, less (i) ordinary and customary trade discounts actually allowed by the Selling Party to the third party purchaser; (ii) credits, rebates and returns allowed and credited to the third party purchaser (including, but not limited to, wholesaler and retailer returns); (iii) freight, handling and duties paid on shipments by the Selling Party to the third party purchaser and separately identified on the invoice; and (iv) sales taxes, excise taxes, consumption taxes, customs duties and other compulsory payments to governmental authorities actually paid with respect to the sale by the Selling Party to the third party purchaser. For the avoidance of doubt, Net Sales by Licensees shall not include sales by a Selling Party to its Affiliates for resale; provided, however, that if the Selling Party sells a Product to an Affiliate for resale, Net Sales by Licensees shall include the amounts invoiced by such Affiliate to third parties on the resale of such Product.

1.10.2. " Net Sales by VI " shall mean the amount invoiced by VI or its Affiliates (for purposes of this definition, as applicable, the "Selling Party") for the sale of Products to bona fide independent third parties throughout the world, less (i) ordinary and customary trade discounts actually allowed by the Selling Party to the third party purchaser; (ii) credits, rebates and returns allowed and credited to the third party purchaser (including, but not limited to, wholesaler and retailer returns); (iii) freight, handling and duties paid on shipments by the Selling Party to the third party purchaser and separately identified on the invoice; and (iv) sales taxes, excise taxes, consumption taxes, customs duties and other compulsory payments to governmental authorities actually paid with respect to the sale by the Selling Party to the third party purchaser. For the avoidance of doubt, Net Sales by VI shall not include sales by a Selling Party to its Affiliates or Licensees for resale; provided, however, that if the Selling Party sells a Product to an Affiliate or Licensees for resale, Net Sales shall include the amounts invoiced by such Affiliate or Licensees to third parties on the resale of such Product. For avoidance of doubt, Net Sales by VI shall also include Third Party Payments for the purpose of calculating royalties payable under Section 2.3.1.

1.10.3. " Bundles ." In the case of discounts on "bundles" of products or services which include Products, Net Sales by Licensees and Net Sales by VI will be calculated by discounting the bona fide list price of such Product by the average percentage discount of all products of VI and/or its Licensees in a particular "bundle," calculated as follows: Average percentage discount on a particular bundle = (1 - A/B) x 100 where A equals the total discounted price of a particular "bundle" of products, and B equals the sum of the undiscounted bona fide list prices of each unit of every product in such "bundle." VI shall provide ASI documentation, reasonably acceptable to ASI, establishing such average discount with respect to each "bundle." If VI cannot so establish the average discount of a "bundle," Net Sales shall be based on the undiscounted list price of the Products in the "bundle." If a Product in a "bundle" is not sold separately and no bona fide list price exists for such Product, the parties shall negotiate in good faith an imputed list price for such Product, and Net Sales with respect thereto shall be based on such imputed list price.

1.11. " Product " shall mean any product containing a prostaglandin and/or other vasodilator within the Field of Use, the sale of which would infringe upon a Valid Claim.

1.12. " Valid Claim " means (i) a claim of an issued and unexpired patent included within the Patent Rights which has not been held unenforceable or invalid by a court or other governmental agency of competent jurisdiction, and which has not been disclaimed or admitted to be invalid or unenforceable through reissue or otherwise, or (ii) a claim of a pending patent application within the Patent Rights.

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1.13. " Field of Use " shall mean the diagnosis, prophylaxis and/or treatment involving female sexual dysfunction ("FSD"), including without limitation enhancing female sexual desire and responsiveness, and preventing, treating and/or managing female sexual arousal disorder, orgasmic disorder, and pain disorder.

1.14. " Third Party Payments " shall mean any and all cash and non-cash consideration received by VI or VI's Affiliates for the grant of a license or other right attributable to the FSD IP related to the manufacturing, marketing, promotion, distribution, or sale of Products or other method, process or procedure covered by the FSD IP, including but not limited to initial lump-sum payments and milestones. All non-cash consideration will be valued at the fair market value thereof established by agreement of the parties or, failing that, by a qualified "Big 5" or national independent accountant approved by VI and ASI. VI will bear the cost of such accountant. Third Party Payments shall be included within the definition of Net Sales by VI as of the date such Third Party Payments are actually received by VI for purposes of determining the applicable percentage of Third Party Payments to be paid to ASI under Section 2.3.1 of this Settlement Agreement.

1.15. " Novel Chemical Entity " shall mean a new composition of matter having a molecular structure that was not previously found in nature or synthesized, and that is or comes to be conceived of or developed by ASI or GWN during the term of this Settlement Agreement.

1.16. " Supplemental FSD IP " shall mean the patents and/or patent applications identified in Technology Assignment Agreement C, attached hereto as Exhibit 3.

2. PAYMENTS

2.1. Upfront Payment . Within three (3) business days of the Effective Date, VI shall deposit with its counsel, Wilson Sonsini Goodrich & Rosati, a check in the sum of $750,000, payable to ASI, pending confirmation that pursuant to Section 12.1 ASI has furnished its counsel, Rothwell Figg Ernst & Manbeck, with all IP materials described in Section 12.1 and that ASI has directed its counsel to deposit such materials for overnight delivery to VI counsel. Upon receipt of such confirmation, VI shall direct its counsel to likewise deposit the $750,000 payment for overnight delivery to ASI counsel. VI shall ensure that the bank account from which the $750,000 check is drawn is sufficiently funded to allow for the immediate availability of the $750,000 upon ASI's deposit of said check. For the avoidance of doubt, the depositing of the $750,000 payment for overnight delivery to ASI counsel shall be made on the same day as the deposit of IP materials for overnight delivery to VI counsel under Section 12.1 of this Settlement Agreement.

2.1.1. ASI Right to Rescind . In the event that VI fails to deliver payment to ASI under this Section 2.1, ASI shall have the right to rescind this Settlement Agreement in its entirety.

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2.2. Milestone Payments . VI agrees to make the following one-time payments to ASI within thirty (30) days after achievement of the specified milestone: (i) [***] upon the first submission, by VI or on VI's behalf, of an NDA for a product covered by the Patent Rights; and (ii) [***] upon the first approval of an NDA for a product covered by the Patent Rights.

2.3. Continuing Payments .

2.3.1. Payment to ASI on Net Sales by VI or its Affiliates . VI shall make payments to ASI at the applicable percentage of annual Net Sales by VI, as defined herein, as follows:

Annual Net Sales by VI	Payment Rate
Up to [***]	[***]
[***]up to [***]	[***]
[***]up to [***]	[***]
Equal to or greater than [***]	[***]

2.3.2. Payment to ASI on Net Sales for Products Sold by Licensees . VI shall make payments to ASI at the applicable percentage of annual Net Sales by Licensees, as defined herein, as follows:

Annual Net Sales by Licensees	Payment Rate.
Up to [***]	[***]
[***]up to [***]	[***]
[***]up to [***]	[***]
[***]up to [***]	[***]
Equal to or greater than [***]	[***]

2.3.3. Third Party Royalties . If VI, or any Affiliate or Licensees of VI, becomes obligated to pay to third parties royalties or other amounts with respect to any Product through litigation or under agreements for patent rights or other technologies which VI or such Affiliate or Licensee determines are desirable to license or acquire with respect to such Product, VI shall be responsible for making such payments. VI shall not deduct such payments from any payments to ASI, and such payments shall not be deducted from gross invoiced amounts for Products in calculating Net Sales.

2.3.4. One Payment . No more than one payment shall be due to ASI with respect to a sale of a particular Product or for a Third Party Payment received by VI.

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2.3.5. Payment Term . The payments due under this Section 2.3 shall be payable until the expiration of the last to expire Valid Claim.

3. PAYMENTS; REPORTS; AND RECORDS

3.1. Payments .

3.1.1. Timing of Payments . After the First Commercial Sale of a Product on which royalties are payable hereunder, VI shall make quarterly written reports to ASI within sixty (60) days after the end of each calendar quarter, stating in such report, separately for Net Sales by VI and Net Sales by Licensees, the number, description and aggregate Net Sales, by country, of each Product sold during the calendar quarter upon which a royalty is payable. Concurrently with the making of such reports, VI shall pay to ASI payments due at the rates specified hereunder. This Section 3.1.1 shall not apply to any payments for Third Party Payments.

3.1.2. Timing of Payments for Third Party Payments . Within thirty (30) days following VI's actual receipt of any Third Party Payment, VI shall pay any amount due ASI for such Third Party Payment, at the applicable percentage set forth in Section 2.3.1, and provide written notice to ASI indicating the amount of Third Party Payment received and the percentage rate applied to such amount.

3.1.3. Payment Method . All payments due under this Settlement Agreement shall be made by bank wire transfer in immediately available funds to a bank account designated by ASI, with the exception of the Upfront Payment set forth in Section 2.1 above. All payments due to ASI hereunder shall be paid in United States dollars.

3.1.4. Currency Conversion . If any currency conversion shall be required in connection with the calculation of amounts payable hereunder, such conversion shall be made using the buying exchange rate for conversion of the foreign currency into U.S. Dollars, quoted for current transactions reported in The Wall Street Journal (U.S., Western Edition) for the

last business day of the calendar quarter to which such payment pertains.

3.1.5. Taxes . All payments required to be paid to ASI pursuant to this Settlement Agreement shall be paid with deduction for withholding for or on account of any applicable sales, use, value-added, or other federal, state or local taxes or import duties or tariffs, or similar governmental charges imposed by a jurisdiction other than the United States ("Withholding Taxes"). VI shall provide ASI a certificate evidencing payment of any Withholding Taxes hereunder, and shall provide any further assistance reasonably requested by ASI to enable ASI to obtain the benefit of any deduction.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

3.2. Reports; Inspection . VI shall maintain accurate books and records that enable the calculation of royalties payable hereunder to be verified. VI shall retain the books and records for each calendar year period for three (3) years after the submission of the corresponding report under Section 3.1.1 hereof. Upon thirty (30) days prior notice to VI, independent accountants selected by ASI, which shall be from a "Big 5" or national accounting firm and reasonably acceptable to VI, after entering into a confidentiality agreement with VI, may have access to VI's books and records during VI's normal business hours to conduct a review or audit once per calendar year, for the sole purpose of verifying the accuracy of VI's payments and compliance with this Settlement Agreement. Any such inspection or audit shall be at ASI's expense, however, if an inspection reveals underpayment of five percent (5%) or more in any audit period, VI shall pay the costs of the inspection. VI shall promptly pay to ASI any underpayment identified in such an audit.

4. CONFIDENTIALITY

4.1. Termination of Confidentiality Agreement . The Confidentiality and Non-Disclosure Agreement, dated December 16, 1999, by and between ASI, VI and ASIVI, is hereby terminated and any information deemed Confidential Information under that Confidentiality and Non-Disclosure Agreement shall be deemed Confidential Information under this Settlement Agreement.

4.2. Confidentiality Obligations . Except as expressly provided herein, the party in receipt of Confidential Information (the "Receiving Party") shall not disclose to any third party or use for any purpose any Confidential Information furnished to it by the other party (the "Disclosing Party"). Notwithstanding the foregoing, Confidential Information shall not include any information that, in each case as demonstrated by written documentation: (i) was already known to the Receiving Party, other than under an obligation of confidentiality, at the time of disclosure; (ii) was generally available to the public or otherwise part of the public domain at the time of its disclosure to the Receiving Party; (iii) became generally available to the public or otherwise part of the public domain after its disclosure and other than through any act or omission of the Receiving Party in breach of this Settlement Agreement; (iv) was subsequently lawfully disclosed to the Receiving Party by a third party who did not acquire it directly or indirectly from the Disclosing Party; or (v) was developed by the Receiving Party without use of or reference to any Confidential Information of the Disclosing Party.

4.3. Permitted Use and Disclosures . The Receiving Party may use and disclose the Confidential Information of the Disclosing Party to the extent necessary to exercise its rights or perform its obligations under this Settlement Agreement, in filing or prosecuting applications and patents, prosecuting or defending litigation, complying with applicable governmental regulations or court order or otherwise submitting information to tax or other governmental authorities, conducting trials, or making a permitted sublicense or

otherwise exercising rights expressly granted to it pursuant to the terms of this Settlement Agreement, provided that if the Receiving Party is required to make any such disclosures of the Disclosing Party's Confidential Information, other than pursuant to a confidentiality agreement, it shall give reasonable advance notice to the Disclosing Party of such disclosure and, save to the extent inappropriate in the case of patent applications, shall use its reasonable efforts to secure confidential treatment of such Confidential Information in consultation with the Disclosing Party prior to its disclosure (whether through protective orders or otherwise) and disclose only that portion of the Confidential Information necessary to comply with such requirements.

4.4. Confidential Terms . Each party agrees not to disclose any terms of this Settlement Agreement to any third party without the consent of the other party; provided, disclosures may be made as necessary in the exercise of a party's rights under this Settlement Agreement, as required by securities or other applicable laws, or to a party's accountants, attorneys and other professional advisors, or by VI, ASIVI, and ASI to actual or prospective investors or corporate partners.

4.5. Information Furnished Under Settlement Agreement . All information and materials furnished by a party to another party pursuant to or in connection with the terms of this Settlement Agreement shall be treated as Confidential Information, including but not limited to information furnished under Sections 3.1, 12.1, and 15.9.

5. REPRESENTATIONS, WARRANTIES AND COVENANTS

5.1. ASIVI . ASIVI represents and warrants to VI, ASI, and GWN that: (i) it is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware; and (ii) the execution, delivery and performance of this Settlement Agreement have been duly authorized by all necessary company action on the part of ASIVI; (iii) it is the sole, equal, and exclusive owner of all right, title and interest in the FSD IP; (iv) it has the right to grant the rights granted herein, and the FSD IP is free and clear of any lien, encumbrance or security interest; (v) it has not previously granted, and will not grant, any right, license or interest in and to the FSD IP, or any portion thereof, inconsistent with the assignment to VI; and (vi) there are no threatened or pending actions, lawsuits, claims or arbitration proceedings in any way relating to the FSD IP, other than the arbitration proceeding referenced in the Recitals above.

5.2. VI . VI represents, warrants and covenants to ASIVI, ASI, and GWN that: (i) it is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware; (ii) the execution, delivery and performance of this Settlement Agreement have been duly authorized by all necessary corporate action on the part of VI; (iii) it will use Commercially Reasonable Efforts to develop and commercialize Products under the FSD IP; and (iv) it will use good faith efforts to obtain and maintain the Patent Rights.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

5.3. ASI, GWN . ASI and GWN represent, warrant and covenant to VI and ASIVI as follows:

5.3.1. ASI is a corporation duly organized, validly existing and in good standing under the laws of the State of Tennessee.

5.3.2. The execution, delivery and performance of this Settlement Agreement have been duly authorized by all necessary corporate action on the part of ASI.

5.3.3. The Supplemental FSD IP includes all patents and pending patent applications, which are owned or controlled as of the Effective Date by ASI or GWN, or their Affiliates or beneficiaries, that that relate to the Field of Use; that, as of the Effective Date, no other such patents or patent applications exist; that, as of the Effective Date, neither ASI nor GWN, nor their Affiliates or beneficiaries, have transferred, assigned or licensed any rights in such patents and patent applications to any third-party; and that there are no threatened or pending actions, lawsuits, claims or arbitration proceedings in any way relating to such patents and patent applications, other than the arbitration proceeding referenced in the Recitals above;

5.3.4. ASI and GWN have previously transferred to ASIVI all of the patents and pending patent applications owned or controlled as of February 29, 2000 by ASI or GWN, or their Affiliates or beneficiaries, that relate to the design, development, manufacture, or use of products containing a prostaglandin and/or other vasodilator within the Field of Use; and

5.3.5. ASI and GWN have, concurrent with the execution of this Settlement Agreement, assigned to VI all of the patents and pending patent applications owned or controlled as of the Effective Date by ASI or GWN, or their Affiliates or beneficiaries, that relate to the Field of Use.

5.3.6. ASI and GWN have not assigned, licensed, sold or otherwise transferred any patents or patent applications that relate to the Field of Use during the period from February 29, 2000 up to and including the Effective Date of this Settlement Agreement

6. INTELLECTUAL PROPERTY

6.1. Prosecution and Maintenance of Patent Rights . As provided by Technology Assignment Agreement A, Technology Assignment Agreement B, and Technology Assignment Agreement C, attached hereto as Exhibits 1, 2 and 3, respectively, VI shall, at its expense, have the sole right to file, prosecute, maintain and enforce the Patent Rights, including without limitation the patents and patent applications encompassed thereby. VI shall not be entitled to offset any amount expended in connection with such

activities against payments, if any, due under Article 2 of this Settlement Agreement. ASI and GWN shall provide any cooperation reasonably requested by VI in connection therewith, including but not limited to the IP Information delivered to VI pursuant to Section 12.1 below.

6.2. No Liens . ASIVI or VI shall not incur, nor suffer to exist, any lien, claim or other encumbrance on any of the FSD IP.

6.3. Enforcement . If either ASIVI, ASI, or GWN become aware that any Patent Rights are being infringed by any third party, such party shall promptly notify VI in writing describing the facts relating thereto in reasonable detail. As provided in Technology Assignment Agreement A, Technology Assignment Agreement B and Technology Assignment Agreement C, attached hereto as Exhibits 1, 2 and 3, respectively, VI shall have the sole right, in its discretion, to institute any action, suit or proceeding, including any declaratory judgment action (each an "Action"), at its expense, using counsel of its choice. ASI shall provide any cooperation reasonably requested by VI in connection with any such Action, at VI's expense. VI shall retain any amount recovered in any such Action, but shall not be entitled to offset any amount expended in connection with any such Action against payments, if any, due under Article 2.

7. DISPUTE RESOLUTION

7.1. Settlement of Disputes . The parties will attempt to settle any dispute, controversy or claim between them arising out of or relating to the validity, construction, enforceability or performance of this Settlement Agreement, including disputes relating to alleged breach or to termination of this Settlement Agreement (each, a "Dispute") through consultation and negotiation in good faith and in the spirit of mutual cooperation.

7.2. Failure to Settle Dispute . If those attempts fail, then the Dispute may be made the subject of a lawsuit. If VI or ASIVI initiates such a suit, it shall be filed and litigated in the state or federal court in or for Knoxville, Tennessee. If ASI or GWN initiates such a suit, it shall be filed and litigated in the state or federal court in or for Santa Clara County, California.

7.3. Specific Performance . The parties hereto acknowledge that recovery of damages will be an inadequate remedy for a breach of the provisions of this Settlement Agreement and agree that, in the event of any such breach or threatened breach, the respective rights and obligations hereunder shall be enforceable by specific performance, injunction, or other equitable relief, but nothing herein contained is intended to, nor shall it, limit or affect any rights at law or by statute or otherwise of any party aggrieved as against another for such breach, it being the intention of the parties by this Section 7.3 to make clear their agreement that their respective rights and obligations in this Settlement Agreement shall be enforceable in equity as well as at law or otherwise.

7.4. Expenses . Should any party breach this Settlement Agreement, in addition to all other remedies available at law or in equity or otherwise, such party shall pay all of any other party's costs and expenses resulting therefrom and/or incurred in enforcing this Settlement Agreement, including legal fees and expenses.

8. INDEMNIFICATION

8.1. Indemnification of ASI, GWN . VI and ASIVI shall indemnify, defend and hold harmless ASI and its directors, officers and employees, and GWN (each an "ASI Indemnitee") from and against any and all liabilities, damages, losses, costs or expenses (including reasonable attorneys' and professional fees and other expenses of litigation and/or arbitration) (a "Liability") resulting from a claim, suit or proceeding (any of the foregoing, a "Claim") brought by a third party against an ASI Indemnitee, arising from or occurring as a result of (i) a material breach by VI or ASIVI of their respective obligations under this Settlement Agreement, (ii) the negligence or willful misconduct of VI or of ASIVI, or (iii) activities performed by ASIVI, VI, its Affiliates, or its Licensees in connection with the development, manufacture or sale of any Product, except to the extent caused by the negligence or willful misconduct of ASI.

8.2. Indemnification of VI and ASIVI . ASI and GWN shall indemnify, defend and hold harmless VI and ASIVI and their respective directors, officers and employees (each a "VI 12 Indemnitee") from and against any and all liabilities, damages, losses, costs or expenses (including reasonable attorneys' and professional fees and other expenses of litigation and/or arbitration) (a "Liability") resulting from a claim, suit or proceeding (any of the foregoing, a "Claim") brought by a third party against a VI Indemnitee, arising from or occurring as a result of (i) a material breach by ASI or GWN of their respective obligations under this Settlement Agreement, (ii) the negligence or willful misconduct of ASI or of GWN, or (iii) ASI's or GWN's use of the FSD IP, except to the extent caused by the negligence or willful misconduct of VI, its Affiliates, or Licensees, or of ASIVI.

8.3. Indemnification Procedures . In the event that an Indemnitee intends to claim indemnification under this Article 8, it shall promptly notify the other party (the "Indemnitor") in writing of such alleged Liability. The Indemnitor shall have the sole right to control the defense and/or settlement thereof, provided that the indemnified party may participate in any such proceeding with counsel of its choice at its own expense. The indemnity agreement in this Article 8 shall not apply to amounts paid in settlement of any Claim if such settlement is effected without the consent of the Indemnitor, which consent shall not be withheld unreasonably. The failure to deliver written notice to the Indemnitor within a reasonable time after the commencement of any such action, if prejudicial to its ability to defend such action, shall relieve such Indemnitor of any liability to the Indemnitee under this Article 8 but the omission so to deliver written notice to the Indemnitor shall not relieve the Indemnitor of any liability that it may have to any Indemnitee other than under this Article 8. The Indemnitee under this Article 8, its employees and agents, shall cooperate fully with the Indemnitor and its legal

representatives and provide full information in the investigation of any Claim covered by this indemnification. Neither party shall be liable for any costs or expenses incurred by the other party without its prior written authorization.

9. TERM AND TERMINATION

9.1. Term . The term of this Settlement Agreement shall commence on the Effective Date, and unless earlier terminated as provided in this Article 9, shall continue in full force and effect until the expiration of the last to expire Valid Claim.

9.2. Termination for Cause . VI and ASIVI will have the right to terminate this Settlement Agreement upon sixty (60) days notice of a material breach by ASI or GWN, provided that ASI or GWN may avoid such termination if before the end of such sixty (60) day period ASI or GWN cures such breach or default. ASI and GWN will have the right to terminate this Settlement Agreement upon sixty (60) days notice of a material breach by VI or ASIVI, provided that VI or ASIVI may avoid such termination if before the end of such sixty (60) day period VI or ASIVI cures such breach or default. However, if the party accused of breach disputes an asserted breach in writing within such sixty (60) day period, the non-breaching party shall not have the right to terminate this Settlement Agreement unless and until it has been determined in a legal proceeding conducted pursuant to Section 7.2 that this Settlement Agreement was materially breached, and the party accused of the breach fails to cure the breach within sixty (60) days after such determination.

9.3. Termination for Dissolution, Transfer of Interest to ASI . In the event that VI is dissolved and permanently ceases its business operations, ASI may terminate this Settlement Agreement and, to the extent permitted by law, shall immediately become a joint owner with VI of all right, title, and interest in and to the FSD IP, including the Patent Rights. VI agrees to cooperate in good faith and to take any reasonable action necessary to effectuate such joint ownership upon such dissolution.

9.4. Accrued Rights and Obligations . Termination of this Settlement Agreement for any reason shall not release any party hereto from any liability which, at the time of such termination, has already accrued to the other party or which is attributable to a period prior to such termination, nor preclude either party from pursuing any rights and remedies it may have hereunder or at law or in equity which accrued or are based upon any event occurring prior to such termination.

9.5. Survival . The following provisions of this Settlement Agreement shall survive termination of this Settlement Agreement for any reason: Articles 1, 4, 6, 7, 9, 10, 11, 12, 13, 15, and 16, and Sections 14.1, 14.2, 14.3, 14.4, 14.5, 14.7, and 14.9. In the event that this Settlement Agreement is terminated under Section 9.2 as a result of a material breach, Sections 14.8.1 and 14.8.2 shall also survive such termination.

10. SETTLEMENT

10.1. Settlement of all Claims and Counterclaims . This Settlement Agreement resolves, satisfies, and settles all claims and counterclaims involved in the aforementioned arbitration proceedings.

11. LICENSE AGREEMENT

11.1. Termination of License Agreement . The License Agreement entered into by and between VI and ASIVI dated February 29, 2000 is hereby terminated, and the parties thereto are released of all of their rights and obligations thereunder. For the avoidance of doubt, the survival provisions of Section 11.5 of the License Agreement are likewise terminated and do not survive.

11.2. Effect of Termination of License Agreement . Termination of the License Agreement pursuant to this Settlement Agreement will not be deemed (a) to be a Dissolving Event permitting dissolution of ASIVI pursuant to Section 8 of the Operating Agreement, and (b) to permit termination of the Manufacturing and Supply Agreement between VI and ASI dated February 29, 2000.

12. IP ANALYSIS

12.1. Information and Analysis . Within three (3) business days of the Effective Date, ASI shall deposit with its counsel, Rothwell Figg Ernst & Manbeck, all IP Information, [***] of the patents and patent applications that ASI assigned to ASIVI. ASI shall direct its counsel to prepare all such materials for overnight delivery to the offices of VI counsel, Wilson Sonsini Goodrich & Rosati, 650 Page Mill Rd., Palo Alto, California 94304, and upon receipt of confirmation that VI counsel is in custody of the payment for ASI described in Section 2.1 above, to deposit all such IP Information materials for shipment in the manner previously described. VI may use all IP Information and materials furnished by ASI in order to [***] and to exercise its rights under this Settlement Agreement. At VI's reasonable request and direction, ASI agrees to cooperate with VI in [***]. For the avoidance of doubt, the depositing of IP materials for overnight delivery shall be made on the same day as the deposit of the $750,000 payment for overnight delivery under Section 2.1 of this Settlement Agreement.

The parties acknowledge that ASI has previously furnished counsel for VI with certain IP Information, and that additional copies of such materials need not be provided in the manner described above. Nonetheless, ASI and GWN agree to that they shall ensure that VI is in receipt of all IP Information, whether previously furnished or not.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

13. MEMORANDUM OF UNDERSTANDING

13.1. Termination of Memorandum of Understanding . The MOU entered into by and between VI and ASI dated October 14, 1999 is hereby terminated, and the parties thereto are released of all of their rights and obligations thereunder. For the avoidance of doubt, any survival provisions of the MOU are terminated and do not survive.

14. ASIVI OPERATING AGREEMENT

14.1. Assignment of FSD IP to VI . ASIVI hereby transfers and assigns to VI its entire right, title, and interest in the FSD IP. Assignment of the Patent Rights is provided for in Technology Assignment Agreement A and Technology Assignment Agreement B, attached hereto as Exhibits 1 and 2, respectively. Such assignments to VI shall include all rights to use and practice the FSD IP and to make, use and sell Products.

14.2. Modification to Allow Transfer of Interest . Section 7.1 of the ASIVI Operating Agreement is deleted in its entirety, and in its place inserted the following: "A Member may Transfer all of its Interest to another Member."

14.3. Transfer and Consent to Transfer of Interest of Managing Member . ASI hereby transfers and assigns, and VI hereby consents to the transfer and assignment by ASI, to VI its entire interest in ASIVI.

14.4. Effect of Transfer of Interest . The transfer of ASI's interest in ASIVI to VI:

14.4.1. will relieve ASI of all obligations and liabilities arising under the Operating Agreement.

14.4.2. will not entitle ASI to any redemption of its interest, distribution, or payment in connection with its assignment other than as set forth in this Settlement Agreement.

14.5. Deletion of Sections . Sections 4.6, 5.4, 8.1(e), 8.1(f), 8.2(d)(iii), 11.4, 11.5, 11.6, and 11.7 are hereby deleted from the Operating Agreement in their entirety.

14.6. Initial Publication . The initial publication of a clinical study resulting from Product development shall list GWN as the lead author.

14.7. Retention of Rights; Abandonment of Supplemental FSD IP . To the extent that any portion of the U.S. Provisional Patent Application filed on September 8, 2002 set forth in Technology Assignment Agreement C, attached hereto as Exhibit 3, discloses, claims, and/or relates to subject matter that is outside the field of sexual function in men and women, all rights in and to such subject matter shall be retained by ASI. Except with respect to that subject matter retained by ASI pursuant to this Section 14.7, if any, ASI shall not claim priority to any patent or patent application that is the subject of the Patent Rights or the Supplemental FSD IP.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Following the Execution Date of this Settlement Agreement, VI agrees to [***]

14.8. Covenants Not to Sue .

14.8.1. VI Covenant Not to Sue . VI shall not make, or threaten to make, any claim against ASI or GWN alleging infringement of any Valid Claim based on the conduct by ASI or GWN of (i) basic research and testing within the Field of Use for non-commercial purposes, (ii) direct patient care by GWN, or (iii) activities outside the Field of Use. The covenant set forth in this Section 14.8.1 shall not extend to activities within the Field of Use related to research, testing and development of products for commercial purposes, and shall not be construed as a grant of any rights to ASI or GWN under any Investigational New Drug application of ASIVI or VI, or under any other patent or other intellectual property owned or controlled by VI, including without limitation the patents and patent applications encompassed by the Patent Rights. The performance by ASI or GWN of any activities under the covenant set forth in this Section 14.8.1 shall not result in any liability of ASIVI or VI, and ASI and GWN agree to indemnify ASIVI and VI to the extent of any such liability. The covenant granted herein is independent of the option and conditional license grant set forth in that certain Manufacture and Supply Agreement between VIVUS, Inc. and AndroSolutions, Inc. dated February 29, 2000. Notwithstanding Section 16.3 below, the covenant set forth in this Section 14.8.1 is personal to ASI and GWN and may not be assigned or otherwise transferred.

14.8.2. ASI, GWN Covenant Not to Sue and Statement of Non-Liability . ASI and GWN shall not make, or threaten to make, any claim against VI, its Affiliates or Licensees alleging infringement based upon VI's, its Affiliates' or its Licensees' making, having made, importing, having imported, exporting, having exported, distributing, having distributed, selling, having sold, using, or offering for sale products within the Field of Use. ASI and GWN further agree that VI, its Affiliates or Licensees cannot be held liable for infringement of a right purportedly originating from ASI or GWN relating to the Field of Use. The parties acknowledge and agree that the covenant not to sue and statement of non-liability set forth in this Section 14.8.2 is intended to and shall bind all present and future successors, heirs, assigns, and licensees of GWN or ASI who come to acquire any rights from GWN or ASI relating to products within the Field of Use, and ASI and GWN shall provide any such third parties with notice of the covenant not to sue and the statement of non-liability.

ASI and GWN further covenant that they shall, within ten (10) days of the Effective Date for any existing patents or patent applications, or concurrently with the filing of any patent application after the Effective Date, record with the U.S. Patent and Trademark Office, or other appropriate government entity in the case of international patents, a short form of the covenant contained in this Section 14.8.2,

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in the form attached hereto as Exhibit 4, in connection with any patent or patent application within the Field of Use.

The covenant set forth in this Section 14.8.2 shall not extend to activities by VI, its Affiliates, or its Licensees (i) for products not within the Field of Use, or (ii) involving the use of a Novel Chemical Entity in a product. In addition, other than the covenant set forth in this Section 14.8.2, this Section 14.8.2 shall not be construed as a grant of any other rights to VI, its Affiliates, or its Licensees under any intellectual property owned or controlled by ASI or GWN. The performance by VI, its Affiliates, and its Licensees of any activities under the covenant set forth in this Section 14.8.2 shall not result in any liability of ASI or GWN, and VI agrees to indemnify ASI and GWN to the extent of any such liability.

14.9. ASIVI Dissolution . Subsequent dissolution of ASIVI, for whatever reason, shall have no effect on this Settlement Agreement whatsoever.

15. MANUFACTURE AND SUPPLY AGREEMENT

15.1. Modification of Definitions . The following terms in the Manufacture and Supply Agreement shall have the same meaning and definition as set forth in this Settlement Agreement, notwithstanding the definitions provided in the Manufacture and Supply Agreement: "FSD IP," "Product," and Valid Claim." 15.1.1. FSD IP. All references to or use of the term "ASIVI Technology" in the Manufacture and Supply Agreement are deleted, and in their place inserted the term "FSD IP."

15.2. Deletion of Sections . The following Sections are deleted in their entirety from the Manufacture and Supply Agreement: 1.3, 1.7, 1.7.1, 1.7.2, 1.8, 1.10, and 9.

15.3. Independent Accountant . Section 4.1 of the Manufacturing and Supply Agreement is modified by adding the following text at the end of the section: "Any accountant chosen or designated under this Section 4.1 shall be limited to a "Big 5" or national accounting firm."

15.4. Payments Cumulative . Section 4.3 of the Manufacture and Supply Agreement is modified as follows: all text in Section 4.3 after the word "certain" is deleted, and in its place inserted the following: "Settlement Agreement executed in July 2001."

15.5. Termination . Section 8.1 of the Manufacture and Supply Agreement is modified as follows: the reference to "License Agreement" is deleted, and in its place inserted the following: "Settlement Agreement executed in July 2001."

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

15.6. Assignment . Section 10.5 is deleted in its entirety, and in its place inserted the following: “Neither party may assign this Supply Agreement or any of its rights or obligations hereunder except with the written consent of the other party.”

15.7. VI Best Efforts . Section 3.1 of the Manufacturing and Supply Agreement is modified by adding the following text at the end of the section: “To the extent practicable, VI agrees to use its best efforts to cause each of its Licensees, if any, to: (i) purchase its requirements for Product from VI, or (ii) purchase the Applicable Percentage of such Licensee’s requirements of Product directly from ASI.

15.8. Confidentiality . Article 5 of the Manufacture and Supply Agreement is deleted in its entirety, and in its place inserted the following: “The definition of Confidential Information under Section 1.3 of the Settlement Agreement and the parties’ rights and obligations in connection therewith under Article 4 of the Settlement Agreement are incorporated by reference herein.”

15.9. VI Disclosure of Manufacturing Specifications, Good Faith Cooperation . In order for ASI to evaluate and consider the exercise of its option under Section 2.1 of the Manufacture and Supply Agreement, VI shall provide to ASI written notice of its intention to submit an NDA for a Product within nine (9) months of such submission. Upon such notice from VI, ASI shall, within 30 days, provide VI with written notice that ASI desires to evaluate its manufacturing option, that ASI possesses the financial wherewithal and capacity to exercise such option, and that it possesses a good faith and reasonable expectation that it is able to exercise such option, furnishing VI with contemporaneous evidence reasonably sufficient to support ASI’s representations as to financial wherewithal, capacity and expectations. Upon such notice from ASI, VI shall, within twenty (20) days, disclose the following information relating to the Product that VI reasonably believes will be included in such submission: (i) specifications and test methods for the excipients, active ingredient, drug product, and container closure system; (ii) formulation and master batch records; and (iii) manufacturing equipment list and specifications. The parties acknowledge and agree that the aforementioned information may be modified at any time and is subject to FDA approval. VI agrees to notify ASI of any such modifications and shall update or supplement the disclosures required under this Section 15.9 accordingly. VI further agrees to cooperate in good faith and, at ASI’s reasonable request, to provide such additional information necessary and proper for ASI to obtain the full benefit of its option under Section 2.1 of the Manufacture and Supply Agreement.

15.10. Notices . Section 10.3 of the Manufacture and Supply Agreement is deleted in its entirely, and in its place inserted the following: “Any notice required or permitted by this Manufacture and Supply Agreement shall be in writing and shall be sent by hand delivery, by prepaid registered or certified mail, return receipt requested, or by facsimile transmission, addressed to the other party at the address shown in Section 16.4 of the Settlement Agreement or at such other address for which such party gives notice

hereunder. Such notice shall be deemed to have been given upon delivery, if sent by hand delivery, three (3) days after deposit in the mail, or upon transmission by facsimile."

16. MISCELLANEOUS

16.1. Governing Law . This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without reference to its conflicts of laws provisions.

16.2. Independent Contractors . The relationship of the parties hereto is that of independent contractors. The parties hereto are not deemed to be agents, partners or joint ventures of the other for any purpose as a result of this Settlement Agreement or the transactions contemplated thereby. Neither party shall have the power to obligate or bind the other party in any manner whatsoever.

16.3. Assignment . The parties agree that their rights and obligations under this Settlement Agreement shall not be delegated, transferred or assigned to a third party without the prior written consent of the other party hereto; provided that either party may assign all of its rights and obligations under this Settlement Agreement, without the other party's consent (a) to its Affiliates, and (b) to an entity that acquires all or substantially all of the business or assets of the assigning party to which this Settlement Agreement pertains, whether by merger, reorganization, acquisition, sale or otherwise; which Affiliate or acquiring entity (y) agrees in a writing provided to the non-assigning party prior to any assignment, to assume all of the obligations of the assigning party hereunder, and (z) has provided to the non-assigning party evidence reasonably satisfactory to the non-assigning party of its ability to perform all such obligations in a timely manner. This Settlement Agreement shall be binding upon and inure to the benefit of the parties and their successors and permitted assigns.

16.4. Notices . Any notice required or permitted by this Settlement Agreement shall be in writing and shall be sent by hand delivery, by prepaid registered or certified mail, return receipt requested, or by facsimile transmission, addressed to the other party at the address shown below or at such other address for which such party gives notice hereunder. Such notice shall be deemed to have been given upon delivery, if sent by hand delivery, three (3) days after deposit in the mail, or upon transmission by facsimile.

To ASIVI:

ASIVI, LLC
1172 Castro Street
Mountain View, California 94040
Attention: Legal Affairs
Facsimile: (650) 934-5389

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

With a copy to:

Wilson Sonsini
Goodrich & Rosati, PC
650 Page Mill Road
Palo Alto, CA 94304
Attention: Mark Casper, Esq.
Facsimile: (650) 496-4082

To VIVUS:

VIVUS, Inc.
1172 Castro Street
Mountain View, CA 94040
Attention: Legal Affairs
Facsimile: (650) 934-5389

With a copy to:

Wilson Sonsini
Goodrich & Rosati, PC
650 Page Mill Road
Palo Alto, CA 94304
Attention: Mark Casper, Esq.
Facsimile: (650) 496-4082

To ASI: AndroSolutions, Inc.
200 Fort Sanders West Blvd., Suite 309
Knoxville, TN 37922
Attention: Gary W. Neal, M.D., President
Facsimile: (865) 531-6550

With a copy to:

Zoltick Technology Law Group, PLLC
Loudoun Tech Center
21515 Ridgetop Circle, Suite 200
Sterling, VA 20166
Attention: Martin M. Zoltick, Esq.
Facsimile: (571) 434-7264

To GWN: AndroSolutions, Inc.
200 Fort Sanders West Blvd., Suite 309
Knoxville, TN 37922

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Attention: Gary W. Neal, M.D., President
Facsimile: (865) 531-6550

With a copy to:

Zoltick Technology Law Group, PLLC
Loudoun Tech Center
21515 Ridgetop Circle, Suite 200
Sterling, VA 20166
Attention: Martin M. Zoltick, Esq.
Facsimile: (571) 434-7264

16.5. Force Majeure . Neither party shall lose any rights hereunder or be liable to the other party for damages or losses (except for payment obligations) on account of failure of performance if such failure is occasioned by war, strike, fire, Act of God, earthquake, flood, lockout, embargo, governmental acts or orders or restrictions, failure of suppliers, or any other reason where failure to perform is beyond the reasonable control and not caused by the negligence, intentional conduct or misconduct of the nonperforming party and such party has exerted all reasonable efforts to avoid or remedy such force majeure; provided, however, that in no event shall a party be required to settle any labor dispute or disturbance.

16.6. Advice of Counsel . VI, ASIVI, ASI, and GWN have each consulted counsel of their choice regarding this Settlement Agreement, and each acknowledges and agrees that this Settlement Agreement shall not be deemed to have been drafted by one party or another and will be construed accordingly.

16.7. Compliance with Laws . Each party shall furnish to the other party any information requested or required by that party during the term of this Settlement Agreement or any extensions hereof to enable that party to comply with the requirements of any U.S. or foreign, state and/or government agency.

16.8. Severability; Waiver . If any provision(s) of this Settlement Agreement are determined to be invalid or unenforceable by a court of competent jurisdiction, the remainder of the Settlement Agreement shall remain in full force and effect without said provision. The parties shall in good faith negotiate a substitute clause for any provision declared invalid or unenforceable, which shall most nearly approximate the intent of the parties in entering this Settlement Agreement. The failure of a party to enforce any provision of the Settlement Agreement shall not be construed to be a waiver of the right of such party to thereafter enforce that provision or any other provision or right.

16.9. Entire Agreement; Modification . This Settlement Agreement sets forth the entire agreement and understanding of the parties with respect to the subject matter hereof, and supersedes all prior discussions, agreements and writings in relation thereto,

except that the Operating Agreement, and the Manufacture and Supply Agreement, as modified herein, remain in effect. This Settlement Agreement may not be altered, amended or modified in any way except by a writing signed by both parties.

16.10. Counterparts . This Settlement Agreement may be executed in two counterparts, each of which shall be deemed an original and which together shall constitute one instrument.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

IN WITNESS WHEREOF, ASIVI, VI, ASI, and GWN have caused this Settlement Agreement to be executed by their respective duly authorized representatives as of the date first written above.

ASIVI, LLC

By: /s/ Gary W. Neal
AndroSolutions, Inc.
Managing Member
Gary W. Neal, M.D. President
Date: July 10, 2001

VIVUS, INC.

By: /s/ Leland Wilson
Leland F. Wilson
President/Chief Executive Officer
Date: July 12, 2001

By: /s/ Leland Wilson
VIVUS, Inc.
Managing Member
Leland F. Wilson
President/Chief Executive Office
Date: July 12, 2001

ANDROSOLUTIONS, INC.

/s/ Gary W. Neal
Gary W. Neal, M.D.
President
Date: July 10, 2001

GARY W. NEAL, M.D.

/s/ Gary W. Neal
Gary W. Neal, M.D.
Individually and on behalf of himself
Date: July 10, 2001

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

EXHIBIT 1

TECHNOLOGY ASSIGNMENT AGREEMENT A
ASSIGNMENT

ASIVI, LLC, a Delaware limited liability company, with offices at 1172 Castro Street, Mountain View, CA 94040 (ASIVI), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby assigns, sells and transfers to VIVUS, Inc., a Delaware corporation having offices at 1172 Castro Street, Mountain View, CA 94040, and its successors, assigns and legal representatives, all hereinafter referred to as the "Assignee":

1. its entire right, title and interest in and to any and all patents and pending patent applications relating to, inter alia, the design, development, manufacturing, and use of products containing a prostaglandin and/or other vasodilator for the treatment of female sexual dysfunction, as specified on Exhibit A attached hereto (the "FSD IP");

2. the full and complete right to file patent applications in the name of the Assignee, its designee, or its designee's election, on the aforesaid FSD IP, in all countries of the world;

3. the entire right, title and interest in and to any Letters Patent which may issue thereon in the United States or in any country, and any renewals, revivals, reissues, reexaminations and extensions thereof, and any patents of confirmation, registration and importation of the same; and

4. the entire right, title and interest in all Convention and Treaty Rights of all kinds thereon, including without limitation all rights of priority in any country of the world, in and to the above FSD IP.

ASIVI hereby authorizes and requests the competent authorities to grant and to issue any and all such Letters Patent in the United States and throughout the world to Assignee of the entire right, title and interest therein, as fully and entirely as the same would have been held and enjoyed by ASIVI had this assignment, sale and transfer not been made.

ASIVI further agrees at any time to execute and to deliver upon request of Assignee such additional documents, if any, as are necessary or desirable to secure patent protection on said FSD IP, throughout all countries of the world, and otherwise to do the necessary acts to give full effect to and to perfect the rights of Assignee under this Assignment, including the execution, delivery and procurement of any and all further documents evidencing this assignment, transfer and sale as may be necessary or desirable.

ASIVI hereby covenants that no assignment, sale, agreement or encumbrance has been or will be made or entered into which would conflict with this assignment.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

ASIVI further covenants that it will, upon request by Assignee, provide Assignee promptly with all pertinent facts and documents relating to said FSD IP and said Letters Patent and legal equivalents as may be known and accessible to ASIVI, and will testify as to the same in any interference, litigation or proceeding related thereto and will promptly execute and deliver to Assignee or its legal representatives any and all papers, instruments or affidavits required to apply for, obtain, maintain, issue and enforce said application, said FSD IP and said Letters Patent and said equivalents thereof which may be necessary or desirable to carry out the purposes thereof.

ASIVI, LLC

Date: July 12, 2001

By: /s/ Leland Wilson
VIVUS, Inc.
Managing Member
Leland F. Wilson
President/Chief Executive Officer

Date: July 10, 2001

By: /s/ Gary W. Neal
AndroSolutions, Inc.
Managing Member
Gary W. Neal, M.D.
President

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EXHIBIT A

DESCRIPTION OF PROPERTY CONTRIBUTED TO VIVUS, INC. BY ASIVI, LLC

[***]

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EXHIBIT 2

TECHNOLOGY ASSIGNMENT AGREEMENT B

ASSIGNMENT

ASIVI, LLC, a Delaware limited liability company, with offices at 1172 Castro Street, Mountain View, CA 94040 (ASIVI), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby assigns, sells and transfers to VIVUS, Inc., a Delaware corporation having offices at 1172 Castro Street, Mountain View, CA 94040, and its successors, assigns and legal representatives, all hereinafter referred to as the "Assignee": 1. its entire right, title and interest in and to any and all patents and pending patent applications relating to, inter alia, the design, development, manufacturing, and use of products containing a prostaglandin and/or other vasodilator for the treatment of female sexual dysfunction, as specified on Exhibit A attached hereto (the "FSD IP"); 2. the full and complete right to file patent applications in the name of the Assignee, its designee, or its designee's election, on the aforesaid FSD IP, in all countries of the world; 3. the entire right, title and interest in and to any Letters Patent which may issue thereon in the United States or in any country, and any renewals, revivals, reissues, reexaminations and extensions thereof, and any patents of confirmation, registration and importation of the same; and 4. the entire right, title and interest in all Convention and Treaty Rights of all kinds thereon, including without limitation all rights of priority in any country of the world, in and to the above FSD IP.

ASIVI hereby authorizes and requests the competent authorities to grant and to issue any and all such Letters Patent in the United States and throughout the world to Assignee of the entire right, title and interest therein, as fully and entirely as the same would have been held and enjoyed by ASIVI had this assignment, sale and transfer not been made.

ASIVI further agrees at any time to execute and to deliver upon request of Assignee such additional documents, if any, as are necessary or desirable to secure patent protection on said FSD IP, throughout all countries of the world, and otherwise to do the necessary acts to give full effect to and to perfect the rights of Assignee under this Assignment, including the execution, delivery and procurement of any and all further documents evidencing this assignment, transfer and sale as may be necessary or desirable.

ASIVI hereby covenants that no assignment, sale, agreement or encumbrance has been or will be made or entered into which would conflict with this assignment.

ASIVI further covenants that it will, upon request by Assignee, provide Assignee promptly with all pertinent facts and documents relating to said FSD IP and said Letters Patent and legal equivalents as may be known and accessible to ASIVI, and will testify as to the same in any interference, litigation or proceeding related thereto and will promptly execute and deliver to Assignee or its legal representatives any and all papers, instruments or affidavits required to apply for, obtain, maintain, issue and enforce said application, said FSD IP and said Letters

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Patent and said equivalents thereof which may be necessary or desirable to carry out the purposes thereof.

ASIVI, LLC

Date: July 12, 2001

By: /s/ Leland Wilson
VIVUS, Inc.
Managing Member
Leland F. Wilson
President/Chief Executive Officer

Date: July 10, 2001

By: /s/ Gary W. Neal
AndroSolutions, Inc.
Managing Member
Gary W. Neal, M.D.
President

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EXHIBIT A

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EXHIBIT 3

TECHNOLOGY ASSIGNMENT AGREEMENT C ASSIGNMENT

AndroSolutions, Inc., a Tennessee corporation with a principal place of business at Suite 309, 200 Fort Sanders West Blvd., Knoxville, TN 37922 (collectively with its Affiliates, "ASI"), for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, hereby assigns, sells and transfers to VIVUS, Inc., a Delaware corporation having offices at 1172 Castro Street, Mountain View, CA 94040, and its successors, assigns and legal representatives, all hereinafter referred to as the "Assignee": 1. its entire right, title and interest in and to any and all patents and pending patent applications relating to, inter alia, the treatment of female sexual dysfunction, as specified on Exhibit A --------- attached hereto (the " Supplemental FSD IP"); 2. the full and complete right to file patent applications in the name of the Assignee, its designee, or its designee's election, on the aforesaid SUPPLEMENTAL FSD IP, in all countries of the world; 3. the entire right, title and interest in and to any Letters Patent which may issue thereon in the United States or in any country, and any renewals, revivals, reissues, reexaminations and extensions thereof, and any patents of confirmation, registration and importation of the same; and 4. the entire right, title and interest in all Convention and Treaty Rights of all kinds thereon, including without limitation all rights of priority in any country of the world, in and to the above SUPPLEMENTAL FSD IP.

ASI hereby authorizes and requests the competent authorities to grant and to issue any and all such Letters Patent in the United States and throughout the world to Assignee of the entire right, title and interest therein, as fully and entirely as the same would have been held and enjoyed by ASI had this assignment, sale and transfer not been made.

ASI further agrees at any time to execute and to deliver upon request of Assignee such additional documents, if any, as are necessary or desirable to secure patent protection on said SUPPLEMENTAL FSD IP, throughout all countries of the world, and otherwise to do the necessary acts to give full effect to and to perfect the rights of Assignee under this Assignment, including the execution, delivery and procurement of any and all further documents evidencing this assignment, transfer and sale as may be necessary or desirable.

ASI hereby covenants that no assignment, sale, agreement or encumbrance has been or will be made or entered into which would conflict with this assignment.

ASI further covenants that it will, upon request by Assignee, provide Assignee promptly with all pertinent facts and documents relating to said SUPPLEMENTAL FSD IP and said Letters Patent and legal equivalents as may be known and accessible to ASI, and will testify as to the same in any interference, litigation or proceeding related thereto and will promptly execute and deliver to Assignee or its legal representatives any and all papers, instruments or affidavits required to apply for, obtain, maintain, issue and enforce said application, said SUPPLEMENTAL FSD IP and said Letters Patent and said equivalents thereof which may be necessary or desirable to carry out the purposes thereof.

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ANDROSOLUTIONS, INC.

Date: July 10, 2001

By: /s/ Gary W. Neal
Gary W. Neal, M.D.
President

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EXHIBIT A

DESCRIPTION OF PROPERTY CONTRIBUTED TO VIVUS, INC.

BY ANDROSOLUTIONS, INC.

[***]

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EXHIBIT 4

SHORT FORM PROVIDING NOTICE OF COVENANT NOT TO SUE AND STATEMENT OF NON-LIABILITY

"All subject matter claimed within this patent or patent application is subject to the following covenant not to sue and statement of non-liability:

THE HOLDER OF ANY RIGHTS UNDER THIS PATENT OR PATENT APPLICATION SHALL NOT MAKE, OR THREATEN TO MAKE, ANY CLAIM AGAINST VIVUS, INC. ("VI"), ITS AFFILIATES OR LICENSEES ALLEGING INFRINGEMENT BASED UPON VI'S, ITS AFFILIATES' OR ITS LICENSEES' MAKING, HAVING MADE, IMPORTING, HAVING IMPORTED, EXPORTING, HAVING EXPORTED, DISTRIBUTING, HAVING DISTRIBUTED, SELLING, HAVING SOLD, USING, OR OFFERING FOR SALE PRODUCTS RELATING TO THE DIAGNOSIS, PROPHYLAXIS, AND/OR TREATMENT OF FEMALE SEXUAL DYSFUNCTION, INCLUDING WITHOUT LIMITATION ENHANCING FEMALE SEXUAL DESIRE AND RESPONSIVENESS, AND PREVENTING, TREATING AND/OR MANAGING FEMALE SEXUAL AROUSAL DISORDER, ORGASMIC DISORDER, AND PAIN DISORDER.

FURTHER, VI, ITS AFFILIATES OR LICENSEES CANNOT BE HELD LIABLE FOR INFRINGEMENT OF ANY RIGHTS UNDER THIS PATENT OR PATENT APPLICATION RELATING TO THE DIAGNOSIS, PROPHYLAXIS, AND/OR TREATMENT OF FEMALE SEXUAL DYSFUNCTION, INCLUDING WITHOUT LIMITATION ENHANCING FEMALE SEXUAL DESIRE AND RESPONSIVENESS, AND PREVENTING, TREATING AND/OR MANAGING FEMALE SEXUAL AROUSAL DISORDER, ORGASMIC DISORDER, AND PAIN DISORDER.

THIS COVENANT NOT TO SUE AND STATEMENT OF NON-LIABILITY IS INTENDED TO AND SHALL BIND ALL PRESENT AND FUTURE SUCCESSORS, HEIRS, ASSIGNS, AND LICENSEES OF ANY RIGHTS UNDER THIS PATENT OR PATENT APPLICATION RELATING TO PRODUCTS FOR THE DIAGNOSIS, PROPHYLAXIS, AND/OR TREATMENT OF FEMALE SEXUAL DYSFUNCTION, INCLUDING WITHOUT LIMITATION ENHANCING FEMALE SEXUAL DESIRE AND RESPONSIVENESS, AND PREVENTING, TREATING AND/OR MANAGING FEMALE SEXUAL AROUSAL DISORDER, ORGASMIC DISORDER, AND PAIN DISORDER.

A HOLDER OF ANY RIGHTS UNDER THIS PATENT OR PATENT APPLICATION MUST PROVIDE NOTICE OF THE ABOVE-STATED COVENANTS AND STATEMENT OF NON-LIABILITY TO ANY THIRD PARTY ACQUIRING RIGHTS UNDER THIS PATENT OR PATENT APPLICATION."

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Exhibit 10.26

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ASSET PURCHASE AGREEMENT

BY AND AMONG

VIVUS , INC.

As Seller

MEDA AB

As Buyer

AND

With respect to Sections 2.1 , 2.7(b) , 2.15 , 3.1(b) , 3.2 , 3.3 , 3.10 , 3.16 and 7.2 , only

VIVUS REAL ESTATE, LLC

Dated as of October 1, 2010

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SCHEDULES

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT (this "***Agreement***") entered into as of October 1, 2010 by and among MEDA AB, a corporation organized under the laws of Sweden (the "***Buyer***"), VIVUS, Inc., a corporation organized under the laws of the State of Delaware ("***Seller***"), and, with respect to Sections 2.1, 2.7(b), 2.15, 3.1(b), 3.2, 3.3, 3.10, 3.16 and 7.2 only, Vivus Real Estate, LLC, a New Jersey limited liability company ("***Vivus Real Estate***", and collectively with Seller, the "***Seller Parties***"). Buyer, Seller and Vivus Real Estate are referred to individually as a "***Party***" and collectively herein as the "***Parties***."

RECITALS

A. Seller is, among other things, engaged in the business of manufacturing, developing, marketing, distributing and selling MUSE®, its approved drug for the treatment of Erectile Dysfunction, or ED, together with applicators and other components developed by Seller for use specifically in connection therewith (such business and operations as presently conducted by Seller being referred to herein as the "***Business***").

B. The Business is comprised of certain assets and liabilities currently owned or used by Seller.

C. Seller desires to sell, transfer and assign to Buyer, and Buyer desires to purchase from Seller, the Business Assets, and Buyer is willing to assume, the Assumed Liabilities, in each case as more fully described and upon the terms and subject to the conditions set forth herein.

D. In connection with the transactions contemplated by this Agreement, Seller and Buyer shall enter into a Transition Services Agreement in the form attached hereto as Exhibit A (the "***Transition Services Agreement***").

NOW, THEREFORE, in consideration of the representations, warranties and covenants herein contained, the Parties agree as follows:

ARTICLE I
DEFINITIONS

1.1 For purposes of this Agreement, the following terms have the meanings specified or referred to in this Article I.

1.2 "***affiliate***" of any Person means any Person that controls, is controlled by, or is under common control with such Person. As used herein, the term "control" (including the terms "controlling", "controlled by" and "under common control with") means the possession, directly

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or indirectly, of the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities or other interests, by contract or otherwise.

1.3 "***Accrued Liabilities***" means all amounts payable to trade creditors not included in Payables and all other current liabilities (including warranty liabilities) to the extent primarily relating to or arising from the conduct or operations of the Business in the Ordinary Course of Business, in each case to the extent such amounts payable and other current liabilities remain outstanding as of the Closing.

1.4 "***Agreement***" shall have the meaning ascribed to such term in the Preamble.

1.5 "***Ancillary Agreements***" means the Transition Services Agreement, the Bill of Sale, Assignment and Assumption Agreement and the Warranty Deed.

1.6 "***Asset Acquisition Statement***" shall have the meaning ascribed to such term in Section 2.10.

1.7 "***Assumed Liabilities***" shall have the meaning ascribed to such term in Section 2.4.

1.8 "***Business***" shall have the meaning ascribed to such term in paragraph A of the Recitals. For clarity, Business shall not include development, manufacture, marketing, selling and distribution activities related to product and technology not specific to the Business Products.

1.9 "***Business Assets***" shall have the meaning ascribed to such term in Section 2.2.

1.10 "***Business Contracts***" means all contracts, agreements, leases, subleases, supply contracts, purchase orders, sales orders and other instruments primarily used or held for use in the operation or conduct of the Business and to which Seller is a party or by which the

Business Assets are otherwise bound, including those contracts listed on Schedule 1.10 , the Leases and the Business License Agreements.

1.11 " ***business day*** " means a day that is not a Saturday, a Sunday or a statutory or civic holiday in the State of California or Stockholm, Sweden or any other day on which banking institutions are not required to be open in the State of California or Stockholm, Sweden.

1.12 " ***Business Disclosure Schedule*** " shall have the meaning ascribed to such term in Article III .

1.13 " ***Business Employees*** " shall have the meaning ascribed to such term in Section 5.3(a) .

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1.14 " ***Business Income Statements*** " shall have the meaning ascribed to such term in Section 3.4(b) .

1.15 " ***Business Intellectual Property*** " shall have the meaning ascribed to such term in Section 3.11(a) .

1.16 " ***Business Know-How*** " means (a) all confidential or proprietary technical and business information contained in the Books and Records or otherwise transferred to Buyer pursuant to the Transition Services Agreement, and (b) all Know-How and other Trade Secrets used to manufacture, formulate, test, package, store, stabilize, market, distribute or sell the Business Products as of the Closing Date or required as of the Closing Date to comply with all applicable regulatory requirements in connection therewith.

1.17 " ***Business License Agreements*** " means all agreements to which Seller is a party and under which Seller obtains the right to use any Business Intellectual Property from a third party.

1.18 " ***Business-Owned Intellectual Property*** " means the Business Intellectual Property owned by Seller and primarily used or held for use in the operation or conduct of the Business.

1.19 " ***Business Plans*** " shall have the meaning ascribed to such term in Section 3.15(d) .

1.20 " ***Business Products*** " means MUSE®, Seller's FDA-approved pharmaceutical product consisting of the active ingredient *alprostadil* for the treatment of Erectile Dysfunction, and any variations and formulations of MUSE® made by Seller that contain *alprostadil* existing as of the Closing Date, and any applicators or other components developed by Seller for use specifically in connection therewith, including those set forth on Schedule 1.20 .

1.21 " ***Business Records*** " means copies of all books, records, ledgers and files or other similar information of Seller exclusively used or held for use in the operation or conduct of the Business, including price lists, customer lists, vendor lists, mailing lists, warranty information, catalogs, records of operation, standard forms of documents, manuals of operations or business procedures, research materials and product testing reports required by any Governmental Entity, but excluding any such items to the extent any applicable Law prohibits their transfer.

1.22 " ***Buyer*** " shall have the meaning ascribed to such term in the Preamble.

1.23 " ***Buyer Certificate*** " shall have the meaning ascribed to such term in Section 6.3(c) .

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1.24 " ***Buyer Closing Deliverables*** " shall have the meaning ascribed to such term in Section 2.8 .

1.25 " ***Buyer Material Adverse Effect*** " shall have the meaning ascribed to such term in Section 4.3 .

1.26 " ***Buyer Tax Returns*** " shall have the meaning ascribed to such term in Section 5.5(a) .

1.27 " ***CERCLA*** " means the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601 et seq.

1.28 " ***Claim*** " shall have the meaning ascribed to such term in Section 7.3(a) .

1.29 " ***Closing*** " shall have the meaning ascribed to such term in Section 2.6 .

1.30 " ***Closing Date*** " shall have the meaning ascribed to such term in Section 2.6 .

1.31 " ***COBRA*** " means the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended and as codified in Section 4980B of the Code and Section 601 et. seq. of ERISA.

1.32 " ***Code*** " means the Internal Revenue Code of 1986, as amended.

1.33 " ***Competing Product*** " means trans-urethral erectile dysfunction drugs.

1.34 " ***Confidentiality Agreement*** " shall have the meaning ascribed to such term in Section 5.6 .

1.35 " ***Control*** " means, with respect to any definition relating to any material, document, item of information, data or Intellectual Property, the possession (whether by ownership or license, other than a license granted pursuant to this Agreement) by a Party or its affiliates of the ability to grant to the other Party access to use, ownership, a license or a sublicense as provided herein under such material, document, item of information, data or Intellectual Property without violating the terms of, or requiring any payment (whether or not then due and payable) under, any agreement or other arrangement with any third party as of the time such Party would first be required hereunder to grant the other Party such access to use, ownership, license or sublicense.

1.36 " ***Disputed Claim*** " shall have the meaning ascribed to such term in Section 9.10 .

1.37 " ***Encumbrance*** " means any lien, encumbrance, mortgage, pledge, option, license, collateral assignment, security interest, easement or other restriction of any kind affecting the Business Assets, other than Permitted Encumbrances.

1.38 " ***End Date*** " shall have the meaning ascribed to such term in Section 7.1 .

1.39 " ***Environmental Claim*** " shall have the meaning ascribed to such term in Section 3.16(d) .

1.40 " ***Environmental Encumbrance*** " shall have the meaning ascribed to such term in Section 3.16(d) .

1.41 " ***Environmental Law*** " shall have the meaning ascribed to such term in Section 3.16(d) .

1.42 " ***Environmental Liabilities*** " means all obligations and liabilities, whether known or unknown, absolute or contingent, current or potential, past, present or future, imposed by, under or pursuant to Environmental Laws, including all obligations and liabilities related to Remedial Actions, and all fees, disbursements and expenses of counsel, experts, personnel and consultants based on, arising out of or otherwise in respect of: (i) the ownership or operation of the Business, the Business Assets, the Owned Real Property or the properties subject to the Leases, or any other real properties, assets, equipment or facilities included within the Business Assets, by Seller or any of its predecessors or Affiliates; (ii) the environmental conditions existing on the Closing Date on, under, above or about any Owned Real Property or properties subject to the Leases or any other real properties, assets, equipment or facilities included in the Business Assets; and (iii) expenditures necessary to cause any Owned Real Property or properties subject to the Leases or any other real properties, assets, equipment or facilities included in the Business Assets, to be in compliance with any and all requirements of Environmental Laws as of the Closing Date.

1.43 " ***ERISA*** " shall have the meaning ascribed to such term in Section 3.15(d) .

1.44 " ***ERISA Affiliate*** " shall have the meaning ascribed to such term in Section 3.15(d) .

1.45 " ***Excluded Assets*** " shall have the meaning ascribed to such term in Section 2.3 .

1.46 " ***Excluded Intellectual Property*** " means the Intellectual Property listed on Schedule 1.46 and the Seller Marks.

1.47 " ***Excluded Liabilities*** " shall have the meaning ascribed to such term in Section 2.5 .

1.48 " ***FDA*** " means the United States Food and Drug Administration, or any successor agency.

1.49 " ***Fixtures and Supplies*** " means all furniture, furnishings and other tangible personal property (including desks, tables, chairs, file cabinets and other storage devices and office supplies) owned by Seller and either (a) located at the Premises or (b) primarily used or held for use in the operation or conduct of the Business, unless such property is identified on Schedule 2.3(j) .

1.50 " ***Fundamental Representations*** " shall have the meaning ascribed to such term in Section 7.3(a) .

1.51 " ***GAAP*** " means generally accepted accounting principles in the United States.

1.52 " ***Governmental Entity*** " shall have the meaning ascribed to such term in Section 3.3 .

1.53 " ***Health Authority*** " means the FDA and any other Governmental Entity in a country where a Business Product is manufactured, used, tested or sold that is responsible for granting licenses or approvals permitting or otherwise regulating the clinical testing, manufacture, pricing or sale of such Business Product in such country.

1.54 " ***Indemnified Party*** " shall have the meaning ascribed to such term in Section 7.2(a).

1.55 " ***Indemnifying Party*** " shall have the meaning ascribed to such term in Section 7.5(a).

1.56 " ***INDs*** " means all Investigational New Drug Applications sponsored by Seller covering the clinical investigation of any Business Product and filed with the FDA, or the equivalent application filed with the relevant Health Authority in a country other than the United States.

1.57 " ***Intellectual Property*** " means all intellectual property rights in any jurisdiction, whether owned or held for use under license, whether registered or unregistered, including such rights in and to: (i) trademarks, trade dress, service marks, certification marks, logos and trade names, and the goodwill associated with the foregoing (collectively, " ***Trademarks*** "); (ii) (A) patents, (B) patent applications, including all provisional and non-provisional applications, substitutions, continuations, continuations-in-part, divisions and renewals, and all patents granted thereon, (C) patents-of-addition, reissues, reexaminations and extensions or restorations by existing or future extension or restoration mechanisms, including supplementary protection certificates or the equivalent thereof, and (D) inventor's certificates (collectively, " ***Patents*** "); (iii) inventions, discoveries, improvements, developments, data, information, processes, methods, practices, techniques, materials, results or other know-how, in any tangible or intangible form and whether or not patentable, including specifications, formulations, formulae, algorithms, technology, test data, including pharmacological, biological, chemical,

biochemical, toxicological and clinical test data, analytical and quality control data, stability data, studies and procedures, including Product Registration Data (collectively, " ***Know-How*** "); (iv) original writings and other original works of authorship (collectively, " ***Copyrights*** "); (v) trade secrets, business and technical information, non-public information and confidential information and rights to limit the use or disclosure thereof by any Person (collectively, " ***Trade Secrets*** "); (vi) software, including data files, source code, object code, application programming interfaces, databases and other software-related specifications and documentation; (vii) registered domain names and uniform resource locators (collectively, " ***Domain Names*** "); and (viii) moral rights; in each case, including any registrations of, applications to register, and renewals and extensions of, any of the foregoing clauses (i) through (viii) with or by any Governmental Entity in any jurisdiction.

1.58 " ***Interested Person*** " shall have the meaning ascribed to such term in Section 3.22 .

1.59 " ***Inventory*** " means all inventory, including raw materials, work in process and finished products and sample products owned by Seller (whether held by Seller or a third party and including materials in transit), to the extent used or held for use in the operation or conduct of the Business, and any rights of Seller to the warranties received from suppliers and any related claims, credits, rights of recovery and setoff with respect to such Inventory.

1.60 " ***IRS*** " means the United States Internal Revenue Service or any successor agency, and, to the extent relevant, the United States Department of the Treasury.

1.61 " ***knowledge of Seller*** " means the actual knowledge of the individuals listed on Schedule 1.61 hereto.

1.62 " ***Legal Proceeding*** " shall have the meaning ascribed to such term in Section 3.13 .

1.63 " ***Law*** " means any national, federal, state, provincial or local law, statute, ordinance, rule, regulation, code, order, judgment, injunction or decree of any Governmental Entity.

1.64 **[Intentionally Omitted]**

1.65 **[Intentionally Omitted]**

1.66 " ***Leased Equipment*** " means the computers, servers, machinery and equipment and other tangible personal property leased by Seller for use in the operation or conduct of the Business.

1.67 " ***Licensed Books and Records*** " means, in any medium including audio, visual, print, magnetic or electronic, that portion of all records, data, files and materials Controlled by Seller or its affiliates as of the Closing Date that are not included in the Business Assets, but are

(a) required to be maintained by Buyer under applicable Law, (b) necessary for the manufacturing of the Business Products or the distribution by Buyer of Business Products or (c) otherwise expressly required to be transferred pursuant to the Transition Services Agreement.

1.68 " ***Loss*** " or " ***Losses*** " shall have the meaning ascribed to such term in Section 7.2(a) .

1.69 " ***Management Employee*** " means each Business Employee listed on Schedule 1.69 .

1.70 " ***Management Retention Agreements*** " means the agreements listed on Schedule 1.70 hereto entered into between Seller and the Management Employees.

1.71 " ***Marketing Authorizations*** " means the approval of each NDA issued by the FDA or relevant Health Authority.

1.72 " ***Material Adverse Effect on the Business*** " means any change, effect or circumstance (such item, an " ***Effect*** ") that (a) is, or reasonably could be expected to be, materially adverse to the Business Assets, financial condition or results of operations of the Business; *provided , however ,* that in no event shall any of the following be taken into account in determining whether there has been or will be a Material Adverse Effect on the Business: (i) any Effect that is the result of general market or political factors or economic factors affecting the economy as a whole, (ii) any Effect that is the result of factors generally affecting the industry or specific markets in which the Business competes (which Effect in the case of each of (i) and (ii) does not disproportionately affect Seller in any material respect), or (iii) any Effect arising out of or resulting from actions contemplated by the Parties in connection with this Agreement or that is attributable to the announcement or performance of this Agreement or the transactions contemplated by this Agreement (including a loss of customers or employees); or (b) materially impairs or delays, or reasonably could be expected to materially impair or delay, the ability of Seller to consummate the transactions contemplated by this Agreement or to perform its obligations under this Agreement.

1.73 " ***Material Business Contract*** " shall have the meaning ascribed to such term in Section 3.12(a) .

1.74 " ***Material of Environmental Concern*** " shall have the meaning ascribed to such term in Section 3.16(d) .

1.75 " ***Milestone Payment*** " shall have the meaning ascribed to such term in Section 2.1(b) .

1.76 " ***NDAs*** " means all New Drug Applications, all amendments and supplements thereto, and all additional documentation required to be filed with the FDA for approval to

commence commercial sale of a Business Product in the United States, or the equivalent application filed with the relevant Health Authority in a country other than the United States.

1.77 " ***NJDEP*** " shall have the meaning ascribed to such term in Section 2.7(k) .

1.78 " ***NJDEP Required Consent*** " shall have the meaning ascribed to such term in Section 2.7(k) .

1.79 " ***Non-Assignable Agreements*** " means the agreements listed on Schedule 1.79 and each Business Contract that is not permitted to be assigned by its terms, for which written consent of the counter party to such Business Contract permitting assignment to Buyer has not been obtained.

1.80 " ***Non-Assignable Assets*** " shall have the meaning ascribed to such term in Section 2.12(a) .

1.81 " ***Notice of Claim*** " shall have the meaning ascribed to such term in Section 7.4(a) .

1.82 " ***Objection*** " shall have the meaning ascribed to such term in Section 7.4(a) .

1.83 " ***Ordinary Course of Business*** " means the ordinary course of the Business as conducted by Seller, consistent with past practice.

1.84 " ***Owned Real Property*** " shall have the meaning ascribed to such term in Section 3.10(a) .

1.85 " ***Party*** " and " ***Parties*** " shall have the meanings ascribed to such terms in the Preamble.

1.86 " ***Payables*** " means all accounts payable to trade creditors to the extent primarily relating to or arising from the conduct or operations of the Business that are incurred in the Ordinary Course of Business, in each case to the extent such Payables remain unpaid as of the Closing.

1.87 " ***Permitted Encumbrances*** " means any (i) lien for Taxes attributable to the Business or the Business Assets, assessments and other governmental charges or of landlords, liens of carriers, warehouseman, mechanics and material men incurred in the Ordinary Course of Business, in each case for sums not yet due and payable or due but not delinquent or being contested in good faith by appropriate proceedings, (ii) liens incurred or deposits made in the Ordinary Course of Business in connection with workers' compensation, unemployment insurance and other types of social security or to secure the performance of tenders, statutory obligations, surety and appeal bonds, bids, leases, government contracts, performance and return of money bonds and similar obligations, (iii) purchase money liens to the extent the underlying

obligation is an Assumed Liability, (iv) non-exclusive licenses granted by Seller in connection with sales of products of the Business in the Ordinary Course of Business, (v) any zoning or similar restrictions imposed by Law against the Owned Real Property, and (vi) any Encumbrance set forth on Schedule 1.87 .

1.88 " ***Permits*** " shall have the meaning ascribed to such term in Section 3.19 .

1.89 " ***Person*** " means any individual, corporation, partnership, firm, association, joint venture, joint stock company, trust, unincorporated organization or other entity, including any Governmental Entity.

1.90 " ***Post-Closing Period*** " means any taxable period or portion of a period that begins after the Closing Date.

1.91 " ***Pre-Closing Period*** " means any taxable period or portion of a period that begins on or before the Closing Date and ends on the Closing Date.

1.92 " ***Premises*** " means the facilities located at 735 Airport Road and 745 Airport Road in Lakewood, New Jersey.

1.93 " ***Principal Equipment*** " means the motor vehicles, trailers and capital equipment set forth on Schedule 1.93 and all other computers, servers, machinery and equipment (including any related spare parts, dies, molds, tools, and tooling held by Seller or any third party) and other similar items owned by Seller that are used or held for use for the operation or conduct of the Business.

1.94 " ***Product Registration Data*** " means (i) all regulatory files relating to the registration of the Business Products in Seller's possession or control, including any licenses, minutes of meetings and telephone conferences with any Governmental Entity, validation data, data from and documentation related to preclinical and clinical studies and tests of the Business Products, including original data, case report forms, study files relating to the aforementioned studies and tests, and all audit reports of clinical studies, plus all applications (and amendments thereto) for regulatory approvals, annual reports and safety reports associated therewith, drug master files, trial master files and all written correspondence with Governmental Entities regarding the marketing status of the Business Products; and (ii) all records maintained under cGMPs or other record keeping or reporting requirements of Governmental Entities, including all written correspondence and communications with Governmental Entities regarding the manufacture of the Business Products, adverse event files, complaint files and manufacturing records.

1.95 " ***Promotional Material*** " means all current and, to the extent reasonably available, historical sales and promotional material and literature used or held for use in the operation of the Business, including samples, premium and promotional items, pamphlets and brochures,

historical and current television, radio, internet and other media advertising, historical and current print advertising and the artwork relating to such sales and promotional literature.

1.96 " ***Property*** " means the Owned Real Property and the Premises.

1.97 " ***Purchase Price*** " shall have the meaning ascribed to such term in Section 2.1(a) .

1.98 " ***Qualified Loss*** " shall have the meaning ascribed to such term in Section 7.3(a) .

1.99 " ***RCRA*** " means the Resource Conservation and Recovery Act, as amended, 42 U.S.C. §§ 6901 et seq.

1.100 " ***Receivables*** " means all trade accounts receivable and other rights to payment from customers of Seller to the extent primarily relating to or from the conduct or operations of the Business occurring on or before July 31, 2010 and that are reflected on Schedule 1.100 and those other accounts receivable arising on or before the Closing Date, in each case, in respect of goods shipped or products sold or services rendered on behalf of the Business, and any claim, remedy or other right related thereto.

1.101 " ***Regulatory Filings*** " means (i) the Marketing Authorizations, and (ii) all INDs.

1.102 " ***Release*** " shall have the meaning ascribed to such term in Section 3.16(d) .

1.103 " ***Remedial Action*** " means all actions required to (i) clean up, remove, treat or in any other way remediate any Material of Environmental Concern; (ii) prevent the Release of any Material of Environmental Concern so that it does not migrate or endanger or threaten to endanger public health or welfare or the environment; or (iii) perform studies, investigations, assessments and monitoring related to any such Material of Environmental Concern.

1.104 " ***Required Consents*** " shall have the meaning ascribed to such term in Section 3.3 .

1.105 " ***Rules*** " shall have the meaning ascribed to such term in Section 7.8 .

1.106 " ***SEC*** " means the United States Securities and Exchange Commission.

1.107 " ***Seller*** " shall have the meaning ascribed to such term in the Preamble.

1.108 " ***Seller Certificate*** " shall have the meaning ascribed to such term in Section 6.2(c) .

1.109 " ***Seller Closing Deliverables*** " shall have the meaning ascribed to such term in Section 2.7 .

1.110 " ***Seller Logos*** " shall have the meaning ascribed to such term in Section 5.8 .

1.111 " ***Seller Marks*** " shall have the meaning ascribed to such term in Section 5.8 .

1.112 " ***Seller Parties*** " shall have the meaning ascribed to such term in the Preamble.

1.113 " ***Seller Tax Returns*** " shall have the meaning ascribed to such term in Section 5.5(a) .

1.114 " ***Seller Trade Names*** " shall have the meaning ascribed to such term in Section 5.8 .

1.115 " ***Statement of Assets*** " shall have the meaning ascribed to such term in Section 3.4(a) .

1.116 " ***Statement of Assets Date*** " shall have the meaning ascribed to such term in Section 3.4(a) .

1.117 " ***Substantially Equivalent Employment*** " shall have the meaning ascribed to such term in Section 5.7(b) .

1.118 " ***Tax Returns*** " means all reports, returns, declarations, statements or other information supplied to a taxing authority in connection with Taxes.

1.119 " ***Taxes*** " means all taxes, including income, gross receipts, ad valorem, value-added, excise, real property, personal property, sales, use, transfer, withholding, employment, unemployment, insurance, social security, business license, business organization, environmental, workers compensation, profits, license, lease, service, service use, severance, stamp, occupation, windfall profits, customs, duties, franchise and other taxes imposed by the United States of America or any state, local or foreign government, or any agency thereof, or other political

subdivision of the United States or any such government, and any interest, penalties, assessments or additions to tax resulting from, attributable to or incurred in connection with any tax or any contest or dispute thereof, and including any liability for the Taxes of another Person.

1.120 " ***Termination Date*** " shall have the meaning ascribed to such term in Section 8.1(c) .

1.121 " ***Third-Party Claim*** " shall have the meaning ascribed to such term in Section 8.1(c) .

1.122 " ***Transaction Materials*** " shall have the meaning ascribed to such term in Section 5.6 .

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

1.123 " ***Transferred Employee*** " shall have the meaning ascribed to such term in Section 5.7(a) .

1.124 " ***Transition Services Agreement*** " shall have the meaning ascribed to such term in paragraph D of the Recitals.

1.125 " ***Vivus Real Estate*** " shall have the meaning ascribed to such term in the Preamble.

1.126 " ***Warranty Deed*** " means that Bargain and Sale Deed with covenants against Grantor's acts for the Owned Real Property substantially in the form of Exhibit C hereto.

ARTICLE II
THE TRANSACTION

2.1 The Transaction . On the Closing Date and effective as of the Closing, upon the terms and subject to the conditions of this Agreement, (a) Vivus Real Estate shall sell, convey, assign, transfer and deliver to Buyer, and Buyer shall purchase from Vivus Real Estate, all of Vivus Real Estate's right, title and interest in and to the Owned Real Estate, and (b) Seller shall sell, convey, assign, transfer and deliver to Buyer, and Buyer shall purchase from Seller, all of Seller's right, title and interest in and to the other Business Assets, in exchange for:

(a) a payment at the Closing to an account designated by Seller in the amount of USD $22,000,000 (the " ***Purchase Price*** ");

(b) a payment to an account designated by Seller in the amount of $1,500,000, promptly following the achievement of Buyer, or Buyer's affiliates, assigns or licensees, of gross sales of Business Products and any Competing Products based in whole or in part on the Business Intellectual Property totaling $50,000,000 or more in any one (1) calendar year during any of the three (3) full calendar years immediately following the date of this Agreement (the "Milestone Payment"); and

(c) the assumption by Buyer of the Assumed Liabilities.

2.2 Business Assets . For purposes of this Agreement, the term " ***Business Assets*** " means all of the assets, properties and rights set forth or described in paragraphs (a) through (p) below (except in each case for the Excluded Assets):

(a) the Owned Real Property and the Premises;

(b) the Principal Equipment and rights to the Leased Equipment;

(c) the Fixtures and Supplies;

(d) the Inventory;

(e) the Business-Owned Intellectual Property;

(f) the Business Contracts;

(g) the Business Records;

(h) the Permits;

(i) all rights, claims and causes of action, whether or not known as of the Closing, against third parties primarily relating to the Business Assets or the operation of the Business;

(j) all rights of indemnity, warranty rights, guarantees, rights of contribution, rights to refunds and other rights of recovery primarily relating to the Business Assets or the operation of the Business, unless any such rights accrued prior to the Closing;

(k) except as set forth on Schedule 2.2(k), all of the prepaid expenses and deposits used or held by the Seller for use in connection with the Business, any of the Business Assets or any Assumed Liability, including prepaid ad valorem taxes, leases and rentals;

(l) all claims to insurance proceeds or other rights of Seller against third parties relating from casualty or loss relating to the Business Assets suffered between the date of this Agreement and the Closing Date, or, to the extent not so assignable, all proceeds received from insurers or third parties in respect of such claims;

(m) the Promotional Material;

(n) all goodwill associated with the Business Assets;

(o) all other assets, properties, interests and rights primarily used or held for use in the conduct or operation of the Business; and

(p) those assets not primarily relating to the operation of the Business set forth on Schedule 2.2(p).

2.3 Excluded Assets . Notwithstanding anything in Section 2.2 to the contrary, it is hereby expressly acknowledged and agreed that the Business Assets shall not include, and Seller is not selling, conveying, assigning, transferring or delivering to Buyer, and Buyer is not purchasing, acquiring or accepting from Seller, any of the rights, properties or assets set forth or

described in paragraphs (a) through (j) below (the rights, properties and assets expressly excluded by this Section 2.3 from the Business Assets being referred to herein as the " ***Excluded Assets*** "):

(a) all Receivables;

(b) all cash, cash equivalents, intercompany receivables owed to Seller, bank deposits or similar cash items of Seller whether or not arising from the conduct of the Business (including the Receivables);

(c) all rights to and under insurance policies of Seller, including rights of proceeds thereunder relating to claims from casualty or loss relating to the Business Assets suffered prior to the date of this Agreement;

(d) (i) confidential personnel records pertaining to any Business Employee; (ii) all records prepared in connection with the sale of the Business Assets; (iii) other books and records that Seller is required by Law to retain; provided, however, that Buyer shall have the right to make copies of any portions of such retained books and records that relate to the Business or any of the Business Assets (subject to clause (i)); and (iv) any information management system of Seller other than those primarily used or held for use in the operation or conduct of the Business and residing on computer hardware included as a Business Asset;

(e) any claim, right or interest of Seller in or to any refund, rebate, abatement or other recovery for Taxes and other monies paid by Seller attributable to the Business, together with any interest due thereon or penalty rebate arising therefrom, the basis of which arises or accrues in any Pre-Closing Period;

(f) rights to and under the Non-Assignable Assets, including the Non-Assignable Agreements, subject to Section 2.12 below;

(g) the Excluded Intellectual Property;

(h) all rights, claims or causes of action of Seller arising under this Agreement and the Ancillary Agreements;

(i) all other assets, properties, interests and rights of Seller not primarily used or held for use in the conduct or operation of the Business and not specifically identified as a Business Asset; and

(j) all rights and interests to and under the assets set forth on Schedule 2.3(j) .

2.4 Assumed Liabilities . On the Closing Date, Buyer shall execute and deliver to Seller the Bill of Sale, Assignment and Assumption Agreement, pursuant to which Buyer shall

accept, assume and agree to pay, perform or otherwise discharge, when due the liabilities and obligations of Seller pursuant to and under the Assumed Liabilities. For purposes of this Agreement, the term "***Assumed Liabilities***" means all liabilities and obligations set forth or described in paragraphs (a) through (i) below:

(a) all liabilities and obligations with respect to Transferred Employees, in each case, only to the extent arising or accruing following the Closing Date, including without limitation all liabilities and obligations arising or accruing following the Closing Date under bonus, commission or other compensation plans of Buyer, and excluding liabilities and obligations arising under the Management Retention Agreements as set forth in Section 2.5(d);

(b) all liabilities and obligations with respect to the resignation or termination of any Business Employees before or after the Closing Date arising under the WARN Act, Millville Dallas Airmotive Plant Job Loss Notification Act, or any state or local statute of similar effect as a result of (i) Buyer's conduct, (ii) Buyer's communications with any Business Employees regarding this transaction, employment, or terms of employment, (iii) Seller's communications with any Business Employees at Buyer's direction or as required under this Agreement, (iv) Buyer's failure to offer a sufficient number of Business Employees employment to avoid liability under the WARN Act, Millville Dallas Airmotive Plant Job Loss Notification Act, or any state or local statute of similar effect, (v) Buyer's failure to offer the Business Employees, to whom it is making offers, employment under terms and conditions that are the same or substantially equivalent to the terms and conditions of such Business Employees' employment with Seller, so as to result in liability under the WARN Act, Millville Dallas Airmotive Plant Job Loss Notification Act, or any state or local statute of similar effect, or (vi) a Governmental Entity determining or ruling that the termination of the Business Employees in connection with this transaction resulted in liability under the WARN Act, Millville Dallas Airmotive Plant Job Loss Notification Act, or any state or local statute of similar effect, regardless of the quality or quantity of Buyer's offers of employment to such Business Employees;

(c) all liabilities and obligations under the Business Contracts and the Permits, in each case, only to the extent arising or accruing following the Closing Date, including without limitation any liabilities and obligations under the Marketing Authorizations during the period between the Closing Date and the date that Buyer receives notice from the applicable Health Authority that the transfer of each such Marketing Authorization is complete;

(d) all liabilities and obligations arising out of the operation or conduct of the Business in the Ordinary Course of Business, in each case, only to the extent arising or accruing following the Closing Date and not constituting Excluded Liabilities;

(e) the Permitted Encumbrances;

(f) all liabilities for rebates, adjustments and returns of Business Product sold after the Closing or allocated to Buyer under Section 2.9;

(g) all chargebacks in respect of Business Products that are received after the thirty (30) day period following the Closing;

(h) all liabilities and obligations arising out of any claim for injury to any Person relating to any Business Product (i) that has become a commercially saleable finished product after the Closing or (ii) that is not a Business Product within the meaning of Section 2.5 (m) and that is sold after the Closing; and

(i) all obligations and liabilities set forth on Schedule 2.4(i) .

2.5 Excluded Liabilities . Notwithstanding any other provisions in this Agreement, Buyer shall not assume or be obligated to pay, perform or otherwise discharge any liabilities or obligations of Seller (or any of its affiliates), whether direct or indirect, known or unknown, absolute or contingent, pursuant to or under the Excluded Liabilities. For purposes of this Agreement, the term " ***Excluded Liabilities*** " means all obligations and liabilities of Seller and its affiliates other than the Assumed Liabilities, including such obligations and liabilities set forth or described in paragraphs (a) through (n) below:

(a) all liabilities and obligations with respect to (i) Taxes under the Seller Tax Returns, or (ii) any other Taxes pertaining to the Business incurred with respect to the Pre-Closing Period.

(b) all liabilities and obligations under Business Plans;

(c) the accrued paid vacation leave of Transferred Employees;

(d) all liabilities and obligations under the Management Retention Agreements;

(e) intercompany payables to Seller;

(f) all Payables;

(g) all Accrued Liabilities;

(h) all obligations and liabilities of Seller not arising from or relating to the conduct or operation of the Business in the Ordinary Course of Business;

(i) all liabilities for rebates, adjustments and returns of Business Product sold prior to the Closing or allocated to Seller under Section 2.9;

(j) all chargebacks in respect of Business Products that are received within the thirty (30) day period following the Closing;

(k) all Environmental Liabilities to the extent existing, arising or accruing, as applicable, at or prior to the Closing;

(l) all liabilities and obligations to the extent relating to an Excluded Asset;

(m) all liabilities and obligations arising out of any claim for injury to any Person relating to any Business Product (i) that is a commercially saleable finished product prior to the Closing or (ii) sold prior to the Closing; and

(n) all liabilities and obligations of the Seller (and its affiliates) under this Agreement and the Ancillary Agreements.

2.6 The Closing . The closing of the transactions contemplated by this Agreement (the " ***Closing*** ") shall take place at: (a) the offices of Wilson Sonsini Goodrich & Rosati, Professional Corporation, Palo Alto, California, on such mutually agreeable date as soon as practicable (and in any event not later than three business days) after the satisfaction or waiver of all conditions set forth in Article VI hereof (other than those conditions that, by their terms, are not capable of being satisfied or waived until the Closing) (the " ***Closing Date*** "); or (b) at such other place, time and date as agreed in writing by Buyer and Seller.

2.7 Deliveries by Seller Parties . At the Closing, Seller or Vivus Real Estate, as applicable, will deliver or cause to be delivered to Buyer the following (the " ***Seller Closing Deliverables*** "):

(a) a duly executed counterpart of the Transition Services Agreement in the form attached hereto as Exhibit A;

(b) copies of duly executed agreements providing for the termination of the leases for the Owned Real Property between Seller, as lessee, and Vivus Real Estate, as lessor, effective as of the Closing, in form and substance satisfactory to Buyer;

(c) a duly executed counterpart of the Bill of Sale, Assignment and Assumption Agreement in the form attached hereto as Exhibit B;

(d) the Seller Certificate;

(e) a certificate of Seller's non foreign status that complies with the requirements of Section 1445 of the Code, and the Treasury Regulations promulgated thereunder, and a standard owner's affidavit for the benefit of Buyer and Buyer's title insurance company concerning tenants in possession and labor and materials provided to the Property by Seller, updating any survey and affirming that Seller is not a foreign person pursuant to Section 1445 of

the Code, together with any other affidavit reasonably requested by Buyer's title insurance company as to facts within Seller's knowledge;

(f) the Warranty Deed in the form attached hereto as Exhibit C; an Affidavit of Title of Vivus Real Estate in form reasonably satisfactory to Buyer's title insurer; an Affidavit of Consideration; such other instruments and documents as are customarily required of a Seller in connection with the closing of the sale of commercial real estate in the State of New Jersey;

(g) a duly executed opinion of Seller's counsel, Wilson Sonsini Goodrich & Rosati, Professional Corporation, in the form attached hereto as Exhibit D.

(h) evidence of the release, discharge or termination of all Encumbrances on the Business Assets, including evidence of the termination and removal of all UCC-1 financing statements, the payoff and release of all associated debt and payment obligations, including those set forth on Schedule 2.7(h), and the discharge of all other monetary Encumbrances, excepting only Encumbrances appearing on Schedule 1.87;

(i) copies of the Required Consents;

(j) the Business Records and Promotional Materials in hard copy, electronic format or any such other format as Seller currently retains such records;

(k) all documents, instruments and writings required to evidence compliance with, or exclusion or exemption from the operation of, the requirements of the New Jersey Industrial Site Recovery Act ("ISRA") applicable as a result of the transactions contemplated by this Agreement, in the form of: (i) a Preliminary Assessment and Remedial Outcome Action report, issued by a Licensed Site Remediation Professional acceptable to Seller, which does not specify or reference any matter or area of environmental concern, does not require or recommend any funding for any potential remediation of known or unknown environmental conditions or concerns, and does not require or recommend any remediation or any other or further action to be undertaken by Seller with respect to the Business Assets, submitted to New Jersey Department of Environmental Protection ("NJDEP"); (ii) a letter from the NJDEP approving a "de minimis quantity exemption"; or (iii) if the Preliminary Assessment obtained by Seller specifies or references any matter or area of environmental concern, requires or recommends any funding for any potential remediation of known or unknown environmental conditions or concerns, or requires or recommends any remediation or any other or further action to be undertaken by Seller with respect to the Business Assets, such reports, workplans and agreements as may be reasonably acceptable to Seller and sufficient to allow the transactions contemplated by this Agreement to proceed under ISRA and to allow any required investigation or remediation to proceed subsequent to the Closing ((i), (ii) or (iii) being referred to as the "NJDEP Required Consent"); and

(l) all other documents, instruments and writings required to be delivered by Seller at or prior to the Closing Date pursuant to this Agreement and the Ancillary Agreements, and, subject to Section 2.12, all other documents, instruments, declarations, affidavits and writings reasonably requested by Buyer that are reasonably necessary to assign, convey, transfer and deliver to Buyer, good and valid title to the Business Assets; provided, however, that Buyer shall be responsible for the payment of all fees for applicable recordations and filings of documents, instruments, declarations, affidavits or other writings necessary to effect any applicable transfers or assignments under this Section 2.7(l).

2.8 Deliveries by Buyer to Seller. At the Closing, Buyer will deliver or cause to be delivered to Seller the following (the "***Buyer Closing Deliverables***"):

(a) the Purchase Price, by wire transfer in immediately available funds to an account designated by Seller;

(b) a duly executed counterpart of the Transition Services Agreement in the form attached hereto as Exhibit A;

(c) a duly executed counterpart of the Bill of Sale, Assignment and Assumption Agreement in the form attached hereto as Exhibit B;

(d) the Buyer Certificate;

(e) such instruments and documents as are customarily required of a Buyer in connection with the closing of the purchase of commercial real estate in the State of New Jersey; and

(f) all other documents, instruments and writings required to be delivered by Buyer at or prior to the Closing Date pursuant to this Agreement and the Ancillary Agreements, and all other documents, instruments, declarations, affidavits and writings reasonably requested by Seller that are reasonably necessary for Buyer to assume the Assumed Liabilities.

2.9 Product Identification. For purposes of determining liability under Sections 2.4(f) and 2.5(i), the Parties agree to determine when Business Products were sold in accordance with this Section 2.9. The Parties shall use commercially reasonable efforts to identify the lot or unit number of a particular Business Product and make reference to the Business Records to determine when that Business Product was sold. If a Business Product's lot or unit number indicates that it could have been sold either before or after Closing, the Parties agree that any claim in respect of such Business Product received by Buyer or Seller (a) within 180 days of the Closing, will be deemed to have been sold prior to the Closing, and (b) 180 days or more after the Closing, will be deemed to have been sold after the Closing.

2.10 Allocation of Purchase Price . Seller and Buyer recognize their mutual obligations pursuant to Section 1060 of the Code to timely file IRS Form 8594 (the " ***Asset Acquisition Statement*** ") with their respective federal income tax returns. Accordingly, Seller and Buyer shall, no later than ninety (90) days after the Closing Date, attempt to (i) enter into a Purchase Price allocation agreement providing for the allocation of the Purchase Price among the Business Assets consistent with the provisions of Section 1060 of the Code and the Treasury Regulations thereunder and (ii) cooperate in the preparation of the Asset Acquisition Statement in accordance with clause (i) for timely filing with their respective federal income tax returns. If Seller and Buyer shall have agreed on a Purchase Price allocation and an Asset Acquisition Statement, then Seller and Buyer shall file the Asset Acquisition Statement in the form so agreed and neither Seller nor Buyer shall take a Tax position which is inconsistent with such Purchase Price allocation in any refund claim, during the course of any Tax audit, for any financial or regulatory purpose, in any litigation or investigation or otherwise. Each Party shall notify the other Party if it receives notice that any Tax authority or other Governmental Entity proposes any allocation different from that made pursuant to this Section 2.10 .

2.11 Further Assurances . On and after the Closing, upon the reasonable request of a Party, the other Party shall prepare, execute and deliver such other and further agreements, instruments, certificates, and other documents, and take, do and perform such other and further actions, as may be reasonably necessary or appropriate in order to effectuate the purposes and intent of this Agreement and to consummate the transactions contemplated hereby. In this regard, Seller and Buyer shall, and shall cause their respective affiliates to, execute, acknowledge and deliver all such further conveyances, notices, assumptions, releases and acquittances and such other instruments, and shall take such further actions, as may be reasonably necessary or appropriate to transfer and deliver to Buyer and its affiliates and their successors and assigns, all of the properties, rights, titles, interests, estates, remedies, powers and privileges intended to be conveyed to Buyer under this Agreement, and to assure the assumption by Buyer from Seller and its affiliates and their successors and assigns of the liabilities and obligations intended to be assumed by Buyer under this Agreement, and to otherwise make effective the transactions contemplated hereby (including returning to Seller any asset not contemplated by this Agreement to be a Business Asset, which asset was delivered to Buyer at the Closing).

2.12 Non-Assignable Assets .

(a) Nothing in this Agreement nor the consummation of the transactions contemplated hereby shall be construed as an attempt or agreement to assign any Business Contract, agreement, asset, property or right, including any certificate, approval, authorization or other right, which by its terms or by Law is nonassignable without the consent of a third party or a Governmental Entity or is cancelable by a third party in the event of an assignment (each a " ***Non-Assignable Asset*** " and collectively, the " ***Non-Assignable Assets*** ") unless and until such consent shall have been obtained.

(b) Seller shall use commercially reasonable efforts to obtain such consents prior to the Closing; *provided* , *however*, Seller shall not be required to pay any fee or make any payment to any third party in order to obtain any such consent, and Buyer understands and agrees that the procurement of any such consent (other than the Required Consents) is not a condition to Buyer's obligation to effect the Closing.

(c) Buyer and Seller shall use their respective commercially reasonable efforts to obtain, or to cause to be obtained prior to the Closing, any consent, substitution, approval, or amendment required to novate all obligations under any and all Business Contracts or other obligations or liabilities that constitute Assumed Liabilities or to obtain in writing the unconditional release of Seller and its affiliates so that, in any such case, Buyer and its affiliates shall, effective as of the Closing, be solely responsible for the liabilities and obligations underlying the Assumed Liabilities; provided, however, Buyer shall not be required to pay any fee or make any payment to any third party in order to obtain any such consent or release, and Seller understands and agrees that the procurement of any such consent or release is not a condition to Seller's obligation to effect the Closing.

(d) To the extent permitted by applicable Law, in the event that written consents to the assignment thereof cannot be obtained prior to the Closing, such Non-Assignable Assets shall be held, as of and from the Closing Date, by Seller in trust for Buyer and the covenants and obligations thereunder shall be performed by Buyer in Seller's name and all benefits and obligations existing thereunder shall be for Buyer's account. Seller shall take or cause to be taken at Buyer's expense such actions in its name or otherwise as Buyer may reasonably request so as to provide Buyer with the benefits of the Non-Assignable Assets and to effect collection of money or other consideration that becomes due and payable under the Non-Assignable Assets, and Seller shall promptly pay over to Buyer all money or other consideration received by it in respect of all Non-Assignable Assets.

(e) As of and from the Closing Date, Seller on behalf of itself and its affiliates, authorizes Buyer, to the extent permitted by applicable Law and the terms of the Non-Assignable Assets, at Buyer's expense, to perform all the obligations and receive all the benefits of Seller or its affiliates under the Non-Assignable Assets.

(f) Notwithstanding anything in this Agreement to the contrary, unless and until any written consent or approval with respect to any Non-Assignable Asset is obtained, such Non-Assignable Asset shall not constitute a Business Asset and any associated liability shall not constitute an Assumed Liability for any purpose under this Agreement, and the failure of any such written consent or approval to be obtained or the failure of any such Non-Assignable Asset to constitute a Business Asset or any circumstances resulting therefrom shall not constitute a Material Adverse Effect on the Business or a breach by Seller of any representation, warranty, covenant or agreement contained in this Agreement; provided, however, that it is a condition to Buyer's obligation to effect the Closing that Seller obtain the Required Consents.

(g) Following the Closing, Buyer and Seller shall use their respective commercially reasonable efforts to obtain, or to cause to be obtained, (i) any remaining consents necessary to assign to Buyer any Non-Assignable Assets, and (ii) any remaining consent, substitution, approval, or amendment required to novate all Assumed Liabilities underlying such Non-Assignable Assets, or to obtain in writing the unconditional release of Seller and its affiliates so that, in any such case, Buyer and its affiliates shall be solely responsible for such Assumed Liabilities; provided, however, neither Party shall be required to pay any fee or make any payment to any third party in order to obtain any such consent or release. Each Party shall keep the other Party reasonably informed of its efforts to obtain such consents and releases.

2.13 Bulk Sales Law . Each of the Parties hereby waives compliance with all waivable requirements and provisions of any "bulk-transfer" Laws of any jurisdiction that may otherwise be applicable with respect to the sale of any or all of the Business Assets to Buyer.

2.14 Transfer Taxes . Each of Seller and Buyer shall pay fifty percent (50%) of all applicable transfer Taxes and all recording and filings fees that may be imposed, assessed or payable by reason of the transactions contemplated by this Agreement, including the sales, transfers, leases, rentals, licenses and assignments contemplated hereby (" ***Transfer Taxes*** ").

2.15 Intercompany Accounts . Immediately prior to the Closing, Seller will cancel all of its intercompany payables to the Business arising on or prior to the Closing Date. Immediately prior to the Closing, Seller will cancel all intercompany receivables of the Business owed to Seller, and Buyer shall not have any responsibility for payment of such liabilities. In no event shall this provision affect any of the Parties' rights, duties and obligations in, to and under any of the Ancillary Agreements, or the obligations between Seller and Vivus Real Estate arising prior to the Closing Date.

ARTICLE III
REPRESENTATIONS AND WARRANTIES OF SELLER

Each of Seller and, with respect to Sections 3.1(b) , 3.2 , 3.3 , 3.10 and 3.16 , Vivus Real Estate hereby represents and warrants to Buyer as of the date hereof, except as set forth in the Business Disclosure Schedule provided by Seller to Buyer on the date hereof (the " ***Business Disclosure Schedule*** ") (as to which Buyer acknowledges and agrees that any matter disclosed pursuant to a section, subsection, paragraph or subparagraph of the Business Disclosure Schedule shall be deemed disclosed for all other purposes of the Business Disclosure Schedule as and to the extent the content or context of such disclosure makes it reasonably apparent, if read in the context of such other section, subsection, paragraph or subparagraph of the Business Disclosure Schedule, that such disclosure is applicable to such other section, subsection, paragraph or subparagraph of the Business Disclosure Schedule), the following:

3.1 Organization, Qualification and Power .

(a) Seller is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. Seller has all requisite corporate power and authority and all governmental licenses, authorizations, consents and approvals required to carry on the Business and to own and use the Business Assets. Seller is duly qualified to do business as a foreign corporation and is in good standing in each jurisdiction where the character of the property owned or leased by it or the nature of its activities makes such qualification necessary, except where the failure to obtain such qualification would not reasonably be expected to have a Material Adverse Effect on the Business.

(b) Vivus Real Estate is a limited liability company duly organized, validly existing and in good standing under the laws of the State of New Jersey. Vivus Real Estate has all requisite limited liability company power and authority and all governmental licenses, authorizations, consents and approvals required to carry on its business and to own and use the Business Assets that it purports to own, including the Owned Real Property. Vivus Real Estate is duly qualified to do business as a foreign limited liability company and is in good standing in each jurisdiction where the character of the property owned or leased by it or the nature of its activities makes such qualification necessary, except where the failure to obtain such qualification would not reasonably be expected to have a Material Adverse Effect on the Business.

3.2 Authorization of Transaction . For purposes of Sections 3.2 and 3.3 , "Seller" shall be deemed to include each of the Seller Parties. Seller has all requisite power and authority to execute and deliver this Agreement and the Ancillary Agreements to which it is a party and to perform its obligations hereunder and thereunder. The execution and delivery by Seller of this Agreement and the Ancillary Agreements to which it is a party and the consummation by Seller of the transactions contemplated hereby and thereby have been duly and validly authorized by all necessary corporate action on the part of Seller. This Agreement has been duly and validly executed and delivered by Seller and, assuming due authorization, execution and delivery by Buyer, constitutes, and when executed at the Closing, each Ancillary Agreement to which Seller is a party will constitute, valid and binding obligations of Seller, enforceable against Seller in accordance with their terms, subject to bankruptcy, insolvency and similar laws affecting the rights of creditors generally and subject to rules of Law governing specific performance, injunctive relief and other equitable remedies.

3.3 Noncontravention . Neither the execution and delivery by Seller of this Agreement or the Ancillary Agreements to which it is a party, nor the consummation by Seller of the transactions contemplated hereby or thereby, will (a) conflict with or violate any provision of the certificate of incorporation or bylaws of Seller, (b) require on the part of Seller any material action by, filing with, or any material permit, authorization, consent or approval of, any U.S. or foreign, federal, state, provincial, regional, county, municipal or local court, tribunal, administrative agency or commission or other governmental or regulatory authority or agency or any instrumentality of any of the foregoing (a " ***Governmental Entity*** "), (c) conflict with, result in a material breach of, constitute (with or without due notice or lapse of time or both) a default

under, result in the acceleration of any obligations under, create in any party the right to terminate, modify any provision or cancel, or require any notice, consent or waiver under, any Material Business Contract listed or required to be listed in Section 3.12 of the Business Disclosure Schedule, except for such consents and waivers as have been obtained prior to the Closing and are set forth in Section 3.3 of the Business Disclosure Schedule (each a " ***Required Consent*** " and collectively, the " ***Required Consents*** "), (d) result in the imposition of any Encumbrance upon any of the Business Assets, or (e) violate in any material respect any order, writ, injunction, decree, statute, rule or regulation applicable to any of the Business Assets. All of the Required Consents (i) will have been duly and validly obtained prior to the Closing and (ii) as of the Closing, will be in full force and effect and enforceable in accordance with their terms.

3.4 Statement of Assets; Financials .

(a) Section 3.4(a) of the Business Disclosure Schedule sets forth a complete and accurate copy of the unaudited pro forma statement of the carrying value of the Business Assets (the " ***Statement of Assets*** ") as of July 31, 2010 (the " ***Statement of Assets Date*** "). The Statement of Assets was prepared from, and are in accordance with, the books and records of Seller, using the same methodologies and principles as used to prepare the balance sheet included in the financial statements filed by Seller with the SEC, except as expressly stated therein. The Statement of Assets fairly presents in all material respects the carrying value of the Business Assets on Seller's books and records as of the Statement of Assets Date.

(b) Section 3.4(b) of the Business Disclosure Schedule sets forth copies of (i) the unaudited statement of operations of the Business for the three- and six-month periods ended on the June 30, 2010; and (ii) the unaudited statements of operations of the Business for each of the fiscal years ended December 31, 2008 and December 31, 2009 (such statements, collectively, the "Business Income Statements"). Each of the statements of operations included in the Business Income Statements were compiled from the books and records of Seller for the periods then ended. The Product Revenue and Cost of Goods Sold and Manufacturing Expense set forth in the Business Income Statements agree with the corresponding category totals in the consolidated statements of operations included in the financial statements filed by Seller with the SEC, except as expressly stated therein.

3.5 Title to Assets . Except as set forth in Section 3.5 of the Business Disclosure Schedule, Seller has, and as of immediately prior to the Closing will have, good and valid title to, or a valid and binding leasehold interest or license in, all of the Business Assets, free and clear of any Encumbrance.

3.6 Inventory . All Inventory consists of items of a quantity and quality historically usable or saleable in the Ordinary Course of Business, and includes items that are excess and obsolete that have been reserved to estimated net realizable value in accordance with GAAP, except for items a third party is contractually obligated to purchase. No Inventory has been

consigned to any Person. Section 3.6 of the Business Disclosure Schedule sets forth an accounting of the Inventory as of August 31, 2010, including Inventory for which reserves for excess and obsolete items have been provided on the books and records of the Company and, with respect only to commercially saleable finished goods included in Inventory, setting forth lot numbers and expiration dates.

3.7 Absence of Changes .

(a) Since the Statement of Assets Date, there has not been any event or condition that has resulted in a Material Adverse Effect on the Business.

(b) Since the Statement of Assets Date, except as set forth on Section 3.7(b) of the Business Disclosure Schedule, Seller has conducted the Business in the Ordinary Course of Business and there has not been any:

(i) payment or grant of any right relating to the Business by Seller to any Interested Person, or any charge by any Interested Person to Seller relating to the Business, or other transaction between Seller relating to the Business and any Interested Person, except in any such case for employee compensation payments in the Ordinary Course of Business;

(ii) damage, destruction or other casualty loss (whether or not covered by insurance) affecting the Business or any Business Asset in an amount greater than $100,000;

(iii) transaction or commitment made, or any contract entered into, by Seller relating to the Business or any Business Asset (including the acquisition or disposition of any assets) or any relinquishment by Seller of any contract or other right, in either case, material to the Business and applying to or affecting the Business subsequent to Closing, other than transactions and commitments in the Ordinary Course of Business and those contemplated by this Agreement affecting the Business or any Business Asset in an amount greater than $100,000;

(iv) change in any method of Tax or financial accounting or accounting practice or any making of a Tax election or change of an existing election by Seller with respect to the Business;

(v) a material change in the sales or marketing activities relating to the Business or generation of sales that are materially different than those set forth in the Business Income Statements;

(vi) (A) grant of any severance or termination pay or any bonus to any employee of the Business, (B) entering into of any employment, deferred compensation or other similar agreement (or any amendment to any such existing agreement) with any employee of the Business, (C) change in benefits payable under existing severance or termination pay policies of

Seller or employment agreements to which any employee of the Business is a party or (D) change in compensation, bonus or other benefits payable to employees of the Business; or

(vii) agreement, undertaking or commitment to do any of the foregoing.

3.8 Condition of Tangible Assets . Each item of tangible personal property included in the Business Assets is in reasonable operating condition, reasonable wear and tear excepted, for the purposes for which it is currently being used, but shall otherwise be transferred to Buyer on a "where is" and, as to condition, "as is" basis.

3.9 Sufficiency of Assets . Except for (i) the Excluded Assets described in clauses (a) through (h) and (j) of Section 2.3 , (ii) any assets, personnel or rights used to provide services under the Transition Services Agreement, (iii) any general corporate or administrative services provided to the Business by Seller, and (iv) any assets or rights licensed to Buyer pursuant to Section 5.12 , the Business Assets and the Business Employees include all assets, personnel and rights that are used or held for use by Seller in the operation or conduct of the Business, and are sufficient for the conduct of the Business by Buyer immediately following the Closing in substantially the same manner as presently conducted by Seller.

3.10 Property . For purposes of this Section 3.10 , "Seller" shall be deemed to include each of the Seller Parties.

(a) Section 3.10 of the Business Disclosure Schedule lists all real property owned by Seller and used primarily for the conduct and operations of the Business (the " ***Owned Real Property*** "). Except as set forth in Section 3.5 of the Business Disclosure Schedule, and Schedule 1.86 , Seller holds good and marketable fee simple title to all Owned Real Property, free and clear of any Encumbrance.

(b) With respect to the Owned Real Property: (i) except for normal wear and tear, to the knowledge of Seller, each of the Premises is in good operating condition and repair, (ii) Seller has not leased or otherwise granted to any Person the right to use or occupy the Property or any portion thereof; and (iii) other than the rights of Buyer pursuant to this Agreement, there are no outstanding options, rights of first offer or rights of first refusal to purchase the Property or any portion thereof or interest therein.

(c) Except as set forth in Section 3.16(a) of the Business Disclosure Schedule, to the knowledge of Seller, the current use and operation of the Owned Real Property now is, and at the time of Closing will be, in compliance in all material respects with all existing Laws. Seller has not received from any Governmental Entity notice of any violation or potential violation of Laws applicable to the Property or any part thereof. There are no condemnation, environmental, zoning or other land-use regulation proceedings, either instituted or, to the knowledge of Seller, planned to be instituted, which would detrimentally affect the Seller's existing use or operation of the Property, nor has Seller received notice of any special assessment proceedings affecting

the Owned Real Property. Seller knows of no facts relating to the Owned Real Property which would prevent Buyer from using and operating the Owned Real Property after Closing in the manner consistent with the operations of the Seller in the Owned Real Property prior to Closing. Water, sewer, gas, electricity, telephone and other utilities are available to the Owned Real Property. To the knowledge of Seller, Seller has not violated any covenants, conditions, restrictions, rights-of-way or easements which affect the Owned Real Property.

3.11 Intellectual Property . Seller owns or has the right to use all Intellectual Property used by Seller in, and reasonably necessary for, the operation of the Business as currently conducted (the " ***Business Intellectual Property*** "). For the avoidance of doubt, "Business Intellectual Property" excludes the Excluded Intellectual Property. Seller has taken commercially reasonable measures to protect the proprietary nature of each item of Business Intellectual Property and to maintain in confidence all Trade Secrets and confidential information owned or used by Seller in the Business. To the knowledge of Seller, no other person or entity is infringing, violating or misappropriating any of the Business Intellectual Property. Seller has made available to Buyer copies of all written documentation in Seller's possession relating to claims or disputes known to Seller concerning any item of Business Intellectual Property. To the knowledge of Seller, none of the activities or operations of the Business infringes or violates, or constitutes a misappropriation of, any Intellectual Property rights of any Person.

(a) Section 3.11(b) of the Business Disclosure Schedule lists (i) all Patents and all registered Trademarks and Copyrights, and any applications and renewals for any of the foregoing owned by or on behalf of Seller and used in connection with the Business irrespective if expired or in force; and (ii) all material licenses, sublicenses and other agreements to which Seller is a party and pursuant to which Seller or any other Person is authorized to use any of the Business Intellectual Property or exercise any other right with regard thereto.

(b) Each item of the Business Intellectual Property is either: (i) owned solely by Seller free and clear of any Encumbrances; or (ii) rightfully used and authorized for use by Seller and its successors in connection with the performance of the Business pursuant to a valid and enforceable Business License Agreement. Seller has all rights in the Business Intellectual Property necessary to operate the Business as it is now conducted.

(c) No claims (i) challenging the validity, enforceability or ownership of any of the Business Intellectual Property or (ii) alleging that the use, manufacture, or sale of the Business Products, infringes on any Intellectual Property or other proprietary right of any Person have been asserted against Seller or, to the knowledge of Seller, are threatened by any Person, nor to the knowledge of Seller does there exist any valid basis for such a claim. There are no legal or governmental proceedings, including interference, re-examination, reissue, opposition, nullity, or cancellation proceedings pending that relate to any of the Business-Owned Intellectual Property, other than the prosecution of pending patent applications, and Seller is not aware of any information indicating that such proceedings are threatened or contemplated by any Governmental Entity or any other Person.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

(d) All granted or issued Patents, all registered Trademarks, and all Copyright registrations included in the Business-Owned Intellectual Property are valid, enforceable and subsisting to the knowledge of Seller.

(e) Seller is not in violation of any Business License Agreement to which Seller is a party or otherwise bound relating to any of the Business Intellectual Property. Except as noted in Section 3.11(f) of the Business Disclosure Schedule, neither Seller nor any of its affiliates is obligated to provide any financial consideration to any third party, under any Business License Agreement, with respect to any exercise of rights by Seller or Buyer, as successor to Seller, in connection with the performance of the Business.

(f) Except as set forth on Section 3.11(g) of the Business Disclosure Schedule, since January 1, 2008, Seller has obtained from all employees and consultants who have created any portion of, the Business-Owned Intellectual Property valid and enforceable written assignments of any such Business-Owned Intellectual Property, to Seller and has provided true and complete copies of such assignments to Buyer.

(g) The consummation of the transactions contemplated hereby shall not alter, impair or otherwise have a Material Adverse Affect on any rights or obligations of Seller, or Buyer as successor to Seller, in any of the Business Intellectual Property.

3.12 Contracts .

(a) Section 3.12 of the Business Disclosure Schedule lists, as of the date of this Agreement, the following contracts and agreements to which Seller is a party or to which any of the Business Assets are bound, that relate to the conduct or operations of the Business (each a " ***Material Business Contract*** "):

(i) any contract for the lease of (x) personal property owned by Seller to a third party providing for lease payments in excess of $50,000 per annum, (y) personal property from a third party providing for lease payments in excess of $50,000 per annum, or (z) real property;

(ii) any contract for the procurement of products, inventory, supplies or other assets, or for the receipt of services, which requires payment by Seller of more than $50,000 annually for any single contract;

(iii) any contract for the sale or distribution of products, inventory, supplies or other assets, or for the furnishing of services, which requires payment to Seller of more than $50,000 annually for any single contract;

(iv) any contract establishing a partnership or joint venture or involving a sharing of profits, losses or costs with another Person;

(v) any contract under which Seller has created, incurred, assumed or guaranteed (or may create, incur, assume or guarantee) indebtedness for borrowed money or the deferred purchase price of property (or capitalized lease obligations) involving more than $50,000 per annum or under which any Person has imposed (or may impose) an Encumbrance on any of the Business Assets;

(vi) any contract with a Governmental Entity;

(vii) any contract under which Seller is restricted from selling, licensing or otherwise distributing any of the technology or products of the Business to, or providing services to, customers or potential customers or any class of customers, in any geographic area, during any period of time or in any market segment, or otherwise limits the freedom of Seller to compete in any line of business or with any Person or in any area;

(viii) other than this Agreement, any contract for the acquisition of any material assets that would be considered Business Assets or disposition of material assets of the Business, other than in the Ordinary Course of Business;

(ix) any contract with or for the benefit of any Interested Person;

(x) any employment or consulting contract;

(xi) any bonus, pension, profit sharing, retirement or any other form of deferred compensation plan or practice, or any severance agreement, arrangement or other contract;

(xii) any contract providing for the payment of any cash or other compensation or benefits upon the consummation of the transactions contemplated by this Agreement; and

(xiii) any other contract that is material to the conduct or operations of the Business.

(b) Seller has made available to Buyer a complete and accurate copy of each Material Business Contract. With respect to each Material Business Contract so listed: (i) the contract is, as of the date hereof, legal, valid, binding and enforceable against Seller and in full force and effect, subject to bankruptcy, insolvency and similar laws affecting the rights of creditors generally and subject to rules of Law governing specific performance, injunctive relief and other equitable remedies; (ii) neither Seller nor, to the knowledge of Seller, any other party thereto, is, as of the date hereof, in material breach or violation of, or default under, any such

Material Business Contract; and (iii) no event or circumstance, to the knowledge of Seller, has occurred that, with notice, would constitute an event of default thereunder.

3.13 Litigation . Except as set forth in Section 3.13 of the Business Disclosure Schedule, there is no action, suit, proceeding, claim, arbitration or to the knowledge of Seller, investigation, before any Governmental Entity (a " ***Legal Proceeding*** ") which is pending or, to the knowledge of Seller, threatened against Seller in connection with the Business or otherwise affecting the Business Assets in any material respect.

3.14 Taxes .

(a) To the extent that failure to do so would adversely impact Buyer, the Business Assets, Buyer's use of the Business Assets, the Business or Buyer's operation of the Business, or might result in an Encumbrance upon any of the Business Assets or in any liability of Buyer for any Pre-Closing Period Taxes, Seller has:

(i) prepared and timely filed all Tax Returns it was required to file relating to any and all Taxes attributable to Seller for all Pre-Closing Periods and such Returns are true and correct in all material respects and have been completed in accordance with applicable Law; and

(ii) paid all Taxes and withheld with respect to the Transferred Employees and timely remitted to the appropriate Governmental Entity all federal, state and foreign income, payroll and other Taxes required to be withheld or paid.

(b) To the extent that doing so would adversely impact Buyer, the Business Assets, Buyer's use of the Business Assets, the Business or Buyer's operation of the Business, or might result in an Encumbrance upon any of the Business Assets or in any liability of Buyer for any Pre-Closing Period Taxes, Seller has paid all Taxes (whether or not shown on any Tax Returns) for all Pre-Closing Periods.

(c) Except as set forth in Section 3.14(c) of the Business Disclosure Schedule, no audit or other examination of any Tax Return of Seller is presently in progress, nor has Seller been notified of any request for such an audit or other examination, pursuant to which an assessment would adversely impact Buyer, the Business Assets, Buyer's use of the Business Assets, the Business or Buyer's operation of the Business, or might result in an Encumbrance upon any of the Business Assets or in any liability of Buyer for any Pre-Closing Period Taxes. To the knowledge of Seller, no action or proceeding is contemplated or threatened for the assessment or collection of any Taxes.

(d) No Tax deficiency is outstanding, assessed or proposed against the Seller that would adversely impact Buyer, the Business Assets, Buyer's use of the Business Assets, the Business or Buyer's operation of the Business, or might result in an Encumbrance upon any of

the Business Assets or in any liability of Buyer for any Pre-Closing Period Taxes. There are no outstanding agreements or waivers extending the statutory period of limitation applicable to any Pre-Closing Period Taxes.

(e) Seller has not been and will not as of the Closing Date be a "United States real property holding corporation" within the meaning of Section 897 of the Code.

(f) Seller is not a party to any Tax allocation, sharing or indemnification agreement with respect to the Business or any Business Assets.

3.15 Employee and Labor Matters .

(a) Section 3.15(a) of the Business Disclosure Schedule sets forth, as to each Business Employee (including any Business Employee who is on a leave of absence), (i) such Business Employee's internal identification number and title; (ii) date of hire; (iii) current annual salary or wage rate; (iv) all bonuses, commissions and incentives paid at any time during the past twelve (12) months; (v) last compensation changes and the dates on which such changes were made; (vi) any specific bonus, commission or incentive plans or agreements for or with them; (vii) each employee benefit plan in which they participate; (viii) any outstanding loans or advances made by or to them; (ix) current status as either active or on leave and, if on leave, the type and date of such leave and the date on which such employee is expected to return to active service.

(b) The employment of each Business Employee is terminable by Seller at will and, except as provided in the Management Retention Agreements, no Business Employee is entitled to severance pay, a notice period prior to termination or other benefits following termination of such Business Employee's employment with Seller, except as required by applicable Law.

(c) As relates to the Business, there is not presently pending or existing, and to the knowledge of Seller, there is not threatened, (i) any strike, slowdown, picketing, work stoppage or material labor trouble, or (ii) any application for certification of a collective bargaining agent. Since January 1, 2005, Seller has not experienced (i) any strike, slowdown, picketing, or work stoppage, or (ii) any

application for certification of a collective bargaining agent.

(d) Section 3.15(d) of the Business Disclosure Schedule contains a complete and accurate list of each material employee benefit plan (including compensation plans) and each employment agreement (excluding offer letters for at-will employment), including each "employee benefit plan" within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") which is maintained by Seller or any affiliate within the meaning of Section 414(b), (c), (m), or (o) of the Code and the regulations thereunder ("ERISA Affiliate") for the benefit of any current or former Business Employees (the "Business

Plans"). With respect to each Business Plan, a copy of the Business Plan and a summary of the Business Plan's materials terms has been made available to Buyer. With respect to the Transferred Employees, Seller has performed in all material respects all obligations required to be performed by it under each Business Plan and each Business Plan has been established and maintained in all material respects in accordance with its terms and in material compliance with all applicable Laws, including ERISA or the Code. At no time has Seller or any ERISA Affiliate contributed to or been obligated to contribute to any "multiemployer plan" (as defined in Section 3(37) of ERISA) or to any plan described in Section 413 of the Code. Neither the Seller nor any ERISA Affiliate has ever sponsored, participated in or contributed to any pension plan related to the Business which is subject to Title IV of ERISA or Section 412 of the Code. No Business Plan promises or provides retiree medical benefits to any Business Employee, or to a multiple employer welfare benefit arrangement (as defined in Section 3(40)(A) of ERISA.

(e) Section 3.15(e) of the Business Disclosure Schedule contains an accurate and complete list of all sales representatives and independent contractors currently engaged by the Business, including payment arrangements and a brief description of jobs or projects currently in progress. The engagement of any sales representative or independent contractor of the Business may be terminated by Seller without payment or other penalty.

(f) Seller is in compliance, in all material respects, with all Laws relating to employment practices. Seller has delivered to Buyer accurate and complete copies of all current employee manuals and handbooks, material disclosure materials and material policy statements.

(g) To the knowledge of Seller, no Business Employee is a party to or is bound by any confidentiality agreement, noncompetition agreement or other contract (with any Person) that may have an adverse effect on (i) the performance by such employee of any of his or her duties or responsibilities as an employee of Seller or (ii) the Business.

(h) Each Business Plan that is intended to be a qualified plan within the meaning of Section 401(a) of the Code is so qualified, and Seller has delivered or caused to be delivered to Buyer the most recently received IRS determination letter or IRS opinion letter issued with respect to such plan.

3.16 Environmental Matters . For purposes of this Section 3.16 , "Seller" shall be deemed to include each of the Seller Parties.

(a) Except as set forth in Section 3.16(a) of the Business Disclosure Schedule, with respect to the Business, (i) Seller has complied in all material respects with all applicable Environmental Laws, and (ii) there is no pending or, to the knowledge of Seller, threatened civil or criminal litigation, written notice of violation, formal administrative proceeding, investigation, inquiry or information request by any Governmental Entity, relating to any Environmental Law involving the Business that would have a Material Adverse Effect on the Business.

(b) Section 3.16(b) of the Business Disclosure Schedule lists all of the Permits relating to the Business and required to be held under or in connection with any Environmental Laws, and Seller has all such Permits, unless the failure to have such Permits would not have had a Material Adverse Effect on the Business.

(c) Seller has delivered to Buyer or made available for inspection by Buyer correct and complete copies of all environmentally-related audits, studies, reports, analyses and results of investigations that have been performed with respect to the Owned Real Property, including all Phase I and Phase II environmental assessments performed on the Owned Real Property by or on behalf of Seller, all environmentally-related or safety-related audits or reports, and correspondence to or from any Governmental Entity or third party regarding violations of any Environmental Law in connection with the Owned Real Property, delivered or received by Seller within the last ten (10) years and in the possession of Seller, all of which are set forth in Section 3.16(c) of the Business Disclosure Schedule.

(d) For purposes of this Agreement:

" ***Environmental Claim*** " means any and all administrative or judicial actions, suits, orders, claims, liens, notices, notices of violations, investigations, complaints, requests for information, proceedings, or other communication (written or oral), whether criminal or civil, pursuant to, relating to, arising under or out of or on the alleged basis of any applicable Environmental Law by any Person (including any Governmental Entity, private person and citizens' group) based upon, alleging, asserting or claiming any actual or potential (i) violation of or liability under any Environmental Law, (ii) violation of any Permit, or (iii) liability for investigatory costs, cleanup costs, removal costs, remedial costs, response costs, natural resource damages, property damage, personal injury, fines, or penalties arising out of, based on, resulting from, or related to the presence, Release, or threatened Release into the environment, of any Material of Environmental Concern at any location, including but not limited to the Owned Real Property and premises located elsewhere from the Owned Real Property to which a Material of Environmental Concern or materials the constituents of which contain any Material of Environmental Concern were sent for handling, storage, treatment, or disposal.

" ***Environmental Encumbrance*** " means an Encumbrance in favor of any Governmental Entity for (i) any liability under any Environmental Law, or (ii) damages arising from, or costs incurred by such Governmental Entity in response to, a Release or threatened Release of a Material of Environmental Concern into the environment.

" ***Environmental Law*** " means any Law relating to the environment or occupational health and safety, including without limitation any statute, regulation, administrative decision or order pertaining to (i) the prohibition, regulation, or control of any Material of Environmental Concern; (ii) the management, treatment, storage, disposal generation and transportation of any Material of Environmental Concern; (iii) air, water and noise pollution; (iv) groundwater and soil contamination; (v) the release or threatened release into the

environment of any Material of Environmental Concern, including without limitation emissions, discharges, injections, spills, escapes or dumping of pollutants, contaminants, radiation, or chemicals; (vi) the protection of wildlife, marine life and wetlands, including without limitation all endangered and threatened species; and (vii) manufacturing, processing, using, distributing or handling of any Material of Environmental Concern, all as amended to date.

" ***Material of Environmental Concern*** " means (i) any petroleum or petroleum products, radioactive materials, asbestos in any form that is or could become friable, urea formaldehyde foam insulation and transformers or other equipment that contain dielectric fluid containing polychlorinated biphenyls (PCBs); (ii) any chemicals, materials, substances or wastes which are defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "extremely hazardous wastes," "restricted hazardous wastes," "toxic substances," "toxic pollutants" or words of similar import, under any Environmental Law; and (iii) any other chemical, material, substance or waste, exposure to which is prohibited, limited or regulated by any Governmental Entity.

" ***Release*** " means any spilling, leaking, pumping, emitting, emptying, discharging, injecting, escaping, leaching, dumping, discarding, burying, abandoning, flowing from a source, or disposing into the environment of any Material of Environmental Concern.

(e) Except as set forth in Section 3.16(c) or Section 3.16(e) of the Business Disclosure Schedule:

(i) to the knowledge of Seller, neither Seller nor any previous owner, occupant or user of the Owned Real Property or any other Person, has engaged in or permitted any activity at or upon, or any use or occupancy of the Owned Real Property in any way involving the handling, manufacture, treatment, storage, use, generation, Release or disposal (whether legal or illegal, accidental or intentional, integral or incidental to the operations at the affected site) of any Material of Environmental Concern on, under, in or about the Owned Real Property, or transported any Material of Environmental Concern to, from or across the Owned Real Property, except as: (A) in compliance with Environmental Laws and (B) such that no Environmental Claim has arisen or will arise in connection with any such activity, use or occupancy;

(ii) no Material of Environmental Concern currently is produced, incorporated in any construction on, deposited, stored or otherwise located on, under, in or about the Owned Real Property except as: (A) used in the ordinary course of the Business; (B) in compliance with Environmental Laws; and (C) such that no Environmental Claim has arisen or will arise under existing Environmental Laws in connection with any such incorporation, deposit, storage, or location through the date of Closing;

(iii) except as: (A) in compliance with Environmental Laws; and (B) such that no Environmental Claim has arisen or will arise in connection with any such Release

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

under existing Environmental Laws: (1) there has occurred no Release of any Material of Environmental Concern by Seller or any affiliate from the Owned Real Property to, on, under, in or about other properties; (2) there has occurred no Release of any Material of Environmental Concern by Seller or any affiliate to, on, under, or in the Owned Real Property; and (3) to the knowledge of Seller, no Material of Environmental Concern has migrated or threatened to migrate from other properties to, on, under, in or about the Owned Real Property;

(iv) Seller has not received any written notice or other written communication or any oral communication concerning: (A) any violation or alleged or probable violation of any Environmental Law or (B) alleged liability for any Environmental Claim or Environmental Encumbrance in connection with the Owned Real Property or any Material of Environmental Concern transported to, from, or across the Owned Real Property. No writ, injunction, decree, order or judgment relating to the foregoing is outstanding. There is no court action or other form of dispute resolution, citation, directive, summons or investigation pending or, to the knowledge of Seller, threatened against Seller relating to any violation or alleged violation of any Environmental Law or the Release, threatened Release, or presence or suspected presence of any Material of Environmental Concern on the Owned Real Property;

(v) with regard to the Business, Seller has not received any written notice of, or entered into, or assumed by Contract or operation of law or otherwise, any obligation, liability, order, decree, settlement, judgment or injunction relating to or arising under (A) any Environmental Laws, (B) any Environmental Encumbrance or (C) any Environmental Claim;

(vi) except as: (A) in compliance with Environmental Laws; and (B) such that no Environmental Claim has arisen or will arise under existing Environmental Laws in connection with any such Release: there has been no Release of any Material of Environmental Concern by Seller or any affiliate at the Owned Real Property, properties at which any operations of the Business were conducted or which Seller leased or operated in connection with the Business, or at any third-party location to which Seller transported or arranged for the disposal or treatment of any Material of Environmental Concern from the location or operation of the Business;

(vii) Seller has not (A) filed a notice pursuant to Section 103(c) of CERCLA or any state law equivalent; (B) filed notice pursuant to Section 3010 of RCRA or any state law equivalent indicating the generation of any "hazardous waste", as that term is defined under 40 C.F.R. Part 261 or under any applicable state law; or (C) filed any notice under any Environmental Law reporting a violation of any Environmental Law; or (D) received an information request pursuant to Section 104(e) of CERCLA or any state equivalent; and

(viii) no Environmental Encumbrance has now or, to the knowledge of Seller, at any time attached to the Owned Real Property.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

(f) As of the Closing Date, Seller shall have completed and timely filed any and all necessary applications with all pertinent Government Entities, including NJDEP, for the effective transfer of all Permits or authorization for change in ownership and/or control of the Business, all as may be required by Environmental Laws, and as listed and described in Section 3.16(f) of the Business Disclosure Schedule.

3.17 Compliance with Laws . To the knowledge of Seller, Seller is in compliance in all material respects with, and has conducted the operations of the Business in compliance in all material respects with, applicable Law and judgments of any Governmental Entity applicable to the Business Assets or the Business or by which any property, asset or the business or operations of the Business is bound or affected.

3.18 Customers and Suppliers . Section 3.18 of the Business Disclosure Schedule sets forth a list of (a) the ten (10) largest customers, based on revenues of the Business, and (b) the ten (10) largest suppliers, based on expenses of the Business, in each case, during the fiscal year ended December 31, 2009. Seller has not received written or, to the knowledge of Seller, other notice from any customer referenced in clause (a) of Section 3.18 that such customer shall or intends to stop purchasing, or materially decrease the purchase of, the products or services of the Business, or otherwise materially change the terms of its relationship with the Business, including terms relating to risk of loss or pricing. Seller has not received written or, to the knowledge of Seller, other notice from any supplier referenced in clause (b) of Section 3.18 that such supplier shall or intends to stop supplying, or materially decrease the supply of, products or services to the Business, or otherwise materially change the terms of its relationship with the Business, including terms relating to risk of loss or pricing.

3.19 Permits .

(a) Seller owns, holds or possesses all permits, licenses, approvals, consents, franchises or other authorizations required by any Governmental Entity or under any Law for the ownership, conduct or operations of the Business, including all Regulatory Filings (collectively, the " ***Permits*** ") and (b) is not in violation in any material respect of, or default under, any such Permits. Section 3.19(a) of the Business Disclosure Schedule contains a complete and accurate list of all Permits held by Seller as of the date of this Agreement. Seller has made available to Buyer complete and accurate copies of all Permits listed on Section 3.19(a) of the Business Disclosure Schedule.

(b) Except as disclosed on Section 3.19(b) of the Business Disclosure Schedule: (i) all material Permits are valid and in full force and effect, and no other material Permits are required for the lawful conduct of the Business as it is currently conducted; (ii) no consent of or notice to any Governmental Entity is required in respect of any material Permit by reason of the transactions contemplated by this Agreement; (iii) no material Permit will be revoked, terminated prior to its normal expiration date or not renewed solely as a result of the consummation of the transactions contemplated by this Agreement; (iv) Seller has conducted the

Business in compliance in all material respects with the Permits and is not in violation of, or default under, any of the material Permits; (v) to the knowledge of Seller, no event has occurred or circumstance exists that, with or without notice or the passage of time or both, could (A) constitute or result in a violation of or failure to comply with any material Permit or (B) result in the revocation, withdrawal, suspension, cancellation, termination or material modification of any material Permit; (vi) Seller has not received written or oral notice from any Governmental Entity or other Person regarding (A) any actual, alleged or potential violation of or failure to comply with any applicable Permit or (B) any actual, proposed or potential revocation, withdrawal, suspension, cancellation, termination or modification of any material Permit; and (vii) Seller has duly filed on a timely basis all applications that were required to be filed for the renewal of the applicable material Permits, and has duly made on a timely basis all other filings required to have been made in respect of the applicable Permits.

3.20 Brokers' Fees . No broker, investment banker, financial advisor or other Person is entitled to any broker's, finder's, financial advisor's or other similar fee or commission in connection with the transactions contemplated by this Agreement based upon arrangements made by or on behalf of Seller.

3.21 No Other Representations or Warranties . Except for the representations and warranties contained in this Article III , none of Seller or any of its affiliates or any of their respective officers, directors, employees, agents or representatives makes any representations or warranties, and Seller hereby disclaims any other representations or warranties, whether made by Seller or any of its affiliates, or any of their respective officers, directors, employees, agents or representatives, with respect to the execution and delivery of this Agreement or any Ancillary Agreements and the transactions contemplated hereby or thereby.

3.22 Transactions with Affiliates; Intercompany Arrangements . There are no loans, leases, royalty agreements or other continuing transactions relating to the Business between Seller and any officer, director or holder of greater than five percent (5%) of any class of equity of Seller or any of its affiliates (" ***Interested Person*** "). To the knowledge of Seller, no Interested Person (i) has any material direct or indirect interest in any entity that does business with Seller or (ii) has any direct or indirect interest in any property, asset or right that is used by Seller in the conduct of the Business. No Interested Person has any contractual relationship (including that of creditor or debtor) with Seller relating to the Business other than such relationships as result solely from being an officer, director or stockholder of Seller.

3.23 Business Products; Defects; Liabilities .

(a) All of the Business Products are set forth in Section 3.23 of the Business Disclosure Schedule.

(b) Each of the Business Products, including the active pharmaceutical ingredients included therein, was in material conformity with the specifications therefor, all

applicable contractual commitments and all applicable express and implied warranties at the time of such manufacture, sale or delivery. No Business Product is subject to any guaranty, warranty or other indemnity beyond the applicable standard terms and conditions of sale or beyond that implied or imposed by applicable Law.

(c) Seller has not received notice of any claim since January 1, 2008 (or earlier and which remains outstanding at the date of this Agreement) for personal injuries (excluding such adverse events routinely reported to regulatory authorities which are not expected to result in claims against Seller or any of its affiliates for compensation) that were caused, or alleged to have been caused, by a Business Product developed, manufactured, marketed, distributed, sold or otherwise provided by, or on behalf of, Seller or any of its affiliates. All inventories of commercially saleable finished goods are safe for their intended uses. Seller has not received within the past four (4) years any notification, written or oral, that remains unresolved, from any Governmental Entity indicating that any Business Product is misbranded or adulterated in violation of any Law.

3.24 Regulatory Matters .

(a) Except as otherwise set forth in Section 3.19 above, all current material Regulatory Filings are set forth on Section 3.24 of the Business Disclosure Schedule. Seller is the sole and exclusive owner of all Regulatory Filings and Product Registration Data. The Product Registration Data constitutes all data included in the Regulatory Filings. Except as otherwise set forth in Section 3.19 above, each Regulatory Filing has been validly issued or acknowledged by the appropriate Governmental Entity and is in full force and effect.

(b) Seller has completed and filed all material notices, supplemental applications, annual and other reports, including adverse event reports, required by any applicable Health Authority to maintain the Regulatory Filings or otherwise required by Law with respect to the Business Products. Seller has made available to Buyer true and complete copies of all Regulatory Filings and all annual and other reports submitted to Health Authorities with respect to the Business Products. Seller is in compliance in all material respects with all Regulatory Filings and Law applicable to the Business Products, including all post-approval monitoring, reporting and other obligations.

(c) Seller has made available to Buyer copies of all material (i) reports of inspectors or officials from any Governmental Entity of any event or condition requiring attention or correction or that is objectionable or otherwise contrary to applicable Law, (ii) establishment inspection reports and (iii) warning letters, in each case received by Seller from any Governmental Entity relating to the Business Products or arising out of the conduct of the Business.

(d) Seller has not received any notice of proceedings from a Governmental Entity regarding any (i) obligation on the part of Seller to undertake, or to bear all or any portion of the

costs of, any product recall of any nature with respect to the Business Products, (ii) loss of or refusal to renew the Regulatory Filings, (iii) renewal of the Regulatory Filings on terms less advantageous to Seller than the terms of those Regulatory Filings currently in force or (iv) action to enjoin production of any Business Product. Within the past four (4) years, no Business Product has been recalled, suspended, discontinued or withdrawn from the market, and no Business Product is currently involved in any ongoing, threatened or potential recall, discontinuance, withdrawal from market, or suspension. There are no pending or, to the knowledge of Seller, threatened actions, suits, proceedings, hearings, investigations, charges, claims, demands, notices or complaints by any Health Authority with respect to the Business Products.

(e) Since January 1, 2008, neither Seller nor, to the knowledge of Seller, any third party manufacturer of the Business Products, has received written notice of, and the Business Products have not been subject to, any adverse inspection, finding of deficiency, finding of non-compliance, completed or voluntary recall, field notification, seizure, investigation, penalty for corrective or remedial action or other compliance or enforcement action, in each case relating to the Business Products or the facilities in which such Business Products are developed, manufactured, packaged, collected, handled or stored, by any applicable Health Authority.

(f) Seller has not been disqualified, debarred or voluntarily excluded by the FDA or any other Governmental Entity for any purpose, or charged with or convicted under any Law for conduct relating to the development or approval, or otherwise relating to the regulation, of any drug product under any relevant Law. To Seller's knowledge, neither Seller nor any officer or employee of Seller nor any agent thereof, has made any false or fraudulent statements on or in, or material or fraudulent omissions from, any applications, approvals, reports and other submissions or communications to any applicable Health Authority or other Governmental Entity or in or from any other records and documentation prepared or maintained to comply with the requirements of any applicable Health Authority relating to the Business Products. Since January 1, 2007, all filings with and submissions to any Health Authority made by Seller with respect to the Business Products were true, accurate and complete in all material respects as of the date made, and to the extent required to be updated, as so updated, remain true, accurate and complete in all material respects.

(g) To Seller's knowledge, no event has occurred or circumstance exists that (with or without notice or lapse of time) is reasonably likely to give rise to any obligation on the part of Seller to undertake, or to bear all or any portion of the cost of, any product recall of any nature related to the Business Products. To the knowledge of Seller, there have been no material adverse effects from the use of the Business Products that are not disclosed in the package inserts, adverse experience reports or periodic safety update reports for the Business Products.

(h) Seller has made all necessary material filings and received all necessary material approvals and consents for the conduct of any ongoing clinical trials for the Business Products from the necessary Governmental Entities, and, to the knowledge of Seller, there are no

actions threatened or pending by such Governmental Entities to suspend or terminate such clinical trials. Seller has not received any written notice, charge, subpoena or other request for information, which has not been complied with or withdrawn, by a Governmental Entity asserting any material breach of the conditions for approval of any such clinical trials. Seller has conducted all clinical trials for the Business Products pursuant to valid protocols. The clinical development and the manufacture of the Business Products were performed in all material respects in accordance with all applicable good clinical practices and current good manufacturing practices for pharmaceutical products.

(i) Since January 1, 2007, Seller has complied in all material respects with all applicable regulatory requirements concerning the marketing, promotion, pricing and distribution of the Business Products and related reporting to applicable Governmental Entities. Seller has not committed any act, failed to take any act, made any statement or failed to make any statement that would materially violate the laws and regulations enforced by any Health Authority or any other Governmental Entity regarding (i) the promotion, sale or distribution of the Business Products (including the promotion of a product for other than the use for which such product is approved by the FDA or any other Health Authority), or (ii) payments or other remuneration including prohibitions against kickbacks and the offering or giving of anything of value to foreign government officials.

ARTICLE IV
REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer represents and warrants to Seller as of the date hereof, as follows:

4.1 Organization and Corporate Power . Buyer is a corporation duly organized, validly existing and in good standing under the laws of Sweden and has qualified to conduct business in the State of New Jersey. Buyer has all requisite corporate power and authority to carry on the businesses in which it is engaged and to own and use the properties owned and used by it.

4.2 Authorization of Transaction . Buyer has all requisite power and authority to execute and deliver this Agreement and the Ancillary Agreements to which it is a party and to perform its obligations hereunder and thereunder. The execution and delivery by Buyer of this Agreement and the Ancillary Agreements to which it is a party and the consummation by Buyer of the transactions contemplated hereby and thereby have been duly and validly authorized by all necessary corporate action on the part of Buyer. This Agreement has been duly and validly executed and delivered by Buyer and, assuming due authorization, execution and delivery by Seller, constitutes, and when executed at the Closing, each Ancillary Agreement to which Buyer is a party will constitute, valid and binding obligations of Buyer, enforceable against Buyer in accordance with their terms, subject to bankruptcy, insolvency and similar laws affecting the rights of creditors generally and subject to rules of Law governing specific performance, injunctive relief and other equitable remedies.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

4.3 Noncontravention . Neither the execution and delivery by Buyer of this Agreement or the Ancillary Agreements to which it is a party, nor the consummation by Buyer of the transactions contemplated hereby or thereby, will (a) conflict with or violate any provision of the charter or bylaws (or corresponding governing documents) of Buyer, (b) require on the part of Buyer any filing with, or permit, authorization, consent or approval of, any Governmental Entity, (c) conflict with, result in breach of, constitute (with or without due notice or lapse of time or both) a default under, result in the acceleration of obligations under, create in any party any right to terminate, modify or cancel, or require any notice, consent or waiver under, any contract or instrument to which Buyer is a party or by which it is bound or to which any of its assets are subject, or (d) violate any order, writ, injunction, decree, statute, rule or regulation applicable to Buyer or any of its properties or assets, except in the case of clauses (b), (c) or (d), any filing, permit, authorization, consent or approval of, or conflict, breach, default, acceleration, right or violation that would not reasonably be excepted to have a Buyer Material Adverse Effect. A " ***Buyer Material Adverse Effect*** " means any material adverse change, event or circumstance with respect to, or any material adverse effect on, the ability of Buyer to consummate the transactions contemplated by this Agreement.

4.4 Brokers' Fees . No broker, investment banker, financial advisor or other Person is entitled to any broker's, finder's, financial advisor's or other similar fee or commission in connection with the transactions contemplated by this Agreement based upon arrangements made by or on behalf of Buyer.

4.5 Legal Proceedings . There are no Legal Proceedings of any nature that are pending or, to the knowledge of Buyer, threatened against or relating to Buyer that would be reasonably expected to have a Buyer Material Adverse Effect.

4.6 Investigation by Buyer . Buyer has conducted its own independent review and analysis of the business, operations, assets, liabilities, results of operations, financial conditions, software, technology and prospects of the Business and acknowledges that Buyer has been provided access to the personnel, properties, premises and records of the Business for such purpose.

4.7 Financing . Buyer has (i) and will have at Closing, sufficient funds available to pay the Purchase Price, the Milestone Payment and any expenses incurred by Buyer in connection with the transactions contemplated by this Agreement, (ii) and will have at Closing, the resources and capabilities (financial or otherwise) to perform its obligations hereunder and under the Ancillary Agreements to which it is a party, and (iii) not incurred and does not reasonably expect to incur any obligation, commitment, restriction or liability of any kind, absolute or contingent, which would impair or adversely affect such resources and capabilities.

ARTICLE V
COVENANTS

5.1 Closing Efforts . Each of the Parties shall use its commercially reasonable efforts to take all actions and to do all things necessary, proper or advisable to consummate the transactions contemplated by this Agreement and the Ancillary Agreements.

5.2 Regulatory Matters . Each of the Parties shall use commercially reasonable efforts to obtain all authorizations, consents, orders and approvals of all Governmental Entities that may be or become necessary for the consummation of the transactions contemplated by this Agreement and shall cooperate fully with each other in promptly seeking to obtain all such authorizations, consents, orders and approvals, including in connection with the preparation and delivery of the documents required by 21 CFR 312.72 to be filed with the FDA to transfer the NDAs relating to the Business Products.

5.3 Operation of Business . Except as contemplated by this Agreement or as set forth in the Business Disclosure Schedule, during the period from the date of this Agreement to the Closing, Seller shall (x) conduct the operations of the Business in the Ordinary Course of Business and (y) use reasonable best efforts to maintain and preserve intact the Business and to maintain satisfactory relationships with suppliers, customers, distributors, Business Employees and other Persons having material business relationships with the Business. Without limiting the generality of the foregoing, except as set forth on Schedule 5.3 or as otherwise required or contemplated by this Agreement, prior to the Closing, Seller shall not, without the written consent of Buyer (such written consent not to be unreasonably withheld, delayed or conditioned):

(a) adopt or amend any employee plan, benefit plan or employment or severance agreement for the benefit of employees of Seller whose duties primarily relate to the Business and are performed at the Premises (together with the employees of Seller listed on Schedule 5.3(a) , the " ***Business Employees*** "), materially increase the compensation or fringe benefits of, or materially modify the employment terms of any Business Employee, or pay any benefit not required by the terms in effect on the date hereof of any existing Business Plan; *provided , however* , that Seller may (i) increase the compensation of or benefits available to any Business Employee in connection with periodic reviews conducted in the Ordinary Course of Business, (ii) take any action required by Law, and (iii) increase the compensation or benefits available to any employee under a Seller employee benefit plan (to the extent such increase does not result in any material liability to Buyer);

(b) sell, lease, license or dispose of any assets used in the Business having an aggregate value exceeding $100,000, other than in the Ordinary Course of Business;

(c) acquire any assets to be used in the Business, outside the Ordinary Course of Business having an aggregate value exceeding $100,000;

(d) license any Business-Owned Intellectual Property to any third party except in the Ordinary Course of Business;

(e) incur or assume any liabilities or obligations that would constitute an Assumed Liability, except in the Ordinary Course of Business;

(f) mortgage or pledge or subject any assets material to the Business to an Encumbrance (or otherwise create any exceptions or Encumbrances to title), other than in the Ordinary Course of Business;

(g) change in any material respect the accounting methods, principles or practices of the Business, except insofar as may be required by a change in GAAP;

(h) terminate (except pursuant to its terms), or materially modify or amend any Material Business Contract, except in the Ordinary Course of Business;

(i) enter into any Material Business Contract, except (i) renewals of contracts on substantially similar terms and conditions, or (ii) any contract relating exclusively to Excluded Assets or Excluded Liabilities;

(j) cancel or compromise any material debt or claim or waive or release any material rights or claims of the Business, other than debts, claims or rights that are not Business Assets;

(k) to the extent it may adversely affect Seller's ownership of the Business Assets, make any election or change concerning Taxes or Tax Returns, change any annual accounting period, adopt or change any accounting method with respect to Taxes, file any amended material Tax Return, enter into any closing agreement with respect to Taxes, settle any Tax claim or assessment, surrender any right to claim a refund of Taxes or obtain or enter into any Tax ruling, agreement, contract, understanding, arrangement;

(l) take any affirmative action that results in the occurrence of an event described in Section 3.7, or fail to take any reasonable action within Seller's control that would avoid the occurrence of an event described in Section 3.7; or

(m) agree to take any of the foregoing actions.

Without the prior written consent of Buyer, Seller shall not (i) take or agree or commit to take any action that would make any representation and warranty made by Seller under this Agreement on the date of its execution and delivery inaccurate in any material respect at, or as of any time prior to, the Closing Date, or (ii) omit or agree or commit to omit to take any action necessary to prevent any such representation or warranty from being inaccurate in any material respect at any such time.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

5.4 Access to Information .

(a) During the period commencing with the execution and delivery of this Agreement until the earlier to occur of the termination of this Agreement pursuant to its terms and the Closing, (x) Seller shall afford Buyer and its officers, authorized employees, accountants, counsel and other authorized representatives reasonable access during normal business hours to the properties, books, records and personnel of the Business, as Buyer may reasonably request (subject to any limitations that are reasonably required to preserve any applicable attorney-client privilege or third-party confidentiality obligation), (y) without the prior written consent of Seller, Buyer shall not contact any Business Employee or any suppliers to or customer of the Business in connection with or pertaining to any subject matter of this Agreement. No investigation by or on behalf of Buyer pursuant to this Section 5.4(a) or otherwise shall affect, augment or mitigate any representations or warranties of the Parties or the rights and obligations of the Parties hereunder.

(b) After the Closing Date, Seller and Buyer shall provide to each other and to their respective officers, authorized employees, accountants, counsel and other authorized representatives, upon reasonable request (subject to any limitations that are reasonably required to preserve any applicable attorney-client privilege or third-party confidentiality obligation), reasonable access for inspection and copying of all the Business Records and Permits and any other information existing as of the Closing Date and primarily relating to the Business, the Business Assets or the Transferred Employees (subject to applicable privacy laws), and shall make their respective personnel reasonably available for interviews, depositions and testimony in any legal matter concerning transactions contemplated by this Agreement, and as otherwise may be necessary or desirable to enable the Party requesting such assistance to: (i) comply with any reporting, filing or other requirements imposed by any Governmental Entity, including filing any Tax Returns and responding to Tax audits or Tax authority disputes with respect to the Business, the Business Assets and the Transferred Employees; (ii) assert or defend any claims or allegations in any litigation or arbitration or in any administrative or legal proceeding other than claims or allegations that one Party to this Agreement has asserted against the other; or (iii) subject to clause (ii) above, perform its obligations under this Agreement. The Party requesting such information or assistance shall reimburse the other party for all reasonable and necessary out-of-pocket costs and expenses incurred by such party in providing such information and in rendering such assistance. The access to files, books and records contemplated by this Section 5.4 shall be during normal business hours and upon reasonable prior notice and shall be subject to such reasonable limitations as the Party having custody or control thereof may impose to preserve the confidentiality of information contained therein.

(c) Buyer shall preserve copies of all Business Records and Permits in accordance with its document retention policies, as in effect from time to time.

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5.5 Tax Matters .

(a) Seller Tax Returns . Subject to Section 5.5(b) below, Seller will prepare and file all Tax Returns of Seller (including Tax Returns required to be filed after Closing Date) to the extent such Tax Returns include or relate to the operations of the Business or the use or ownership of the Business Assets attributable to Pre-Closing Periods (the "Seller Tax Returns"). The Seller Tax Returns shall be true, complete and correct in all material respects and prepared in accordance with applicable Law. Seller will make all payments for Taxes required with respect to the Seller Tax Returns.

(b) Buyer Tax Returns. Buyer will be responsible for the preparation and filing of all Tax Returns it is required to file with respect to Buyer's ownership or use of the Business Assets or its operation of the Business attributable to Post-Closing Periods (the "Buyer Tax Returns"). The Buyer Tax Returns shall be true, complete and correct in all material respects and prepared in accordance with applicable Law. Buyer will make all payments for Taxes required with respect to the Buyer Tax Returns.

(c) Property Taxes. In the case of any real or personal property Taxes (or other similar taxes) attributable to the Business Assets for which the corresponding Tax Returns cover both a Pre-Closing Period and a Post-Closing Period, Buyer shall prepare such Tax Returns and make all payments required with respect to any such Tax Return; provided, however, that Seller will reimburse Buyer concurrently therewith to the extent that any payment made by Buyer relates to a Pre-Closing Period, prorated on a per diem basis.

(d) Wage Withholding. Seller and Buyer shall utilize the standard procedure set forth in Revenue Procedure 2004-53 with respect to wage withholding for Transferred Employees.

(e) FIRPTA Certificate. On or prior to the Closing Date, Seller will furnish to Buyer a certificate of non-foreign status as described in Treasury Regulations Section 1.1445-2(b)(2).

5.6 Confidentiality . The terms of the Confidentiality Agreement dated September 26, 2006 between the Parties (the "***Confidentiality Agreement***") are hereby incorporated herein by reference and shall continue in full force and effect until the Closing, at which time, except as set forth below, such Confidentiality Agreement and the obligations of the parties under this Section 5.6 shall terminate; *provided , however* , that after the Closing (a) the Confidentiality Agreement shall terminate as to Buyer in respect of that portion of the Proprietary Information (as defined in the Confidentiality Agreement) relating to the Business and the Business Assets (the ownership of which will have been transferred to Buyer), (b) such Proprietary Information shall be deemed Buyer's Proprietary Information, and Seller and its affiliates shall be subject to all restrictions against use and disclosure of such information contained in the Confidentiality Agreement as if it were the receiving party and (c) without limiting the foregoing, the Confidentiality Agreement shall continue to apply to the Excluded Assets, Excluded Liabilities and the Transaction Materials. The "***Transaction Materials***" means the terms and conditions of

this Agreement and the Ancillary Agreements. If this Agreement is, for any reason, terminated prior to the Closing, the Confidentiality Agreement shall continue in full force and effect in all respects in accordance with its terms.

5.7 Employees .

(a) Offer Letters . Within five (5) business days following the date of this Agreement, Buyer shall provide Seller with the offers of employment to each Business Employee set forth on Schedule 5.7(a) , which offer shall be consistent with the provisions set forth in Section 5.7(b)(i) below, shall expressly state that they are contingent upon the Closing of this transaction, shall expressly state that they do not become effective until after the Closing Date, and shall be subject to Buyer's standard hiring procedures in effect from time to time. Buyer shall give Seller a reasonable opportunity to comment on such offers and consider Seller's comments in good faith. Buyer may then extend such offers of employment to each Business Employee set forth on Schedule 5.7(a) . Effective as of the Closing Date, Buyer will hire each Business Employee who accepts the offer of employment extended to such individual by Buyer (each a " ***Transferred Employee*** "); *provided , however ,* that, unless otherwise set forth on Section 5.7 , such Transferred Employees shall remain employed "at will," and Buyer may terminate at any time after the Closing Date the employment of any Transferred Employee who accepts such offer of employment. Seller shall not take any action that would impede, hinder, interfere or otherwise compete with Buyer's effort to hire any Transferred Employee. Seller shall use its reasonable best efforts to assist Buyer in Buyer's hiring of the Transferred Employees.

(b) Compensation and Benefits .

(i) As of the Closing Date, Buyer shall provide compensation and employee benefits to each Transferred Employee that are comparable to those provided to similarly situated U.S.-based employees of Buyer and/or its U.S. subsidiaries (" ***Substantially Equivalent Employment*** ").

(ii) For a period of **[***]** (**[***]**) months following the Closing Date, Buyer (i) shall provide, or cause to be provided, Substantially Equivalent Employment to each of **[***]** , **[***]** and **[***]** to the extent such Person is a Transferred Employee, and (ii) shall not terminate any such Person other than for Cause (as such term is defined in the Business Plans).

(iii) Notwithstanding anything to the contrary set forth herein, Seller shall make all payments with respect to Transferred Employees under the Commission Plan, a copy of which has been provided to Buyer, for the period beginning on January 1, 2010 and ending on the Closing Date, which payments shall be made by Seller on the forty-fifth (45th) day following the close of the fiscal quarter in which the Closing occurs.

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(c) Service Credit . For purposes of determining eligibility to participate, vesting and entitlement to benefits where length of service is relevant under any benefit plan or arrangement (other than a defined benefit plan) of Buyer, Buyer shall provide that the Transferred Employees shall receive service credit under Buyer's benefit plans or arrangements equal to the service credit given by Seller and its subsidiaries prior to the Closing. Buyer shall waive all limitations as to preexisting conditions exclusions and waiting periods with respect to participation and coverage requirements applicable to the Transferred Employees under any medical, dental and other health and welfare plans that such employees may be eligible to participate in after the Closing Date. Buyer shall also provide Transferred Employees and their eligible dependents with credit for any co-payments and deductibles paid under Seller's medical, dental and vision plans for the year in which the Closing occurs under Buyer's medical, dental and vision plans for the purposes of satisfying any applicable co-payments and deductibles in the year in which the Closing occurs.

(d) 401(k) Plan . Buyer shall ensure that a defined contribution plan that it maintains shall accept rollover distributions under Section 402 of the Code, including cash and outstanding loans, from or on behalf of any Transferred Employee.

(e) Workers' Compensation . Responsibility for workers' compensation claims relating to Transferred Employees arising out of conditions having a date of injury (or, in the case of a claim relating to occupational illness or disease, the last significant exposure) prior to the Closing Date and that are outstanding as of the Closing, shall remain with the Seller and be deemed to be an Excluded Liability. Buyer shall have responsibility for workers' compensation claims relating to Transferred Employees and arising out of conditions having a date of injury (or, in the case of a claim relating to occupational illness or disease, the last significant exposure) on or after the Closing Date.

(f) No Third Party Beneficiaries . No provision of this Section 5.7 shall create any third party beneficiary or other rights in any Business Employee or any other employee or former employee (including any beneficiary or dependent thereof) of Seller in respect of continued employment (or resumed employment) with Buyer, and no provision of this Section 5.7 shall create any such rights in any such Persons in respect of any benefits that may be provided, directly or indirectly, under any Business Plan or any plan or arrangement that may be established by Buyer. No provision of this Agreement shall constitute a limitation on rights to amend, modify or terminate after the Closing Date any such plans or arrangements of Buyer. No provision of this Agreement shall cause any employee to be a third party beneficiary of any rights herein.

5.8 Use of Seller's Name . Buyer acknowledges that Seller has the absolute and exclusive proprietary right to all names, marks, trade names, trademarks and service marks incorporating VIVUS in any form (the " ***Seller Trade Names*** "), and to all corporate symbols or logos incorporating "VIVUS" in any form (the " ***Seller Logos*** ", and together with the Seller Trade Names, the " ***Seller Marks*** "). Buyer shall not use, and Buyer shall cause its affiliates not

to use, any Seller Marks or any confusingly similar marks in connection with the sale or distribution of any products or services, and if a Business Asset bears a Seller Mark, Buyer shall, prior to the use, sale or distribution of such Business Asset, delete such Seller Mark and clearly and prominently indicate that the Business Asset is no longer affiliated with Seller or any of its affiliates.

(a) Notwithstanding the foregoing, for a period of twelve (12) months following the Closing, Seller hereby grants to Buyer and its affiliates a temporary, paid up, non-exclusive, nontransferable license to use Seller Marks affixed to products of the Business manufactured before the Closing or manufactured by or on behalf of Buyer or its affiliates after the Closing and meeting the same quality standards met by Seller prior to the Closing. Buyer hereby assigns, and agrees to assign, to Seller, any goodwill that accrues to Buyer through such use of the Seller Marks.

(b) Notwithstanding the foregoing, within three (3) months after the Closing Date, Buyer shall remove all Seller Marks from all buildings, signs and vehicles of the Business, and all electronic databases, web sites, schematics, plans, manuals, drawings and other materials, printed or otherwise (except as expressly provided in sub-section (c) below), machinery, tooling, Inventory and the like.

(c) Notwithstanding the foregoing (but subject to sub-section (d) below), Buyer may use existing supplies of literature, product instructions, packaging, invoices, letterhead, Promotional Materials, office forms and business cards included with the Business Assets which refer to or otherwise include Seller Marks, until such supplies are expended.

(d) In no event shall Buyer or any of its affiliates use the Seller Marks for any purpose after the twelve (12) month anniversary of the Closing Date.

(e) Buyer acknowledges and agrees that Seller is and shall remain the owner of the Seller Marks and all goodwill attached thereto. This Agreement does not give Buyer the right to use the Seller Marks except as expressly provided in this Agreement. Buyer agrees not to attempt to register the Seller Marks nor to register anywhere in the world a mark same as or similar to the Seller Marks. In no event shall Buyer or any affiliate of Buyer advertise or hold itself out as Seller or an affiliate of Seller.

5.9 Pre-Closing Sales . Seller agrees that, during the period beginning on September 1, 2010 and ending on the Closing Date, the quantity of units of Business Products sold to domestic wholesalers during such period shall not exceed the historical domestic average daily unit shipments during the 90 day periods ending on the same day and month in 2008 and 2009 as the Closing Date plus **[***]** . Seller further agrees that if the total units of Business Products sold during such period exceeds the historical average daily units of Business Products sold, multiplied by the number of shipping days, multiplied by **[***]** , then Seller shall reimburse Buyer with an amount equal to the excess at a rate of **[***]** per Business Product unit.

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5.10 Real Estate Closing Costs . Except as otherwise provided in Section 2.14 , Buyer shall pay all other closing costs associated with the sale, transfer and conveyance of the Owned Real Property to Buyer hereunder, including all escrow fees, costs of title insurance and endorsements, surveys undertaken by Buyer, document recording costs, and any other incidental fees or charges.

5.11 Notice of Certain Events . Seller shall give prompt notice to Buyer of: (a) the occurrence or non-occurrence of any event, the occurrence or non-occurrence of which could reasonably be expected to cause any representation or warranty of Seller set forth in this Agreement to be untrue or inaccurate at the Closing or any time prior to the Closing; and (b) any failure of Seller to comply with or satisfy any covenant or agreement to be complied with by it under this Agreement at the Closing or at any time prior to the Closing; provided, however, that any disclosure by Seller pursuant to this Section 5.11 shall not: (i) affect or be deemed to modify in any respect any of the representations or warranties of Seller set forth in this Agreement (or in any certificate, instrument or other document delivered by Seller (or any officer thereof) to Buyer in connection with the Transactions), or the conditions to the obligations of the Parties to consummate the transactions contemplated by this Agreement in accordance with the terms and conditions hereof; (ii) be deemed to amend or supplement the Business Disclosure Schedule, or prevent or cure any misrepresentations, breach of warranty or breach of covenant by Seller; or (iii) otherwise limit or affect any remedies available to Buyer as a result of or arising out of such disclosure, including Buyer's right to indemnification under this Agreement.

5.12 Exclusive License of Certain Assets . Subject to the terms and conditions of this Agreement, Seller hereby grants to Buyer, on Seller's behalf and on behalf of each of its affiliates, (a) an exclusive, worldwide, perpetual, irrevocable, fully paid up, royalty-free license, to use all Business Know-How that is Controlled by Seller on the Closing Date (other than Business Know-How included in the Business Assets) to develop, manufacture or sell the Business Products; (b) an exclusive, worldwide, perpetual, irrevocable, fully paid up, royalty-free license, to use all Business Intellectual Property that is Controlled by Seller on the Closing Date (other than Intellectual Property included in the Business Assets) to develop, manufacture or sell the Business Products; and (c) an exclusive, worldwide, perpetual, irrevocable, fully paid up, royalty-free license to use all the Licensed Books and Records Controlled by Seller on the Closing Date to develop, manufacture or sell the Business Products. The foregoing licenses include the right to grant sublicenses. Seller agrees to make copies available to Buyer of any material subject to the foregoing licenses promptly upon request.

5.13 Non-Competition .

(a) From and after the Closing Date until the third (3rd) anniversary thereof, none of Seller or any of its affiliates shall, directly or indirectly through any third party, (a) conduct any preclinical or clinical development with regard to, or make, have made, sell, offer to sell, import, license, market, promote or commercialize, any Competing Product in any jurisdiction or

(b) engage in, or have any majority equity ownership in, or participate in the financing, operation or management of, any Person that engages in, the direct or indirect development, manufacture, licensing, promotion or commercialization of any Competing Product.

(b) This Section 5.13 is reasonable and necessary to protect and preserve Buyer's legitimate business interests and the value of the Business and the Business Assets, and to prevent any unfair advantage conferred on Seller and its successors. To the extent it may effectively do so under applicable Law, Seller hereby waives on its own behalf and on behalf of its successors, any provision of Law which renders any provision of this Section 5.13 invalid, void or unenforceable in any respect.

5.14 No Solicitation . Seller shall immediately cease any and all existing activities, discussions or negotiations with any parties conducted heretofore with respect to any transaction or series of related transactions involving any purchase or acquisition by any one or more third parties, or any sale, lease, exchange, transfer, license or disposition by Seller or any of its subsidiaries of, any of the Business Assets, other than in the Ordinary Course of Business. During the period from the date hereof and continuing until the earlier to occur of the termination of this Agreement pursuant to Article VIII or the Closing, Seller shall not and shall use its commercially reasonable efforts to cause each of its current directors, current executive officers and other employees, affiliates, representatives and other agents (including its financial, legal and accounting advisors) not to, directly or indirectly: (i) solicit, initiate, encourage or induce any inquiry with respect to any such transaction; (ii) furnish to any Person any nonpublic information or take any other action to facilitate any inquiries that could reasonably be expected to lead to any such transaction; (iii) participate or engage in discussions or negotiations with any Person with respect to any such transaction; (iv) approve, endorse or recommend any such transaction; or (v) enter into any letter of intent or similar document or any contract relating to any such transaction.

5.15 Government Pricing Reporting . From and after the Closing Date, Buyer will (a) calculate and/or collect government pricing data relating to the Business Products as required by the reporting requirements of applicable U.S. Governmental Entities, including under applicable rules and regulations relating to the Medicaid Drug Rebate Program (42 U.S.C. § 1396r-8 and implementing regulations) and the Medicare program (42 U.S.C. § 1395w-3a and implementing regulations), and (b) timely certify and report such data to the applicable U.S. Governmental Entities, including the Center for Medicare and Medicaid Services of the U.S. Department of Health and Human Services. Should such U.S. Governmental Entities require the inclusion of pricing data from sales of Business Products by Seller with respect to a period ending on or prior to Closing, Seller will promptly provide Buyer with such data, together with all reasonable support and a certification of accuracy in form and substance reasonably satisfactory to Buyer, and Buyer will continue to provide such reports for as long as required by applicable Law. For the avoidance of doubt, nothing contained herein shall require Buyer to calculate, collect, certify or report any information related to any products bearing Seller's National Drug Code or labeler code other than the Business Products.

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ARTICLE VI
CONDITIONS TO CONSUMMATION OF TRANSACTION

6.1 Conditions to Buyer's and Seller's Obligations . The respective obligations of Buyer and Seller to consummate the transactions contemplated by this Agreement are subject to the satisfaction of the following condition: No Governmental Entity shall have enacted, issued, promulgated, enforced or entered any law, rule, regulation, judgment, decree, order or award which is then in effect and has the effect of making the transactions contemplated by this Agreement illegal or otherwise prohibiting consummation of the transactions contemplated by this Agreement.

6.2 Conditions to Obligations of Buyer . The obligation of Buyer to consummate the transactions contemplated by this Agreement is subject to the satisfaction (or waiver by Buyer) of the following additional conditions:

(a) The representations and warranties of Seller set forth in Article III shall have been true and correct on the date hereof and shall be true and correct at and as of the Closing as if made as of the Closing, except (i) for changes contemplated or permitted by this Agreement, (ii) those representations and warranties that address matters only as of a particular date (which shall be true and correct as of such date, subject to clause (iii)) and (iii) where the failure of the representations and warranties to be true and correct would not reasonably be expected to have a Material Adverse Effect on the Business.

(b) Seller shall have performed or complied with in all material respects its agreements and covenants required to be performed or complied with under this Agreement as of or prior to the Closing.

(c) Seller shall have delivered to Buyer a certificate executed by an authorized officer of Seller (the "***Seller Certificate***") to the effect that each of the conditions specified in clauses (a) and (b) of this Section 6.2 is satisfied in all respects.

(d) No Law shall restrain, prohibit or otherwise interfere with the effective ownership, operation or enjoyment by Buyer of all or any material portion of the Business Assets.

(e) Seller shall have delivered to Buyer a duly executed opinion of Seller's Delaware counsel, Morris, Nichols, Arsht & Tunnell LLP stating that stockholder approval of Seller to consummate the transactions contemplated herein is not required.

(f) Seller shall have obtained the Required Consents, and shall have delivered the Seller Closing Deliverables in accordance with Section 2.7 .

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6.3 Conditions to Obligations of Seller . The obligation of Seller to consummate the transactions contemplated by this Agreement is subject to the satisfaction (or waiver by Seller) of the following additional conditions:

(a) The representations and warranties of Buyer set forth in Article IV shall have been true and correct on the date hereof and shall be true and correct at and as of the Closing as if made as of the Closing, except (i) those representations and warranties that address matters only as of a particular date (which shall be true and correct as of such date, subject to clause (ii)), and (ii) where the failure of the representations and warranties to be true and correct would not reasonably be expected to have a Buyer Material Adverse Effect.

(b) Buyer shall have performed or complied with in all material respects its agreements and covenants required to be performed or complied with under this Agreement as of or prior to the Closing.

(c) Buyer shall have delivered to Seller a certificate executed by a duly authorized officer of Buyer (the "Buyer Certificate") to the effect that each of the conditions specified in clauses (a) and (b) of this Section 6.3 is satisfied in all respects.

(d) Buyer shall have delivered the Buyer Closing Deliverables in accordance with Section 2.8.

(e) Seller shall have obtained the NJDEP Required Consent; provided, however, that the condition set forth in this Section 6.3(e) shall be effective only if Seller has used its commercially reasonable efforts to obtain the NJDEP Required Consent as soon as reasonably practicable after the date of this Agreement.

ARTICLE VII
SURVIVAL AND INDEMNIFICATION

7.1 Survival . Each covenant or agreement in this Agreement shall survive the Closing without limitation as to time until fully performed in accordance with its terms. The representations and warranties of Buyer and Seller contained in this Agreement shall survive the Closing solely for purposes of this Article VII and such representations and warranties shall terminate at the close of business on the date that is eighteen (18) months after the Closing Date, except (a) with respect to any misrepresentation or breach of warranty under Sections 3.1 (*Organization, Qualification and Power*), 3.2 (*Authorization of Transaction*), 3.5 (*Title to Assets*), 3.14 (*Taxes*) and 3.16 (*Environmental Matters*), which shall survive until the expiration of the statute of limitations applicable to the matters set forth therein (giving effect to any waiver or extension thereof), and (b) with respect to any misrepresentation or breach of warranty under Section 3.11(b) , (c) , (d) , (f) , (g) and (h) and the first sentence of 3.11(a) (*Intellectual Property)* , which shall survive for **[***]** (**[***]**) months after the Closing Date (the final date of such survival period, the " ***End Date*** "). The obligations to indemnify and hold harmless an

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Indemnified Party pursuant to Section 7.2(a)(i) and for the breach of any covenants required to be performed by a Party prior to Closing shall terminate on the End Date; *provided* that such obligations to indemnify and hold harmless shall not terminate as to any Loss with respect to which the Indemnified Party shall have delivered to the Indemnifying Party a Notice of Claim in accordance with Section 7.4, or, in the event of a Third-Party Claim, given notice to the Indemnifying Party of such Third-Party Claim in accordance with Section 7.5, in each case on or prior to the End Date. Any investigation or other examination that may have been made or may be made at any time by or on behalf of the Party to whom representations and warranties are made shall not limit, diminish or in any way affect the representations and warranties in this Agreement, and the Parties may rely on the representations and warranties in this Agreement irrespective of any information obtained by them by any investigation, examination or otherwise.

7.2 Indemnification.

(a) Seller and Buyer shall indemnify, defend and hold harmless the other Party and its affiliates, and their respective officers, directors, stockholders, employees, representatives and agents (each an "***Indemnified Party***"), from and against any and all claims, actions, suits, proceedings, liabilities, obligations, losses, and damages, amounts paid in settlement, costs and expenses (including reasonable attorney's fees, court costs and other out-of-pocket expenses incurred in investigating, preparing or defending the foregoing) incurred or paid (collectively, "***Losses***") by any Indemnified Party to the extent that the Losses arise by reason of, or result from (i) any breach of any representation or warranty of the other Party contained in this Agreement or (ii) the breach by the other Party of any covenant or agreement of such Party contained in this Agreement (except in each case as a result of any changes contemplated or permitted by this Agreement).

(b) Seller further agrees to indemnify and hold harmless Buyer and any Indemnified Party of Buyer from and against any Losses arising out of or resulting from the Excluded Liabilities.

(c) Buyer further agrees to indemnify and hold harmless Seller and any Indemnified Party of Seller from and against any Losses arising out of or resulting from the Assumed Liabilities.

(d) For purposes of Section 7.2, "Seller" shall be deemed to include each of the Seller Parties, to the extent Vivus Real Estate makes any representations or has obligations in respect of any covenants or Excluded Liabilities.

7.3 Limitations.

(a) The Indemnifying Party's liability for all claims for indemnifiable Losses made under Section 7.2(a)(i) (each a "***Claim***") shall be subject to the following limitations: (x) the Indemnifying Party shall have no liability for any individual Claim until the amount of

the Loss finally determined to have been incurred or paid equals or exceeds $50,000 (each, a " ***Qualified Loss*** "), and (y) the Indemnifying Party shall have no liability for any Claims until the aggregate amount of the Qualified Losses finally determined to have been incurred or paid shall exceed **[***]** (**[***]**) of the Purchase Price, in which case the Indemnifying Party shall be liable for all Qualified Losses, and (z) the Indemnifying Party's aggregate liability for all such Losses shall not exceed **[***]** (**[***]**) of the Purchase Price. None of the limitations set forth in this Section 7.3(a) shall apply in the case of any Losses or other indemnification matter based upon, arising out of, or relating to (i) intentional misrepresentations, fraud or criminal matters or (ii) any misrepresentation or breach of warranty under Section 3.1 (*Organization, Qualification and Power*), 3.2 (*Authorization of Transaction*), 3.5 (*Title to Assets*) or 3.14 (*Taxes*) (collectively, the " ***Fundamental Representations*** "); *provided, however* , that the Indemnifying Party's aggregate liability for all such Losses resulting from a breach of any of the Fundamental Representations shall not exceed the Purchase Price, inclusive of any other amounts actually paid out pursuant to this Article VII ; *provided, further* , for the sake of clarity, that to the extent Buyer is an Indemnified Party, Buyer may only obtain recovery for a Loss from a Claim against either Seller or Vivus Real Estate, but not both, as the Indemnifying Party.

(b) Notwithstanding anything contained in this Agreement to the contrary, the amount of the Indemnifying Party's liability under this Agreement shall be net of any insurance proceeds or other third party indemnity or contribution amounts actually recovered by an Indemnified Party.

(c) Notwithstanding anything contained in this Agreement to the contrary, no Party shall be liable to the other Party for any indirect, special, punitive, exemplary or consequential loss or damage (including any loss of revenue or profit) arising out of this Agreement in excess of the Purchase Price; provided, however, that the foregoing shall not be construed to preclude recovery by the Indemnified Party in respect of Losses directly incurred from Third Party Claims.

(d) For purposes of this Section 7.2, "Seller" shall be deemed to include each of the Seller Parties, to the extent Vivus Real Estate makes any representations or has obligations in respect of any covenants or Excluded Liabilities

7.4 Procedures for Indemnification .

(a) In the event an Indemnified Party shall have a Claim for Losses under this Article VII , Buyer or Seller (on behalf of itself or its affiliates), as the case may be, shall promptly send written notice of such Claim (the " ***Notice of Claim*** ") to the Indemnifying Party. Such notice must (i) state the amount of Losses paid or reasonably believed to have been incurred by the Indemnified Party, (ii) specify in reasonable detail the individual items of Losses included in the amount stated and the nature of the misrepresentation, breach of warranty or covenant to which such Loss is related (including specific references to the applicable

representation or covenant), and (iii) be executed by a duly authorized officer of Buyer or Seller, as the case may be.

(b) The Indemnifying Party may make a written objection ("Objection") to any Claim for indemnification delivered pursuant to Section 7.4(a). The Objection shall be delivered to the Indemnified Party within thirty (30) days after delivery of the Notice of Claim.

(c) In the event of a dispute that the Parties are able to resolve, the Parties shall prepare and sign a memorandum setting forth such agreement, and the Indemnifying Party shall pay to the Indemnified Party by wire transfer of immediately available funds to an account designated by such Indemnified Party the agreed-upon amount of the Loss (if any) within fifteen (15) days of the date of such written memorandum.

(d) If, within thirty (30) days of delivery of the notice of Objection (as such period may be extended by mutual agreement between the Parties), the Parties are unable to resolve a dispute over the Claim for indemnification to which the Objection has been made, the dispute shall be resolved exclusively in accordance with the dispute resolution provisions described in Section 7.8 .

7.5 Third Party Claims .

(a) The Indemnified Party seeking indemnification under this Agreement shall promptly (and in any event within ten (10) business days of becoming aware of a Third-Party Claim) notify the Party against whom indemnification is sought (the " ***Indemnifying Party*** ") of the assertion of any claim, or the commencement of any action, suit or proceeding by any third party, in respect of which indemnity may be sought by the Indemnified Party under this Article VII (a " ***Third-Party Claim*** ") and shall give the Indemnifying Party such information with respect thereto as the Indemnifying Party may reasonably request, but failure to give timely notice shall not relieve the Indemnifying Party of any liability hereunder (unless and to the extent that the Indemnifying Party has suffered prejudice by such failure, and except as provided in Section 7.1).

(b) The Indemnifying Party shall have the right, but not the obligation, exercisable in its sole discretion by written notice to the Indemnified Party within thirty (30) days of receipt of notice from the Indemnified Party of the commencement of or assertion of any Third-Party Claim, to assume the defense and control the settlement of such Third-Party Claim, subject to Section 7.5(c). The non-controlling Party shall have the right to participate in (but not control), at its own expense, the defense and settlement of any Third-Party Claim. If the Indemnifying Party does not elect to undertake and conduct the defense of a Third-Party Claim, the Indemnified Party shall undertake the defense of such Third-Party Claim. Notwithstanding the provisions of this Section 7.5(b), if the Indemnified Party reasonably determines that there may be a material conflict between the positions of the Indemnifying Party and the Indemnified Party in conducting the defense of such Third-Party Claim or that there may be legal defenses

available to such Indemnified Party different from or in addition to those available to the Indemnifying Party, then counsel for the Indemnified Party shall be entitled to conduct the defense to the extent reasonably determined by the Indemnified Party and such counsel to be necessary to protect the interests of the Indemnified Party, at the reasonable expense of the Indemnifying Party.

(c) In the event the Indemnifying Party has assumed the defense of any Third-Party Claim, the Indemnifying Party shall not consent to a settlement of, or the entry of any judgment arising from, any such Third-Party Claim without the Indemnified Party's prior written consent (which consent shall not be unreasonably withheld, conditioned or delayed), unless such settlement or judgment relates solely to monetary damages and provides for a complete release of the Indemnified Party, in which case, no such consent shall be required. The Indemnified Party shall have the right to settle, or consent to the entry of any judgment arising from, any Third-Party Claim for which the Indemnifying Party has not assumed the defense.

(d) Whether or not the Indemnifying Party elects to defend or prosecute any Third-Party Claim, both Parties hereto shall cooperate in the defense or prosecution thereof and shall furnish such records, information and testimony, and attend such conferences, discovery proceedings, hearings, trials and appeals, as may be reasonably requested in connection therewith or as provided in Section 5.4 .

7.6 Exclusive Remedy . Except as otherwise expressly provided in the Agreement, the indemnification provided in this Article VII shall be the sole and exclusive remedy after the Closing Date for damages available to the Parties for breach of any of the terms, conditions, representations, warranties or covenants contained herein or any right, claim or action arising from the transactions contemplated by this Agreement.

7.7 Asset Acquisition Statement . To the extent allowable by Law, amounts payable in respect of the Parties' indemnification obligations shall be treated as an adjustment to the Purchase Price. Buyer and Seller shall cooperate in the preparation of a supplemental Asset Acquisition Statement as required by Section 2.10 and Treasury Reg. § 1.1060-1(e) as a result of any adjustment to the Purchase Price pursuant to the preceding sentence.

7.8 Binding Arbitration . Any Disputed Claim shall be resolved exclusively and solely by binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association (the " ***Rules*** ") and in accordance with the following: (a) there shall be one arbitrator, who shall be mutually agreed upon by the Parties, but if the Parties are unable to mutually agree upon an arbitrator, then such arbitrator shall be appointed by the American Arbitration Association; (b) the arbitration shall take place in New York, New York, and in no other place; (c) the arbitration shall be conducted in accordance with the procedural laws of the U.S. Federal Arbitration Act, to the extent not inconsistent with the Rules or this Section 7.8 ; (d) subject to legal privileges, the arbitrator shall have the power to permit discovery to the full extent allowable under the Federal Rules of Civil Procedure; (e) at the arbitration hearing, each

Party shall be permitted to make written and oral presentations to the arbitrator, to present testimony and written evidence and to examine witnesses; (f) the arbitrator shall have the power to grant temporary or permanent injunctive relief and to order specific performance; (g) the arbitrator shall have the power to order either Party to pay, or to allocate between the Parties, the fees and expenses of the arbitrator and of the American Arbitration Association; and (h) the arbitrator shall issue a written decision explaining the bases for the final ruling, which decision, with respect to Section 2.1(b) , shall be based solely on representations, warranties and covenants explicitly set forth herein and not on any implied warranties or covenants of any kind, and such decision shall be final and binding on the Parties hereto, and not subject to appeal, and enforceable in any court of competent jurisdiction.

ARTICLE VIII
TERMINATION

8.1 Termination of Agreement . Buyer or Seller may terminate this Agreement prior to the Closing, as provided below:

(a) Buyer and Seller may terminate this Agreement by mutual written consent;

(b) Buyer may terminate this Agreement by giving written notice to Seller in the event Seller is in breach of any representation, warranty or covenant contained in this Agreement, and such breach, individually or in combination with any other such breach, (i) would cause the conditions set forth in clauses (a) or (b) of Section 6.2 not to be satisfied and (ii) is not cured to Buyer's reasonable satisfaction upon the earlier of (x) thirty (30) days following delivery by Buyer to Seller of written notice of such breach, or (y) the Termination Date;

(c) Seller may terminate this Agreement by giving written notice to Buyer in the event Buyer is in breach of any representation, warranty or covenant contained in this Agreement, and such breach, individually or in combination with any other such breach, (i) would cause the conditions set forth in clauses (a) or (b) of Section 6.3 not to be satisfied and (ii) is not cured to Seller's reasonable satisfaction upon the earlier of (x) thirty (30) days following delivery by Seller to Buyer of written notice of such breach or (y) the Termination Date;

(d) Buyer or Seller may terminate this Agreement if the Closing shall not have occurred by November 15, 2010 (the "Termination Date"); provided, however, that the right to terminate this Agreement under this Section 8.1(d) shall not be available to any Party whose breach of this Agreement has been a principal cause of or resulted in the failure of the Closing to occur on or before such date; and

(e) Buyer or Seller may terminate this Agreement if a Governmental Entity shall have issued an order, decree or ruling or taken any other action (including the failure to

have taken an action), and such order, decree or ruling would either have or be reasonably expected to have a Material Adverse Effect on the Business or would have the effect of permanently restraining, enjoining or otherwise prohibiting the transactions contemplated by this Agreement, which order, decree, ruling or other action is final and nonappealable.

8.2 Effect of Termination . Any termination of this Agreement pursuant to Section 8.1 above shall be effective immediately upon delivery of a valid written notice of the terminating Party to the other Party. If any Party terminates this Agreement pursuant to Section 8.1 , all obligations of the Parties hereunder shall terminate without any liability of any Party to any other Party (except for obligations in this Section 8.2 and any liability of any Party for willful breaches of this Agreement). Notwithstanding the foregoing, the provisions of Article IX and of the Confidentiality Agreement shall survive the termination of this Agreement. Nothing in this Section 8.2 shall relieve either Party from liability for breach of this Agreement prior to the date of such termination, in which case the terminating Party shall retain its rights against such other Party in respect of such other Party's breach.

ARTICLE IX
MISCELLANEOUS

9.1 Press Releases and Announcements . No Party shall issue any press release or public announcement relating to the subject matter of this Agreement without the prior written approval of the other Party; *provided* , *however* , that any Party may make any public disclosure it reasonably believes is necessary under applicable Law, regulation or stock market rule (in which case the disclosing Party shall use reasonable efforts to advise the other Party and provide it with a copy of the proposed disclosure prior to making such disclosure).

9.2 No Third Party Beneficiaries . This Agreement shall not confer any rights or remedies upon any person other than the Parties and their respective successors and permitted assigns, except as provided in Section 7.2 .

9.3 Entire Agreement . This Agreement (including the documents referred to herein) constitutes the entire agreement among the Parties and supersedes any prior understandings, agreements or representations by or among the Parties, written or oral, with respect to the subject matter hereof, other than the Confidentiality Agreement which shall remain in effect as contemplated by Section 5.6 .

9.4 Succession and Assignment . This Agreement shall be binding upon and inure to the benefit of the Parties named herein and their respective successors and permitted assigns. No Party may assign either this Agreement or any of its rights, interests or obligations hereunder without the prior written approval of the other Party, and any attempt to make any such assignment without such consent shall be null and void; *provided* , *however* , that Buyer may assign this Agreement or any of its rights, interests or obligations, in whole or in part, to one or

more of its wholly-owned subsidiaries, but Buyer shall remain jointly and severally liable with any such assignee(s) with respect to all obligations of Buyer hereunder.

9.5 Counterparts . This Agreement may be executed and delivered (including by facsimile or other electronic transmission) in multiple counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

9.6 Headings . The section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

9.7 Notices . All notices, requests, demands, claims, and other communications hereunder shall be in writing. Any notice, request, demand, claim or other communication hereunder shall be deemed duly delivered (x) three (3) business days after it is sent by registered or certified mail, return receipt requested, postage prepaid, (y) one (1) business day after it is sent for next business day delivery via a reputable nationwide overnight courier service or (y) on the date sent after transmission by facsimile with written confirmation, in each case to the intended recipient as set forth below:

If to Seller :

VIVUS, Inc.
1172 Castro Street
Mountain View, CA 94040
UNITED STATES
Attention: Timothy E. Morris, CFO
Telecopy: (650) 934-5389

Copy to :

Wilson Sonsini Goodrich & Rosati
Professional Corporation
12235 El Camino Real, Suite 200
San Diego, California 92130
UNITED STATES
Attention: Martin J. Waters
Telecopy: (858) 350-2399

If to Buyer :

MEDA AB
Pipers väg 2A
SE-170 09
Solna
SWEDEN
Attention: Anders Lönner, CEO
Telecopy: +46 8 630 1919

Copy to :

Wiggin and Dana LLP
400 Atlantic Street
Stamford, Connecticut 06901
UNITED STATES
Attention: James F. Farrington, Jr.
Telecopy: +1 203-363-7676

Any Party may give any notice, request, demand, claim or other communication hereunder using any other means (including personal delivery, expedited courier, messenger service, telex, ordinary mail or electronic mail), but no such notice, request, demand, claim or other communication shall be deemed to have been duly given unless and until it actually is

received by the party for whom it is intended. Any Party may change the address to which notices, requests, demands, claims, and other communications hereunder are to be delivered by giving the other Party notice in the manner herein set forth.

9.8 Governing Law . This Agreement shall be governed by and construed in accordance with the internal laws of the State of New York without giving effect to any choice or conflict of law provision or rule (whether of the State of New York or any other jurisdiction) that would cause the application of laws of any jurisdictions other than those of the State of New York (other than Sections 5-1401 and 5-1402 of the New York General Obligations Law).

9.9 Exclusive Jurisdiction . With respect to any matter based upon or arising out of this Agreement or the transactions contemplated by this Agreement that seeks injunctive relief or specific performance, each of the Parties (a) irrevocably consents to the jurisdiction and venue of the state and federal courts located in the Southern District of the State of New York, (b) agrees that process may be served upon them in any manner authorized by the laws of the State of New York for such persons, (c) waives the defense of an inconvenient forum and covenants not to assert or plead any objection which they might otherwise have to such jurisdiction, venue and such process, and (d) agrees that a final judgment in such legal proceeding shall be final, binding and enforceable in any court of competent jurisdiction. Each Party agrees not to commence any legal proceedings subject to this Section 9.9 except in such courts.

9.10 Dispute Resolution . Each Party irrevocably agrees and acknowledges that, subject only to Section 9.9 above, any claim, dispute, controversy or other matter based upon, arising out of or relating to this Agreement, the Ancillary Agreements or the transactions contemplated hereby or thereby, including (i) as to the existence, validity, enforceability or interpretation of any such claim, (ii) the performance, breach, waiver or termination of any provision in dispute, (iii) any such claim in tort, or (iv) any such claim raising questions of law, in each case, whether arising before or after termination of this Agreement (each a " ***Disputed Claim*** "), shall be resolved, as between the Parties, exclusively and solely in accordance with the dispute resolution provisions described in Section 7.8 .

9.11 Amendments and Waivers . The Parties may mutually amend any provision of this Agreement. No amendment of any provision of this Agreement shall be valid unless the same shall be in writing and signed by all of the Parties. No waiver of any right or remedy hereunder shall be valid unless the same shall be in writing and signed by the Party giving such waiver. No waiver by any Party with respect to any default, misrepresentation or breach of warranty or covenant hereunder shall be deemed to extend to any prior or subsequent default, misrepresentation or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence. Any delay of exercise of any right under this Agreement shall not constitute a waiver of such right.

9.12 Severability . Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of

the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction. The Parties shall use their commercially reasonable efforts to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the greatest extent possible, the economic, business and other purposes of such void or unenforceable provision.

9.13 Construction .

(a) The language used in this Agreement shall be deemed to be the language chosen by the Parties to express their mutual intent, and no rule of strict construction shall be applied against any Party.

(b) Any reference to any federal, state, local or foreign statute or law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise.

(c) When reference is made in this Agreement to an Article or a Section, such reference shall be to an Article or Section of this Agreement, unless otherwise indicated.

(d) Whenever the context may require, any pronouns used in this Agreement shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural, and vice versa.

(e) Whenever the words “include”, “includes” or “including” are used in this Agreement, they shall be deemed to be followed by the words “without limitation”.

9.14 WAIVER OF JURY TRIAL . EACH OF THE PARTIES HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THE ACTIONS OF THE PARTIES IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT OF THIS AGREEMENT.

9.15 Expenses. Except as expressly provided in this Agreement, the Parties shall bear their respective direct and indirect expenses incurred in connection with the negotiation and preparation of this Agreement and the consummation of the transactions contemplated hereby.

9.16 Specific Performance. The Parties agree that irreparable damage would occur in the event any provision of this Agreement was not performed in accordance with the terms thereof and that, prior to the termination of this Agreement pursuant to its terms, the Parties shall be entitled to specific performance of the terms hereof, in addition to any other remedy at law or equity.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

[Signatures on Following Page]

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

IN WITNESS WHEREOF, the Parties have executed this Asset Purchase Agreement as of the date first above written.

VIVUS, INC.

By: /s/ Timothy E. Morris

Title: SVP, CFO

By: Anders Larnholt

Title: VP Corporate Development

VIVUS REAL ESTATE, LLC

By: /s/ Timothy E. Morris

Title: SVP, CFO of VIVUS, Inc., the sole member of VIVUS Real Estate, LLC

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Exhibit A

Form of Transition Services Agreement

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Exhibit B

Form of Bill of Sale, Assignment and Assumption Agreement

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Exhibit C

Form of Warranty Deed

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Exhibit D

Form of Legal Opinion

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Exhibit 10.27

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

TRANSITION SERVICES AGREEMENT

THIS TRANSITION SERVICES AGREEMENT (this " ***Agreement*** ") is entered into as of November 5, 2010 (the " ***Effective Date*** ") by and between MEDA AB, a corporation organized under the laws of Sweden (" ***MEDA*** "), and VIVUS, Inc., a corporation organized under the laws of Delaware (" ***VIVUS*** "). MEDA and VIVUS may be referred to herein individually as a " ***Party*** " or collectively as the " ***Parties*** ."

RECITALS

WHEREAS , pursuant to an Asset Purchase Agreement, dated as of October 1, 2010, by and among MEDA, VIVUS and Vivus Real Estate, LLC (the " ***APA*** "), MEDA purchased certain assets of VIVUS currently associated with the Business (as defined therein); and

WHEREAS , to facilitate the orderly and effective separation of the Business from VIVUS to MEDA, each Party has agreed to provide to the other Party certain technology transfer and transition services.

NOW, THEREFORE , the Parties agree as follows:

1. DEFINITIONS. The following terms, when used herein with initial capital letters, will have the meanings ascribed to such terms in this Article 1. Capitalized terms not defined herein shall have the meanings set forth in the APA.

1.1 " ***Chargebacks*** " means those chargebacks for Business Products sold by VIVUS prior to the Closing Date that constitute Excluded Liabilities under the APA.

1.2 " ***Facility*** " means the facility located at 735 Airport Road and 745 Airport Road in Lakewood, New Jersey, or such other location that MEDA shall notify VIVUS of in writing.

1.3 " ***MEDA Services*** **"** means the services, functions, and tasks of MEDA required to process and report Chargebacks and Returns (as defined below). If any service, function, or responsibility not specifically described in this Agreement is an inherent or necessary part of the performance of the MEDA Services, it will be deemed included within the scope of the MEDA Services, including, without limitation, those MEDA Services set forth in Schedule A . For the avoidance of doubt, the MEDA Services shall exclude all claims with respect to product liability, personal injury or other third party claims for breach of warranty, in each case arising from the Excluded Liabilities, which such claims shall be subject to Section 7.2 of the APA.

1.4 " ***Returns*** " means those returns of Business Products sold by VIVUS prior to the Closing Date which constitute Excluded Liabilities under the APA.

1.5 " ***VIVUS Services*** " means those services, functions, and tasks of VIVUS required to effectuate a transfer of the Business to MEDA which are set forth in Schedule A . If any

service, function, or responsibility not specifically described in this Agreement is an inherent or necessary part of the performance of the VIVUS Services, it will be deemed included within the scope of the VIVUS Services.

2. SERVICES

2.1 Provision of VIVUS Services.

(a) VIVUS will provide, through the VIVUS Personnel, the VIVUS Services to MEDA for a period of six (6) months after the Effective Date (the " ***VIVUS Service Term*** "), subject to the reasonable availability of such personnel. VIVUS agrees to keep MEDA reasonably informed with respect to its provision of the VIVUS Services and provide MEDA with information pertaining to the VIVUS Services upon MEDA's reasonable request. Except as otherwise expressly provided in this Agreement, VIVUS will be responsible for providing appropriate personnel, and other resources required for performance of, the VIVUS Services.

(b) During the VIVUS Service Term, the Parties acknowledge and agree that VIVUS will have no obligation to provide more than [*******] ([*******]) hours of VIVUS Services per month as requested by MEDA. Notwithstanding the limitation set forth above, it is understood that VIVUS' Service Manager (as defined in Section 6.1(a)) will be required to contribute the majority of such individual's working hours (not to exceed [*******] ([*******]) hours per month) to providing the VIVUS Services during the initial [*******] ([*******]) days of the VIVUS Service Term.

2.2 Provision of MEDA Services. MEDA will provide, through the MEDA Personnel, the MEDA Services during the term of this Agreement, subject to the reasonable availability of such personnel. MEDA agrees to keep VIVUS reasonably informed with respect to its provision of the MEDA Services and provide VIVUS with information pertaining to the MEDA Services upon VIVUS' reasonable request. Except as otherwise expressly provided in this Agreement, MEDA will be responsible for providing appropriate personnel, and other resources required for performance of, the MEDA Services. Notwithstanding the above and subject to Section 4.1(b), any MEDA Services following the VIVUS Service Term shall be conducted using standard quotation and purchase order processes.

2.3 General Standards of Performance. Each Party will provide (and cause its designees to provide) the VIVUS Services or MEDA Services, as applicable, with at least the same level of skill, quality, care, timeliness, and cost-effectiveness as if such services, functions, and tasks were performed for such Party's own purposes. At a minimum, each Party will perform (and cause its designees to perform) the VIVUS Services or MEDA Services, as applicable, in a timely and professional manner and in accordance with industry standards for services of the type performed. Except as set forth in this Agreement, each Party understands and agrees that the other Party shall provide the VIVUS Services or MEDA Services, as applicable, using its existing assets and personnel, and shall not, except as otherwise agreed in writing, be obligated to perform any service (a) that would require such Party to acquire or use

any other assets, equipment or software or employ (whether as employees or contractors) any additional personnel or (b) to the extent provision of such service materially interferes in the aggregate with the operations of such Party's business. Each Party will comply (and cause its Affiliates to comply) with all applicable international, federal, state, and local laws and regulations, and will obtain all applicable permits and licenses, in connection with its obligations under this Agreement.

2.4 Additional Services. If either Party reasonably requests that the other Party perform additional services not included within the scope of the VIVUS Services or MEDA Services, as applicable, then the Parties will negotiate in good faith the inclusion of such services under this Agreement.

3. TRANSFER OF DOCUMENTATION

3.1 Transfer of VIVUS Materials. As soon as practicable after the Effective Date, MEDA shall deliver to a location specified by VIVUS, the information, documents, and other materials included within the Excluded Assets which are located at the Facility, including, without limitation, all such materials pertaining to avanafil and data with respect to the stability thereof (collectively, the " ***VIVUS Materials*** " **)** . For the avoidance of doubt, MEDA's obligation to transfer the VIVUS Materials to VIVUS according to the provisions of this Article 3 shall be at no cost to VIVUS.

3.2 Cooperation and Assistance by MEDA. If, following the completion of the transfer of the VIVUS Materials in accordance with Section 3.1 above, VIVUS identifies, or is otherwise aware of, information, documents or other materials located at the Facility which constitute VIVUS Materials, MEDA shall transfer such VIVUS Materials to VIVUS promptly following VIVUS' written request for such VIVUS Materials or allow VIVUS access to the Facility to retrieve such VIVUS Materials, subject to the confidentiality provisions set forth in Article 5 below. The Parties anticipate that, in such case, VIVUS shall notify MEDA's Service Manager, who will coordinate either (a) the transfer of the requested VIVUS Materials to VIVUS or (b) VIVUS' access to the Facility and any necessary computer systems as set forth in Section 3.3 below, in each case solely to recover such VIVUS Materials.

3.3 Access to Computer Systems . Upon at least one (1) business day prior written notice, VIVUS shall have the right, during the Term, to access the Facility and any computer, software, network, electronic files or electronic data storage systems therein if VIVUS (or its designee) requires such access in order to retrieve any VIVUS Materials, subject to the confidentiality provisions set forth in Article 5 below. VIVUS shall limit (and, as applicable, cause its designees to limit) such access and use the foregoing items solely to retrieve VIVUS Materials and shall not access or attempt to access any computer, software, network, electronic files or electronic data storage system, other than those specifically required to accomplish the foregoing. MEDA agrees to reasonably cooperate (and cause its employees to reasonably cooperate) with VIVUS or its designees with respect to such access.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

3.4 Transfer of MEDA Materials. As soon as practicable after the Effective Date, VIVUS shall deliver to a location specified by MEDA, the information, documents, and other materials included within the Business Assets which are located at VIVUS' facilities or which are otherwise in the possession or control of VIVUS (collectively, the "***MEDA Materials***") . For the avoidance of doubt, MEDA's obligation to transfer the VIVUS Materials to VIVUS according to the provisions of this Article 3 shall be at no cost to VIVUS and shall be in addition to, and shall not otherwise be deemed as limiting or diminishing in any manner, VIVUS' obligations to transfer the Business Assets to MEDA in accordance with the APA.

3.5 Cooperation and Assistance by VIVUS. If, following the completion of the transfer of the MEDA Materials in accordance with the APA and Section 3.4 above, MEDA identifies, or is otherwise aware of, information, documents or other materials located at VIVUS' facilities which constitute MEDA Materials, VIVUS shall transfer such MEDA Materials to MEDA promptly following MEDA's written request for such MEDA Materials or allow MEDA access to VIVUS' facilities to retrieve such MEDA Materials, subject to the confidentiality provisions set forth in Article 5 below. The Parties anticipate that, in such case, MEDA shall notify VIVUS' Service Manager, who will coordinate either (a) the transfer of the requested MEDA Materials to MEDA or (b) MEDA's access to the Facility solely to recover such MEDA Materials.

4. COMPENSATION

4.1 Charges.

(a) VIVUS Services. In consideration for VIVUS' performance of the VIVUS Services following the sixtieth (60th) day of the VIVUS Service Term, MEDA agrees to pay VIVUS the hourly service fees set forth on Schedule B for time allocated by VIVUS Personnel in performing the VIVUS Services, including associated travel time. The hourly service fees set forth on Schedule B shall be fixed until the end of the Term (as defined in Section 8.1). All VIVUS Services performed on or before the sixtieth (60th) day of the VIVUS Service Term shall be at no cost to MEDA.

(b) MEDA Services. In consideration for MEDA's performance of the MEDA Services following the sixtieth (60th) day of the VIVUS Service Term, VIVUS agrees to pay MEDA (i) for amounts incurred (including with respect to payment adjustments) or paid by MEDA for third party processing of Chargebacks and Returns and (ii) the hourly service fees set forth on Schedule B for time allocated by MEDA Personnel in performing the MEDA Services, including associated travel time. The hourly service fees set forth on Schedule B shall be fixed until the end of the Term. All MEDA Services performed on or before the sixtieth (60th) day of the VIVUS Service Term shall be at no cost to VIVUS.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

4.2 Invoicing and Payment to VIVUS. VIVUS will invoice MEDA monthly at the end of each month for the amount due by MEDA under this Agreement for that month. Each such invoice submitted by VIVUS will include a statement setting forth time allocated by the VIVUS Personnel in performing the VIVUS Services during such month and the corresponding amounts due to VIVUS with respect thereto consistent with the fee schedule set forth on Schedule B . Payments for each invoice will be due within forty-five (45) days after the paying Party's receipt of the invoice.

4.3 Invoicing and Payment to MEDA. Within fifteen (15) days following MEDA's payment to third parties or incurrence of amounts with respect to Chargebacks or Returns, MEDA shall submit an invoice therefor to VIVUS, along with all reasonable and necessary documentation supporting such payment or incurrence of charges. With respect to MEDA Services, MEDA will invoice VIVUS monthly at the end of each month for the amount due by VIVUS under this Agreement for that month. Each such invoice submitted by MEDA will include a statement setting forth time allocated by the MEDA Personnel in performing the MEDA Services during such month and the corresponding amounts due to MEDA with respect thereto consistent with the fee schedule set forth on Schedule B . Payments for each invoice submitted pursuant to this Section 4.3 will be due within forty-five (45) days after VIVUS' receipt of the invoice.

5. CONFIDENTIAL INFORMATION

5.1 MEDA Confidential Information. MEDA may from time to time communicate to VIVUS, or VIVUS may otherwise retain or gain access to, certain confidential business or technical information with respect to the Business, MEDA's operations, business plans or intellectual property after the Effective Date (the " ***MEDA Confidential Information*** "). VIVUS shall not disclose, or permit the disclosure of, any MEDA Confidential Information to any third party without the express prior written consent of MEDA, except as otherwise provided in this Article 5. VIVUS shall use the MEDA Confidential Information only for purposes of performing the VIVUS Services. Without limiting the generality of the foregoing, VIVUS shall limit the use and disclosure of the MEDA Confidential Information to those of its employees who need such information to perform the VIVUS Services, and VIVUS shall ensure that each employee who has access to the MEDA Confidential Information complies with the obligations set forth above.

5.2 VIVUS Confidential Information. VIVUS may from time to time communicate to MEDA, or MEDA may otherwise gain access to, certain confidential business or technical information with respect to VIVUS' operations, business plans or intellectual property after the Effective Date (the " ***VIVUS Confidential Information*** "). MEDA shall not disclose, or permit the disclosure of, any VIVUS Confidential Information to any third party without the express prior written consent of VIVUS, except as otherwise provided in this Article 5. MEDA shall use the VIVUS Confidential Information only for purposes of performing the MEDA Services. Without limiting the generality of the foregoing, MEDA shall limit the use and disclosure of the

VIVUS Confidential Information to those of its employees who need such information for the purposes of this Agreement, and MEDA shall ensure that each employee who has access to the VIVUS Confidential Information complies with the obligations set forth above.

5.3 Confidentiality Exceptions. Notwithstanding the foregoing, the VIVUS Confidential Information and the MEDA Confidential Information shall not include information which the receiving Party can establish (a) to have been publicly known prior to disclosure of such information by the disclosing Party to the receiving Party, (b) to have become publicly known, without fault on the part of the receiving Party, (c) to already be in the possession of the receiving Party, or to come into the possession of the receiving Party by a third party, without restriction on its disclosure or use or (d) was developed independent of the Confidential Information of the disclosing Party; provided, however, that nothing in this Agreement shall be deemed as limiting or diminishing in any manner the Parties' confidentiality obligations under the APA.

5.4 Permitted Disclosures. The confidentiality obligations contained in this Article 5 shall not apply to the extent that the receiving Party is required to disclose information by law, order or regulation of a governmental agency or a court of competent jurisdiction, provided the receiving Party shall provide written notice thereof to the disclosing Party and sufficient opportunity to object to any such disclosure or to request confidential treatment thereof.

6. PERSONNEL

6.1 Services Managers.

(a) For VIVUS. VIVUS will designate a "Services Manager" as identified on Schedule C hereto, for its performance of the VIVUS Services. Such Services Manager will devote a reasonable amount of time and effort to managing the VIVUS Services, will serve as the initial point of contact to MEDA for matters relating to the Services, and will have day-to-day authority for ensuring performance of the Services in accordance with the terms of this Agreement. VIVUS may replace the Services Manager by providing prior written notice to MEDA.

(b) For MEDA. MEDA will designate a "Services Manager" as identified on Schedule C hereto, for its performance of the MEDA Services. Such Services Manager will devote a reasonable amount of time and effort to managing the MEDA Services, will serve as the initial point of contact to VIVUS for matters relating to the MEDA Services, and will have day-to-day authority for ensuring performance of the MEDA Services in accordance with the terms of this Agreement. MEDA may replace the Services Manager by providing prior written notice to VIVUS.

6.2 Access to Personnel. Each Party agrees to provide reasonable access to such Party's personnel set forth in Schedule B (the "***Personnel***") for performance of the VIVUS Services and MEDA Services in accordance with this Agreement.

6.3 Payments to Personnel . Each Party shall select, employ, pay, supervise and direct such Party's Personnel. Without limiting the generality of the foregoing, each Party shall be solely responsible for the payment of all direct and indirect compensation (including fringe benefits), worker's compensation insurance, employment taxes and all other liabilities relating to such Party's Personnel.

7. INDEMNIFICATION

7.1 Indemnification of VIVUS. Subject to Section 7.3 below, MEDA shall indemnify, defend and hold harmless VIVUS from and against any and all liabilities, damages, settlements, claims, actions, suits, penalties, fines, costs or expenses (including, without limitation, reasonable attorneys' fees and other expenses of litigation) incurred by VIVUS as a result of a claim by a third party brought against VIVUS arising or resulting from (i) MEDA's material breach of this Agreement or (ii) the gross negligence or willful misconduct of MEDA hereunder; except in each case to the extent that VIVUS is obligated to indemnify, defend and hold MEDA harmless for such claims under Section 7.2 below.

7.2 Indemnification of MEDA. Subject to Section 7.3 below, VIVUS shall indemnify, defend and hold harmless MEDA from and against any and all liabilities, damages, settlements, claims, actions, suits, penalties, fines, costs or expenses (including, without limitation, reasonable attorneys' fees and other expenses of litigation) incurred by MEDA as a result of a claim by a third party brought against MEDA arising or resulting from (i) VIVUS' material breach of this Agreement or (ii) the gross negligence or willful misconduct of VIVUS hereunder; except in each case to the extent that MEDA is obligated to indemnify, defend and hold VIVUS harmless for such claims under Section 7.1 above.

7.3 Procedure. A Party (the "***Indemnitee***") that intends to claim indemnification under this Article 7 shall: (i) promptly notify the indemnifying Party (the "***Indemnitor***") in writing of any claim, action, suit, or other proceeding brought by third parties in respect of which the Indemnitee intends to claim such indemnification hereunder; (ii) provide the Indemnitor sole control of the defense and/or settlement thereof, and (iii) provide the Indemnitor, at the Indemnitor's request and expense, with reasonable assistance and full information with respect thereto. Indemnitor shall not settle any claim, suit or proceeding subject to this Article 7 or otherwise consent to an adverse judgment in such claim, suit or proceeding if the same materially diminishes the rights or interests of the Indemnitee without the express written consent of the Indemnitee. Notwithstanding the foregoing, the indemnity agreement in this Article 7 shall not apply to amounts paid in settlement of any loss, claim, damage, liability or action if such settlement is effected without the consent of the Indemnitor, to the extent such consent is not withheld unreasonably or delayed. Notwithstanding anything herein to the contrary, the

Indemntee shall have the right to participate in any such claim, suit or proceeding with counsel of its choosing at its own expense.

7.4 Limitation of Liability. NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY SPECIAL, CONSEQUENTIAL, EXEMPLARY OR INCIDENTAL DAMAGES (INCLUDING LOST OR ANTICIPATED REVENUES OR PROFITS RELATING TO THE SAME), ARISING FROM ANY CLAIM RELATING TO THIS AGREEMENT, WHETHER SUCH CLAIM IS BASED ON CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EVEN IF AN AUTHORIZED REPRESENTATIVE OF SUCH PARTY IS ADVISED OF THE POSSIBILITY OR LIKELIHOOD OF SAME. IN NO EVENT SHALL THE AGGREGATE LIABILITY OF EITHER PARTY EXCEED THE TOTAL AMOUNT ACTUALLY PAID TO SUCH PARTY BY OR ON BEHALF OF THE OTHER PARTY IN CONNECTION WITH THE SERVICES PROVIDED HEREUNDER.

8. TERM AND TERMINATION

8.1 Term. The term of this Agreement will commence on the Effective Date and will continue for a period of two (2) years thereafter (the " ***Term*** ").

8.2 Termination for Cause . Each Party may terminate this Agreement immediately, upon written notice specifying in reasonable detail the material breach and the required cure, if the other Party materially breaches any term of this Agreement and fails to cure such breach within fifteen (15) days after receipt by the breaching Party of written notice from the non-breaching Party describing such breach; *provided, however* , that the Parties agree that a failure to pay an amount owed pursuant to Section 4 shall not qualify as a material breach if the disputing Party pays the undisputed amounts owed in a timely fashion.

8.3 Survival. Termination of this Agreement shall not relieve the Parties of any obligation accruing prior to such termination, and the provisions of Sections 2.3, 3.1, 3.3, 4, 5, 7 and 9 shall survive any such termination.

9. GENERAL

9.1 Relationship Between the Parties. The relationship between the Parties established under this Agreement is that of independent contractors and no Party shall be deemed an employee, agent, partner, or joint venturer of or with the other. Each Party will be solely responsible for any employment-related taxes, insurance premiums or other employment benefits respecting its personnel's performance of services under this Agreement. Each Party agrees to grant to the other Party's personnel reasonable access to sites, systems and information as necessary for such Party to perform its obligations hereunder.

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9.2 Subcontracting. Each Party may engage a subcontractor to perform all or any portion of its duties under this Agreement provided that any such subcontractor agrees in writing to be bound by confidentiality obligations similar to those applicable herein, and provided further that the performing Party remains responsible for the performance of such subcontractor.

9.3 Entire Agreement; Amendment. This Agreement, together with the APA, constitute the entire agreement of the Parties with respect to the subject matter hereof and thereof and supersede any and all prior understandings, written or oral, between the Parties with regard to the subject matter hereof and thereof. In the event of a conflict between this Agreement and any of the schedules attached hereto, the terms set forth on the schedule shall govern. This Agreement may be amended, modified or waived only by an instrument in writing signed by an authorized representative of each of the Parties hereto.

9.4 Further Assurances. Each Party agrees to take such actions and execute such documents as are reasonably requested by the other Party (including providing executed documents in such recordable form as is deemed required or necessary by the other Party) to effect the purposes of this Agreement.

9.5 Notices. Any notice or other communication required or permitted to be delivered to any Party under this Agreement must be in writing and will be deemed properly delivered, given and received (a) when delivered by hand, or (b) two (2) business days after sent by registered mail, by courier or express delivery service or by facsimile, in each case to the address or facsimile telephone number set forth beneath the name of such Party below (or to such other address or facsimile telephone number as such Party will have specified in a written notice given to the other Parties hereto):

if to VIVUS:

VIVUS, Inc.
1172 Castro Street
Mountain View, CA 94040
U.S.A.
Attention: Guy Marsh
Facsimile: (650) 934-5389

with a copy to :

Wilson Sonsini Goodrich & Rosati, Professional Corporation
12235 El Camino Real, Suite 200
San Diego, California 92130
UNITED STATES
Attention: Martin J. Waters
Telecopy: (858) 350-2399

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

if to MEDA:

MEDA AB
Pipers väg 2A
SE-170 09
Solna
SWEDEN
Attention: Anders Lönner, CEO
Telecopy: +46 8 630 1919

with a copy to :

Wiggin and Dana LLP
400 Atlantic Street
Stamford, Connecticut 06901
UNITED STATES
Attention: James F. Farrington, Jr.
Telecopy: +1 203-363-7676

9.6 Disclaimer . THE VIVUS SERVICES AND THE MEDA SERVICES, AND ANY OTHER SERVICES, FACILITIES OR EQUIPMENT PROVIDED UNDER THIS AGREEMENT, ARE PROVIDED "AS IS." EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, NEITHER PARTY MAKES (AND EACH PARTY EXPRESSLY DISCLAIMS) ANY REPRESENTATIONS OR WARRANTIES UNDER THIS AGREEMENT WITH RESPECT TO THE SERVICES PROVIDED HEREUNDER.

9.7 Force Majeure. Each Party will be excused for any failure or delay in performing any of its obligations under this Agreement, other than the obligations to make payments, if such failure or delay is caused by any act of God or the public enemy, any accident, explosion, fire, storm, earthquake, flood, or any other circumstance or event beyond the reasonable control of such Party.

9.8 Headings. Paragraph and Section headings are inserted for convenience of reference only and do not form a part of this Agreement.

9.9 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, regardless of the laws that might otherwise govern under applicable principles of conflicts of laws thereof.

9.10 Jurisdiction and Venue. Each of the Parties hereto irrevocably consents to the exclusive jurisdiction and venue of any court within located in the Southern District of the State

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of New York, in connection with any matter based upon or arising out of this Agreement or the matters contemplated herein.

9.11 Binding Effect; Assignment. This Agreement shall not be assignable by a Party without the prior written permission of the other Party except that a Party may assign this Agreement without consent as part of a change of control, corporate reorganization, consolidation, merger or sale or all or substantially all of its assets. Any permitted assignee shall agree to perform the obligations of the assigning Party, and this Agreement shall inure to the benefit of and be binding upon any permitted assignee. Subject to the foregoing, this Agreement shall inure to the benefit of and be binding upon the Parties hereto and their respective legal representatives and successors in interest. Nothing in this Agreement, express or implied, is intended to confer upon any other Person any rights or remedies of any nature whatsoever under or by reason of this Agreement.

9.12 Waiver. Waiver of any term or condition of this Agreement by any Party hereto shall be effective if in writing and shall not be construed as a waiver of any subsequent breach or failure of the same term or condition or any other terms or conditions of this Agreement. No waiver shall be effective unless it is in writing signed by an authorized representative of the waiving Party.

9.13 Severability. In the event that any provision of this Agreement or the application thereof, becomes or is declared by a court of competent jurisdiction to be illegal, void or unenforceable, the remainder of this Agreement will continue in full force and effect and the application of such provision to other persons or circumstances will be interpreted so as reasonably to effect the intent of the Parties hereto. The Parties further agree to replace such void or unenforceable provision of this Agreement with a valid and enforceable provision that will achieve, to the extent possible, the economic, business and other purposes of such void or unenforceable provision.

9.14 No Third Party Beneficiaries . Nothing in this Agreement shall confer any rights or liabilities upon any third party, except as expressly provided hereunder.

9.15 Specific Performance. The Parties agree that irreparable damage would occur in the event any provision of this Agreement was not performed in accordance with the terms hereof and that the Parties shall be entitled to specific performance of the terms hereof, in addition to any other remedy at law or equity.

9.16 Counterparts . This Agreement may be executed and delivered (including by facsimile or other electronic transmission) in one or more counterparts, all of which shall be considered one and the same agreement and shall become effective when one or more counterparts have been signed by each of the Parties and delivered to the other Party, it being understood that all Parties need not sign the same counterpart.

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[*Remainder of page intentionally left blank. Signature page follows.*]

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The parties to this Agreement have caused this Agreement to be executed and delivered as of the Effective Date.

MEDA AB		**VIVUS, INC.**	
By:	/s/ Anders Larnholt	By:	/s/ Timothy E. Morris
Name:	Anders Larnholt	Name:	Timothy E. Morris
Title:	VP Corporate Dev.	Title:	SVP Finance, Chief Financial Officer

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Schedule A

Services

Manufacturing Support Services:

VIVUS will provide support for the manufacture and supply of MUSE™ as reasonably requested by MEDA, including, but not limited to, the transfer of all knowledge and documents from VIVUS' Mountain View, California office to the Facility or, if requested by MEDA in writing, to MEDA's Somerset, New Jersey facility.

Regulatory Services:

VIVUS will provide support for the regulatory processes related to MUSE™ as reasonably requested by MEDA, including, but not limited to: (a) the assembly of all the registration documentation and the transfer of the NDA to MEDA (which such transfer shall be done at no cost or expense to MEDA); and (b) causing [***] (in [***] capacity as consultant under the Master Services Agreement dated as of October 3, 2007 between VIVUS and Regulatory Professional, Inc., as amended and supplemented from time to time) to be available to provide regulatory consulting services to MEDA for a period of time not to exceed [***] ([***]) days following the Closing Date.

Manager and Executive Services:

VIVUS shall make the VIVUS Service Manager available for [***] ([***]) days after the Effective Date to ensure the smooth integration of the operations and that MEDA receives the support required in connection therewith. MEDA shall make the MEDA Service Manager available for [***] ([***]) days after the Effective Date to ensure the smooth integration of the operations and that VIVUS receives the support required in connection therewith.

VIVUS shall use reasonable commercial efforts to have [***] available to assist MEDA with integration and staffing issues for the initial [***] ([***]) days of the VIVUS Service Term.

Sales and Marketing Support:

VIVUS will use best efforts to transfer the marketing knowledge held by VIVUS to MEDA and to facilitate the processing of new marketing materials through MEDA's PCR system and deployed to MEDA's sales representatives. The VIVUS Service Manager shall be made available at either the Facility or MEDA's Somerset, New Jersey facility upon the reasonable request of MEDA. In addition, the VIVUS Manager may be required to attend field visits to physicians upon the reasonable request of MEDA.

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Telephone System:

VIVUS will make available to MEDA, for a period of thirty (30) days after the Effective Date, all hardware and software related to VIVUS' corporate-wide telephone system currently in place at the Premises, free of charge to MEDA (other than actual charges incurred by VIVUS for calls made by or on behalf of MEDA during such period).

HR Services:

MEDA shall cause certain of the MEDA Personnel who are Transferred Employees to provide the following human resources ("***HR***") services:

(a) assist VIVUS with its termination of all former VIVUS employees from VIVUS benefits plans within thirty (30) days following the Closing;

(b) assist VIVUS with its handling of all aspects of terminated employees' COBRA benefits within thirty (30) days following the Closing;

(c) transfer all HR records relating to non-Transferred Employees to VIVUS' Mountain View, California offices within thirty (30) days following the Closing;

(d) assist VIVUS with the transition of HR functions to VIVUS' Mountain View, California offices; and

(e) assist VIVUS with its compliance with internal controls mandated by The Sarbanes-Oxley Act of 2002 ("***SOX***") for a period of thirty (30) days following the Closing.

Finance and Accounting Services:

MEDA shall cause certain of the MEDA Personnel who are Transferred Employees to provide the following finance and accounting services, including, without limitation, [*******] (to the extent still employed by MEDA):

(a) assist VIVUS with its closing of the VIVUS books;

(b) finalize the books for MUSE within ten (10) business days after the Closing;

(c) assist VIVUS with its preparation of reconciliations and account analyses;

(d) assist VIVUS with its maintenance of all SOX controls relating to finalizing MUSE books;

(e) assist VIVUS with its compliance with internal controls mandated by SOX for a period of thirty (30) days following the Closing;

(f) assist VIVUS with its quarterly auditors' review (October/November 2010);

(g) assist VIVUS with its year-end audit (January/February 2011);

(h) process accounts payable invoices received after the Closing and forward to VIVUS for payment for the thirty (30) day period after the Closing;

(i) calculate final royalty payments incurred for sales occurring prior to the Closing;

(j) provide monthly reports on returns data by lot # and by year from SPS/Cord until the end of the return window;

(k) assist with the transfer of (i) the originals of all historical accounting records, customer files and invoices and vendor files relating to (A) pre-Closing periods, (B) the Excluded Assets, (C) the Excluded Liabilities and (D) any non-Business Assets, including, without limitation, VIVUS' general corporate accounting materials, as soon as practicable following the Closing, but no later than ninety (90) days following the Closing, and (ii) if requested by VIVUS, copies of any pre-Closing accounting materials relating to the Business Assets not covered by item (A) above, to VIVUS' Mountain View, California offices following the Closing; provided, however, that VIVUS shall, upon request by MEDA, assist MEDA in making copies of any materials that relate to pre-Closing periods and the Business Assets;

(l) assist VIVUS with its preparation of proforma financials for VIVUS' SEC quarterly and year-end reports within thirty (30) days following the Closing; and

(m) assist VIVUS with its preparation of VIVUS' tax returns for the 2009 and 2010 tax years, as well as prior tax years to the extent an audit or assessment requires the same, during calendar years 2010 and 2011.

PAYROLL:

MEDA shall cause certain of the MEDA Personnel who are Transferred Employees to provide the following payroll services:

(a) assist VIVUS with its payroll processing for VIVUS employees for a period of ninety (90) days following the Closing;

(b) assist VIVUS with its ESPP refund processing for VIVUS employees for a period of thirty (30) days following the Closing;

(c) assist VIVUS with the transition of payroll functions to VIVUS' Mountain View, California offices on or before the end of calendar year 2010; and

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(d) assist VIVUS with the transfer of payroll records relating to non-Transferred Employees to VIVUS' Mountain View, California offices within thirty (30) days of ceasing to process payroll for VIVUS' employees.

INFORMATION TECHNOLOGY:

MEDA shall cause certain of the MEDA Personnel who are Transferred Employees to provide the following information technology ("***IT***") services:

(a) assist VIVUS with its transfer of Fourth Shift historical data, either virtually or physically, to one or more new servers in VIVUS' Mountain View, California offices; following such transfer and following the Closing, assist VIVUS in the destruction of any and all data on the old servers, to the extent that such data does not relate to the Business Product;

(b) provide VIVUS reasonable access to Pillar historical data;

(c) assist VIVUS with its transition of the IT SOX controls to VIVUS' Mountain View, California offices; and

(d) transfer the Finance Folders located on the servers at the Facility to a server designated by VIVUS to the extent such folders relate exclusively to the Excluded Assets (or transfer copies thereof to the extent they relate to the Excluded Assets and the Business Assets).

Vivus shall cause certain of the Vivus Personnel, including, without limitation, [*******] (to the extent still employed by Vivus), to provide IT services as reasonably requested by MEDA and for a period of time not to exceed sixty (60) days following the Closing Date.

GOVERNMENT PRICE REPORTING

From and after the Closing Date, MEDA will (a) calculate and/or collect government pricing data relating to the Business Products as required by the reporting requirements of applicable U.S. Governmental Entities, including under applicable rules and regulations relating to the Medicaid Drug Rebate Program (42 U.S.C. § 1396r-8 and implementing regulations) and the Medicare program (42 U.S.C. § 1395w-3a and implementing regulations), and (b) timely certify and report such data to the applicable U.S. Governmental Entities, including the Center for Medicare and Medicaid Services of the U.S. Department of Health and Human Services. Should such U.S. Governmental Entities require the inclusion of pricing data from sales of Business Products by VIVUS with respect to a period ending on or prior to Closing, VIVUS will promptly provide MEDA with such data, together with all reasonable support and a certification of accuracy in form and substance reasonably satisfactory to MEDA, and MEDA will continue to provide such reports for as long as required by applicable Law. For the avoidance of doubt, nothing contained herein shall require MEDA to calculate, collect, certify or report any

information related to any products bearing VIVUS' National Drug Code or labeler code other than the Business Products.

LABORATORY & STABILITY SERVICES:

MEDA shall cause certain of the MEDA Personnel who are Transferred Employees to provide the following laboratory and stability testing services, including, without limitation, [*******], [*******] and [*******] (to the extent still employed by MEDA):

(a) Stability Program Management and Testing of Avanafil Clinical and Registration Batches: (i) MEDA shall have drafted protocols for storage and test schedule, test product at defined time-points, have trained QC analysts perform testing, and report results on CofA's and summary stability data tables; (ii) laboratory and stability testing services shall be provided by MEDA until [*******] unless VIVUS desires to transfer such services to a third party before such date; (iii) MEDA shall complete a GMP audit of the stability program as part of the completion of the transition of the services to a third party designated by VIVUS; (iv) all stability program documentation and electronic files will need to be inventoried and transferred to VIVUS' Mountain View, California offices or to a third party designated by VIVUS; and (v) the stability sample inventory will need to be transferred to a third party designated by VIVUS as part of transition closeout.

(b) Avanafil Clinical Supply Returns: (i) these clinical trial returns shall include receipt, inspection, reconciliation of tablet counts, documentation, and product disposal; (ii) these services will be transferred within sixty (60) days following VIVUS' designation of a third party designee; and (iii) MEDA shall complete a GMP audit of all clinical returns and transfer of all documentation to VIVUS' Mountain View, California offices on or before the completion of the transfer to VIVUS' third party designee.

(c) A protocol for testing transfer and qualification will be required and acceptance criteria must be met prior to completion and transfer of the stability program to the third party designated by VIVUS.

Pharmacovigilance:

VIVUS shall continue to maintain the adverse event reporting processes, files and information on the ClinTrace database for a period of sixty (60) days following the Closing and thereafter assist with the transfer of the processes and files to the Facility. To this end, during the period of these services MEDA shall allow VIVUS reasonable access to the ClinTrace database, which currently resides on a server at the Facility, subject to the confidentiality provisions set forth in Article 5 of this Agreement.

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Medical:

VIVUS shall assist in the transfer of all scripts, standard operating procedures, standard questions and answers and reprint materials currently used by VIVUS and VIVUS' third party contractors to interact with patients and the medical professionals treating patients.

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Schedule B

Personnel and Fees for Services

VIVUS Personnel	Hourly Rate*
[***]	**[***]**
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	Rate as provided in MSA between VIVUS and Regulatory Professional, Inc.

***** Rate applies to travel time.

MEDA Personnel	Hourly Rate*
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]
[***]	[***]

***** Rate applies to travel time.

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Schedule C

Service Managers

VIVUS Service Manager: [*******]

MEDA Service Manager: [***]

[***] INDICATES MATERIAL THAT WAS OMITTED AND FOR WHICH CONFIDENTIAL TREATMENT WAS REQUESTED. ALL SUCH OMITTED MATERIAL WAS FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION PURSUANT TO RULE 24b-2 PROMULGATED UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED.

Exhibit 10.34

LEASE

SFERS REAL ESTATE CORP. U,
a Delaware corporation,

Landlord,

and

VIVUS, INC.,
a Delaware corporation,

Tenant

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(continued)

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MULTI-TENANT INDUSTRIAL NET LEASE

REFERENCE PAGES

BUILDING:	Mountain View Corporate Center 351 East Evelyn Avenue Mountain View, California 94041 The Building is part of a multi-building project currently containing approximately 267,315 rentable square feet and commonly known as Mountain View Corporate Center ("Project"), as depicted on the Site Plan attached hereto as Exhibit A-1 .
LANDLORD:	**SFERS REAL ESTATE CORP. U,** **a Delaware corporation**
LANDLORD'S ADDRESS:	SFERS Real Estate Corp. U c/o RREEF Real Estate 101 California Street, 26th Floor San Francisco, California 94111 Attn: Asset Manager
WIRE INSTRUCTIONS AND/OR ADDRESS FOR RENT PAYMENT:	SFERS Real Estate Corp. U 08.N25001 - MOUNTAIN VIEW CORP. CTR. P.O. Box 9047 Addison, Texas 75001-9047
LEASE REFERENCE DATE:	December 11, 2012
TENANT:	**VIVUS, INC.,** **a Delaware corporation**
TENANT'S NOTICE ADDRESS:	
(a) As of beginning of Term:	The Premises Attn: General Counsel
(b) Prior to beginning of Term (if different):	1172 Castro Street Mountain View, California 94040 Attn: General Counsel
PREMISES ADDRESS:	351 East Evelyn Avenue Mountain View, California 94041
PREMISES RENTABLE AREA:	Approximately **45,240** sq. ft. (for outline of Premises see Exhibit A)
USE:	General office use, administration and research and development related to the pharmaceutical drug industry and other legal uses related thereto.
COMMENCEMENT DATE:	The date that is the later of (i) May 1, 2013, and (ii) four (4) months following delivery of the Premises to Tenant; the Commencement Date is estimated to be May 1, 2013
SCHEDULED DELIVERY DATE:	January 1, 2013

LW LV
Initials

TERM OF LEASE: Approximately eighty-four (84) months beginning on the Commencement Date and ending on the Termination Date. The period from the Commencement Date to the last day of the same month is the "Commencement Month."

TERMINATION DATE: The last day of the eighty-fourth (84th) full calendar month after (if the Commencement Month is not a full calendar month), or from and including (if the Commencement Month is a full calendar month), the Commencement Month, which Termination Date is estimated to be April 30, 2020.

ANNUAL RENT and MONTHLY INSTALLMENT OF RENT (Article 3):*

Months		Rentable Square	Annual Rent		Monthly Installment
from	through	Footage	Per Square Foot	Annual Rent	of Rent
1	12	45,240	$ 31.20	$ 1,411,488.00	$ 117,624.00
13	24	45,240	$ 32.14	$ 1,454,013.60	$ 121,167.80
25	36	45,240	$ 33.10	$ 1,497,444.00	$ 124,787.00
37	48	45,240	$ 34.09	$ 1,542,231.60	$ 128,519.30
49	60	45,240	$ 35.11	$ 1,588,376.40	$ 132,364.70
61	72	45,240	$ 36.16	$ 1,635,878.40	$ 136,323.20
73	84	45,240	$ 37.24	$ 1,684,737.60	$ 140,394.80

* Monthly Installment of Rent for the full calendar months seven (7) through twelve (12) of the initial Term is subject to abatement pursuant to Section 3.3 of the Lease.

INITIAL ESTIMATED MONTHLY INSTALLMENT OF RENT ADJUSTMENTS (Article 4): $21,715.20

TENANT'S PROPORTIONATE SHARE: 100% of the Building and 16.92% of the Project

SECURITY DEPOSIT: $250,000.00 (In cash or Letter of Credit pursuant to Article 39 of this Lease).

ASSIGNMENT/SUBLETTING FEE: $1,500.00

REAL ESTATE BROKER: Cornish & Carey Commercial Newmark Knight Frank, representing Landlord, and Jones Lang LaSalle, representing Tenant.

TENANT'S NAICS CODE: 325412

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Initials

AMORTIZATION RATE: N/A

The Reference Pages information is incorporated into and made a part of the Lease. In the event of any conflict between any Reference Pages information and the Lease, the Lease shall control. The Lease includes Exhibits A through I, all of which are made a part of the Lease.

IN WITNESS WHEREOF, Landlord and Tenant have entered into the Lease as of the Lease Reference Date set forth above.

LANDLORD:	**TENANT:**
SFERS REAL ESTATE CORP. U, **a Delaware corporation**	**VIVUS, INC.,** **a Delaware corporation**
By: /s/ Lisa Vogel	By: /s/ Leland Wilson
Name: Lisa Vogel	Name: Leland Wilson
Title: Vice President, Asset Manager	Title: Chief Executive Officer
Dated: 12/13/12	Dated: 12/12/12

LEASE

By this Lease Landlord leases to Tenant and Tenant leases from Landlord the Premises in the Building as set forth and described on the Reference Pages. The Premises are depicted on the floor plan attached hereto as Exhibit A , and the Building is depicted on the site plan attached hereto as Exhibit A-1 . The Reference Pages, including all terms defined thereon, are incorporated as part of this Lease.

1. **USE AND RESTRICTIONS ON USE.**

1.1 The Premises are to be used solely for the purposes set forth on the Reference Pages and for no other purpose without Landlord's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed. Tenant shall not do or permit anything to be done in or about the Premises which will in any way obstruct or interfere with the rights of other tenants or occupants of the Building or injure or disturb them, or allow the Premises to be used for any improper, unlawful, or reasonably objectionable purpose, or commit any waste. Tenant shall not do, permit or allow in, on, or about the Premises the sale of any alcoholic liquor without the written consent of Landlord first obtained. Tenant shall comply with all federal, state and city laws, codes, ordinances, rules and regulations (collectively, "Regulations") applicable to the use of the Premises and its occupancy and shall promptly comply with all governmental orders and directions for the correction, prevention and abatement of any violations in the Building or appurtenant land, caused or permitted by, or resulting from the specific use by, Tenant, or in or upon, or in connection with, the Premises, all at Tenant's sole expense. Tenant shall, at its own expense, procure any and all licenses and permits required for the conduct of Tenant's Permitted Use by applicable Regulations, including without limitation, with respect to any machinery or equipment that emits vibrations or noise. Any noise or vibrations resulting from the Permitted Use shall not violate Regulations and shall not unreasonably impact the operations of the Project or interfere with Landlord's operations therein. In the event an unreasonable amount of noise or vibration emanates from the Building, Tenant shall immediately cease all such noise or vibration creating activities. Further, Tenant agrees to install at Tenant's sole cost and expense any such sound-proofing, measures on floors, walls and ceilings of the Building as is necessary to abate noise or vibration emanating from within the Premises. Notwithstanding the foregoing, Landlord, at its sole cost and expense (except to the extent properly included in Expenses) shall be responsible for correcting any violations of applicable Regulations (including, without limitation, Title III of the Americans with Disabilities Act) in effect (and as interpreted and enforced) as of the Commencement Date with respect to the common areas of the Project, including the parking areas. Landlord shall have the right to contest any alleged violations of Regulation in good faith, including, without limitation, the right to apply for and obtain a waiver or deferment of compliance, the right to assert any and all defenses allowed by Regulation and the right to appeal any decisions, judgments or rulings to the fullest extent permitted by Regulation. Landlord, after the exhaustion of any and all rights to appeal or contest, will make all repairs, additions, alterations or improvements necessary to comply with the terms of any final order or judgment. Notwithstanding the foregoing, Tenant, not Landlord, shall be responsible for the correction of any violations of Regulations that arise out of or in connection with: (a) the specific nature of Tenant's use of or business in the Premises (other than general office use), (b) the acts or omissions of Tenant, its agents, employees or contractors, and (c) any repairs, alterations, additions or improvements performed by or on behalf of Tenant. Nothing in this Lease shall be deemed or construed to require Tenant to perform any alterations, additions or improvements (and/or incur any cost or expense in connection therewith, except to the extent reimbursable to Landlord as an Expense pursuant to Article 4 below) which are necessary to comply with Regulations which require structural alterations, capital improvements or the installation of new or additional mechanical, electrical, plumbing or fire/life safety systems not arising from or otherwise triggered by the particular use of Tenant (other than general office use) or any alterations, additions or improvements performed by or on behalf of Tenant. Tenant shall not do or permit anything to be done on or about the Premises or bring or keep anything into the Premises which will in any way increase the rate of (unless Tenant agrees to pay for such increase), invalidate or prevent the procuring of any insurance protecting against loss or damage to the Building or any of its contents by fire or other casualty or against liability for damage to property or injury to persons in or about the Building or any part thereof.

1.2 Subject to the terms of Section 44 below, Tenant shall not, and shall not direct or permit any of its agents, contractors, employees, licensees or invitees (collectively, the "Tenant Entities") to at any time handle, use, manufacture, store or dispose of (collectively, "Handle") in or about the Premises or the Building any (collectively, "Hazardous Materials") flammables, explosives, radioactive materials, hazardous wastes or materials, toxic wastes or materials, or other similar substances, petroleum products or derivatives or any substance subject to regulation by or under any federal, state and local laws and ordinances relating to the protection of the environment or the keeping, use or disposition of environmentally hazardous materials, substances, or wastes, presently in effect or hereafter adopted, all amendments to any of them, and all rules and regulations issued pursuant to any of such laws or ordinances (collectively, "Environmental Laws"), nor shall Tenant allow or permit any Hazardous Materials to be used in any manner not fully in compliance with all Environmental Laws, in the Premises or the Building or by Tenant or any Tenant Entity in any appurtenant land or allow the environment to become contaminated with any Hazardous Materials by Tenant or any Tenant Entities. Notwithstanding the foregoing,

Tenant may Handle products containing small quantities of Hazardous Materials to the extent customary and necessary for the use of the Premises for the conduct of Tenant's business consistent with the Permitted Use; provided that Tenant shall always Handle any such Hazardous Materials in a safe and lawful manner and never allow such Hazardous Materials to contaminate the Premises, Building and appurtenant land or the environment. Tenant shall protect, defend, indemnify and hold each and all of the Landlord Entities (as defined in Article 30) harmless from and against any and all loss, claims, liability or costs (including court costs and attorney's fees) incurred by reason of any actual or asserted failure of Tenant to fully comply with all applicable Environmental Laws, or the presence, handling, use or disposition in or from the Premises of any Hazardous Materials by Tenant or any Tenant Entity (even though permissible under all applicable Environmental Laws or the provisions of this Lease), or by reason of any actual or asserted failure of Tenant to keep, observe, or perform any provision of this Section 1.2 or Article 44 below. Prior to Tenant (and at least ten (10) days prior to any assignee or any subtenant of Tenant) taking possession of any part of the Premises, Tenant shall disclose to Landlord in writing the names and amounts of all Hazardous Materials, or any combination thereof, which Tenant initially desires to Handle on, in, under or about the Premises or the Project, during the Term by executing and delivering to Landlord a "Hazardous Materials Questionnaire", in the form attached hereto as Exhibit G (as updated and modified by Landlord, from time to time). Tenant's disclosure obligations under this Section 1.2 shall include a requirement that, to the extent any information contained in a Hazardous Materials Questionnaire previously delivered by Tenant shall become inaccurate in any material respect, Tenant shall immediately deliver to Landlord a new updated Hazardous Materials Questionnaire. Landlord shall review and approve or disapprove Tenant's use of the Hazardous Materials disclosed in Tenant's completed Hazardous Materials Questionnaire within a reasonable time period following Landlord's receipt thereof. As of the date hereof, Landlord has not received written notice from any governmental agencies that the Building is in violation of any Environmental Laws. Further, to Landlord's actual knowledge, there are no Hazardous Materials in or at the Building in violation of Environmental Laws. For purposes of this Section, "Landlord's actual knowledge" shall be deemed to mean and limited to the current actual knowledge of Lisa Vogel, Landlord's representative for the Building, at the time of execution of this Lease and not any implied, imputed, or constructive knowledge of said individual or of Landlord or any parties related to or comprising Landlord and without any independent investigation or inquiry having been made or any implied duty to investigate or make any inquiries; it being understood and agreed that such individual shall have no personal liability in any manner whatsoever hereunder or otherwise related to the transactions contemplated hereby. Tenant shall not be liable for any cost or expense related to removal, cleaning, abatement or remediation of Hazardous Materials existing in the Premises prior to the date Landlord tenders possession of the Premises to Tenant, including, without limitation, Hazardous Materials in the ground water or soil, except to the extent that any of the foregoing results directly or indirectly from any act or omission by Tenant or any Tenant Entity or any Hazardous Materials disturbed, distributed or exacerbated by Tenant or any Tenant Entity. For purposes of this Article 1, Tenant, not Landlord, shall have the burden to prove with reasonable and unequivocal documentation that such Hazardous Materials were in fact preexisting in the Premises prior to the date Landlord delivered possession of the Premises to Tenant.

1.3 Tenant and the Tenant Entities will be entitled to the non-exclusive use, together with the other occupants of the Project, of the common areas of the Project as they exist from time to time during the Term, including the use on an un-reserved basis of one hundred eighty-one (181) parking spaces located in the parking facilities, subject to Landlord's rules and regulations regarding such use. However, in no event will Tenant or the Tenant Entities park more vehicles in the parking facilities than the number of parking spaces forth in this Section 1.3. The foregoing shall not be deemed to provide Tenant with an exclusive right to any particular parking spaces or any guaranty of the availability of any particular parking spaces. No less than one hundred eighty-one (181) unreserved parking spaces shall be available for Tenant's use during the Term, subject to force majeure, condemnation and changes in the applicable parking ratio by the governing jurisdiction. If during the Term more than fifteen percent (15%) of the parking shall no longer be available for Tenant and Tenant's invitees on an unreserved, first-come, first-served basis, Landlord may satisfy its obligations to provide parking for Tenant and Tenant's invitees for the portion of the parking that is no longer on an unreserved, first-come, first-served basis by using diligent and good faith efforts to make available to Tenant and Tenant's invitees alternate parking at the Property for said portion of the parking on an unreserved, first-come, first-served basis. Under no circumstances shall such efforts require Landlord to construct an alternative parking structure. Similarly, under no circumstances shall such efforts require Landlord to provide any reimbursement for validated parking to Tenant. Tenant accepts and agrees that Landlord may be unable to make available to Tenant and Tenant's invitees alternate parking at the Property for said portion of the parking on an unreserved, first-come, first-served basis, and that Tenant shall not be entitled to any reduction in rent or any other remedy if Landlord fails to make available such alternate parking.

2. **TERM.**

2.1 The Term of this Lease shall begin on the date ("Commencement Date") as shown on the Reference Pages as the Commencement Date, and shall terminate on the date ("Termination Date") as shown on the Reference Pages as the Termination Date, unless sooner terminated by the provisions of this Lease. Tenant shall, at Landlord's request, execute and

deliver a memorandum agreement provided by Landlord in the form of Exhibit C attached hereto, setting forth the actual Commencement Date, Termination Date and, if necessary, a revised rent schedule. Should Tenant fail to do so or fail to reasonably dispute the date set forth in Landlord's form within thirty (30) days after Landlord's request, the information set forth in such memorandum provided by Landlord shall be conclusively presumed to be agreed and correct. Landlord shall deliver possession of the Premises to Tenant, subject to the terms of Section 7.1 below, in the condition that exists as of the date of this Lease.

2.2 Tenant agrees that in the event of the inability of Landlord to deliver possession of the Premises on the Scheduled Delivery Date set forth on the Reference Pages for any reason, Landlord shall not be liable for any damage resulting from such inability, but except to the extent such delay is the result of the acts or omissions of Tenant or any Tenant Entity, Tenant shall not be liable for any rent until the Commencement Date. No such failure to give possession on the Scheduled Delivery Date set forth on the Reference Pages shall affect the other obligations of Tenant under this Lease, except that the actual Commencement Date shall be postponed until four (4) months after the date that Landlord delivers possession of the Premises to Tenant unless such delay is caused by the acts or omissions of Tenant or any Tenant Entities. If any delay is the result of the acts or omissions of Tenant or any Tenant Entities, the Commencement Date and the payment of rent under this Lease shall be accelerated by the number of days of such delay. Landlord and Tenant agree and acknowledge that the Premises is currently leased to a tenant whose lease expires December 31, 2012, with no options or rights to extend. Landlord believes such tenant will vacate the Premises on or before such date and will use commercially reasonable efforts to cause such tenant to vacate the Premises on or before such date, including promptly commencing eviction proceedings. Notwithstanding any of the foregoing to the contrary, if Landlord has not delivered possession of the Premises in accordance with Section 2.2 for any reason on or before February 15, 2013 (the "Outside Delivery Date"), then, as Tenant's sole remedy hereunder, Tenant shall have the option to terminate this Lease exercisable by giving written notice to Landlord on or before the earlier to occur of: (i) ten (10) business days after the Outside Delivery Date; and (ii) the date of actual delivery of the Premises. Landlord and Tenant acknowledge and agree that: (a) the determination of the Outside Delivery Date shall take into consideration the effect of any delays caused by the acts or omissions of Tenant on any Tenant Entities; and (b) the Outside Delivery Date shall be postponed by the number of days, but in no event more than thirty (30) days, the Outside Delivery Date is delayed due to strikes, acts of God, shortages of labor or materials, war, terrorist acts, civil disturbances and other causes beyond the reasonable control of Landlord. In the event that Tenant terminates this Lease as provided in this Section 2.2, monies previously paid by Tenant shall be reimbursed to Tenant or, if this Lease is not terminated, the date Tenant is otherwise obliged to commence payment of rent shall be delayed by one additional day for each day that the delivery date is delayed beyond the Outside Delivery Date.

2.3 Subject to the terms of this Section 2.3 and provided that this Lease and the Early Possession Agreement (as defined below) have been fully executed by all parties and Tenant has delivered all prepaid rental, the Security Deposit or Letter of Credit (as the case may be), and insurance certificates required hereunder, Landlord grants Tenant the right to enter the Premises, at Tenant's sole risk, as soon as the Premises have been vacated, but in no event less than four (4) months prior to the Commencement Date for the purpose of performing the Initial Alterations specified in Exhibit B attached hereto, installing telecommunications and data cabling, equipment, furnishings and other personalty, and otherwise preparing the Premises for Tenant's occupancy. Such possession prior to the Commencement Date shall be subject to all of the terms and conditions of this Lease, except that Tenant shall not be required to pay Monthly Installment of Rent or, during the first sixty (60) days of such period of early entry, Tenant's Proportionate Share of Expenses and Taxes, with respect to the period of time prior to the Commencement Date during which Tenant occupies the Premises for such purposes. Subject to the terms and conditions of this Section 2.3, during such early possession period, Tenant may utilize a portion of the Premises for the Permitted Use without an obligation to pay Monthly Installments of Rent or Tenant's Proportionate Share of Expenses and Taxes. However, Tenant shall be liable for any utilities or special services provided to Tenant during any such early possession period and commencing on the sixty-first (61 st) day of such early entry upon the Premises, Tenant shall be liable to pay to Landlord Tenant's Proportionate Share of Expenses and Taxes. Said early possession shall not advance the Termination Date. Landlord may withdraw such permission to enter the Premises prior to the Commencement Date at any time that Landlord reasonably determines that such entry by Tenant is causing a dangerous situation for Landlord, Tenant or their respective contractors or employees, or if Landlord reasonably determines that such entry by Tenant is hampering or otherwise preventing Landlord from proceeding with any of Landlord's work required to be completed prior to delivery of possession of the Premises. As a condition to any early entry by Tenant pursuant to this Section 2.3, Tenant shall execute and deliver to Landlord an early possession agreement (the "Early Possession Agreement") in the form attached hereto as Exhibit E , provided by Landlord, setting forth the actual date for early possession and the date for the commencement of payment of Monthly Installment of Rent.

3. **RENT.**

3.1 Tenant agrees to pay to Landlord the Annual Rent in effect from time to time by paying the Monthly Installment of Rent then in effect on or before the first day of each full calendar month during the Term, except that the first (1st) full month's Monthly Installment of Rent and Tenant's Proportionate Share of Expenses and Taxes shall be paid upon the execution of this Lease. The Monthly Installment of Rent in effect at any time shall be one-twelfth (1/12) of the Annual Rent in effect at such time. Rent for any period during the Term which is less than a full month shall be a prorated portion of the Monthly Installment of Rent based upon the number of days in such month. Said rent shall be paid to Landlord, without deduction or offset and without notice or demand, at the Rent Payment Address, as set forth on the Reference Pages, or to such other person or at such other place as Landlord may from time to time designate in writing. Unless specified in this Lease to the contrary, all amounts and sums payable by Tenant to Landlord pursuant to this Lease shall be deemed additional rent.

3.2 Tenant recognizes that late payment of any rent or other sum due under this Lease will result in administrative expense to Landlord, the extent of which additional expense is extremely difficult and economically impractical to ascertain. Tenant therefore agrees that if rent or any other sum is not paid when due and payable pursuant to this Lease, a late charge shall be imposed in an amount equal to the greater of: (a) Fifty Dollars ($50.00), or (b) five percent (5%) of the unpaid rent or other payment; provided, however, that the foregoing late charge shall not apply to the first such late payment in any twelve (12) month period of the Term of this Lease or any extension thereto until following written notice to Tenant and the expiration of five (5) days thereafter without cure. The amount of the late charge to be paid by Tenant shall be reassessed and added to Tenant's obligation for each successive month until paid. The provisions of this Section 3.2 in no way relieve Tenant of the obligation to pay rent or other payments on or before the date on which they are due, nor do the terms of this Section 3.2 in any way affect Landlord's remedies pursuant to Article 19 of this Lease in the event said rent or other payment is unpaid after date due.

3.3 Notwithstanding anything in this Lease to the contrary, Tenant shall be entitled to an abatement of Monthly Installment of Rent with respect to the Premises, as originally described in this Lease, in the amount of $117,624.00 per month for months seven (7) through twelve (12) of the initial Term ("Rent Abatement Period"). The maximum total amount of Monthly Installment of Rent abated with respect to the Premises in accordance with the foregoing shall equal $705,744.00 (the "Abated Monthly Installment of Rent"). If Tenant defaults under this Lease at any time during the Rent Abatement Period and fails to cure such default within any applicable cure period under this Lease, then Tenant's right to receive the Abated Monthly Installment of Rent shall toll (and Tenant shall be required to pay Monthly Installment of Rent during such period of any Tenant default) until Tenant has cured, to Landlord's satisfaction, such default. Following Tenant's cure of any such default, Tenant shall be entitled to receive the Abated Monthly Installment of Rent up to the full amount thereof as described above in this Section 3.3. Only Monthly Installment of Rent shall be abated pursuant to this Section, as more particularly described herein, and Tenant's Proportionate Share of Expenses and Taxes and all other rent and other costs and charges specified in this Lease shall remain as due and payable pursuant to the provisions of this Lease.

4. **RENT ADJUSTMENTS.**

4.1 For the purpose of this Article 4, the following terms are defined as follows:

4.1.1 **Lease Year:** Each fiscal year (as determined by Landlord from time to time) falling partly or wholly within the Term.

4.1.2 **Expenses:** All actual costs of operation, maintenance, repair, replacement and management of the Building (including the amount of any credits which Landlord may grant to particular tenants of the Building in lieu of providing any standard services or paying any standard costs described in this Section 4.1.2 for similar tenants), as determined in accordance with generally accepted accounting principles, including the following costs by way of illustration, but not limitation: water and sewer charges; insurance charges of or relating to all insurance policies and endorsements deemed by Landlord to be reasonably necessary or desirable and relating in any manner to the protection, preservation, or operation of the Building or any part thereof (provided, however, in the event that the Building is damaged by a casualty event (each, a "Casualty Event"), Tenant's Proportionate Share of any insurance deductibles payable pursuant to this Section shall not exceed $25,000.00 for each such Casualty Event); utility costs, including, but not limited to, the cost of heat, light, power, steam, gas and energy for the Building; waste disposal; recycling costs; the cost of security and alarm services (including any central station signaling system); costs of cleaning, repairing, replacing and maintaining the common areas, including parking and landscaping, window cleaning costs; labor costs; costs and expenses of managing the Building including management and/or administrative fees (provided, however, during the initial Term of this Lease, the management fees for the Building and the Project shall equal three percent (3%) of gross income for the Building and the Project); air

conditioning maintenance costs; HVAC (defined in Section 7.1 below) repair, service and maintenance, including costs of any regularly scheduled preventive maintenance/service contracts; elevator maintenance fees and supplies; material costs; equipment costs including the cost of maintenance, repair and service agreements and rental and leasing costs; purchase costs of equipment; current rental and leasing costs of items which would be capital items if purchased; tool costs; licenses, permits and inspection fees; wages and salaries; employee benefits and payroll taxes; accounting and legal fees; any sales, use or service taxes incurred in connection therewith. In addition, Landlord shall be entitled to recover, as additional rent (which, along with any other capital expenditures constituting Expenses, Landlord may either include in Expenses or cause to be billed to Tenant along with Expenses and Taxes but as a separate item), Tenant's Proportionate Share of: (i) an allocable portion of the cost of capital improvement items which are reasonably calculated to reduce operating expenses; (ii) the cost of fire sprinklers and suppression systems and other life safety systems or enhance the environmental sustainability of the Property's operations; and (iii) other capital expenses which are required under any Regulations which were not applicable to the Building (as then interpreted and enforced) as of the date of this Lease; but the costs described in this sentence shall be amortized over the reasonable life of such expenditures in accordance with such

reasonable life and amortization schedules as shall be determined by Landlord in accordance with generally accepted accounting principles, with interest on the unamortized amount at one percent (1%) in excess of the Wall Street Journal prime lending rate announced from time to time. Landlord agrees to act in a commercially reasonable manner in incurring Expenses, taking into consideration the class and the quality of the Building and shall extrapolate Expenses in accordance with the methodology used to extrapolate Expenses in comparable buildings owned by Landlord and its affiliates in the geographic area in which the Building is located. Expenses shall not include depreciation or amortization of the Building or equipment in the Building except as provided herein, loan principal payments or fees incurred in connection with such debt, costs of alterations of tenants' premises, leasing commissions, interest expenses on long-term borrowings or advertising costs.

The following are also excluded from Expenses:

(a) Sums (other than management fees, it being agreed that the management fees included in Expenses are as described in Section 4.1.2 above) paid to subsidiaries or other affiliates of Landlord for services on or to the Building and/or Premises, but only to the extent that the costs of such services exceed the competitive cost for such services rendered by unrelated persons or entities of similar skill, competence and experience.

(b) Any expenses for which Landlord has received actual reimbursement (other than through Expenses).

(c) Attorney's fees and other expenses incurred in connection with negotiations or disputes with prospective tenants or tenants or other occupants of the Building.

(d) Costs in connection with leasing space in the Building, including brokerage commissions, brochures and marketing supplies, legal fees in negotiating and preparing lease documents.

(e) Fines, costs or penalties incurred as a result and to the extent of a violation by Landlord of any applicable Regulations.

(f) Any fines, penalties or interest resulting from the gross negligence or willful misconduct of Landlord.

(g) The cost of operating any commercial concession which is operated by Landlord at the Building.

(h) Costs incurred by Landlord for the repair of damage to the Building, to the extent that Landlord is reimbursed for such costs by insurance proceeds, contractor warranties, guarantees, judgments or other third party sources.

(i) The cost of complying with any Regulations in effect (and as interpreted and enforced) on the date of this Lease, provided that if any portion of the Building that was in compliance with all applicable Regulations on the date of this Lease becomes out of compliance due to normal wear and tear, the cost of bringing such portion of the Building into compliance shall be included in Expenses in accordance with Section 4.1.2 of this Lease unless otherwise excluded pursuant to the terms hereof.

(j) Reserves not spent by Landlord by the end of the calendar year for which Expenses are paid.

(k) All bad debt loss, rent loss, or reserves for bad debt or rent loss.

(l) Landlord's charitable and political contributions.

(m) All costs of purchasing or leasing major sculptures, paintings or other major works or objects of art (as opposed to decorations purchased or leased by Landlord for display in the common areas of the Building).

(n) Depreciation; principal payments of mortgage and other non operating debts of Landlord.

(o) Ground lease rental.

(p) The cost of the initial installation of the New HVAC Unit (as defined in Section 7.1 below).

(q) The cost of roof repairs for the Building until full roof replacement occurs. The cost of the first full roof replacement shall be excluded from Expenses.

(r) Except with respect to the cost of insurance deductibles, the cost of repairs to or replacements of the Building incurred by reason of a Casualty Event or condemnation, to the extent (i) Landlord actually receives proceeds of property and casualty insurance policies or condemnation awards or would have received such proceeds had Landlord maintained the insurance required to be maintained by Landlord under this Lease, or (ii) such amounts (together with any deductibles) so that Tenant's Proportionate Share exceeds $25,000 for each such Casualty Event.

(s) Any cost or expense related to removal, cleaning, abatement or remediation of Hazardous Materials in or about the Building, common area or the Project, or fines, penalties or litigation expenses related thereto, including, without limitation, Hazardous Material in the ground water or soil, except to the extent such removal, cleaning, abatement or remediation is related to the routine general repair and maintenance of the Building, common area or Project.

(t) Costs incurred by Landlord for the repair of damage to the Building, to the extent that Landlord is reimbursed for such costs by insurance proceeds, contractor warranties, guarantees, judgments or other third party sources.

(u) Any costs, fines, penalties or interest resulting from the gross negligence, willful misconduct or to the extent of a violation by Landlord of any applicable Regulations.

(v) The cost of repairs or replacements incurred by reason of fire or other casualty, or condemnation, to the extent Landlord actually receives proceeds of property and casualty insurance policies or condemnation awards or would have received such proceeds had Landlord maintained the insurance required to be maintained by Landlord under this Lease.

(w) Costs which could properly be capitalized under generally accepted accounting principles, except to the extent set forth in the second sentence of Section 4.1.2.

(x) Salaries or fringe benefits of employees whose time is not spent directly and solely in the operation of the Project, provided that if any employee performs services in connection with the Project and other buildings, costs associated with such employee may be proportionately included in Expenses based on the percentage of time such employee spends in connection with the operation, maintenance and management of the Project.

(y) Costs incurred by Landlord in connection with the correction of latent defects in the original construction of the Building or Project.

(z) Cost incurred in connection with structural repairs to the Building to the extent such repairs are Landlord's express liability to perform pursuant to the terms and conditions of this Lease.

4.1.3 **Taxes:** Real estate taxes and any other taxes, charges and assessments which are levied with respect to the Project or the land appurtenant to the Project, or with respect to any improvements, fixtures and equipment or other property of Landlord, real or personal, located in the Project and used in connection with the operation of the Building and said land, any payments to any ground lessor in reimbursement of tax payments made by such lessor; and all fees, expenses and costs incurred by Landlord in investigating, protesting, contesting or in any way seeking to reduce or avoid increase in any assessments, levies or the tax rate pertaining to any Taxes to be paid by Landlord in any Lease Year. Taxes shall be determined without regard to any "green building" credit and shall not include any corporate franchise, or estate, inheritance or net income tax, or documentary transfer tax imposed upon any transfer by Landlord of its interest in this Lease or any taxes to be paid by Tenant pursuant to Article 28. If an assessment of Taxes is payable in installments, regardless of whether Landlord pays such amount in one lump sum or elects to pay in installments, Taxes shall include the amount of the installment and any interest due and payable over the time period of installments are paid or would have been paid had Landlord elected to pay such Taxes in installments.

4.2 Tenant shall pay as additional rent for each Lease Year Tenant's Proportionate Share of Expenses and Taxes incurred for such Lease Year.

4.3 The annual determination of Expenses shall be made by Landlord and shall be binding upon Landlord and Tenant, subject to the provisions of this Section 4.3. Landlord may deliver such annual determination to Tenant via regular

U.S. mail. During the Term, Tenant may review, at Tenant's sole cost and expense, the books and records supporting such determination in an office of Landlord, or Landlord's agent, during normal business hours, upon giving Landlord five (5) days advance written notice within ninety (90) days after receipt of such determination, but in no event more often than once in any one (1) year period, subject to execution of a confidentiality agreement acceptable to Landlord, and provided that if Tenant utilizes an independent accountant to perform such review it shall be one which is reasonably acceptable to Landlord, is not compensated on a contingency basis and is also subject to such confidentiality agreement. If Tenant fails to object to Landlord's determination of Expenses within one hundred twenty (120) days after receipt, or if any such objection fails to state with specificity the reason for the objection, Tenant shall be deemed to have approved such determination and shall have no further right to object to or contest such determination.

4.4 Prior to the actual determination thereof for a Lease Year, Landlord may from time to time estimate Tenant's liability for Expenses and/or Taxes under Section 4.2, Article 6 and Article 28 for the Lease Year or portion thereof. Landlord will give Tenant written notification of the amount of such estimate and Tenant agrees that it will pay, by increase of its Monthly Installments of Rent due in such Lease Year, additional rent in the amount of such estimate. Any such increased rate of Monthly Installments of Rent pursuant to this Section 4.4 shall remain in effect until further written notification to Tenant pursuant hereto.

4.5 When the above mentioned actual determination of Tenant's liability for Expenses and/or Taxes is made for any Lease Year and when Tenant is so notified in writing, then:

4.5.1 If the total additional rent Tenant actually paid pursuant to Section 4.3 on account of Expenses and/or Taxes for the Lease Year is less than Tenant's liability for Expenses and/or Taxes, then Tenant shall pay such deficiency to Landlord as additional rent in one lump sum within thirty (30) days of receipt of Landlord's bill therefor; and

4.5.2 If the total additional rent Tenant actually paid pursuant to Section 4.3 on account of Expenses and/or Taxes for the Lease Year is more than Tenant's liability for Expenses and/or Taxes, then Landlord shall credit the difference against the then next due payments to be made by Tenant under this Article 4, or, if this Lease has terminated, refund the difference in cash.

4.5.3 However, if Landlord fails to furnish Tenant a statement of the actual Expenses for a given calendar year within twenty-four (24) months after the end of said calendar year and such failure continues for an additional thirty (30) days after Landlord's receipt of a written request from Tenant that such statement of the actual Expenses be furnished, Landlord shall be deemed to have waived any rights to recover any underpayment of Expenses from Tenant applicable to said calendar year (except to the extent such underpayment is attributable to a default by Tenant in its obligation to make estimated payments of Expenses), and Tenant shall be deemed to have waived any credit regarding overpayment of Expenses by Tenant; provided that such twenty-four (24) month time limit shall not apply to Taxes. Further, in no event shall the foregoing provision describing the time period during which Landlord is to deliver the statement of actual costs in any manner limit or otherwise prejudice Landlord's right to modify such statement of actual costs after such time period if new, additional or different information relating to such statement of actual costs is discovered or otherwise determined.

4.6 If the Commencement Date is other than January 1 or if the Termination Date is other than December 31, Tenant's liability for Expenses and Taxes for the Lease Year in which said Date occurs shall be prorated based upon a three hundred sixty-five (365) day year.

5. **SECURITY DEPOSIT.** Subject to the terms and conditions of Article 39 of this Lease, Tenant shall deposit the Security Deposit with Landlord upon execution of this Lease. Said sum shall be held by Landlord as security for the faithful performance by Tenant of all the terms, covenants and conditions of this Lease to be kept and performed by Tenant and not as an advance rental deposit or as a measure of Landlord's damage in case of Tenant's default. If Tenant defaults with respect to any provision of this Lease beyond the expiration of any applicable notice and cure period, Landlord may use any part of the Security Deposit for the payment of any rent or any other sum in default, or for the payment of any amount which Landlord may spend or become obligated to spend by reason of Tenant's default, or to compensate Landlord for any other loss or damage which Landlord may suffer by reason of Tenant's default. If any portion is so used, Tenant shall within five (5) days after written demand therefor, deposit with Landlord an amount sufficient to restore the Security Deposit to its original amount and Tenant's failure to do so shall be a material breach of this Lease. Except to such extent, if any, as shall be required by law, Landlord shall not be required to keep the Security Deposit separate from its general funds, and Tenant shall not be entitled to interest on such deposit. Landlord shall return any unapplied balance of the Security Deposit to Tenant within forty-five (45) days after the later of: (i) the date Tenant surrenders the Premises to Landlord in accordance with this Lease, and (ii) the date of the expiration or earlier termination of this Lease. In addition to any other deductions Landlord is entitled to make pursuant to the terms hereof, Landlord shall have the right to make a good faith estimate of any

unreconciled Expenses and/or Taxes as of the Termination Date and to deduct any anticipated shortfall from the Security Deposit with a final reconciliation to be performed by Landlord pursuant to the terms of Section 4.5 above. Notwithstanding anything to the contrary contained herein or in Article 23 hereof, Tenant hereby waives the provisions of Section 1950.7 of the California Civil Code, or any similar or successor Regulations or other laws now or hereinafter in effect; provided that Tenant's waiver shall not include a waiver of the provisions of Section 19.50.7(b) regarding the priority of Tenant's claim to the Security Deposit.

6. **ALTERATIONS.**

6.1 Tenant shall not make or permit to be made any alterations, additions, or improvements, including, but not limited to, the attachment of any fixtures or equipment in, on, or to the Premises or any part thereof or the making of any improvements as required by Article 7, without the prior written consent of Landlord which shall be granted or not within thirty (30) days of Tenant's request. When applying for such consent, Tenant shall, if requested by Landlord, furnish complete plans and specifications for such alterations, additions and improvements. Landlord's consent shall not be unreasonably withheld, and shall be granted or not within ten (10) days of Tenant's request, with respect to alterations which (i) are not structural in nature, (ii) are not visible from the exterior of the Building, and (iii) do not materially and adversely affect the Building's electrical, mechanical, plumbing, HVAC or other systems. In addition, Tenant shall have the right to perform, with prior written notice to but without Landlord's consent, any alteration, addition, or improvement that satisfies all of the following criteria (a "Cosmetic Alteration"): (1) is of a cosmetic nature such as painting, wallpapering, hanging pictures and installing carpeting; (2) is not visible from the exterior of the Premises or Building; (3) will not affect the systems or structure of the Building; (4) costs less than $50,000.00 in the aggregate during any twelve (12) month period of the Term of this Lease, and (5) does not require work to be performed inside the walls or above the ceiling of the Premises. However, even though consent is not required, the performance of Cosmetic Alterations shall be subject to all of the other provisions of this Article 6.

6.2 In the event Landlord consents to the making of any such alteration, addition or improvement by Tenant, the same shall be made by using either Landlord's contractor or a contractor reasonably approved by Landlord, in either event at Tenant's sole cost and expense. If Tenant shall employ any contractor other than Landlord's contractor and such other contractor or any subcontractor of such other contractor shall employ any non-union labor or supplier, Tenant shall be responsible for and hold Landlord harmless from any and all delays, damages and extra costs suffered by Landlord as a result of any dispute with any labor unions concerning the wage, hours, terms or conditions of the employment of any such labor. In any event, except with respect to any Cosmetic Alteration that satisfies the criteria set forth in Section 6.1 above, if Landlord performs the subject alteration, improvement or addition on Tenant's behalf, Landlord may charge Tenant a construction management fee equal to (i) five percent (5%) of the cost of such work (other than any Cosmetic Alteration that satisfies the criteria set forth in Section 6.1) for any work costing $100,000.00 or less in the aggregate, and (ii) to the extent the cost of such work exceeds $100,000.00 in the aggregate, three percent (3%) of the cost of any such work, to cover its overhead as it relates to such proposed work, plus third-party costs actually incurred by Landlord, including, without limitation, any construction management fees charged by Landlord's property manager, in connection with the proposed work and the design thereof, with all such amounts being due ten (10) days after Landlord's demand. In the event of any alteration, addition and/or improvement performed by Tenant, Tenant shall reimburse Landlord as additional rent hereunder all third-party costs actually incurred by Landlord, including, without limitation, any construction management fees (which construction management fee shall not exceed 1% of the cost of such work) charged by Landlord's property manager, in connection with the proposed work and the design thereof, with all such amounts being due ten (10) days after Landlord's demand.

6.3 All alterations, additions or improvements proposed by Tenant shall be constructed in accordance with all Regulations, and with Landlord's Building construction standards (if any) from time to time to the extent applicable (which standards shall be made available to Tenant by Landlord's Building manager upon request). Tenant shall use Building standard materials where applicable, and Tenant shall, prior to construction, provide the additional insurance required under Article 11 in such case, notices of non-responsibility and waivers of lien to protect Landlord and the Building and appurtenant land against any loss from any mechanic's, materialmen's or other liens. Tenant shall pay in addition to any sums due pursuant to Article 4, any increase in real estate taxes attributable to any such alteration, addition or improvement for so long, during the Term, as such increase is ascertainable; at Landlord's election said sums shall be paid in the same way as sums due under Article 4.

6.4 Notwithstanding anything to the contrary contained herein, so long as Tenant's written request for consent for a proposed alteration or improvements contains the following statement in large, bold and capped font " **PURSUANT TO ARTICLE 6 OF THE LEASE, IF LANDLORD CONSENTS TO THE SUBJECT ALTERATION, LANDLORD SHALL NOTIFY TENANT IN WRITING WHETHER OR NOT LANDLORD WILL REQUIRE SUCH**

ALTERATION TO BE REMOVED AT THE EXPIRATION OR EARLIER TERMINATION OF THE LEASE. ", at the time Landlord gives its consent for any alterations or improvements, if it so does, Tenant shall also be notified whether or not Landlord will require that such alterations or improvements be removed upon the expiration or earlier termination of this Lease. Notwithstanding anything to the contrary contained in this Lease, and except as expressly set forth in Section 26.2 below and below in this Section 6.4, at the expiration or earlier termination of this Lease and otherwise in accordance with Article 26 hereof, Tenant shall be required to remove all alterations or improvements made to the Premises except for any such alterations or improvements which Landlord expressly indicates or is deemed to have indicated shall not be required to be removed from the Premises by Tenant. If Tenant's written notice strictly complies with the foregoing and if Landlord fails to notify Tenant within twenty (20) days of Landlord's receipt of such notice whether (1) Landlord consents to the proposed alteration or improvement and (2) Tenant shall be required to remove the subject alterations or improvements at the expiration or earlier termination of this Lease, Tenant may, within fifteen (15) days following the expiration of the twenty (20) day period described above, provide to Landlord a second written notice (the "Second Notice") in compliance with the foregoing requirements but also stating in large, bold and capped font the following: " **THIS IS TENANT'S SECOND NOTICE TO LANDLORD. LANDLORD FAILED TO RESPOND TO TENANT'S FIRST NOTICE IN ACCORDANCE WITH THE TERMS OF ARTICLE 6 OF THE LEASE. IF LANDLORD FAILS TO RESPOND TO THIS NOTICE IN TEN (10) BUSINESS DAYS WITH RESPECT TO TENANT'S OBLIGATION TO REMOVE THE SUBJECT ALTERATION AND THE ESTIMATED REMOVAL COST IS LESS THAN $20,000.00, TENANT SHALL HAVE NO OBLIGATION TO REMOVE THE SUBJECT ALTERATION AT THE EXPIRATION OR EARLIER TERMINATION OF ITS LEASE** ". If (a) Tenant's second written notice strictly complies with the terms of this Section 6.4, (b) Landlord fails to notify Tenant within ten (10) business days of Landlord's receipt of such second written notice, and (c) the estimated removal costs associated with the subject alterations or improvements is less than $20,000.00, it shall be assumed that Landlord shall not require the removal of the subject alterations or improvements at the expiration or earlier termination of this Lease.

7. **REPAIR.**

7.1 Except as provided herein, Landlord shall have no obligation to alter, remodel, improve, repair, decorate or paint the Premises, except that Landlord shall repair and maintain the structural portions of the Building, including the exterior walls, foundation, roof and roof membrane, the Existing HVAC Unit and the New HVAC Unit (as each are defined below); provided, however, that the costs and expenses associated with the foregoing shall be a part of Expenses subject to the terms and conditions of Article 4 of this Lease. By taking possession of the Premises, and subject to the express terms and conditions of this Lease, Tenant accepts them as being in good order, condition and repair and in the condition in which Landlord is obligated to deliver them. However, notwithstanding the foregoing, Landlord agrees that the roof, Building electrical, lighting, HVAC and plumbing systems (but excluding any supplemental systems) located in the Premises shall be in good working order and the roof of the Premises is water tight as of the date Landlord delivers possession of the Premises to Tenant. Except to the extent caused by the acts or omissions of Tenant or any Tenant Entities or by any alterations or improvements performed by or on behalf of Tenant, if such systems are not in good working order or if there is any leakage from the roof of the Premises (or damage to the Premises related to such leakage) as of the date possession of the Premises is delivered to Tenant and Tenant provides Landlord with notice of the same within one hundred twenty (120) days following the date Landlord tenders access of the Premises to Tenant (the "Inspection Period"), Landlord shall be responsible for repairing or restoring the same at its sole cost and not as part of Expenses. In addition, in the event that there is additional future leakage from any roof leaks previously identified in writing to Landlord during the Inspection Period, Landlord shall repair such leaks at its sole cost and expense until such time as the roof of the Building is fully replaced. Notwithstanding the foregoing, Landlord shall be liable to repair damage caused to the Premises as a result of any such roof leakage identified during the Inspection Period, provided that Landlord's obligation with respect thereto shall exclude repair of any damage to any property that Tenant is required to insure under this Lease, including, without limitation, Tenant's personal property. Landlord and Tenant acknowledge and agree that prior to December 31, 2012, Landlord will replace the Building's existing heating, ventilating and air conditioning unit exclusively serving the Premises (the "Existing HVAC Unit") with a new heating, ventilating and air conditioning unit (the "New HVAC Unit") of comparable size and quality, as reasonably determined by Landlord, at Landlord's sole cost and expense and not as part of Expenses. Notwithstanding the foregoing, during the Term of this Lease, Tenant shall be liable for any supplemental heating, ventilating and air conditioning unit(s) installed by or for the benefit of Tenant and any costs chargeable hereunder as part of Tenant's Proportionate Share of Expenses and Taxes. It is hereby understood and agreed that no representations respecting the condition of the Premises or the Building have been made by Landlord to Tenant, except as specifically set forth in this Lease. Landlord shall not be liable for any failure to make any repairs or to perform any maintenance to the Premises other than routine maintenance to the items Landlord is expressly responsible for maintaining hereunder (provided in no event shall Landlord be liable for consequential damages hereunder) unless such failure shall persist for an unreasonable time after written notice of the need of such repairs or maintenance is given to Landlord by Tenant.

7.2 Subject to the terms and conditions of Section 7.1 above, Tenant shall, at its own cost and expense, keep and maintain all parts of the Premises in good condition, promptly making all necessary repairs and replacements, whether ordinary or extraordinary, with materials and workmanship of the same character, kind and quality as the original (including, but not limited to, repair and replacement of all fixtures installed by Tenant, water heaters serving the Premises, windows, glass and plate glass, doors, any special office entries, interior walls and finish work, floors and floor coverings, heating and air conditioning systems (excluding the New HVAC Unit), electrical systems and fixtures, sprinkler systems, dock boards, truck doors, dock bumpers, plumbing work and fixtures, and performance of regular removal of trash and debris). Tenant as part of its obligations hereunder shall keep the Premises in a clean and sanitary condition. Tenant will, subject to Section 7.1, as far as possible keep all such parts of the Premises from falling temporarily out of repair, and upon termination of this Lease in any way Tenant will yield up the Premises to Landlord in good condition and repair, ordinary wear and tear, loss by fire or other casualty or by condemnation, repairs and maintenance of the Premises which are Landlord's express obligations under the terms and conditions of this Lease, and alterations or other interior improvements which Tenant is permitted to surrender at the termination of the Lease excepted (but not excepting any damage to glass). Tenant shall, at its own cost and expense, repair any damage to the Premises or the Building resulting from and/or caused in whole or in part by the negligence or misconduct of Tenant, its agents, employees, contractors, invitees, or any other person entering upon the Premises as a result of Tenant's business activities or caused by Tenant's default hereunder. Notwithstanding anything to the contrary contained herein, Tenant shall have no responsibility to perform any repair or maintenance to any portion of the Project outside of the Building, except as otherwise set forth in this Lease. Repair and maintenance work shall be undertaken in compliance with Landlord's Building construction standards (if any) from time to time to the extent applicable (which standards shall be made available to Tenant by Landlord's Building manager upon request).

7.3 Except as provided in Article 22, there shall be no abatement of rent and no liability of Landlord by reason of any injury to or interference with Tenant's business arising from the making of any repairs, alterations or improvements in or to any portion of the Building or the Premises or to fixtures, appurtenances and equipment in the Building. Tenant hereby waives any and all rights under and benefits of subsection 1 of Section 1932 and Sections 1941 and 1942 of the California Civil Code, or any similar or successor Regulations or other laws now or hereinafter in effect.

7.4 As of the date of this Lease, Landlord has entered into and, subject to the terms hereof, shall maintain, a regularly scheduled preventive maintenance/service contract with respect to the Existing HVAC Unit and the New HVAC unit (as defined in Section 7.1 above) servicing the Premises and the Building. The cost of such contract and any service shall be included in Expenses subject to the terms and conditions of Article 4. Tenant shall, at Landlord's request at any time during the Term and at Tenant's own cost and expense, enter into a regularly scheduled preventive maintenance/service contract with a maintenance contractor approved by Landlord for servicing all heating and air conditioning systems and equipment serving the Premises (and a copy thereof shall be furnished to Landlord). In the event that Landlord so requires Tenant to maintain a regularly scheduled preventive maintenance/service contract, the service contract must include all services suggested by the equipment manufacturer in the operation/maintenance manual and must become effective within thirty (30) days of the date Tenant takes possession of the Premises. Should Tenant fail to do so, Landlord may, upon notice to Tenant, enter into such a maintenance/ service contract on behalf of Tenant or perform the work and in either case, charge Tenant the cost thereof along with a reasonable amount for Landlord's overhead.

8. **LIENS.** Tenant shall keep the Premises, the Building and appurtenant land and Tenant's leasehold interest in the Premises free from any liens arising out of any services, work or materials performed, furnished, or contracted for by Tenant, or obligations incurred by Tenant. In the event that Tenant fails, within ten (10) days following delivery of notice to Tenant of the imposition of any such lien, to either cause the same to be released of record or provide Landlord with insurance against the same issued by a major title insurance company or such other protection against the same as Landlord shall accept (such failure to constitute an Event of Default), Landlord shall have the right to cause the same to be released by such means as it shall deem proper, including payment of the claim giving rise to such lien. All such sums paid by Landlord and all expenses incurred by it in connection therewith shall be payable to it by Tenant within five (5) days of Landlord's demand.

9. **ASSIGNMENT AND SUBLETTING.**

9.1 Except in connection with a Permitted Transfer (defined in Section 9.8 below), Tenant shall not have the right to assign or pledge this Lease or to sublet the whole or any part of the Premises whether voluntarily or by operation of law, or permit the use or occupancy of the Premises by anyone other than Tenant, and shall not make, suffer or permit such assignment, subleasing or occupancy without the prior written consent of Landlord, such consent not to be unreasonably withheld, conditioned or delayed and said restrictions shall be binding upon any and all assignees of this Lease and subtenants of the Premises. In the event Tenant desires to sublet, or permit such occupancy of, the Premises, or any portion thereof, or assign this Lease, Tenant shall give written notice thereof to Landlord at least thirty (30) days but no more than one hundred twenty (120) days prior to the proposed commencement date of such subletting or assignment, which notice

shall set forth the name of the proposed subtenant or assignee, the relevant terms of any sublease or assignment and copies of financial reports and other relevant financial information of the proposed subtenant or assignee. Within thirty (30) days following the later of (i) Landlord's receipt of such notice from Tenant, or (ii) Landlord's receipt of all relevant information requested by Landlord from Tenant, Landlord shall either: (a) grant its consent to the sublease or assignment of this Lease by execution and delivery of a consent agreement on Landlord's then form of consent; (b) reasonably refuse to consent to the assignment or sublease in writing to Tenant, stating the reasons for Landlord's refusal; or (c) upon written notice to Tenant, elect to terminate this Lease with respect to the subject portion of the Premises covered by the request in accordance with the provisions of Section 9.3 below.

9.2 Notwithstanding any assignment or subletting, permitted or otherwise, Tenant shall at all times remain directly, primarily and fully responsible and liable for the payment of the rent specified in this Lease and for compliance with all of its other obligations under the terms, provisions and covenants of this Lease. Upon the occurrence of an Event of Default, if the Premises or any part of them are then assigned or sublet, Landlord, in addition to any other remedies provided in this Lease or provided by law, may, at its option, collect directly from such assignee or subtenant all rents due and becoming due to Tenant under such assignment or sublease and apply such rent against any sums due to Landlord from Tenant under this Lease, and no such collection shall be construed to constitute a novation or release of Tenant from the further performance of Tenant's obligations under this Lease.

9.3 In addition to Landlord's right to approve of any subtenant or assignee to the extent provided herein, Landlord shall have the option, in its sole discretion, in the event of any proposed sublease of 100% of the Premises or an assignment of this Lease to terminate this Lease effective as of the date the proposed assignment or subletting is to be effective and, in the case of a sublease (a) that would result in more than fifty percent (50%) of the Premises being subject to the sublease, and (b) a sublease for a term of more than fifty percent (50%) of the then-remaining Term of this Lease, to recapture the portion of the Premises to be sublet effective as of the date the proposed subletting is to be effective. The option shall be exercised, if at all, by Landlord giving Tenant written notice given by Landlord to Tenant within thirty (30) days following Landlord's receipt of Tenant's written notice as required above. However, if Tenant notifies Landlord, within five (5) days after receipt of Landlord's termination notice, that Tenant is rescinding its proposed assignment or sublease, the termination notice shall be void and this Lease shall continue in full force and effect. If this Lease shall be terminated with respect to the entire Premises pursuant to this Section, the Term of this Lease shall end on the date stated in Tenant's notice as the effective date of the sublease or assignment as if that date had been originally fixed in this Lease for the expiration of the Term. If Landlord recaptures under this Section only a portion of the Premises, the rent to be paid from time to time during the unexpired Term shall abate proportionately based on the proportion by which the approximate square footage of the remaining portion of the Premises shall be less than that of the Premises as of the date immediately prior to such recapture. Tenant shall, at Tenant's own cost and expense, discharge in full any outstanding commission obligation which may be due and owing by Tenant pursuant to Tenant's listing agreement with its broker as a result of any proposed assignment or subletting, whether or not the Premises are recaptured pursuant to this Section 9.3 and rented by Landlord to the proposed tenant or any other tenant. The provisions of this Section 9.3 shall not apply to a Permitted Transfer.

9.4 In the event that Tenant sells, sublets, assigns or transfers this Lease, Tenant shall pay to Landlord as additional rent an amount equal to fifty percent (50%) of any Increased Rent (as defined below), less the Costs Component (as defined below), when and as such Increased Rent is received by Tenant. As used in this Section, "Increased Rent" shall mean the excess of (i) all rent and other consideration attributable to the Premises or this Lease which Tenant is entitled to receive by reason of any sale, sublease, assignment or other transfer of this Lease, over (ii) the rent otherwise payable by Tenant under this Lease at such time. For purposes of the foregoing, any consideration received by Tenant in form other than cash shall be valued at its fair market value as determined by Landlord in good faith. The "Costs Component" is the reasonable costs incurred by Tenant for leasing commissions, reasonable attorneys' fees and tenant improvements in connection with such sublease, assignment or other transfer. The provisions of this Section 9.4 shall not apply to a Permitted Transfer.

9.5 Notwithstanding any other provision hereof, it shall be considered reasonable for Landlord to withhold its consent to any assignment of this Lease or sublease of any portion of the Premises if at the time of either Tenant's notice of the proposed assignment or sublease or the proposed commencement date thereof, there shall exist any uncured Event of Default of Tenant, or if the proposed assignee or sublessee is an entity: (a) with which Landlord is already in negotiation for space in the Project (unless Landlord does not have space available for lease in the Building that is comparable to the space Tenant desires to sublet or assign; provided, however, Landlord shall be deemed to have comparable space if it has, or will have, space available on any floor of the Building that is approximately the same size as the space Tenant desires to sublet or assign within four (4) months, in the aggregate, of the proposed commencement of the proposed sublease or assignment, and for a comparable term); (b) is already an occupant of the Building unless Landlord is unable to provide the amount of space required by such occupant; (c) is a governmental agency; (d) is incompatible with the character of occupancy of the Building;

(e) with which the payment for the sublease or assignment is determined in whole or in part based upon its net income or profits; or (f) would subject the Premises to a use which would: (i) involve materially increased wear upon the Building; (ii) violate any exclusive right granted to another tenant of the Building; (iii) require any addition to or modification of the Premises or the Building or the Project in order to comply with building code or other governmental requirements (and with respect to any such additions or modifications to the Premises or Building only, unless Tenant or the proposed assignee or sublessee perform the same and pay the cost thereof); or, (iv) involve a violation of Section 1.2. Tenant expressly agrees that for the purposes of any statutory or other requirement of reasonableness on the part of Landlord, Landlord's refusal to consent to any assignment or sublease for any of the reasons described in this Section 9.5, shall be conclusively deemed to be reasonable.

9.6 Upon any request to assign or sublet, Tenant will pay to Landlord the Assignment/Subletting Fee plus, on demand, a sum equal to all of Landlord's costs, including reasonable attorney's fees, incurred in investigating and considering any proposed or purported assignment or pledge of this Lease or sublease of any of the Premises (the "Review Reimbursement"), regardless of whether Landlord shall consent to, refuse consent, or determine that Landlord's consent is not required for, such assignment, pledge or sublease. Except as otherwise expressly provided herein, the Review Reimbursement shall not exceed $1,000.00 (the "Cap"). Any purported sale, assignment, mortgage, transfer of this Lease or subletting which does not comply with the provisions of this Article 9 shall be void. If: (a)Tenant fails to execute Landlord's standard form of consent without any changes to this Lease, without material changes to the consent and without material negotiation of the consent, or if the documentation of the proposed transfer requires significant review effort, and (b) Landlord shall notify Tenant that the Review Reimbursement shall exceed the Cap as a result of such changes, negotiation and/or documentation, and (c) Tenant elects to proceed with such changes and/or negotiation, then the Cap shall not apply and Tenant shall pay to Landlord the Assignment/Subletting Fee plus the Review Reimbursement in full. The foregoing shall in no event be deemed to be a right of Tenant to rescind its written notice to Landlord requesting consent to a transfer of this Lease or a sublease of all or a portion of the Premises as provided in Section 9.1. In the event that Tenant fails to notify Landlord of its election as provided in subsection (c) above within three (3) business days following Landlord's notice to Tenant of the excess described in subsection (b) above, then Tenant shall be deemed to have elected proceed with any such changes and/or negotiation and the Cap shall not apply.

9.7 Subject to the terms and conditions of Section 9.8 below (that is, Landlord shall not have a right to consent to any proposed transfer if such potential transfer otherwise qualifies as a Permitted Transfer hereunder and is also a change in control as described in this Section 9.7), if Tenant is a corporation, limited liability company, partnership or trust, any transfer or transfers of or change or changes within any twelve (12) month period in the number of the outstanding voting shares of the corporation or limited liability company, the general partnership interests in the partnership or the identity of the persons or entities controlling the activities of such partnership or trust resulting in the persons or entities owning or controlling a majority of such shares, partnership interests or activities of such partnership or trust at the beginning of such period no longer having such ownership or control shall be regarded as equivalent to an assignment of this Lease to the persons or entities acquiring such ownership or control and shall be subject to all the provisions of this Article 9 to the same extent and for all intents and purposes as though such an assignment. Notwithstanding anything to the contrary contained in this Lease, the transfer of outstanding capital stock or other listed equity interests, or the purchase of outstanding capital stock or other listed equity interests, or the purchase of equity interests issued in an initial public offering of stock, by persons or entities through the "over-the-counter" market or any recognized national or international securities exchange shall not be included in determining whether control has been transferred. The foregoing also shall not apply to the infusion of additional equity capital in Tenant or an initial public offering of equity securities of Tenant under the Securities Act of 1933, as amended, which results in Tenant's stock being traded on a national securities exchange, including, but not limited to, the NYSE, the NASDAQ Stock Market or the NASDAQ Small Cap Market System. In addition to the foregoing, any private sale or transfer of the capital stock of Tenant, if Tenant is a corporation, shall not be deemed to be a transfer for purposes of this Lease (and therefore shall not require Landlord's prior consent) only if all of the following conditions precedent are satisfied to Landlord's satisfaction (i) such sale or transfer occurs solely in connection with any bona fide financing or capitalization for the benefit of Tenant, and (ii) Tenant provides to Landlord five (5) days prior written notice of such sale or transfer (unless the same is subject to confidentiality restriction and in such event Tenant shall provide notice of any such transfer within ten (10) days thereafter), and (iii) following such transfer, Tenant's successor's net worth meets the requirements set forth in Section 9.8 below.

9.8 So long as Tenant is not entering into the Permitted Transfer (as defined below) for the purpose of avoiding or otherwise circumventing the remaining terms of this Article 9, Tenant may undergo a deemed assignment due to a transfer or change of control as described in Section 9.7 or sublease all or a portion of the Premises or assign its entire interest under this Lease, without the consent of Landlord, to (a) an affiliate, subsidiary, or parent of Tenant, or a corporation, partnership or other legal entity wholly owned by Tenant (collectively, an "Affiliated Party"), or (b) a successor to Tenant by purchase, merger, consolidation or reorganization, or (c) a purchaser of substantially all of Tenant's assets, provided that all of the

following conditions are satisfied (each such transfer a "Permitted Transfer" and any such assignee or sublessee of a Permitted Transfer, a "Permitted Transferee"): (i) Tenant is not in default beyond applicable notice and cure periods under this Lease; (ii) the Permitted Use does not allow the Premises to be used for retail purposes; (iii) Tenant shall give Landlord written notice at least ten (10) days prior to the effective date of the proposed Permitted Transfer (provided however that such notice may be delivered promptly following such Permitted Transfer if confidentiality restrictions or disclosure requirements applicable to the Permitted Transfer prevent prior notice); (iv) with respect to a deemed transfer due to a change of control or proposed Permitted Transfer to an Affiliated Party, following the transfer, Tenant (in the case of a deemed transfer due to a change of control) or Tenant's successor continues to have a net worth, financial standing and financial resources, as evidenced by the most recent publicly filed financial statements (in the case of public companies) or by current financial statements satisfactory to Landlord and certified by an independent certified public accountant, prepared in accordance with generally accepted accounting principles that are consistently applied (in the case of private companies), reasonably sufficient, taking into account all expected obligations of the transferee with respect to the proposed transfer and all of its other contingent and non-contingent obligations, to service when due the obligations of the transferee with respect to the proposed transfer; and (v) with respect to a purchase, merger, consolidation or reorganization or any Permitted Transfer which results in Tenant ceasing to exist as a separate legal entity, (A) Tenant's successor shall own all or substantially all of the assets of Tenant, and (B) following the transfer, Tenant's successor shall have a net worth, financial standing and financial resources, as evidenced by current financial statements satisfactory to Landlord and certified by an independent certified public accountant, prepared in accordance with generally accepted accounting principles, that are consistently applied, reasonably sufficient, taking into account all expected obligations of the transferee with respect to the proposed transfer and all of its other contingent and non-contingent obligations, to service when due the obligations of the transferee with respect to the proposed transfer. Tenant's notice to Landlord shall include information and documentation showing that each of the above conditions has been satisfied. If requested by Landlord, Tenant's successor shall sign a commercially reasonable form of assumption agreement. As used herein, (1) "parent" shall mean a company which owns a majority of Tenant's voting equity; (2) "subsidiary" shall mean an entity wholly owned by Tenant or at least fifty-one percent (51%) of whose voting equity is owned by Tenant; and (3) "affiliate" shall mean an entity controlled, controlling or under common control with Tenant.

10. INDEMNIFICATION.

10.1 None of the Landlord Entities shall be liable and Tenant hereby waives all claims against them for any damage to any property or any injury to any person in or about the Premises by or from any cause whatsoever (including without limiting the foregoing, rain or water leakage of any character from the roof, windows, walls, basement, pipes, plumbing works or appliances, the Premises not being in good condition or repair, gas, fire, oil, electricity or theft), except to the extent caused by or arising from the active negligence or willful misconduct of Landlord or its agents, employees or contractors. Subject to Article 12 below, Tenant shall protect, indemnify and hold the Landlord Entities harmless from and against any and all loss, claims, liability or costs (including court costs and attorney's fees) incurred by reason of (a) any damage to any property (including but not limited to property of any Landlord Entity) or any injury (including but not limited to death) to any person occurring in, on or about the Premises to the extent that such injury or damage shall be caused by or arise from any actual or alleged act, neglect, fault, or omission by or of Tenant or any Tenant Entity to meet any standards imposed by any duty with respect to the injury or damage; (b) the conduct or management of any work or thing whatsoever done by the Tenant in or about the Premises or from transactions of the Tenant concerning the Premises; (c) Tenant's actual or asserted failure to comply with any and all Regulations applicable to the condition or use of the Premises or its occupancy; or (d) any breach or default on the part of Tenant in the performance of any covenant or agreement on the part of the Tenant to be performed pursuant to this Lease.

10.2 Subject to Article 12 below, Landlord shall protect, indemnify and hold Tenant harmless from and against any and all loss, claims, liability or costs (including court costs and attorney's fees) incurred by reason of any damage to any property (including but not limited to property of Tenant) or any injury (including but not limited to death) to any person occurring in, on or about the Building or common areas of the Project to the extent that such injury or damage shall be caused by or arise from the active negligence or willful misconduct of or breach of this Lease by Landlord or any of Landlord's agents or employees.

10.3 The provisions of this Article shall survive the termination of this Lease with respect to any claims or liability accruing prior to such termination.

11. INSURANCE.

11.1 Tenant shall keep in force throughout the Term: (a) a Commercial General Liability insurance policy or policies to protect the Landlord Entities against any liability to the public or to any invitee of Tenant or a Landlord Entity

incidental to the use of or resulting from any accident occurring in or upon the Premises with a limit of not less than $1,000,000 per occurrence and not less than $2,000,000 in the annual aggregate, or such larger amount as Landlord may prudently require from time to time, covering bodily injury and property damage liability (provided that, except to the extent required by Landlord's lender, Landlord shall only require any such increase in the amount of existing insurance required pursuant to this Section in the event that (i) Landlord reasonably determines that the amount of insurance carried by Tenant hereunder is materially less than the amount or type of insurance coverage typically carried by tenants of the Building and the Project and owners or tenants of comparable buildings located in the geographical area in which the Premises are located which are operated for similar purposes as the Premises, or (ii) if Tenant's use of the Premises should change with or without Landlord's consent) and, once Tenant has completed products, $1,000,000 products/completed operations aggregate; (b) Business Auto Liability covering owned, non-owned and hired vehicles with a limit of not less than $1,000,000 per accident; (c) Worker's Compensation Insurance with limits as required by statute and Employers Liability with limits of $500,000 each accident, $500,000 disease policy limit, $500,000 disease—each employee; (d) All Risk or Special Form coverage protecting Tenant against loss of or damage to Tenant's alterations, additions, improvements, carpeting, floor coverings, panelings, decorations, fixtures, inventory and other business personal property situated in or about the Premises to the full replacement value of the property so insured (including, without limitation, the Initial Alterations); and, (e) Business Interruption Insurance with limit of liability not less than $1,000,000.00.

11.2 The aforesaid policies shall (a) be provided at Tenant's expense; (b) name the Landlord Entities as additional insureds (General Liability) and loss payee (Property—Special Form) for alterations, additions, improvements, carpeting, floor coverings and fixtures at the Premises; (c) be issued by an insurance company with a minimum Best's rating of "A-:VII" during the Term; and (d) provide that said insurance shall not be canceled unless thirty (30) days prior written notice (ten days for non-payment of premium) shall have been given to Landlord, provided, however, that in the event Tenant's insurer fails to comply with the provisions of this item (d), then Tenant shall provide Landlord with thirty (30) days prior written notice (ten (10) days for non-payment of premium) prior to any cancellation of any insurance; a certificate of Liability insurance on ACORD Form 25 and a certificate of Property insurance on ACORD Form 28 shall be delivered to Landlord by Tenant upon the Commencement Date and at least thirty (30) days prior to each renewal of said insurance.

11.3 Whenever Tenant shall undertake any alterations, additions or improvements in, to or about the Premises ("Work") the aforesaid insurance protection must extend to and include injuries to persons and damage to property arising in connection with such Work, without limitation including liability under any applicable structural work act, and such other insurance as Landlord shall reasonably require; and the policies of or certificates evidencing such insurance must be delivered to Landlord prior to the commencement of any such Work.

11.4 Landlord shall keep in force throughout the Term Commercial General Liability Insurance and All Risk or Special Form coverage insuring the Landlord and the Building at full replacement cost. The cost of all such insurance is included in Expenses.

12. **WAIVER OF SUBROGATION.** Notwithstanding anything to the contrary contained in this Lease, Tenant and Landlord hereby mutually waive their respective rights of recovery against each other for any loss insured (or required to be insured pursuant to this Lease) by fire, extended coverage, All Risks or other insurance now or hereafter existing for the benefit of the respective party but only to the extent of the net insurance proceeds payable under such policies. Landlord further agrees that Tenant's liability for any deductibles or other amounts due to risks required to be insured against as to which there are not adequate insurance proceeds available shall be capped at $25,000 for each Casualty Event. Each party shall obtain any special endorsements required by their insurer to evidence compliance with the aforementioned waiver. All of Landlord's and Tenant's repair and indemnity obligations under this Lease shall be subject to the waiver contained in this paragraph.

13. **SERVICES AND UTILITIES.** Tenant shall pay for all water, gas, heat, light, power, telephone, sewer, sprinkler system charges and other utilities and services used on or from the Premises, together with any taxes, penalties, and surcharges or the like pertaining thereto and any maintenance charges for utilities. Tenant shall furnish all electric light bulbs, tubes and ballasts, battery packs for emergency lighting and fire extinguishers. In addition, if required by Regulations, (i) Landlord may install and shall have access to the Premises to monitor a separate meter (or submeter) to determine the actual use of any utility in the Premises or any shared common area, or (ii) require Tenant to provide such information to Landlord, so that Landlord and may make available and share actual whole-project energy and water usage data as necessary to maintain the Building's "green building" certification, if any. If any utility services are not separately metered to Tenant, Tenant shall pay such proportion of all charges jointly metered with other premises as determined by Landlord, in its sole discretion, to be reasonable. Any such charges paid by Landlord and assessed against Tenant shall be immediately payable to Landlord on demand and shall be additional rent hereunder. Tenant acknowledges that as of the date hereof the Premises are separately metered for gas and electricity and Tenant shall, prior to the Commencement Date, open accounts directly with

each applicable utility service provider for each such service to the Premises and the costs for the same shall be paid by Tenant by separate charge billed by the applicable utility company and payable directly by Tenant. Tenant further acknowledges that trash collection service is not provided by Landlord and that Tenant shall be solely responsible to contract for trash collection for the Premises directly with the appropriate provider. Tenant will not, without the written consent of Landlord, contract with a utility provider to service the Premises with any utility, including, but not limited to, telecommunications, electricity, water, sewer or gas, which is not previously providing such service to other tenants in the Project; provided, that Landlord shall not unreasonably withhold its consent to a future telecommunications provider if the telecommunication services affect only the Premises, any agreement between Tenant and such telecommunications provider is terminable at will with no more than thirty (30) days prior notice. Landlord shall in no event be liable for any interruption or failure of utility services on or to the Premises. Tenant shall be responsible for providing janitorial service for the Premises at its sole cost and expense, and Tenant hereby acknowledges that Landlord shall have no obligation whatsoever to provide janitorial service to the Premises. Tenant shall have access to the Building and the Premises for Tenant and its employees 24 hours per day/7 days per week, subject to the terms of this Lease and such security or monitoring systems as Landlord may reasonably impose.

14. **HOLDING OVER.** Tenant shall pay Landlord for each day Tenant retains possession of the Premises or part of them after termination of this Lease by lapse of time or otherwise at the rate ("Holdover Rate") which shall be One Hundred and Fifty Percent (150%) of the amount of the Annual Rent for the last period prior to the date of such termination plus the actual amount of Tenant's Proportionate Share of Expenses and Taxes under Article 4, prorated on a daily basis, and also pay all damages sustained by Landlord by reason of such retention. If Landlord gives notice to Tenant of Landlord's election to such effect, such holding over shall constitute renewal of this Lease for a period from month to month at the Holdover Rate, but if the Landlord does not so elect, no such renewal shall result notwithstanding acceptance by Landlord of any sums due hereunder after such termination; and instead, a tenancy at sufferance at the Holdover Rate shall be deemed to have been created. In any event, no provision of this Article 14 shall be deemed to waive Landlord's right of reentry or any other right under this Lease or at law.

15. **SUBORDINATION.** Without the necessity of any additional document being executed by Tenant for the purpose of effecting a subordination, this Lease shall be subject and subordinate at all times to ground or underlying leases and to the lien of any mortgages or deeds of trust now or hereafter placed on, against or affecting the Building, Landlord's interest or estate in the Building, or any ground or underlying lease; provided, however, that if the lessor, mortgagee, trustee, or holder of any such mortgage or deed of trust elects to have Tenant's interest in this Lease be superior to any such instrument, then, by notice to Tenant, this Lease shall be deemed superior, whether this Lease was executed before or after said instrument. Notwithstanding the foregoing, Tenant covenants and agrees to execute and deliver within ten (10) days of Landlord's request such further reasonable instruments evidencing such subordination or superiority of this Lease as may be required by Landlord. Notwithstanding the foregoing in this Section to the contrary, as a condition precedent to the future subordination of this Lease to a future mortgage, Landlord shall be required to provide Tenant with a non-disturbance, subordination, and attornment agreement in favor of Tenant from any such mortgagee who comes into existence after the Commencement Date. Such non-disturbance, subordination, and attornment agreement in favor of Tenant shall provide that, so long as Tenant is paying the rent due under the Lease and is not otherwise in default under the Lease beyond any applicable cure period, its right to possession and the other terms of the Lease shall remain in full force and effect. Such non-disturbance, subordination, and attornment agreement may include other commercially reasonable provisions in favor of the mortgagee, including, without limitation, additional time on behalf of the mortgagee to cure defaults of the Landlord and provide that (a) neither mortgagee nor any successor-in-interest shall be bound by (i) any payment of the Monthly Installment of Rent or any Rent Adjustments or other sum due under this Lease for more than 1 month in advance or (ii) any amendment or modification of the Lease made without the express written consent of mortgagee or any successor-in-interest; (b) neither mortgagee nor any successor-in-interest will be liable for (i) any act or omission or warranties of any prior landlord (including Landlord), (ii) the breach of any warranties or obligations relating to construction of improvements on the property or any tenant finish work performed or to have been performed by any prior landlord (including Landlord), or (iii) the return of any security deposit, except to the extent such deposits have been received by mortgagee; and (c) neither mortgagee nor any successor-in-interest shall be subject to any offsets or defenses which Tenant might have against any prior landlord (including Landlord). The current mortgagee's standard subordination, non-disturbance and attornment agreement ("SNDA") is attached as Exhibit I to this Lease. Landlord shall provide to Tenant, or cause its current mortgagee to provide to Tenant, a fully executed SNDA, in favor of Tenant, sixty (60) days after mutual execution and delivery of this Lease, provided that Tenant shall be responsible for any fee or review costs charged by mortgagee, which amounts shall be paid by Tenant to Landlord within thirty (30) days following Tenant's receipt of a paid invoice evidencing such legal fees.

16. **RULES AND REGULATIONS.** Tenant shall faithfully observe and comply with all the rules and regulations as set forth in Exhibit D to this Lease and all reasonable and non-discriminatory modifications of and additions to them from time to time put into effect by Landlord, so long as such modifications or additions are provided to Tenant in writing and do

not substantially diminish any right or substantially increase any obligation of Tenant hereunder. Landlord shall not be responsible to Tenant for the non-performance by any other tenant or occupant of the Project of any such rules and regulations. Landlord hereby agrees to use commercially reasonable efforts to generally enforce the rules and regulations in a nondiscriminatory manner. In the event of any conflict between any of the rules and regulations set forth in Exhibit D hereto and this Lease, the terms of this Lease shall control.

17. **REENTRY BY LANDLORD.**

17.1 Landlord reserves and shall at all times have the right to re-enter the Premises to inspect the same, to show said Premises to prospective purchasers, mortgagees or tenants, and to alter, improve or repair the Premises and any portion of the Building, without abatement of rent, and may for that purpose erect, use and maintain scaffolding, pipes, conduits and other necessary structures and open any wall, ceiling or floor in and through the Building and Premises where reasonably required by the character of the work to be performed, provided entrance to the Premises shall not be blocked thereby, and further provided that the business of Tenant shall not be interfered with unreasonably. Landlord agrees that except in the event (a) Tenant is in default under this Lease, (b) Landlord and Tenant are negotiating for or have agreed to an early termination of this Lease or Tenant has exercised its Acceleration Option, or (c) Landlord and Tenant otherwise mutually agree to the contrary, Landlord shall not show the Premises to prospective tenants except during the last nine (9) months of the Term of this Lease. Notwithstanding the foregoing, except (i) to the extent requested by Tenant, (ii) in connection with scheduled maintenance programs, and/or (iii) in the event of an emergency, Landlord shall provide to Tenant at least twenty-four (24) hours' prior notice (either written or oral) before Landlord enters the Premises to perform any repairs therein. Tenant shall be entitled to have an employee of Tenant accompany the person(s) entering the Premises, provided Tenant makes such employee available at the time Landlord or such other party desires to enter the Premises. To the extent required by any applicable Regulations, Landlord shall have the right at any time to change the arrangement and/or locations of entrances, or passageways, doors and doorways, and corridors, windows, elevators, stairs, toilets or other public parts of the Building. Landlord shall have the right at any time to change the name, number or designation by which the Building is commonly known provided Landlord provides Tenant with not less than sixty (60) days prior written notice and reimburses Tenant as provided in Rule 10 of Exhibit D . In the event that Landlord damages any portion of any wall or wall covering, ceiling, or floor or floor covering within the Premises, Landlord shall repair or replace the damaged portion to match the original as nearly as commercially reasonable but shall not be required to repair or replace more than the portion actually damaged. Tenant hereby waives any claim for damages for any injury or inconvenience to or interference with Tenant's business, any loss of occupancy or quiet enjoyment of the Premises, and any other loss occasioned by any action of Landlord authorized by this Article 17. Except in emergency situations, as determined by Landlord, Landlord shall exercise reasonable efforts to perform any entry into the Premises in a manner that is reasonably designed to minimize interference with the operation of Tenant's business in the Premises.

17.2 For each of the aforesaid purposes, Landlord shall at all times have and retain a key with which to unlock all of the doors in the Premises, excluding Tenant's vaults and safes or special security areas (designated in advance), and Landlord shall have the right to use any and all means which Landlord may deem proper to open said doors in an emergency to obtain entry to any portion of the Premises. As to any portion to which access cannot be had by means of a key or keys in Landlord's possession, Landlord is authorized to gain access by such means as Landlord shall elect and the cost of repairing any damage occurring in doing so shall be borne by Tenant and paid to Landlord within five (5) days of Landlord's demand.

18. **DEFAULT.**

18.1 Except as otherwise provided in Article 20, the following events shall be deemed to be Events of Default under this Lease:

18.1.1 Tenant shall fail to pay when due any sum of money becoming due to be paid to Landlord under this Lease, whether such sum be any installment of the rent reserved by this Lease, any other amount treated as additional rent under this Lease, or any other payment or reimbursement to Landlord required by this Lease, whether or not treated as additional rent under this Lease, and such failure shall continue for a period of five (5) days after written notice that such payment was not made when due, but if any such notice shall be given two (2) times during the twelve (12) month period commencing with the date of the first (1 st) such notice, the third (3 rd) failure to pay within five (5) days after due any additional sum of money becoming due to be paid to Landlord under this Lease during such twelve (12) month period shall be an Event of Default, without notice. So long as the same complies with California Code of Civil Procedure Section 1161 (or any similar or successor statute), the notice required pursuant to this Section 18.1.1 shall replace rather than supplement any statutory notice required under California Code of Civil Procedure Section 1161 or any similar or successor statute.

18.1.2 Tenant shall fail to comply with any term, provision or covenant of this Lease which is not provided for in another Section of this Article and shall not cure such failure within thirty (30) days (forthwith, if the failure involves a hazardous condition) after written notice of such failure to Tenant provided, however, that such failure shall not be an event of default if such failure could not reasonably be cured during such thirty (30) day period, Tenant has commenced the cure within such thirty (30) day period and thereafter is diligently pursuing such cure to completion, but the total aggregate cure period shall not exceed one hundred twenty (120) days.

18.1.3 Tenant shall fail to vacate the Premises immediately upon termination of this Lease, by lapse of time or otherwise, or upon termination of Tenant's right to possession only.

18.1.4 Tenant shall become insolvent, admit in writing its inability to pay its debts generally as they become due, file a petition in bankruptcy or a petition to take advantage of any insolvency statute, make an assignment for the benefit of creditors, make a transfer in fraud of creditors, apply for or consent to the appointment of a receiver of itself or of the whole or any substantial part of its property, or file a petition or answer seeking reorganization or arrangement under the federal bankruptcy laws, as now in effect or hereafter amended, or any other applicable law or statute of the United States or any state thereof.

18.1.5 A court of competent jurisdiction shall enter an order, judgment or decree adjudicating Tenant bankrupt, or appointing a receiver of Tenant, or of the whole or any substantial part of its property, without the consent of Tenant, or approving a petition filed against Tenant seeking reorganization or arrangement of Tenant under the bankruptcy laws of the United States, as now in effect or hereafter amended, or any state thereof, and such order, judgment or decree shall not be vacated or set aside or stayed within sixty (60) days from the date of entry thereof.

19. **REMEDIES.**

19.1 Upon the occurrence of any Event or Events of Default under this Lease, whether enumerated in Article 18 or not, Landlord shall have the option to pursue any one or more of the following remedies without any notice (except as expressly prescribed herein) or demand whatsoever (and without limiting the generality of the foregoing, Tenant hereby specifically waives notice and demand for payment of rent or other obligations, except for those notices specifically required pursuant to the terms of this Lease and notices which may be required under California Code of Civil Procedure Section 1161, or any successor statute, as described in Section 18.1.1 above):

19.1.1 Terminate this Lease and Tenant's right to possession of the Premises and recover from Tenant an award of damages equal to the sum of the following:

19.1.1.1 The Worth at the Time of Award of the unpaid rent which had been earned at the time of termination;

19.1.1.2 The Worth at the Time of Award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rent loss that Tenant affirmatively proves could have been reasonably avoided;

19.1.1.3 The Worth at the Time of Award of the amount by which the unpaid rent for the balance of the Term after the time of award exceeds the amount of such rent loss that Tenant affirmatively proves could be reasonably avoided;

19.1.1.4 Any other amount necessary to compensate Landlord for all the detriment either proximately caused by Tenant's failure to perform Tenant's obligations under this Lease or which in the ordinary course of things would be likely to result therefrom; and

19.1.1.5 All such other amounts in addition to or in lieu of the foregoing as may be permitted from time to time under applicable law.

The "Worth at the Time of Award" of the amounts referred to in parts 19.1.1.1 and 19.1.1.2 above, shall be computed by allowing interest at the lesser of a per annum rate equal to: (i) the greatest per annum rate of interest permitted from time to time under applicable law, or (ii) the Prime Rate plus 5%. For purposes hereof, the "Prime Rate" shall be the per annum interest rate publicly announced as its prime or base rate by a federally insured bank selected by Landlord in the State of

California. The "Worth at the Time of Award" of the amount referred to in part 19.1.1.3, above, shall be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award plus 1%;

19.1.2 Employ the remedy described in California Civil Code § 1951.4 (Landlord may continue this Lease in effect after Tenant's breach and abandonment and recover rent as it becomes due, if Tenant has the right to sublet or assign, subject only to reasonable limitations); or

19.1.3 Notwithstanding Landlord's exercise of the remedy described in California Civil Code § 1951.4 in respect of an Event or Events of Default, at such time thereafter as Landlord may elect in writing, to terminate this Lease and Tenant's right to possession of the Premises and recover an award of damages as provided above in Section 19.1.1.

19.2 The subsequent acceptance of rent hereunder by Landlord shall not be deemed to be a waiver of any preceding breach by Tenant of any term, covenant or condition of this Lease, other than the failure of Tenant to pay the particular rent so accepted, regardless of Landlord's knowledge of such preceding breach at the time of acceptance of such rent. No waiver by Landlord of any breach hereof shall be effective unless such waiver is in writing and signed by Landlord.

19.3 **TENANT HEREBY WAIVES ANY AND ALL RIGHTS CONFERRED BY SECTION 3275 OF THE CIVIL CODE OF CALIFORNIA AND BY SECTIONS 1174 (c) AND 1179 OF THE CODE OF CIVIL PROCEDURE OF CALIFORNIA AND ANY AND ALL OTHER REGULATIONS AND RULES OF LAW FROM TIME TO TIME IN EFFECT DURING THE TERM PROVIDING THAT TENANT SHALL HAVE ANY RIGHT TO REDEEM, REINSTATE OR RESTORE THIS LEASE FOLLOWING ITS TERMINATION BY REASON OF TENANT'S BREACH. TENANT ALSO HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, THE RIGHT TO TRIAL BY JURY IN ANY LITIGATION ARISING OUT OF OR RELATING TO THIS LEASE.**

19.4 No right or remedy herein conferred upon or reserved to Landlord is intended to be exclusive of any other right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right or remedy given hereunder or now or hereafter existing by agreement, applicable law or in equity. In addition to other remedies provided in this Lease, Landlord shall be entitled, to the extent permitted by applicable law, to injunctive relief, or to a decree compelling performance of any of the covenants, agreements, conditions or provisions of this Lease, or to any other remedy allowed to Landlord at law or in equity. Forbearance by Landlord to enforce one or more of the remedies herein provided upon an Event of Default shall not be deemed or construed to constitute a waiver of such Event of Default.

19.5 This Article 19 shall be enforceable to the maximum extent such enforcement is not prohibited by applicable law, and the unenforceability of any portion thereof shall not thereby render unenforceable any other portion..

19.6 If more than two (2) Events of Default occur during any twelve (12) month period during the Term or any renewal thereof, Tenant's renewal options, expansion options, purchase options and rights of first offer and/or refusal, if any are provided for in this Lease, shall be null and void.

19.7 If, on account of any breach or default by Tenant in Tenant's obligations under the terms and conditions of this Lease, it shall become necessary or appropriate for Landlord to employ or consult with an attorney or collection agency concerning or to enforce or defend any of Landlord's rights or remedies arising under this Lease or to collect any sums due from Tenant, subject to the following sentence, Tenant agrees to pay all reasonable costs and fees so incurred by Landlord, including, without limitation, reasonable attorneys' fees and costs. If either party participates in an action against the other party arising out of or in connection with this Lease or any covenants or obligations hereunder, then the prevailing party shall be entitled to have or recover from the other party, upon demand, all reasonable attorneys' fees and costs incurred in connection therewith.

19.8 Upon the occurrence of an Event of Default, Landlord may (but shall not be obligated to) cure such default at Tenant's sole expense. Without limiting the generality of the foregoing, Landlord may, at Landlord's option, enter into and upon the Premises if Landlord determines in its sole discretion that Tenant is not acting within a commercially reasonable time to maintain, repair or replace anything for which Tenant is responsible under this Lease or to otherwise effect compliance with its obligations under this Lease and correct the same, without being deemed in any manner guilty of trespass, eviction or forcible entry and detainer and without incurring any liability for any damage or interruption of Tenant's business resulting therefrom and Tenant agrees to reimburse Landlord within five (5) days of Landlord's demand as additional rent, for any expenses which Landlord may incur in thus effecting compliance with Tenant's obligations under this Lease, plus interest from the date of expenditure by Landlord at the Wall Street Journal prime rate.

19.9 Landlord shall be in default under this Lease if (i) Landlord fails to perform any of its obligations hereunder and said failure continues for a period of thirty (30) days after written notice thereof from Tenant to Landlord (provided that if such failure cannot reasonably be cured within said thirty (30) day period, Landlord shall be in default hereunder only if Landlord fails to commence the cure of said failure within said thirty (30) day period, or having commenced the curative action within said thirty (30) day period, fails to diligently pursue same), except in the case of emergency posing an immediate threat to persons or property that occurs in connection with Landlord's failure to perform any nonstructural repair and maintenance obligations of Landlord set forth in this Lease, in which event no notice shall be required (provided Tenant shall promptly thereafter notify Landlord of the alleged failure) and (ii) each mortgagee of whose identity Tenant has been notified in writing shall have failed to cure such default within thirty (30) days (or such longer period of time as may be specified in any written agreement between Tenant and mortgagee regarding such matter) after receipt of written notice from Tenant of Landlord's failure to cure within the time periods provided above (except as set forth above in the event of an emergency following Landlord's failure to perform any nonstructural repair or maintenance obligation of Landlord as set forth in the Lease). In the event of a default by Landlord under the Lease, Tenant shall use reasonable efforts to mitigate its damages and losses arising from any such default and Tenant may pursue any and all remedies available to it at law or in equity, provided, however, in no event shall Tenant claim a constructive or actual eviction or that the Premises have become unsuitable or unhabitable prior to a default and failure to cure by Landlord and its mortgagee under this Lease and, further provided, in no event shall Tenant be entitled to receive more than its actual direct damages, it being agreed that Tenant hereby waives any claim it otherwise may have for special or consequential damages. Tenant, without being obligated to do so, shall have the right, but not the obligation, to perform the nonstructural repair or maintenance obligation to the Premises following a Landlord default in the performance thereof. The full amount of the documented, third party out-of-pocket reasonable costs and expenses so incurred by Tenant (the "Reimbursable Costs") shall be paid by Landlord to Tenant, within 30 days after written demand therefore (provided that such written demand is accompanied by reasonable documented evidence of the Reimbursable Costs); provided, however, in no event shall such Reimbursable Costs exceed $50,000.00. Tenant shall give no less than three (3) business days prior written notice to Landlord of Tenant's intention to exercise its rights under this Article. In the event Tenant exercises its rights under this Article, Tenant shall use only those contractors used by Landlord in the Building for work unless (a) such contractors are unwilling or unable to perform, or timely perform, such work, (b) such contractors are unwilling to perform such work for a price that is market-based, or (c) Landlord fails to identify who the approved contractors are for work in the Building within 1 business day following Tenant's request therefor, in any of which events Tenant may utilize the services of any other qualified, appropriately insured, bonded and licensed (in the state in which the Building is located) contractor which normally and regularly performs similar work in comparable buildings. Prior to starting any such work, Tenant shall furnish Landlord with plans and specifications therefor, if appropriate; copies of contracts; necessary governmental permits and approvals; evidence of contractor's and subcontractor's insurance. All such work shall be performed in a good and workmanlike manner using materials of a quality that is at least equal to the minimum quality for the Building. Tenant shall comply with the reasonable rules, regulations and procedures for the performance of work in the Building which have been provided to Tenant. Upon completion of any such work, Tenant shall furnish "as-built" plans (to the extent appropriate), completion affidavits, full and final waivers of lien and receipted bills covering all labor and materials. Tenant shall assure that the work comply with all insurance requirements of this Lease and applicable laws. If any such work will adversely affect the common areas of the Building, the exterior appearance of the Building, or any other tenant's leased space, Tenant shall not be permitted to perform such work.

20. TENANT'S BANKRUPTCY OR INSOLVENCY.

20.1 If at any time and for so long as Tenant shall be subjected to the provisions of the United States Bankruptcy Code or other law of the United States or any state thereof for the protection of debtors as in effect at such time (each a "Debtor's Law"):

20.1.1 Tenant, Tenant as debtor-in-possession, and any trustee or receiver of Tenant's assets (each a "Tenant's Representative") shall have no greater right to assume or assign this Lease or any interest in this Lease, or to sublease any of the Premises than accorded to Tenant in Article 9, except to the extent Landlord shall be required to permit such assumption, assignment or sublease by the provisions of such Debtor's Law. Without limitation of the generality of the foregoing, any right of any Tenant's Representative to assume or assign this Lease or to sublease any of the Premises shall be subject to the conditions that:

20.1.1.1 Such Debtor's Law shall provide to Tenant's Representative a right of assumption of this Lease which Tenant's Representative shall have timely exercised and Tenant's Representative shall have fully cured any default of Tenant under this Lease.

20.1.1.2 Tenant's Representative or the proposed assignee, as the case shall be, shall have deposited with Landlord as security for the timely payment of rent an amount equal to the larger of: (a) three (3) months' rent and other monetary charges accruing under this Lease; and (b) any sum specified in Article 5; and shall have provided Landlord with adequate other assurance of the future performance of the obligations of the Tenant under this Lease. Without limitation, such assurances shall include, at least, in the case of assumption of this Lease, demonstration to the satisfaction of the Landlord that Tenant's Representative has and will continue to have sufficient unencumbered assets after the payment of all secured obligations and administrative expenses to assure Landlord that Tenant's Representative will have sufficient funds to fulfill the obligations of Tenant under this Lease; and, in the case of assignment, submission of current financial statements of the proposed assignee, audited by an independent certified public accountant reasonably acceptable to Landlord and showing a net worth and working capital in amounts determined by Landlord to be sufficient to assure the future performance by such assignee of all of the Tenant's obligations under this Lease.

20.1.1.3 The assumption or any contemplated assignment of this Lease or subleasing any part of the Premises, as shall be the case, will not breach any provision in any other lease, mortgage, financing agreement or other agreement by which Landlord is bound.

20.1.1.4 Landlord shall have, or would have had absent the Debtor's Law, no right under Article 9 to refuse consent to the proposed assignment or sublease by reason of the identity or nature of the proposed assignee or sublessee or the proposed use of the Premises concerned.

21. **QUIET ENJOYMENT.** Landlord represents and warrants that it has full right and authority to enter into this Lease and that Tenant, while paying the rental and performing its other covenants and agreements contained in this Lease, shall peaceably and quietly have, hold and enjoy the Premises for the Term without hindrance or molestation from Landlord subject to the terms and provisions of this Lease. Landlord shall not be liable for any interference or disturbance by other tenants or third persons, nor shall Tenant be released from any of the obligations of this Lease because of such interference or disturbance. Notwithstanding the foregoing, Landlord shall use commercially reasonable efforts to end or minimize unreasonable interference or disturbance by other tenants or third persons after Tenant has requested Landlord to do so in writing. "Commercially reasonable efforts" of Landlord shall not include payment of money, commencing or participating in any litigation or other similar proceeding or incurring liability.

22. **CASUALTY.**

22.1 In the event the Premises or the Building are damaged by fire or other cause and in Landlord's reasonable estimation such damage can be materially restored within two hundred seventy (270) days following the date of the casualty, Landlord shall forthwith repair the same and this Lease shall remain in full force and effect, except that Tenant shall be entitled to a proportionate abatement in rent from the date of such damage. Such abatement of rent shall be made pro rata in accordance with the extent to which the damage and the making of such repairs shall interfere with the use and occupancy by Tenant of the Premises from time to time. Within forty-five (45) days from the date of such damage, Landlord shall notify Tenant, in writing, of Landlord's reasonable estimation of the length of time within which material restoration can be made, and Landlord's determination shall be binding on Tenant. For purposes of this Lease, the Building or Premises shall be deemed "materially restored" if they are in such condition as would not prevent or materially interfere with Tenant's use of the Premises for the purpose for which it was being used immediately before such damage.

22.2 If such repairs cannot, in Landlord's reasonable estimation, be made within two hundred seventy (270) days following the date of the casualty, Landlord and Tenant shall each have the option of giving the other, at any time within thirty (30) days after Landlord's notice of estimated restoration time, notice terminating this Lease as of the date of such damage. In the event of the giving of such notice, this Lease shall expire and all interest of the Tenant in the Premises shall terminate as of the date of such damage as if such date had been originally fixed in this Lease for the expiration of the Term. In the event that neither Landlord nor Tenant exercises its option to terminate this Lease, then Landlord shall repair or restore such damage, this Lease continuing in full force and effect, and the rent hereunder shall be proportionately abated as provided in Section 22.1.

22.3 Landlord shall not be required to repair or replace any damage or loss by or from fire or other cause to any panelings, decorations, partitions, additions, railings, ceilings, floor coverings, office fixtures or any other property or improvements installed on the Premises by, or belonging to, Tenant. Any insurance which may be carried by Landlord or Tenant against loss or damage to the Building or Premises shall be for the sole benefit of the party carrying such insurance and under its sole control.

22.4 In the event that Landlord should fail to complete such repairs and material restoration within thirty (30) days after the date estimated by Landlord therefor as extended by this Section 22.4, Tenant may at its option and as its sole remedy terminate this Lease by delivering written notice to Landlord, within fifteen (15) days after the expiration of said period of time, whereupon this Lease shall end on the date of such notice or such later date fixed in such notice as if the date of such notice was the date originally fixed in this Lease for the expiration of the Term; provided, however, that if construction is delayed because of (i) changes, deletions or additions in construction requested by Tenant, or (ii) by up to one hundred twenty (120) days due to strikes, lockouts, casualties, Acts of God, war, material or labor shortages, government regulation or control or other causes beyond the reasonable control of Landlord, then the period for restoration, repair or rebuilding shall be extended for the amount of time Landlord is so delayed.

22.5 Notwithstanding anything to the contrary contained in this Article: (a) Landlord shall not have any obligation whatsoever to repair, reconstruct, or restore the Premises when the damages resulting from any casualty covered by the provisions of this Article 22 occur during the last twelve (12) months of the Term or any extension thereof, but if Landlord determines not to repair such damages Landlord shall notify Tenant and if such damages shall render any material portion of the Premises untenantable Tenant shall have the right to terminate this Lease by notice to Landlord within fifteen (15) days after receipt of Landlord's notice; and (b) in the event the holder of any indebtedness secured by a mortgage or deed of trust covering the Premises or Building requires that any insurance proceeds be applied to such indebtedness, then Landlord shall have the right to terminate this Lease by delivering written notice of termination to Tenant within fifteen (15) days after such requirement is made by any such holder, whereupon this Lease shall end on the date of such damage as if the date of such damage were the date originally fixed in this Lease for the expiration of the Term. Notwithstanding anything to the contrary contained in this Lease, if the sole reason for which a right in Landlord to terminate this Lease arises under this Article 22 is because the required repair or restoration cost is not fully covered by insurance proceeds (excepting applicable deductibles), or such proceeds are directed by Landlord's lender to any applicable encumbrance on title to the Project, and if the required repair and restoration shall cost in the aggregate less than Fifty Thousand Dollars ($50,000.00), then Landlord's right to terminate this Lease shall be deemed null and void. The foregoing shall not prohibit Landlord from exercising its right to terminate for any of the other reasons set forth herein. Notwithstanding anything to the contrary contained herein, Landlord shall not in bad faith terminate this Lease pursuant to the terms of this Article 22 solely for the purpose of replacing Tenant with a successor tenant at a higher rental rate or that Landlord otherwise prefers. In addition to Landlord's and Tenant's right to terminate as provided herein, Tenant shall have the right to terminate this Lease if: (i) a material portion of the Premises is rendered untenantable by fire or other casualty and Landlord's completion estimate described in Section 22.1 provides that such damage cannot reasonably be repaired (as determined by Landlord) within sixty (60) days after Landlord's receipt of all required permits to restore the Premises; (ii) there is less than one (1) year of the Term remaining on the date of such casualty; (iii) the casualty was not caused by the negligence or willful misconduct of Tenant or any Tenant Entities; and (iv) Tenant provides Landlord with written notice of its intent to terminate within thirty (30) days after the date of Landlord's completion estimate.

22.6 In the event of any damage or destruction to the Building or Premises by any peril covered by the provisions of this Article 22, it shall be Tenant's responsibility to reasonably secure the Premises and upon notice from Landlord to remove forthwith, at its sole cost and expense, such portion of all of the property belonging to Tenant or its licensees from such portion or all of the Building or Premises as Landlord shall reasonably request.

22.7 Tenant hereby waives any and all rights under and benefits of Sections 1932(2) and 1933(4) of the California Civil Code, or any similar or successor Regulations or other laws now or hereinafter in effect.

23. **EMINENT DOMAIN.** If all or any substantial part of the Premises shall be taken or appropriated by any public or quasi-public authority under the power of eminent domain, or conveyance in lieu of such appropriation, either party to this Lease shall have the right, at its option, of giving the other, at any time within thirty (30) days after such taking, notice terminating this Lease, except that Tenant may only terminate this Lease by reason of taking or appropriation, if such taking or appropriation shall be so substantial as to materially interfere with Tenant's use and occupancy of the Premises. If neither party to this Lease shall so elect to terminate this Lease, the rental thereafter to be paid shall be adjusted on a fair and equitable basis under the circumstances to the extent the Premises is rendered unusable or inaccessible as a result of the condemnation. If only a part of the Premises is subject to a permanent taking and this Lease is not terminated as provided in this Article, Landlord, with reasonable diligence and at its expense (to the extent covered by any condemnation award) will restore the remaining portion of the Premises as nearly as practicable to its condition immediately prior to such taking. In addition to the rights of Landlord above, if any substantial part of the Building shall be taken or appropriated by any public or quasi-public authority under the power of eminent domain or conveyance in lieu thereof, and regardless of whether the Premises or any part thereof are so taken or appropriated, Landlord shall have the right, at its sole option, to terminate this Lease. Landlord shall be entitled to any and all income, rent, award, or any interest whatsoever in or upon any such sum, which may be paid or made in connection with any such public or quasi-public use or purpose, and Tenant hereby assigns to

Landlord any interest it may have in or claim to all or any part of such sums, other than any separate award which may be made with respect to Tenant's trade fixtures, personal property and moving expenses; Tenant shall make no claim for the value of any unexpired Term. Tenant hereby waives any and all rights under and benefits of Section 1265.130 of the California Code of Civil Procedure, or any similar or successor Regulations or other laws now or hereinafter in effect.

24. **SALE BY LANDLORD.** In event of a sale or conveyance by Landlord of the Building, the same shall operate to release Landlord from any future liability upon any of the covenants or conditions, expressed or implied, contained in this Lease in favor of Tenant, provided that any successor pursuant to a voluntary, third-party transfer (but not as part of an involuntary transfer resulting from a foreclosure or deed in lieu thereof) shall have assumed Landlord's obligations under this Lease either by contractual obligation, assumption agreement or by operation of law, and in such event Tenant agrees to look solely to the responsibility of the successor in interest of Landlord in and to this Lease. Except as set forth in this Article 24, this Lease shall not be affected by any such sale and Tenant agrees to attorn to the purchaser or assignee. If any security has been given by Tenant to secure the faithful performance of any of the covenants of this Lease, Landlord may transfer or deliver said security, as such, to Landlord's successor in interest and thereupon Landlord shall be discharged from any further liability with regard to said security.

25. **ESTOPPEL CERTIFICATES.** Within ten (10) business days following any written request which Landlord may make from time to time, Tenant shall execute and deliver to Landlord or mortgagee or prospective mortgagee a sworn statement certifying: (a) the date of commencement of this Lease; (b) the fact that this Lease is unmodified and in full force and effect (or, if there have been modifications to this Lease, that this Lease is in full force and effect, as modified, and stating the date and nature of such modifications); (c) the date to which the rent and other sums payable under this Lease have been paid; (d) the fact that, to Tenant's actual knowledge, there are no current defaults under this Lease by either Landlord or Tenant except as specified in Tenant's statement; and (e) such other matters as may be reasonably requested by Landlord. Landlord and Tenant intend that any statement delivered pursuant to this Article 25 may be relied upon by any mortgagee, beneficiary or purchaser. Tenant irrevocably agrees that if Tenant fails to execute and deliver such certificate within such ten (10) business day period, Landlord may provide to Tenant a second written request with respect to such estoppel certificate. If Tenant fails to execute and deliver such certificate within a five (5) day period following the date of Landlord's second written request therefor, Landlord or Landlord's beneficiary or agent may rely upon, for whatever purposes, such certificate as prepared on Tenant's behalf, and that such certificate shall be fully binding on Tenant.

26. **SURRENDER OF PREMISES.**

26.1 Tenant and Landlord shall arrange to meet at mutually and reasonably acceptable times for two (2) joint inspections of the Premises, the first to occur at least thirty (30) days (but no more than sixty (60) days) before the last day of the Term, and the second to occur not later than three (3) days after Tenant has vacated the Premises. In the event of Tenant's failure to agree to schedule such joint inspections and/or participate in either such inspection, Landlord's inspection at or after Tenant's vacating the Premises shall be conclusively deemed correct for purposes of determining Tenant's responsibility for repairs and restoration.

26.2 All alterations, additions, and improvements in, on, or to the Premises made or installed by or for Tenant, including, without limitation, carpeting (collectively, "Alterations"), shall be and remain the property of Tenant during the Term. Upon the expiration or sooner termination of the Term, all Alterations shall become a part of the realty and shall belong to Landlord without compensation, and title shall pass to Landlord under this Lease as by a bill of sale. At the end of the Term or any renewal of the Term or other sooner termination of this Lease, Tenant will peaceably deliver up to Landlord possession of the Premises, together with all Alterations by whomsoever made, in the same conditions received or first installed, broom clean and free of all debris, excepting only ordinary wear and tear and damage by fire or other casualty or by condemnation or repairs and maintenance which are the responsibility of Landlord under this Lease. Notwithstanding the foregoing, and subject to Section 6.4 above, if Landlord elects by notice given to Tenant at least ten (10) days prior to expiration of the Term, Tenant shall, at Tenant's sole cost, remove any Alterations, including carpeting, so designated by Landlord's notice, and repair any damage caused by such removal. Tenant must, at Tenant's sole cost, remove upon termination of this Lease, any and all of Tenant's furniture, furnishings, equipment, movable partitions of less than full height from floor to ceiling and other trade fixtures and personal property, as well as all data/telecommunications cabling and wiring installed by or on behalf of Tenant, whether inside walls, under any raised floor or above any ceiling (collectively, "Personalty"). Personalty not so removed shall be deemed abandoned by the Tenant and title to the same shall thereupon pass to Landlord under this Lease as by a bill of sale, but Tenant shall remain responsible for the cost of removal and disposal of such Personalty, as well as any damage caused by such removal. In the event Tenant acquires any furniture, fixtures and/or equipment or other personal property from the prior tenant at the Premises which property shall be deemed to be a part of Tenant's Personalty hereunder and, in such event, Tenant shall remove the same in accordance with the terms and conditions set forth herein.

26.3 All obligations of Tenant under this Lease not fully performed as of the expiration or earlier termination of the Term shall survive the expiration or earlier termination of the Term. Upon the expiration or earlier termination of the Term, Tenant shall pay to Landlord the amount, as estimated by Landlord, necessary to repair and restore the Premises as provided in this Lease and/or to discharge Tenant's obligation for unpaid amounts due or to become due to Landlord. All such amounts shall be used and held by Landlord for payment of such obligations of Tenant, with Tenant being liable for any additional costs upon demand by Landlord, or with any excess to be returned to Tenant after all such obligations have been determined and satisfied. Any otherwise unused Security Deposit shall be credited against the amount payable by Tenant under this Lease.

27. **NOTICES.** Any notice or document required or permitted to be delivered under this Lease shall be addressed to the intended recipient, by fully prepaid registered or certified United States Mail return receipt requested, or by reputable independent contract delivery service furnishing a written record of attempted or actual delivery, and shall be deemed to be delivered when tendered for delivery to the addressee at its address set forth on the Reference Pages, or at such other address as it has then last specified by written notice delivered in accordance with this Article 27, whether or not actually accepted or received by the addressee. Any such notice or document may also be personally delivered if a receipt is signed by and received from, the individual, if any, named in Tenant's Notice Address.

28. **TAXES PAYABLE BY TENANT.** In addition to rent and other charges to be paid by Tenant under this Lease, Tenant shall reimburse to Landlord, upon demand, any and all taxes payable by Landlord (other than net income taxes) whether or not now customary or within the contemplation of the parties to this Lease except to the extent excluded under Section 4.1.3: (a) upon, allocable to, or measured by or on the gross or net rent payable under this Lease, including without limitation any gross income tax or excise tax levied by the State, any political subdivision thereof, or the Federal Government with respect to the receipt of such rent; (b) upon or with respect to the possession, leasing, operation, management, maintenance, alteration, repair, use or occupancy of the Premises or any portion thereof, including any sales, use or service tax imposed as a result thereof; (c) upon or measured by the Tenant's gross receipts or payroll or the value of Tenant's equipment, furniture, fixtures and other personal property of Tenant or leasehold improvements, alterations or additions located in the Premises; or (d) upon this transaction or any document to which Tenant is a party creating or transferring any interest of Tenant in this Lease or the Premises. In addition to the foregoing, Tenant agrees to pay, before delinquency, any and all taxes levied or assessed against Tenant and which become payable during the term hereof upon Tenant's equipment, furniture, fixtures and other personal property of Tenant located in the Premises.

29. **RELOCATION OF TENANT.** ~~Landlord, at its sole expense, on at least sixty (60) days prior written notice, may require Tenant to move from the Premises to other space of comparable size and decor in order to permit Landlord to consolidate the space leased to Tenant with other adjoining space leased or to be leased to another tenant. In the event of any such relocation, Landlord will pay all expenses of preparing and decorating the new premises so that they will be substantially similar to the Premises from which Tenant is moving, and Landlord will also pay the expense of moving Tenant's furniture and equipment to the relocated premises. In such event this Lease and each and all of the terms and covenants and conditions hereof shall remain in full force and effect and thereupon be deemed applicable to such new space except that revised Reference Pages and a revised Exhibit A shall become part of this Lease and shall reflect the location of the new premises.~~ [INTENTIONALLY OMITTED]

30. **DEFINED TERMS AND HEADINGS.** The Article headings shown in this Lease are for convenience of reference and shall in no way define, increase, limit or describe the scope or intent of any provision of this Lease. Any indemnification or insurance of Landlord shall apply to and inure to the benefit of all the following "Landlord Entities", being Landlord, Landlord's investment manager, and the trustees, boards of directors, officers, general partners, beneficiaries, stockholders, employees and agents of each of them. Any option granted to Landlord shall also include or be exercisable by Landlord's trustee, beneficiary, agents and employees, as the case may be. In any case where this Lease is signed by more than one person, the obligations under this Lease shall be joint and several. The terms "Tenant" and "Landlord" or any pronoun used in place thereof shall indicate and include the masculine or feminine, the singular or plural number, individuals, firms or corporations, and their and each of their respective successors, executors, administrators and permitted assigns, according to the context hereof. The term "rentable area" shall mean the rentable area of the Premises or the Building as calculated by the Landlord on the basis of the plans and specifications of the Building. Each of Landlord and Tenant hereby accepts and agrees to be bound by the figures for the rentable square footage of the Premises and Tenant's Proportionate Share shown on the Reference Pages; provided, however, following the initial Term of this Lease, Landlord may adjust either or both figures if there is manifest error, addition or subtraction to the Building or Project, remeasurement or other circumstance reasonably justifying adjustment. Notwithstanding the foregoing, if Tenant exercises its Renewal Option pursuant to Article 40 of this Lease, Landlord shall only be entitled to increase the rentable square footage of the Premises after the initial Term pursuant to the foregoing sentence if, within twenty (20) days following such exercise by Tenant, Landlord provides to Tenant the increased rentable square footage of the Premises and, in such event, Tenant may, within five (5) business days of Landlord's

delivery to Tenant of the increased measurement, rescind its Renewal Option exercise and in such event, Tenant shall be deemed to have waiver its Renewal Option. The term "Building" refers to the structure in which the Premises are located.

31. **TENANT'S AUTHORITY.**

31.1 If Tenant signs as a corporation, partnership, trust or other legal entity, Tenant represents and warrants that Tenant has been and is qualified to do business in the state in which the Building is located, that the entity has full right and authority to enter into this Lease, and that all persons signing on behalf of the entity were authorized to do so by appropriate actions. Upon Landlord's request, Tenant agrees to deliver to Landlord, simultaneously with the delivery of this Lease, a corporate resolution, proof of due authorization by partners or other appropriate documentation reasonably acceptable to Landlord evidencing the due authorization of Tenant to enter into this Lease.

31.2 Tenant hereby represents and warrants that Tenant is not (i) the target of any sanctions program that is established by Executive Order of the President or published by the Office of Foreign Assets Control, U.S. Department of the Treasury ("OFAC"); (ii) designated by the President or OFAC pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 5, the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-06, the Patriot Act, Public Law 107-56, Executive Order 13224 (September 23, 2001) or any Executive Order of the President issued pursuant to such statutes; or (iii) named on the following list that is published by OFAC: "List of Specially Designated Nationals and Blocked Persons." If the foregoing representation is untrue at any time during the Term, an Event of Default will be deemed to have occurred, without the necessity of notice to Tenant.

32. **FINANCIAL STATEMENTS AND CREDIT REPORTS.** At Landlord's request, Tenant shall deliver to Landlord a copy, certified by an officer of Tenant as being a true and correct copy, of Tenant's most recent audited financial statement, or, if unaudited, certified by Tenant's chief financial officer as being true, complete and correct in all material respects, subject to year-end adjustments. Tenant hereby authorizes Landlord to obtain one or more credit reports on Tenant at any time, and shall execute such further authorizations as Landlord may reasonably require in order to obtain a credit report. Notwithstanding the foregoing, Landlord shall not request financial statements more than once in each consecutive one (1) year period during the Term unless (i) Tenant is in default, (ii) Landlord reasonably believes that there has been an adverse change in Tenant's financial position since the last financial statement provided to Landlord, or (iii) requested (a) in connection with a proposed sale or transfer of the Building by Landlord, or (b) by an investor of Landlord, any Landlord Entity or any lender or proposed lender of Landlord or any Landlord Entity. At Tenant's request, Landlord shall enter into a confidentiality agreement with Tenant, which agreement is reasonably acceptable to Landlord and covers confidential financial information provided by Tenant to Landlord. Notwithstanding the foregoing, so long as Tenant is a publicly traded company on an "over-the-counter" market or any recognized national or international securities exchange, the foregoing shall not apply so long as Tenant's current public annual report (in compliance with applicable securities laws) for such applicable year is available to Landlord in the public domain.

33. **COMMISSIONS.** Each of the parties represents and warrants to the other that it has not dealt with any broker or finder in connection with this Lease, except as described on the Reference Pages.

34. **TIME AND APPLICABLE LAW.** Time is of the essence of this Lease and all of its provisions. This Lease shall in all respects be governed by the laws of the state in which the Building is located. Whenever a period of time is prescribed for the taking of an action by Landlord, the period of time for the performance of such action shall be extended by the number of days that the performance is actually delayed due to strikes, acts of God, shortages of labor or materials, war, terrorist acts, pandemics, civil disturbances and other causes beyond the reasonable control of Landlord.

35. **SUCCESSORS AND ASSIGNS.** Subject to the provisions of Article 9, the terms, covenants and conditions contained in this Lease shall be binding upon and inure to the benefit of the heirs, successors, executors, administrators and assigns of the parties to this Lease.

36. **ENTIRE AGREEMENT.** This Lease, together with its exhibits, contains all agreements of the parties to this Lease and supersedes any previous negotiations. There have been no representations made by the Landlord or any of its representatives or understandings made between the parties other than those set forth in this Lease and its exhibits. This Lease may not be modified except by a written instrument duly executed by the parties to this Lease. This Lease may be executed in any number of counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same Lease. In order to expedite the transaction contemplated herein, telecopied signatures or signatures transmitted by electronic mail in so-called "pdf" format may be used in place of original signatures on this Lease. Landlord and Tenant intend to be bound by the signatures on the telecopied or e-mailed document, are aware that the other party will rely on the telecopied or e-mailed signatures, and hereby waive any defenses to the enforcement of the terms of this Lease

based on such telecopied or e-mailed signatures. Promptly following transmission of the telecopied or e-mailed signatures, Tenant shall promptly deliver to Landlord with original signatures on this Lease.

37. **EXAMINATION NOT OPTION.** Submission of this Lease shall not be deemed to be a reservation of the Premises. Landlord shall not be bound by this Lease until it has received a copy of this Lease duly executed by Tenant and has delivered to Tenant a copy of this Lease duly executed by Landlord, and until such delivery Landlord reserves the right to exhibit and lease the Premises to other prospective tenants. Notwithstanding anything contained in this Lease to the contrary, Landlord may withhold delivery of possession of the Premises from Tenant until such time as Tenant has paid to Landlord any security deposit required by Article 5, the first month's rent as set forth in Article 3 and any sum owed pursuant to this Lease.

38. **RECORDATION.** Tenant shall not record or register this Lease or a short form memorandum hereof without the prior written consent of Landlord, and then shall pay all charges and taxes incident such recording or registration.

39. **LETTER OF CREDIT.** In lieu of providing cash as a security deposit, at Tenant's option, upon Tenant's execution and delivery of this Lease to Landlord (or if Tenant provides a cash Security Deposit at execution and delivery of this Lease, Tenant may thereafter substitute such cash Security Deposit with a Letter of Credit provided pursuant to the terms and conditions of this Article 39), Tenant shall deliver to Landlord, as collateral for the full performance by Tenant of all of its obligations under this Lease and for all losses and damages Landlord may suffer as a result of Tenant's failure to comply with one or more provisions of this Lease, including, but not limited to, any post lease termination damages under Section 1951.2 of the California Civil Code, an Irrevocable Standby Letter of Credit (the "Letter of Credit") in the amount of Two Hundred and Fifty Thousand Dollars ($250,000.00). The following terms and conditions shall apply to the Letter of Credit:

39.1 The Letter of Credit shall be in favor of Landlord, shall be issued by a bank acceptable to Landlord with a Standard & Poors rating of "A" or better, shall comply with all of the terms and conditions of this Article and shall otherwise be in the form attached hereto as Exhibit F . Landlord hereby approves of Wells Fargo Bank as the issuing bank.

39.2 The Letter of Credit or any replacement Letter of Credit shall be irrevocable for the term thereof and shall automatically renew on a year to year basis until a period ending not earlier than two months subsequent to the Termination Date (the "LOC Expiration Date") without any action whatsoever on the part of Landlord; provided that the issuing bank shall have the right not to renew the Letter of Credit by giving written notice to Landlord not less than sixty (60) days prior to the expiration of the then current term of the Letter of Credit that it does not intend to renew the Letter of Credit. Tenant understands that the election by the issuing bank not to renew the Letter of Credit shall not, in any event, diminish the obligation of Tenant to deposit the Security Deposit or maintain such an irrevocable Letter of Credit in favor of Landlord through the LOC Expiration Date.

39.3 Landlord, or its then authorized representative, upon Tenant's failure to comply with one or more provisions of this Lease (subject to applicable notice and cure periods), or as otherwise specifically agreed by Landlord and Tenant pursuant to this Lease or any amendment hereof, without prejudice to any other remedy provided in this Lease or by Regulations, shall have the right from time to time to make one or more draws on the Letter of Credit and use all or part of the proceeds in accordance with Section 39.4 below. In addition, if Tenant fails to furnish a renewal or replacement letter of credit complying with all of the provisions of this Article 39 at least thirty (30) days prior to the stated expiration date of the Letter of Credit then held by Landlord, Landlord may draw upon such Letter of Credit and hold the proceeds thereof (and such proceeds need not be segregated) in accordance with the terms of this Article 39. Funds may be drawn down on the Letter of Credit upon presentation to the issuing bank of Landlord's (or Landlord's then authorized representative's) certification set forth in Exhibit F . In the event that Landlord draws upon the Letter of Credit solely due to Tenant's failure to renew the Letter of Credit at least thirty (30) days before its expiration, Tenant shall at any time thereafter be entitled to provide Landlord with a replacement Letter of Credit that satisfies the requirements hereunder, at which time Landlord shall return any remaining unapplied cash proceeds of the original Letter of Credit drawn by Landlord. Tenant may at any time substitute a Security Deposit for the Letter of Credit, or a Letter of Credit for the Security Deposit.

39.4 Tenant acknowledges and agrees (and the Letter of Credit shall so state) that the Letter of Credit shall be honored by the issuing bank without inquiry as to the truth of the statements set forth in such draw request and regardless of whether the Tenant disputes the content of such statement. The proceeds of the Letter of Credit shall constitute Landlord's sole and separate property (and not Tenant's property or the property of Tenant's bankruptcy estate) and Landlord may immediately upon any draw (and without notice to Tenant) apply or offset the proceeds of the Letter of Credit: (a) against any rent or other amounts payable by Tenant under this Lease that is not paid when due; (b) against all losses and damages that Landlord has suffered or that Landlord reasonably estimates that it may suffer as a result of Tenant's failure to comply with one or more provisions of this Lease, including any damages arising under Section 1951.2 of the California Civil Code

following termination of this Lease; (c) against any costs incurred by Landlord in connection with this Lease (including attorneys' fees); and (d) against any other amount that Landlord may spend or become obligated to spend by reason of Tenant's default. Provided Tenant has surrendered the Premises, Landlord agrees to pay to Tenant within sixty (60) days after the LOC Expiration Date the amount of any proceeds of the Letter of Credit received by Landlord and not applied as allowed above; provided, that if prior to the LOC Expiration Date a voluntary petition is filed by Tenant or any guarantor, or an involuntary petition is filed against Tenant or any Guarantor by any of Tenant's or guarantor's creditors, under the Federal Bankruptcy Code, then Landlord shall not be obligated to make such payment in the amount of the unused Letter of Credit proceeds until either all preference issues relating to payments under this Lease have been resolved in such bankruptcy or reorganization case or such bankruptcy or reorganization case has been dismissed, in each case pursuant to a final court order not subject to appeal or any stay pending appeal.

39.5 If, as result of any application or use by Landlord of all or any part of the Letter of Credit, the amount of the Letter of Credit shall be less than the amount set forth in this Article 39, Tenant shall, within five (5) days thereafter, provide Landlord with additional letter(s) of credit in an amount equal to the deficiency (or a replacement letter of credit in the total amount required pursuant to this Article 39), and any such additional (or replacement) letter of credit shall comply with all of the provisions of this Article 39, and if Tenant fails to comply with the foregoing, notwithstanding anything to the contrary contained in this Lease, the same shall constitute an incurable Event of Default by Tenant. Tenant further covenants and warrants that it will neither assign nor encumber the Letter of Credit or any part thereof and that neither Landlord nor its successors or assigns will be bound by any such assignment, encumbrance, attempted assignment or attempted encumbrance.

39.6 Landlord may, at any time and without notice to Tenant and without first obtaining Tenant's consent thereto, transfer all or any portion of its interest in and to the Letter of Credit to another party, person or entity, including Landlord's mortgagee and/or to have the Letter of Credit reissued in the name of Landlord's mortgagee. If Landlord transfers its interest in the Building and transfers the Letter of Credit (or any proceeds thereof then held by Landlord) in whole or in part to the transferee, Landlord shall, without any further agreement between the parties hereto, thereupon be released by Tenant from all liability therefor. The provisions hereof shall apply to every transfer or assignment of all or any part of the Letter of Credit to a new landlord. In connection with any such transfer of the Letter of Credit by Landlord, Tenant shall, at Tenant's sole cost and expense, execute and submit to the issuer of the Letter of Credit such applications, documents and instruments as may be necessary to effectuate such transfer. Tenant shall be responsible for paying the issuer's transfer and processing fees in connection with any transfer of the Letter of Credit and, if Landlord advances any such fees (without having any obligation to do so), Tenant shall reimburse Landlord for any such transfer or processing fees within ten (10) days after Landlord's written request therefor.

39.7 If the Letter of Credit expires earlier than the LOC Expiration Date, or the issuing bank notifies Landlord that it shall not renew the Letter of Credit, Landlord shall accept a renewal thereof or substitute Letter of Credit (such renewal or substitute Letter of Credit to be in effect not later than thirty (30) days prior to the expiration thereof), irrevocable and automatically renewable through the LOC Expiration Date upon the same terms as the expiring Letter of Credit or upon such other terms as may be acceptable to Landlord. However, if (a) the Letter of Credit is not timely renewed, or (b) a substitute Letter of Credit, complying with all of the terms and conditions of this paragraph is not timely received, Landlord may present such Letter of Credit to the issuing bank, and the entire sum so obtained shall be paid to Landlord, to be held by Landlord in accordance with Article 5 of this Lease. Notwithstanding the foregoing, Landlord shall be entitled to receive from Tenant all attorneys' fees and costs incurred in connection with the review of any proposed substitute Letter of Credit pursuant to this Section.

39.8 Landlord and Tenant (a) acknowledge and agree that in no event or circumstance shall the Letter of Credit or any renewal thereof or substitute therefor or any proceeds thereof be deemed to be or treated as a "security deposit" under any Regulation applicable to security deposits in the commercial context including Section 1950.7 of the California Civil Code, as such section now exist or as may be hereafter amended or succeeded ("Security Deposit Laws"), (b) acknowledge and agree that the Letter of Credit (including any renewal thereof or substitute therefor or any proceeds thereof) is not intended to serve as a security deposit, and the Security Deposit Laws shall have no applicability or relevancy thereto, and (c) waive any and all rights, duties and obligations either party may now or, in the future, will have relating to or arising from the Security Deposit Laws. Tenant hereby waives the provisions of Section 1950.7 of the California Civil Code and all other provisions of Regulations, now or hereafter in effect, which (i) establish the time frame by which Landlord must refund a security deposit under a lease, and/or (ii) provide that Landlord may claim from the security deposit only those sums reasonably necessary to remedy defaults in the payment of rent, to repair damage caused by Tenant or to clean the Premises, it being agreed that Landlord may, in addition, claim those sums specified above in this Section 39.8 and/or those sums reasonably necessary to compensate Landlord for any loss or damage caused by Tenant's breach of this Lease or the acts or omission of Tenant or any other Tenant Entities, including any damages Landlord suffers following termination of this Lease.

39.9 Notwithstanding anything to the contrary contained in this Lease, in the event that at any time the financial institution which issues said Letter of Credit is declared insolvent by the FDIC or is closed for any reason, Tenant must immediately provide a substitute Letter of Credit that satisfies the requirements of this Lease hereby from a financial institution acceptable to Landlord, in Landlord's sole discretion.

40. **OPTION TO RENEW.** Provided this Lease is in full force and effect and Tenant is not in default beyond applicable notice and cure periods under any of the other terms and conditions of this Lease at the time of notification or commencement, Tenant shall have one (1) option to renew (the "Renewal Option") this Lease for a term of three (3) years (the "Renewal Term"), for the portion of the Premises being leased by Tenant as of the date the Renewal Term is to commence, on the same terms and conditions set forth in this Lease, except as modified by the terms, covenants and conditions as set forth below:

40.1 If Tenant elects to exercise the Renewal Option, then Tenant shall provide Landlord with written notice no earlier than the date which is fifteen (15) months prior to the expiration of the Term of this Lease but no later than the date which is twelve (12) months prior to the expiration of the Term of this Lease. If Tenant fails to provide such notice, Tenant shall have no further or additional right to extend or renew the Term of this Lease.

40.2 The Annual Rent and Monthly Installment of Rent in effect at the expiration of the Term of this Lease shall be adjusted to reflect the Prevailing Market (defined below) rate. Landlord shall advise Tenant of the new Annual Rent and Monthly Installment of Rent for the Premises no later than thirty (30) days after receipt of Tenant's written request therefor. Said request shall be made no earlier than thirty (30) days prior to the first date on which Tenant may exercise its Renewal Option under this Article 40. Said notification of the new Annual Rent and Monthly Installment of Rent may include a provision for its escalation or decrease to provide for a change in the Prevailing Market rate between the time of notification and the commencement of the Renewal Term.

40.3 If Tenant and Landlord are unable to agree on a mutually acceptable Annual Rent and Monthly Installment of Rent for the Renewal Term not later than sixty (60) days prior to the expiration of the initial Term, then Landlord and Tenant, within five (5) days after such date, shall each simultaneously submit to the other, in a sealed envelope, its good faith estimate of the Prevailing Market rate for the Premises during the Renewal Term (collectively referred to as the "Estimates"). If the higher of such Estimates is not more than one hundred five percent (105%) of the lower of such Estimates, then the Prevailing Market rate shall be the average of the two Estimates. If the Prevailing Market rate is not established by the exchange of Estimates, then, within seven (7) days after the exchange of Estimates, Landlord and Tenant shall each select an appraiser to determine which of the two Estimates most closely reflects the Prevailing Market rate for the Premises during the Renewal Term. Each appraiser so selected shall be certified as an MAI appraiser or as an ASA appraiser and shall have had at least five (5) years experience within the previous ten (10) years as a real estate appraiser working in Mountain View, California, with working knowledge of current rental rates and practices. For purposes hereof, an "MAI" appraiser means an individual who holds an MAI designation conferred by, and is an independent member of, the American Institute of Real Estate Appraisers (or its successor organization, or in the event there is no successor organization, the organization and designation most similar), and an "ASA" appraiser means an individual who holds the Senior Member designation conferred by, and is an independent member of, the American Society of Appraisers (or its successor organization, or, in the event there is no successor organization, the organization and designation most similar).

40.4 Upon selection, Landlord's and Tenant's appraisers shall work together in good faith to agree upon which of the two Estimates most closely reflects the Prevailing Market rate for the Premises. The Estimates chosen by such appraisers shall be binding on both Landlord and Tenant. If either Landlord or Tenant fails to appoint an appraiser within the seven (7) day period referred to above, the appraiser appointed by the other party shall be the sole appraiser for the purposes hereof. If the two appraisers cannot agree upon which of the two Estimates most closely reflects the Prevailing Market rate within twenty (20) days after their appointment, then, within ten (10) days after the expiration of such twenty (20) day period, the two appraisers shall select a third appraiser meeting the aforementioned criteria. Once the third appraiser (i.e., the arbitrator) has been selected as provided for above, then, as soon thereafter as practicable but in any case within fourteen (14) days, the arbitrator shall make his or her determination of which of the two Estimates most closely reflects the Prevailing Market rate and such Estimate shall be binding on both Landlord and Tenant as the Prevailing Market rate for the Premises. If the arbitrator believes that expert advice would materially assist him or her, he or she may retain one or more qualified persons to provide such expert advice. The parties shall share equally in the costs of the arbitrator and of any experts retained by the arbitrator. Any fees of any appraiser, counsel or experts engaged directly by Landlord or Tenant, however, shall be borne by the party retaining such appraiser, counsel or expert.

40.5 If the Prevailing Market rate has not been determined by the commencement date of the Renewal Term, Tenant shall pay Monthly Installments of Rent upon the terms and conditions in effect during the last month of the initial

Term until such time as the Prevailing Market rate has been determined. Upon such determination, the Annual Rent and Monthly Installments of Rent for the Premises shall be retroactively adjusted to the commencement of such Renewal Term for the Premises.

40.6 Except with respect to a Permitted Transfer, this Renewal Option is not transferable; the parties hereto acknowledge and agree that they intend that the aforesaid option to renew this Lease shall be "personal" to Tenant as set forth above and any Permitted Transferee and that in no event will any other assignee or sublessee have any rights to exercise the aforesaid option to renew.

40.7 If the Renewal Option is validly exercised or if Tenant fails to validly exercise the Renewal Option, Tenant shall have no further right to extend the term of this Lease.

40.8 For purposes of this Renewal Option, "Prevailing Market" shall mean the arms length fair market annual rental rate per rentable square foot under new and renewal leases and amendments entered into on or about the date on which the Prevailing Market is being determined hereunder for the Premises for space comparable to the Premises at the Project and buildings comparable to the Building in the same rental market in the Mountain View, California area (which the parties acknowledge does not include the downtown Mountain View submarket) as of the date the Renewal Term is to commence, taking into account the specific provisions of this Lease which will remain constant. The determination of Prevailing Market shall take into account any material economic differences between the terms of this Lease and any comparison lease or amendment, such as rent abatements, construction costs and other concessions and the manner, if any, in which the landlord under any such lease is reimbursed for operating expenses and taxes. The determination of Prevailing Market shall also take into consideration any reasonably anticipated changes in the Prevailing Market rate from the time such Prevailing Market rate is being determined and the time such Prevailing Market rate will become effective under this Lease.

41. **ACCELERATION OPTION.**

41.1 Tenant shall have the one time right to accelerate the Termination Date ("Acceleration Option") of this Lease, with respect to the entire Premises only, from the expiration of the eighty-fourth (84 th) full calendar month of the Term to the expiration of the sixtieth (60 th) full calendar month of the Term (the "Accelerated Termination Date"), if:

41.1.1 There is no default by Tenant beyond any applicable notice and cure periods under this Lease at the date Tenant provides Landlord with an Acceleration Notice (hereinafter defined); provided, however, that if Tenant is in default under this Lease at such time but the applicable cure period has not yet expired, then Tenant shall be obligated to cure such default within the applicable cure period or Tenant's Acceleration Notice shall be null and void and of no force or effect; and

41.1.2 No part of the Premises is sublet for a term extending past the Accelerated Termination Date unless such sublease can be terminated prior to the Accelerated Termination Date; and

41.1.3 This Lease has not been assigned except to a Permitted Transferee; and

41.1.4 Landlord receives notice of acceleration ("Acceleration Notice") not less than twelve (12) full calendar months prior to the Accelerated Termination Date.

41.2 If Tenant exercises its Acceleration Option, at least six (6) months prior to the Accelerated Termination Date, Tenant shall pay to Landlord the sum of an amount equal to (i) six (6) months of the Monthly Installment of Rent and Tenant's Proportionate Share of Expenses and Taxes applicable to the fifth (5 th) Lease Year, and (ii) the unamortized portion of all of the following: (a) any leasing commissions and legal fees, (b) the Initial Alterations, and (c) the Allowance (collectively, the "Acceleration Fee") as a fee in connection with the acceleration of the Termination Date and not as a penalty; provided that the Acceleration Fee shall be increased by an amount equal to the unamortized portion of any leasing commissions, tenant improvements and allowances or other concessions incurred by Landlord in connection with any additional space other than the initial Premises leased by Tenant under this Lease and that is subject to acceleration hereunder. Tenant shall remain liable for all Monthly Installments of Rent, Tenant's Proportionate Share of Expenses and Taxes, additional rent and all other sums due under this Lease up to and including the Accelerated Termination Date even though billings for such may occur subsequent to the Accelerated Termination Date. The "unamortized portion" of any of the foregoing shall be determined using an interest rate of eight percent (8%) per annum. Within ninety (90) days following the Commencement Date, Landlord shall submit a statement to Tenant that identifies the nature and amount of the components that comprise the Acceleration Fee (subject to the foregoing) for Tenant's review and approval. If Tenant

reasonably disagrees with any component of the Acceleration Fee or the amount of such component, then Landlord and Tenant shall work together to resolve any outstanding issues with respect to the components of the Acceleration Fee within thirty (30) days after Landlord has submitted its statement. Once Landlord and Tenant have resolved any outstanding issues concerning the components of the Acceleration Fee, the parties shall execute a letter confirming the amount of the Acceleration Fee, which amount shall be subject to any increases with respect to any additional space in accordance with the first sentence of this Section 41.2.

41.3 If Tenant, subsequent to providing Landlord with an Acceleration Notice, defaults in any of the provisions of this Lease beyond the expiration of any applicable notice and cure periods (including, without limitation, a failure to pay the Acceleration Fee due hereunder), Landlord, at its option, may (i) declare Tenant's exercise of the Acceleration Option to be null and void, and any Acceleration Fee paid to Landlord shall be returned to Tenant, after first applying such Acceleration Fee against any past due rent under this Lease, or (ii) continue to honor Tenant's exercise of its Acceleration Option, in which case, Tenant shall remain liable for the payment of the Acceleration Fee and for all Monthly Installments of Rent, Tenant's Proportionate Share of Expenses, Insurance Costs and Taxes, any additional rent and other sums due under this Lease up to and including the Accelerated Termination Date even though billings for such may occur subsequent to the Accelerated Termination Date.

41.4 As of the date Tenant provides Landlord with an Acceleration Notice, any unexercised rights or options of Tenant to renew the Term of this Lease or to expand the Premises (whether expansion options, rights of first or second refusal, rights of first or second offer, or other similar rights), and any outstanding tenant improvement allowance not claimed and properly utilized by Tenant in accordance with this Lease as of such date, shall immediately be deemed terminated and no longer available or of any further force or effect.

42. BUILDING SIGNAGE.

42.1 Tenant shall be entitled to one tenant identification sign to be located on the Building in a location and of a size that is reasonably comparable to the signage of other tenants in the Project (the "Building Signage"). The exact location of the Building Signage shall be subject to all applicable Regulations and Landlord's prior written approval. The Building Signage shall not be illuminated. Such right to the Building Signage is subject to the following terms and conditions: (a) Tenant shall submit plans and drawings for the Building Signage to Landlord and to the City of Mountain View and to any other public authorities having jurisdiction and shall obtain written approval from Landlord and each such jurisdiction prior to installation, and shall fully comply with all applicable Regulations; (b) Tenant shall, at Tenant's sole cost and expense, design, construct and install the Building Signage; (c) the size, color and design of the Building Signage shall be subject to Landlord's prior written approval; and (d) Tenant shall maintain the Building Signage in good condition and repair, ordinary wear and tear excepted, and all costs of maintenance and repair shall be borne by Tenant. Maintenance shall include, without limitation, cleaning. Notwithstanding the foregoing, Tenant shall not be liable for any fee in connection with Tenant's right to display the Building Signage in accordance with this Lease. At Landlord's option, Tenant's right to the Building Signage may be revoked and terminated upon occurrence of any of the following events: (i) There shall be an Event of Default by Tenant under this Lease that continues for more than thirty (30) days without having cured such Event of Default; (ii) Tenant or any Permitted Transferee leases less than fifty percent (50%) of the Premises; or (iii) this Lease shall terminate or otherwise no longer be in effect.

42.2 Upon the expiration or earlier termination of this Lease or at such other time that Tenant's signage rights are terminated pursuant to the terms hereof, if Tenant fails to remove the Building Signage and repair the Building in accordance with the terms of this Lease, Landlord shall cause the Building Signage to be removed from the Building and the Building to be repaired and restored to the condition which existed prior to the installation of the Building Signage (including, if necessary, the replacement of any precast concrete panels), all at the sole cost and expense of Tenant and otherwise in accordance with this Lease, without further notice from Landlord. Notwithstanding anything to the contrary contained in this Lease, Tenant shall pay all costs and expenses for such removal and restoration within five (5) business days following delivery of an invoice therefor. Except in connection with a Permitted Transfer, the rights provided in this Article 42 shall be non-transferable apart from an approved sublease or assignment of this Lease unless otherwise agreed by Landlord in writing in its sole discretion. Notwithstanding anything to the contrary contained in this Lease, Tenant shall have the exclusive right to place tenant identification signage on the Building and the Premises.

43. MONUMENT SIGNAGE.

43.1 So long as (a) Landlord has not terminated this Lease as a result of Tenant's default under the terms of this Lease beyond the expiration of applicable notice and cure periods; and (b) Tenant or any Permitted Transferee leases more than fifty percent (50%) of the Premises, Tenant shall have the exclusive right to have its name listed and/or logo (as of the

date of this Lease) depicted on the monument sign associated with the Building, and a right to have its name only listed on a pro rata portion of the shared monument sign for the Project (collectively, the "Monument Sign"), subject to the terms of this Article 43. The design, size and color of Tenant's signage with Tenant's name and/or logo to be included on the Monument Sign, and the manner in which it is attached to the Monument Sign, shall comply with all applicable Regulations and shall be subject to the approval of Landlord and any applicable governmental authorities, including the City of Mountain View. Landlord reserves the right to withhold consent to any sign that, in the reasonable judgment of Landlord, is not harmonious with the design standards of the Building and Monument Sign. Landlord shall have the right to require that all names on the Monument Sign be of the same size and style. Tenant must obtain Landlord's written consent to any proposed signage and lettering prior to its fabrication and installation. The location of Tenant's name on the shared Monument Sign, shall be subject to the existing rights of existing tenants in the Project, and the location of Tenant's name on the shared Monument Sign shall be further subject to Landlord's reasonable approval. To obtain Landlord's consent, Tenant shall submit design drawings to Landlord showing the type and sizes of all lettering; the colors, finishes and types of materials used; and (if applicable and Landlord consents in its sole discretion) any provisions for illumination. Although the Monument Sign will be maintained by Landlord, Tenant shall pay its Proportionate Share of the cost of any maintenance and repair associated with the Monument Sign. In the event that additional names are listed on the Monument Sign, all future costs of maintenance and repair shall be prorated between Tenant and the other parties that are listed on such Monument Sign.

43.2 Tenant's name and/or logo on the Monument Sign shall be designed, constructed, installed, insured, maintained, repaired and removed from the Monument Sign all at Tenant's sole risk, cost and expense. Tenant, at its cost, shall be responsible for the maintenance, repair or replacement of Tenant's signage on the Monument Sign, which shall be maintained in a manner reasonably satisfactory to Landlord.

43.3 If during the Term (and any extensions thereof) (a) Landlord has terminated this Lease as a result of Tenant's default under the terms of this Lease beyond the expiration of applicable notice and cure periods; or (b) Tenant or any Permitted Transferee leases less than fifty percent (50%) of the Building, then Tenant's rights granted herein will terminate and Landlord may remove Tenant's name from the Monument Sign at Tenant's sole cost and expense and restore the Monument Sign to the condition it was in prior to installation of Tenant's signage thereon, ordinary wear and tear excepted. The cost of such removal and restoration shall be payable as additional rent within five (5) days of Landlord's demand. Landlord may, at anytime during the Term (or any extension thereof), upon five (5) days prior written notice to Tenant, relocate the position of Tenant's name on the shared Monument Sign. The cost of such relocation of Tenant's name shall be at the cost and expense of Landlord.

43.4 Except in connection with a Permitted Transfer, the rights provided in this Article 43 shall be non-transferable apart from an approved sublease or assignment of this Lease unless otherwise agreed by Landlord in writing in its sole discretion.

44. **HAZARDOUS MATERIALS.** The terms of this Article 44 supplement Article 1 of this Lease.

44.1 Tenant agrees that Tenant, its agents and contractors, licensees, or invitees shall not Handle any Hazardous Materials on, under, or about the Premises, without Landlord's prior written consent (which consent shall not be unreasonably withheld as long as Tenant demonstrates and documents to Landlord's reasonable satisfaction (a) that such Hazardous Materials (i) are necessary or useful to Tenant's business; and (ii) will be used, kept, and stored in compliance with all laws relating to any Hazardous Materials so brought or used or kept in or about the Premises; and (b) that Tenant will give all required notices concerning the presence in or on the Premises or the release of such Hazardous Materials from the Premises) provided that Tenant may handle, store, use or dispose of products containing small quantities of Hazardous Materials, which products are of a type customarily found in offices and households (such as aerosol cans containing insecticides, toner for copies, paints, paint remover, and the like) and de minimis quantities of pharmaceutical products, the presence of which in the Premises does not require a governmental permit, provided further that Tenant shall Handle any such Hazardous Materials in a safe and lawful manner and shall not allow such Hazardous Materials to contaminate the Premises or the Building or the property upon which the Building is located ("Property").

44.2 Tenant further agrees that neither Tenant nor any Tenant Entity will cause any substance suspected of causing cancer or reproductive toxicity to come into contact with groundwater under the Premises or Property. Any such substance coming into contact with groundwater shall be considered a Hazardous Material.

44.3 In addition to the provisions of Section 44.1, and subject to the terms and conditions hereof, Tenant may Handle Hazardous Materials, limited to the types, amounts, and use identified on Exhibit H attached hereto. Tenant hereby certifies to Landlord that the information provided by Tenant pursuant to this Article 44 is true, correct, and complete. Tenant's business and operations, and its handling, storage, use and disposal of Hazardous Materials shall at all times comply

with all Environmental Laws. Tenant shall secure and abide by all permits necessary for Tenant's operations on the Premises. Tenant shall give or post all notices required by all Environmental Laws. If Tenant shall at any time fail to comply with this Article 44, Tenant shall immediately notify Landlord in writing of such noncompliance.

44.4 Tenant shall provide Landlord with copies of any Material Safety Data Sheets (as required by the Occupational Safety and Health Act) relating to any Hazardous Materials to be used, kept, or stored at or on the Premises, at least thirty (30) days prior to the first use, placement, or storage of such Hazardous Material on the Premises.

44.5 Tenant shall not store hazardous wastes on the Premises for more than ninety (90) days; "hazardous waste" has the meaning given it by the Resource Conservation and Recovery Act of 1976, as amended. Tenant shall not install any underground or above ground storage tanks on the Premises. Tenant shall not dispose of any Hazardous Material or solid waste on the Premises. In performing any alterations of the Premises permitted by this Lease, Tenant shall not install any Hazardous Material in the Premises without the specific written consent of Landlord.

44.6 Any increase in the premiums for necessary insurance on the Building or the Property which arises from Tenant's use and/or storage of Hazardous Materials shall be borne solely by Tenant. Tenant shall procure and maintain at its sole expense such additional insurance as may be necessary to comply with any requirement of any federal, state or local governmental agency with jurisdiction.

44.7 If Landlord, in its sole discretion, reasonably believes that the Premises, the Building or the Property have become contaminated with Hazardous Materials that must be removed under the laws of the State in which the Premises is located or otherwise in breach of the provisions of this Lease, Landlord, in addition to its other rights under this Lease, may enter upon the Premises and obtain samples from the Premises, including without limitation the soil and groundwater under the Premises, for the purposes of analyzing the same to determine whether and to what extent the Premises, the Building or the Property have become so contaminated. Tenant shall reimburse Landlord for the costs of any inspection, sampling and analysis that discloses contamination for which Tenant is liable under the terms of this Lease. Tenant may not perform any sampling, testing, or drilling to locate any Hazardous Materials on the Premises without Landlord's prior written consent.

44.8 Without limiting the above, Tenant shall reimburse, defend, indemnify and hold Landlord and the Landlord Entities harmless from and against any and all claims, losses, liabilities, damages, costs and expenses, including without limitation, loss of rental income, loss due to business interruption, and attorneys fees and costs, to the extent arising out of or in any way connected with the use, manufacture, storage, or disposal of Hazardous Materials by Tenant, any Tenant Entities or Tenant's contractors on, under or about the Premises including, without limitation, the costs of any required or necessary investigation, repair, cleanup or detoxification and the preparation of any closure or other required plans in connection herewith, whether voluntary or compelled by governmental authority. The indemnity obligations of Tenant under this Section shall survive the expiration or any termination of this Lease. At Landlord's option, Tenant shall perform any required or necessary investigation, repair, cleanup, or detoxification of the Premises and the Property that is Tenant's responsibility under this Lease. In such case, Landlord shall have the right, in its sole discretion, to approve all plans, consultants, and cleanup standards. Tenant shall provide Landlord on a timely basis with (a) copies of all documents, reports, and communications with governmental authorities; and (b) notice and an opportunity to attend all meetings with regulatory authorities. Tenant shall comply with all notice requirements and Landlord and Tenant agree to cooperate with governmental authorities seeking access to the Premises for purposes of sampling or inspection. No disturbance of Tenant's use of the Premises resulting from activities conducted pursuant to this Section shall constitute an actual or constructive eviction of Tenant from the Premises. In the event that such cleanup extends beyond the termination of this Lease, Tenant's obligation to pay rent (including additional rent and percentage rent, if any) shall continue until such cleanup is completed and any certificate of clearance or similar document has been delivered to Landlord. Rent during such holdover period shall be at market rent; if the parties are unable to agree upon the amount of such market rent, then Landlord shall have the option of (i) increasing the rent for the period of such holdover based upon the increase in the cost-of-living from the third month preceding the commencement date to the third month preceding the start of the holdover period, using such indices and assumptions and calculations as Landlord in its sole reasonable judgment shall determine are necessary; or (ii) having Landlord and Tenant each appoint a qualified MAI appraiser doing business in the area; in turn, these two independent MAI appraisers shall appoint a third MAI appraiser and the majority shall decide upon the fair market rental for Premises as of the expiration of the then current term. Landlord and Tenant shall equally share in the expense of this appraisal except that in the event the rent is found to be within fifteen percent (15%) of the original rate quoted by Landlord, then Tenant shall bear the full cost of all the appraisal process. In no event shall the rent be subject to determination or modification by any person, entity, court, or authority other than as set forth expressly herein, and in no event shall the rent for any holdover period be less than the rent due in the preceding period.

44.9 Notwithstanding anything set forth in this Lease, Tenant shall only be responsible for contamination of Hazardous Materials or any cleanup resulting directly therefrom, to the extent resulting directly from matters occurring or Hazardous Materials deposited (other than by contractors, agents or representatives controlled by Landlord) during the Term (as the same may be extended), and any other period of time during which Tenant or Tenant's Entities are in actual or constructive occupancy of the Premises. Except to the extent exacerbated by Tenant or any Tenant Entity, Tenant shall have no responsibility for Hazardous Materials that migrate onto the Premises from outside the Premises. Tenant shall take reasonable precautions to prevent the contamination of the Premises with Hazardous Materials by third parties.

44.10 It shall not be unreasonable for Landlord to withhold its consent to any proposed assignment or sublease if (a) the proposed assignee's or sublessee's anticipated use of the Premises involves the generation, storage, use, treatment or disposal of Hazardous Materials not approved by Landlord in accordance with the terms and conditions of this Lease or otherwise in violation of the terms or conditions of this Lease; (b) the proposed assignee or sublessee has been required by any prior landlord, lender, or governmental authority to take remedial action in connection with Hazardous Materials contaminating a property if the contamination resulted from such assignee's or sublessee's actions or use of the property in question; or (c) the proposed assignee or sublessee is subject to an enforcement order issued by any governmental authority in connection with the use, disposal, or storage of a hazardous material.

44.11 Any of Tenant's insurance insuring against claims of the type dealt with in this Article 44 shall be considered primary coverage for claims against the Property arising out of or under this Article 44.

44.12 In the event of (a) any transfer of Tenant's interest under this Lease; or (b) the termination of this Lease, by lapse of time or otherwise, Tenant shall be solely responsible for compliance with any and all then effective federal, state or local laws concerning the presence of Hazardous Materials in or on the Premises, and the presence of Hazardous Materials (i) brought in or on the Premises (except as expressly set forth in this Article 44), and (ii) brought in or on the Building or Property (but outside of the Premises) by Tenant or any Tenant Entity (for example, the New Jersey Environmental Cleanup Responsibility Act, the Illinois Responsible Property Transfer Act, or similar applicable state laws), including but not limited to any reporting or filing requirements imposed by such Regulations. Tenant's duty to pay any rent and additional rent shall continue until the obligations imposed by such Regulations are satisfied in full and any certificate of clearance or similar document has been delivered to Landlord.

44.13 All consents given by Landlord pursuant to this Article 44 shall be in writing.

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45. **LIMITATION OF LANDLORD'S LIABILITY.** Redress for any claim against Landlord under this Lease shall be limited to and enforceable only against and to the extent of Landlord's interest in the Building, which, for purposes of this Lease, shall include rents due from tenants, insurance proceeds (provided, however, that in no event shall Tenant, or anyone claiming on behalf or through Tenant, be deemed or otherwise considered a loss payee under any such insurance policies), and proceeds from condemnation or eminent domain proceedings (prior to the distribution of same to any partner or shareholder of Landlord or any other third party). The obligations of Landlord under this Lease are not intended to be and shall not be personally binding on, nor shall any resort be had to the private properties of, any of its or its investment manager's trustees, directors, officers, partners, beneficiaries, members, stockholders, employees, or agents, and in no case shall Landlord be liable to Tenant hereunder for any lost profits, damage to business, or any form of special, indirect or consequential damages.

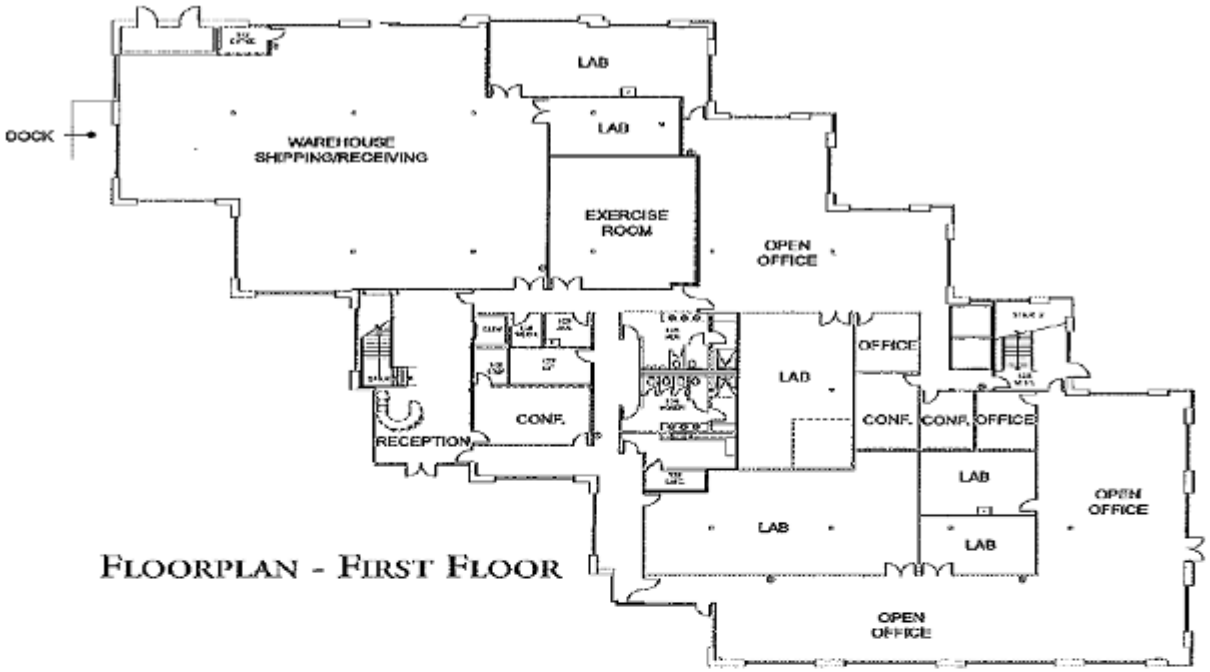
IN WITNESS WHEREOF, Landlord and Tenant have executed this Lease as of the Lease Reference Date set forth in the Reference Pages of this Lease.

LANDLORD:	**TENANT:**
SFERS REAL ESTATE CORP. U, **a Delaware corporation**	**VIVUS, INC.,** **a Delaware corporation**
By: /s/ Lisa Vogel	By: /s/ Leland Wilson
Name: Lisa Vogel	Name: Leland Wilson
Title: Vice President, Asset Manager	Title: Chief Executive Officer
Dated: 12/13/12	Dated: 12/12/12

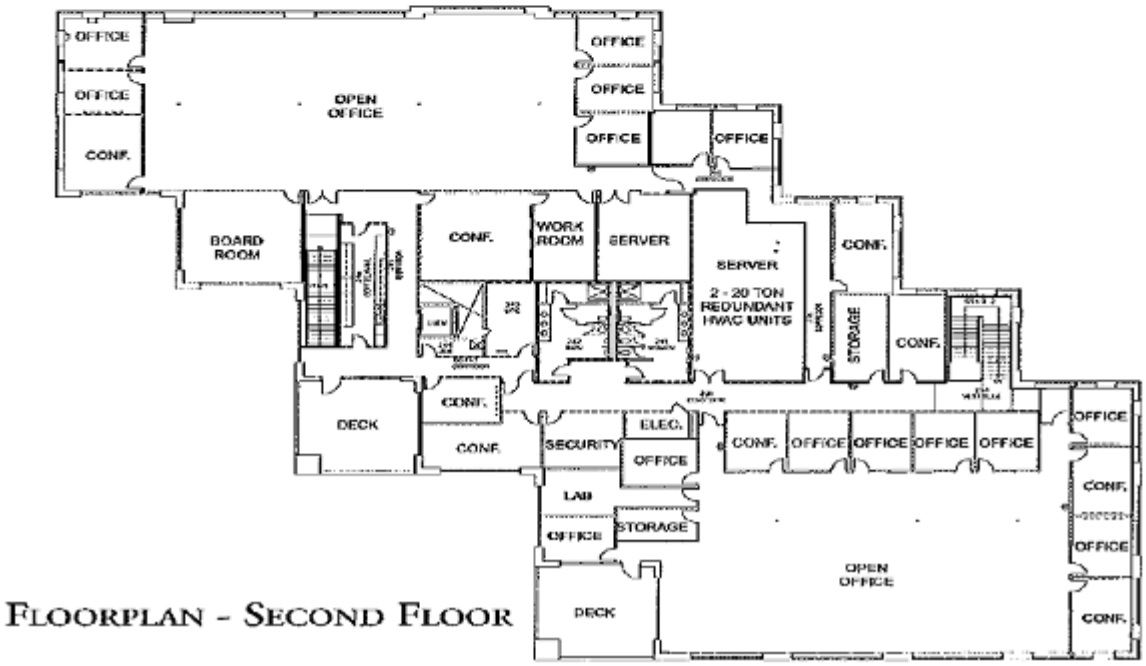
EXHIBIT A — FLOOR PLAN DEPICTING THE PREMISES

attached to and made a part of the Lease bearing the Lease Reference Date of December 11, 2012 between SFERS REAL ESTATE CORP. U, a Delaware corporation, as Landlord and VIVUS, INC., a Delaware corporation, as Tenant

Exhibit A is intended only to show the general layout of the Premises as of the beginning of the Term of the Lease. It does not in any way supersede any of Landlord's rights set forth in Article 17 of the Lease with respect to arrangements and/or locations of public parts of the Building and changes in such arrangements and/or locations. It is not to be scaled; any measurements or distances shown should be taken as approximate.



FLOORPLAN - FIRST FLOOR



FLOORPLAN - SECOND FLOOR

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EXHIBIT A-1 — SITE PLAN

attached to and made a part of the Lease bearing the Lease Reference Date of December 11, 2012 between SFERS REAL ESTATE CORP. U, a Delaware corporation, as Landlord and VIVUS, INC., a Delaware corporation, as Tenant

Exhibit A-1 is intended only to show the general location of the Building and/or the Project as of the beginning of the Term of the Lease. It does not in any way supersede any of Landlord's rights set forth in Article 17 of the Lease with respect to arrangements and/or locations of public parts of the Building and changes in such arrangements and/or locations. It is not to be scaled; any measurements or distances shown should be taken as approximate.

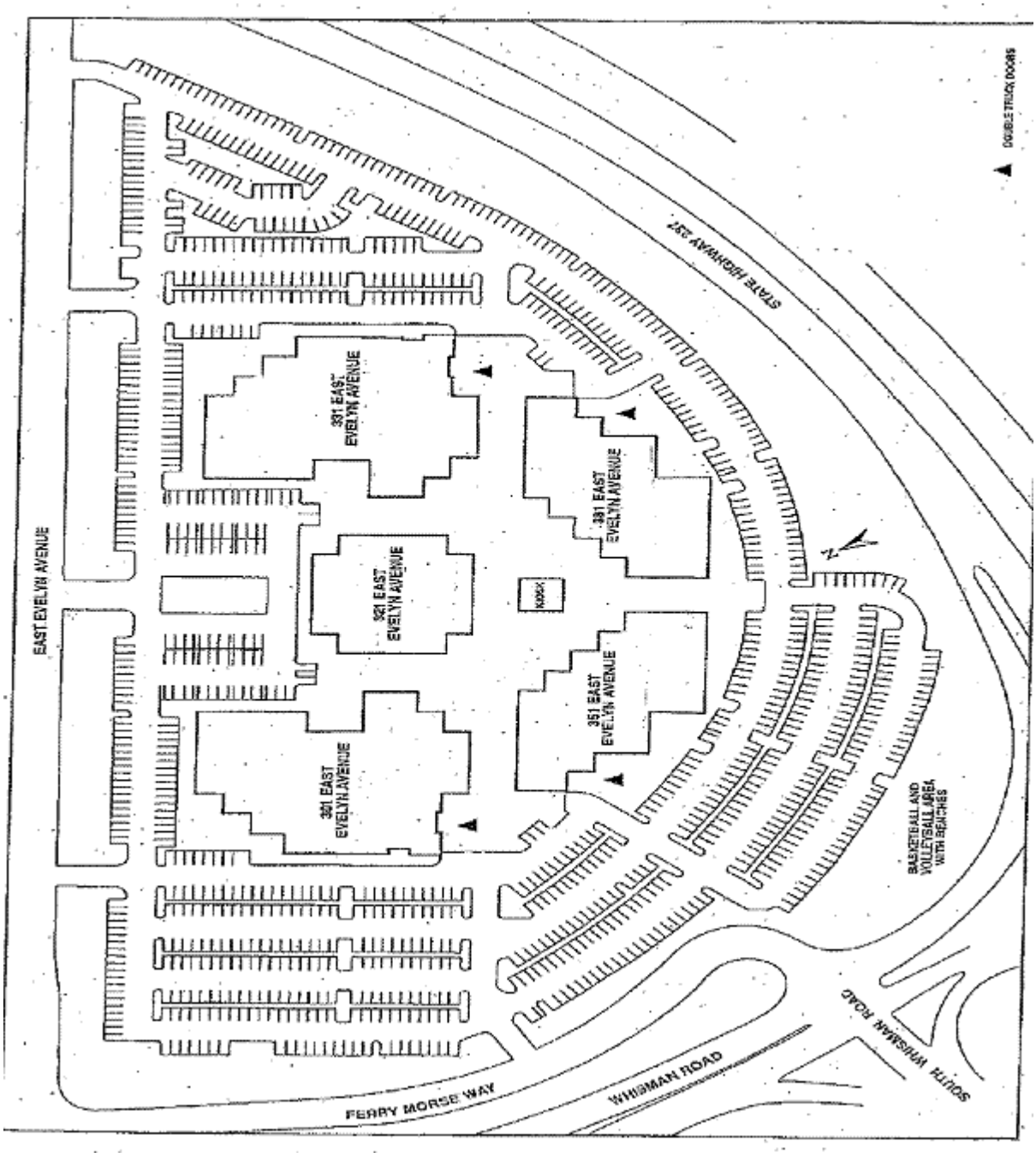

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EXHIBIT B — INITIAL ALTERATIONS

attached to and made a part of the Lease bearing the Lease Reference Date of December 11, 2012 between SFERS REAL ESTATE CORP. U, a Delaware corporation, as Landlord and VIVUS, INC., a Delaware corporation, as Tenant

1. Tenant, following the delivery of the Premises by Landlord and the full and final execution and delivery of the Lease to which this Exhibit B is attached and all prepaid rental, the Security Deposit or Letter of Credit (as the case may be) and insurance certificates required under the Lease, shall have the right to perform alterations and improvements in the Premises (the "Initial Alterations"). Notwithstanding the foregoing, Tenant and its contractors shall not have the right to perform the Initial Alterations in the Premises unless and until Tenant has complied with all of the terms and conditions of Article 6 of the Lease, including, without limitation, approval by Landlord of the final plans for the Initial Alterations and the contractors to be retained by Tenant to perform such Initial Alterations. Tenant shall be responsible for all elements of the design of Tenant's plans (including, without limitation, compliance with law, functionality of design, the structural integrity of the design, the configuration of the Premises and the placement of Tenant's furniture, appliances and equipment), and Landlord's approval of Tenant's plans shall in no event relieve Tenant of the responsibility for such design. In addition to the foregoing and subject to Section 6 of this Exhibit B , Tenant shall be solely liable for all costs and expenses associated with or otherwise caused by Tenant's performance and installment of the Initial Alterations (including, without limitation, any legal compliance requirements arising outside of the Premises). Landlord's approval of the architect and contractors to perform the Initial Alterations shall not be unreasonably withheld. The parties agree that Landlord's approval of the general contractor to perform the Initial Alterations shall not be considered to be unreasonably withheld if any such general contractor (a) does not have trade references reasonably acceptable to Landlord, (b) does not maintain insurance as required pursuant to the terms of the Lease, (c) does not have the ability to be bonded for the work in an amount of no less than one hundred fifty percent (150%) of the total estimated cost of the Initial Alterations, (d) does not provide current financial statements reasonably acceptable to Landlord, (e) does not execute the Responsible Contractor Policy Statement provided by Landlord, or (f) is not licensed as a contractor in the state/municipality in which the Premises is located. Tenant acknowledges the foregoing is not intended to be an exclusive list of the reasons why Landlord may reasonably withhold its consent to a general contractor. Notwithstanding the foregoing, Landlord hereby approves of Tenant's use of South Bay Construction, Iron Construction, Hollander Smith Construction, or JLL Construction as the general contractor and API Design as the architect with respect to the Initial Alterations.

2. Landlord agrees to contribute the sum of $316,680.00 (that is $7.00 per rentable square feet of the Premises) (the "Allowance") toward the cost of performing the Initial Alterations. The Allowance may only be used for the cost of preparing design and construction documents and mechanical and electrical plans for the Initial Alterations, permitting, Tenant's project manager and for hard costs in connection with the Initial Alterations. The Allowance, less a ten percent (10%) retainage (which retainage shall be payable as part of the final draw), shall be paid to Tenant in periodic disbursements within thirty (30) days after receipt of the following documentation: (a) an application for payment and sworn statement of contractor substantially in the form of AIA Document G-702 covering all work for which disbursement is to be made to a date specified therein; (b) a certification from an AIA architect substantially in the form of the Architect's Certificate for Payment which is located on AIA Document G702, Application and Certificate of Payment; (c) contractor's, subcontractor's and material supplier's conditional waivers of liens which shall cover all Initial Alterations for which disbursement is being requested and all other statements and forms required for compliance with the mechanics' lien laws of the state in which the Premises is located, together with all such invoices, contracts, or other supporting data as Landlord or Landlord's Mortgagee may reasonably require; (d) a cost breakdown for each trade or subcontractor performing the Initial Alterations; (e) plans and specifications for the Initial Alterations, together with a certificate from an AIA architect that such plans and specifications comply in all material respects with all laws affecting the Building, Property and Premises; (f) copies of all construction contracts for the Initial Alterations, together with copies of all change orders, if any; and (g) a request to disburse from Tenant containing a good faith estimate of the cost to complete the Initial Alterations. Upon completion of the Initial Alterations, and prior to final disbursement of the Allowance, Tenant shall furnish Landlord with: (i) general contractor and architect's completion affidavits; (ii) full and final waivers of lien; (iii) receipted bills covering all labor and materials expended and used; (iv) as-built plans of the Initial Alterations; and (v) the certification of Tenant's architect that the Initial Alterations have been installed in a good and workmanlike manner in accordance with the approved plans, and in accordance with applicable laws, codes and ordinances. In no event shall Landlord be required to disburse the Allowance more than one time per month. Notwithstanding anything herein to the contrary, Landlord shall not be obligated to disburse any portion of the Allowance during the continuance of an uncured default under the Lease, and Landlord's obligation to disburse shall only resume when and if such default is cured.

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3. In no event shall the Allowance be used for the purchase of equipment, furniture or other items of personal property of Tenant. If Tenant does not submit a request for payment of the entire Allowance to Landlord in accordance with the provisions contained in this Exhibit B by December 15, 2013, any unused amount shall accrue to the sole benefit of Landlord, it being understood that Tenant shall not be entitled to any credit, abatement or other concession in connection therewith. Tenant shall be responsible for all applicable state sales or use taxes, if any, payable in connection with the Initial Alterations and/or Allowance. Landlord shall be entitled to deduct from the Allowance a construction management fee for the Initial Alterations in an amount equal to two percent (2%) of the Allowance.

4. Except as otherwise provided in this Lease, Tenant agrees to accept the Premises in its "as-is" condition and configuration, it being agreed that Landlord shall not be required to perform any work or, except as provided above with respect to the Allowance or in the Lease, incur any costs in connection with the construction or demolition of any improvements in the Premises.

5. Upon Tenant's request, no later than thirty (30) days of Landlord's approval of Tenant's final construction drawings for the Initial Alterations, Landlord shall advise Tenant what portion, if any, of the Initial Alterations Tenant shall be required to remove at the expiration or earlier termination of this Lease. Notwithstanding the foregoing, it is agreed that other than cabling and wiring, Tenant shall have no obligation to remove that portion of the Initial Alterations, or later installed alterations, additions or improvements including in the warehouse portion of the Premises, pursuant to Article 6 of the Lease, and comprising standard office improvements such as gypsum board, partitions, ceiling grids and tiles, fluorescent lighting panels, Building standard doors and non-glued down carpeting.

6. Notwithstanding anything to the contrary contained in the Lease or in this Exhibit B , Landlord, not Tenant, shall perform at its sole cost and expense any alterations or improvements that are required by Regulations solely as a result of the administrative act of Tenant's submission of an application for a building permit and/or the issuance of such building permit to perform the Initial Alterations so long as such requirement is not in any manner related to the particular design, scope and/or construction of the actual Initial Alterations or triggered thereby. Except to the extent negligently caused or exacerbated by Tenant or any of Tenant's employees, agents, invites and/or contractors, if Tenant, in connection with the performance of the Initial Alterations discovers the existence of any asbestos or other hazardous substances in the Premises that is in a condition that, pursuant to applicable Regulations, will require removal, remediation or encapsulation and which (i) renders the Premises untenantable, or (ii) otherwise prevents Tenant from commencing or completing the Initial Alterations (the "Required Remediation"), Landlord shall diligently engage in such removal, remediation or encapsulation in accordance with applicable Regulations at Landlord's sole cost. Landlord shall have the right to contest any alleged Required Remediation in good faith, including, without limitation, the right to apply for and obtain a waiver or deferment of compliance, the right to assert any and all defenses allowed by Regulations and the right to appeal any decisions, judgments or rulings to the fullest extent permitted by Regulations. Landlord, after the exhaustion of any and all rights to appeal or contest, will perform all Required Remediation required for purposes of clauses (i) and (ii) of above. Landlord, after the exhaustion of any and all rights to appeal or contest, will make all repairs, additions, alterations or improvements necessary to comply with the terms of any final order or judgment, provided that if Landlord elects not to contest any alleged violation, Landlord will promptly make necessary all repairs, additions, alterations or improvements. Subject to the foregoing, Tenant, not Landlord, shall be responsible for the correction of any violations that arise out of or in connection with the specific nature of Tenant's business in the Premises, the acts or omissions of Tenant, its agents, employees or contractors, Tenant's arrangement of any furniture, equipment or other property in the Premises, any repairs, alterations, additions or improvements performed by or on behalf of Tenant and any design or configuration of the Premises.

7. Notwithstanding anything in this Lease to the contrary, the Commencement Date shall be extended by one (1) day for each day Tenant's completion of the Initial Alterations is actually delayed solely due to (i) Landlord's failure to provide responses and/or approvals within the time frames expressly specified in this Exhibit B , or (ii) Landlord's performance of the Required Remediation, including Landlord's consents or appeals thereof. Landlord and Tenant shall cooperate and work together in good faith to reduce or eliminate any interference or delay in Tenant's performance and completion of the Initial Alterations that may result from Landlord performance of any Required Remediation as set forth above.

8. This Exhibit B shall not be deemed applicable to any additional space added to the Premises at any time or from time to time, whether by any options under the Lease or otherwise, or to any portion of the original Premises or any additions to the Premises in the event of a renewal or extension of the original Term of the Lease, whether by any options under the Lease or otherwise, unless expressly so provided in the Lease or any amendment or supplement to the Lease.

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EXHIBIT C — COMMENCEMENT DATE MEMORANDUM

attached to and made a part of the Lease bearing the Lease Reference Date of December 11, 2012 between SFERS REAL ESTATE CORP. U, a Delaware corporation, as Landlord and VIVUS, INC., a Delaware corporation, as Tenant

COMMENCEMENT DATE MEMORANDUM

THIS MEMORANDUM, made as of , 20 , by and between SFERS REAL ESTATE CORP. U, a Delaware corporation ("Landlord") and VIVUS, INC., a Delaware corporation ("Tenant").

Recitals:

A. Landlord and Tenant are parties to that certain Lease, dated for reference December 11, 2012 (the "Lease") for certain premises (the "Premises") consisting of approximately 45,240 square feet at the building located at 351 East Evelyn Avenue, Mountain View, California 94041.

B. Tenant is in possession of the Premises and the Term of the Lease has commenced.

C. Landlord and Tenant desire to enter into this Memorandum confirming the Commencement Date, the Termination Date and other matters under the Lease.

NOW, THEREFORE, Landlord and Tenant agree as follows:

1. The actual Commencement Date is .

2. The actual Termination Date is .

3. The schedule of the Annual Rent and the Monthly Installment of Rent set forth on the Reference Pages is deleted in its entirety, and the following is substituted therefor:

[insert rent schedule]

4. Capitalized terms not defined herein shall have the same meaning as set forth in the Lease.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date and year first above written.

LANDLORD:	**TENANT:**
SFERS REAL ESTATE CORP. U, a Delaware corporation	**VIVUS, INC., a Delaware corporation**
By: DO NOT SIGN	By: DO NOT SIGN
Name:	Name:
Title:	Title:
Dated:	Dated:

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EXHIBIT D — RULES AND REGULATIONS

attached to and made a part of the Lease bearing the Lease Reference Date of December 11, 2012 between SFERS REAL ESTATE CORP. U, a Delaware corporation, as Landlord and VIVUS, INC., a Delaware corporation, as Tenant

1. Except as expressly permitted in the Lease, no sign, placard, picture, advertisement, name or notice (collectively referred to as "Signs") shall be installed or displayed on any part of the outside of the Building without the prior written consent of the Landlord which consent shall be in Landlord's sole discretion. All approved Signs shall be printed, painted, affixed or inscribed at Tenant's expense by a person or vendor approved by Landlord and shall be removed by Tenant at Tenant's expense upon vacating the Premises. Landlord shall have the right to remove any Sign installed or displayed in violation of this rule at Tenant's expense and without notice.

2. If Landlord objects in writing to any curtains, blinds, shades or screens attached to or hung in or used in connection with any window or door of the Premises or Building, Tenant shall immediately discontinue such use. No awning shall be permitted on any part of the Premises. Tenant shall not place anything or allow anything to be placed against or near any glass partitions or doors or windows which may appear unsightly, in the opinion of Landlord, from outside the Premises.

3. Tenant shall not alter any lock or other access device or install a new or additional lock or access device or bolt on any door of its Premises without the prior written consent of Landlord. Tenant, upon the termination of its tenancy, shall deliver to Landlord the keys or other means of access to all doors.

4. If Tenant requires telephone, data, burglar alarm or similar service, the cost of purchasing, installing and maintaining such service shall be borne solely by Tenant. No boring or cutting for wires will be allowed without the prior written consent of Landlord. Landlord shall direct electricians as to where and how telephone, data, and electrical wires are to be introduced or installed. The location of burglar alarms, telephones, call boxes or other office equipment affixed to the Premises shall be subject to the prior written approval of Landlord.

5. Tenant shall not place a load upon any floor of its Premises, including mezzanine area, if any, which exceeds the load per square foot that such floor was designed to carry and that is allowed by law. Heavy objects shall stand on such platforms as determined by Landlord to be necessary to properly distribute the weight. Landlord will not be responsible for loss of or damage to any such equipment or other property from any cause, and all damage done to the Building by maintaining or moving such equipment or other property shall be repaired at the expense of Tenant.

6. Tenant shall not install any radio or television antenna, satellite dish, loudspeaker or other device on the roof or exterior walls of the Building without Landlord's prior written consent which consent shall be in Landlord's sole discretion.

7. Except in connection with any Cosmetic Alterations or any approved alterations, Tenant shall not mark, drive nails, screw or drill into the partitions, woodwork, plaster or drywall (except for pictures and general office uses) or in any way deface the Premises or any part thereof. Subject to Section 6.1 of the Lease, Tenant shall not affix any floor covering to the floor of the Premises or paint or seal any floors in any manner except as approved by Landlord. Tenant shall repair any damage resulting from noncompliance with this rule.

8. No cooking shall be done or permitted on the Premises, except that Underwriters' Laboratory approved microwave ovens or equipment for brewing coffee, tea, hot chocolate and similar beverages shall be permitted, provided that such equipment and use is in accordance with all applicable Regulations.

9. Tenant shall not use any hand trucks except those equipped with the rubber tires and side guards, and may use such other material-handling equipment as Landlord may approve. Except as set forth in the Lease to the contrary, Tenant shall not bring any other vehicles of any kind into the Building. Forklifts which operate on asphalt areas shall only use tires that do not damage the asphalt.

10. Tenant shall not use the name of the Building or any photograph or other likeness of the exterior of the Building in connection with or in promoting or advertising Tenant's business except that Tenant may include the Building name in Tenant's address. Landlord shall have the right, exercisable without notice and without liability to any tenant, to change the name and address of the Building; provided, that Landlord shall make commercially reasonable efforts to provide Tenant with not less than sixty (60) days written notice thereof and shall reimburse Tenant for the cost of one month's supply of stationery showing the new address (not to exceed $500.00).

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11. All trash and refuse shall be contained in suitable receptacles at locations approved by Landlord. Tenant shall not place in the trash receptacles any personal trash or material that cannot be disposed of in the ordinary and customary manner of removing such trash without violation of any law or ordinance governing such disposal.

12. Tenant shall comply with all safety, fire protection and evacuation procedures and regulations established by Landlord or any governing authority.

13. Tenant assumes all responsibility for securing and protecting its Premises and its contents including keeping doors locked and other means of entry to the Premises closed.

14. Tenant shall not use any method of heating or air conditioning other than that supplied by Landlord without Landlord's prior written consent. Tenant shall not permit space heaters in the Premises.

15. No person shall go on the roof without Landlord's permission.

16. Tenant shall not permit any animals (including birds and other fowl), reptiles, amphibians or fish (including fish tanks), other than service animals, e.g. seeing-eye dogs, to be brought or kept in or about the Premises and shall not permit the same from being brought or kept in any common area of the Property by Tenant or any Tenant Entities.

17. Tenant shall not permit any motor vehicles to be washed or mechanical work or maintenance of motor vehicles to be performed on any portion of the Premises or parking lot.

18. These Rules and Regulations are in addition to, and shall not be construed to in any way modify or amend, in whole or in part, the terms, covenants, agreements and conditions of any lease of any premises in the Building. Subject to Article 16 of the Lease, Landlord may waive any one or more of these Rules and Regulations for the benefit of any tenant or tenants, and any such waiver by Landlord shall not be construed as a waiver of such Rules and Regulations for any or all tenants.

19. Landlord reserves the right to make such other and reasonable rules and regulations as in its judgment may from time to time be needed for safety and security, for care and cleanliness of the Building and for the preservation of good order in and about the Building. Tenant agrees to abide by all such rules and regulations herein stated and any additional rules and regulations which are adopted, subject to Article 16 of the Lease. Tenant shall be responsible for the observance of all of the foregoing rules by Tenant's employees, agents, clients, customers, invitees and guests.

20. Any toilet rooms, toilets, urinals, wash bowls and other apparatus shall not be used for any purpose other than that for which they were constructed and no foreign substance of any kind whatsoever shall be thrown into them. The expense of any breakage, stoppage or damage resulting from the violation of this rule shall be borne by the Tenant who, or whose employees or invitees, shall have caused it.

21. Tenant shall not permit smoking or carrying of lighted cigarettes or cigars in areas reasonably designated by Landlord or any applicable governmental agencies as non-smoking areas.

22. Any directory of the Building or Project ("Project Area"), if provided, will be exclusively for the display of the name and location of tenants only.

23. Canvassing, soliciting, distribution of handbills or any other written material in the Building or Project Area is prohibited and each tenant shall cooperate to prevent the same. No tenant shall solicit business from other tenants or permit the sale of any goods or merchandise in the Building or Project Area without the written consent of Landlord.

24. Except for the equipment used by Tenant for the Permitted Uses, any equipment belonging to Tenant which causes noise or vibration that may be transmitted to the structure of the Building or to any space therein to such a degree as to be objectionable to Landlord or to any tenants in the Building shall be placed and maintained by Tenant, at Tenant's expense, on vibration eliminators or other devices sufficient to eliminate the noise or vibration.

25. Driveways, sidewalks, halls, passages, exits, entrances and stairways ("Access Areas") shall not be obstructed by tenants or used by tenants for any purpose other than for ingress to and egress from their respective premises. Access areas are not for the use of the general public and Landlord shall in all cases retain the right to control and prevent access thereto by all persons whose presence, in the judgment of Landlord, shall be prejudicial to the safety, character, reputation and interests of the Building or its tenants.

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26. Tenant shall reasonably comply with Landlord's recycle policy for the Building, including, without limitation, Tenant shall sort and separate its trash into separate recycling containers as required by law or which may be furnished by Landlord and located in the Premises. Tenant shall comply with all Regulations regarding the collection, sorting, separation, and recycling of garbage, waste products, trash and other refuse at the Building. Landlord reserves the right to refuse to collect or accept from Tenant any trash that is not separated and sorted as required by law or pursuant to Landlord's recycling policy, and to require Tenant to arrange for such collection at Tenant's cost, utilizing a contractor reasonably satisfactory to Landlord.

27. Tenant acknowledges that the Building, at Landlord's option, may be operated in accordance with standards for the certification of environmentally sustainable, high performance buildings or aspects of their performance, including the U.S. EPA's Energy Star® rating and, U.S. Green Building Council's Leadership in Energy and Environmental Design program's standards, as the same are amended or replaced from time to time and similar "green building" standards (hereinafter collectively referred to as "Green Building Standards"). To support Landlord's sustainability practices, Tenant is encouraged to use reasonable efforts to use proven energy, water carbon reduction, and other sustainable measures, such as for example using energy efficient bulbs in task lighting, installing lighting controls, such as automatic sensors; turning off lights at the end of the work day; and utilizing water filtration systems to avoid the use of bottled water.

28. Landlord reserves the right to designate the use of parking areas and spaces. Tenant shall not park in visitor, reserved, or unauthorized parking areas. Tenant and Tenant's guests shall park between designated parking lines only and shall not park motor vehicles in those areas designated by Landlord for loading and unloading. Vehicles in violation of the above shall be subject to being towed at the vehicle owner's expense. Vehicles parked overnight without prior written consent of the Landlord shall be deemed abandoned and shall be subject to being towed at vehicle owner's expense; provided, however, Tenant may park a reasonable number of company-owned vehicles overnight. Tenant will from time to time, upon the request of Landlord, supply Landlord with a list of license plate numbers of vehicles owned or operated by its employees or agents. Overnight parking shall be subject to the terms of this Section 28, as follows: except as expressly provided below, vehicles parked overnight without prior written consent of the Landlord shall be subject to being towed at vehicle owner's expense. Notwithstanding the foregoing, Tenant shall be entitled to park its company-owned vehicles overnight, provided that (a) any such vehicles parked overnight shall be at Tenant's sole risk, (b) Landlord shall not directly or indirectly be liable to Tenant or any other person for any damage, loss or theft related to such overnight parking of vehicles and Tenant hereby waives any and all claims, known or unknown, against and releases Landlord and the Landlord Entities from any and all claims arising as a consequence of or related to any such damage, loss or theft, (c) in no event shall the number of such vehicles exceed Tenant's Proportionate Share of parking spaces, (d) any such vehicles shall actively enter and leave on a regular, ongoing basis consistent with Tenant's operations at the Premises and shall not be abandoned (in Landlord's reasonable judgment) by Tenant, and (e) nothing set forth herein shall be deemed to permit Tenant to use more parking spaces than Tenant's Proportionate Share of parking spaces for the Building. Tenant will from time to time, upon the request of Landlord, supply Landlord with a list of license plate numbers of vehicles owned or operated by its employees or agents.

29. No trucks, tractors or similar vehicles can be parked anywhere other than in Tenant's own truck dock area. Tractor-trailers which must be unhooked or parked with dolly wheels beyond the concrete loading areas must use steel plates or wood blocks under the dolly wheels to prevent damage to the asphalt paving surfaces. No parking or storing of such trailers will be permitted in the parking areas or on streets adjacent thereto.

30. During periods of loading and unloading, Tenant shall not unreasonably interfere with traffic flow and loading and unloading areas of other tenants. All products, materials or goods must be stored within the Tenant's Premises and not in any exterior areas, including, but not limited to, exterior dock platforms, against the exterior of the Building, parking areas and driveway areas. Tenant agrees to keep the exterior of the Premises clean and free of nails, wood, pallets, packing materials, barrels and any other debris produced from their operation.

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EXHIBIT E — EARLY POSSESSION AGREEMENT

attached to and made a part of the Lease bearing the Lease Reference Date of December 11, 2012 between SFERS REAL ESTATE CORP. U, a Delaware corporation, as Landlord and VIVUS, INC., a Delaware corporation, as Tenant

EARLY POSSESSION AGREEMENT

Reference is made to that certain lease dated December 11, 2012, between SFERS REAL ESTATE CORP. U, a Delaware corporation ("Landlord") and VIVUS, INC., a Delaware corporation ("Tenant"), for the Premises located 351 East Evelyn Avenue, Mountain View, California 94041.

It is hereby agreed that, notwithstanding anything to the contrary contained in the Lease but subject to the terms of Section 2.3 of the Lease, Tenant may occupy the Premises on . The first Monthly Installment of Rent is due on .

Landlord and Tenant agree that all the terms and conditions of the above referenced Lease are in full force and effect as of the date of Tenant's possession of the Premises prior to the Commencement Date pursuant to Section 2.3 other than the payment of rent.

LANDLORD:	**TENANT:**
SFERS REAL ESTATE CORP. U, **a Delaware corporation**	**VIVUS, INC.,** **a Delaware corporation**
By: DO NOT SIGN	By: DO NOT SIGN
Name:	Name:
Title:	Title:
Dated:	Dated:

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EXHIBIT F — FORM OF LETTER OF CREDIT

attached to and made a part of the Lease bearing the Lease Reference Date of December 11, 2012 between SFERS REAL ESTATE CORP. U, a Delaware corporation, as Landlord and VIVUS, INC., a Delaware corporation, as Tenant

FORM OF LETTER OF CREDIT

[Name of Financial Institution]

Irrevocable Standby
Letter of Credit
No.
Issuance Date:
Expiration Date:
Applicant:

Beneficiary

[*Insert Name of Landlord*]
[*Insert Building management office address*]

Ladies/Gentlemen:

We hereby establish our Irrevocable Standby Letter of Credit in your favor for the account of the above referenced Applicant in the amount of U.S. Dollars ($) available for payment at sight by your draft drawn on us when accompanied by the following documents:

1. An original copy of this Irrevocable Standby Letter of Credit.

2. Beneficiary's dated statement purportedly signed by an authorized signatory or agent reading: "This draw in the amount of U.S. Dollars ($) under your Irrevocable Standby Letter of Credit No. represents funds in the amount due and owing to us pursuant to the terms of that certain lease by and between , as landlord, and , as tenant, and/or any amendment to the lease or any other agreement between such parties related to the lease."

It is a condition of this Irrevocable Standby Letter of Credit that it will be considered automatically renewed for a one year period upon the expiration date set forth above and upon each anniversary of such date, unless at least 60 days prior to such expiration date or applicable anniversary thereof, we notify you in writing, by certified mail return receipt requested or by recognized overnight courier service, that we elect not to so renew this Irrevocable Standby Letter of Credit. A copy of any such notice shall also be sent, in the same manner, to: RREEF Property Management, 875 North Michigan Avenue, 41 st Floor, Chicago, Illinois 60611-1901, Attention: John Marconnet. In addition to the foregoing, we understand and agree that you shall also be entitled to draw upon this Irrevocable Standby Letter of Credit in the event that we elect not to renew this Irrevocable Standby Letter of Credit by complying with item 1 above and, in addition, you provide us with a dated statement purportedly signed by an authorized signatory or agent of Beneficiary stating that the Applicant has failed to provide you with an acceptable substitute irrevocable standby letter of credit in accordance with the terms of the above referenced lease. We further acknowledge and agree that: (a) upon receipt of the documentation required herein, we will honor your draws against this Irrevocable Standby Letter of Credit without inquiry into the accuracy of Beneficiary's signed statement and regardless of whether Applicant disputes the content of such statement; (b) this Irrevocable Standby Letter of Credit shall permit partial draws and, in the event you elect to draw upon less than the full stated amount hereof, the stated amount of this Irrevocable Standby Letter of Credit shall be automatically reduced by the amount of such partial draw; and (c) you shall be entitled to transfer your interest in this Irrevocable Standby Letter of Credit from time to time and more than one time without our approval and without charge. In the event of a transfer, we reserve the right to require reasonable evidence of such transfer as a condition to any draw hereunder.

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This Irrevocable Standby Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (1993 revision) ICC Publication No. 500.

We hereby engage with you to honor drafts and documents drawn under and in compliance with the terms of this Irrevocable Standby Letter of Credit.

All communications to us with respect to this Irrevocable Standby Letter of Credit must be addressed to our office located at to the attention of .

Very truly yours,

_____

[name]

[title]

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EXHIBIT G — FORM OF HAZARDOUS MATERIALS QUESTIONNAIRE

attached to and made a part of the Lease bearing the Lease Reference Date of December 11, 2012 between SFERS REAL ESTATE CORP. U, a Delaware corporation, as Landlord and VIVUS, INC., a Delaware corporation, as Tenant

HAZARDOUS MATERIALS QUESTIONNAIRE

This questionnaire is designed to solicit information regarding Tenant's proposed use, generation, treatment, storage, transfer or disposal of hazardous or toxic materials, substances or wastes. If this questionnaire is attached to or provided in connection with a lease, the reference herein to any such items shall include all items defined as "Hazardous Materials," "Hazardous Substances," "Hazardous Wastes," "Toxic Materials," "Toxic Substances, "Toxic Wastes," or such similar definitions contained in such lease. Please complete the questionnaire and return it to Landlord for evaluation. If your use of materials or substances, or generation of wastes is considered to be significant, further information may be requested regarding your plans for hazardous and toxic materials management. Submission to Landlord of this Hazardous Materials Questionnaire or Landlord's request for additional information shall not deemed consent by Landlord to Tenant's use of the materials disclosed herein. Your cooperation in this matter is appreciated. If you have any questions, do not hesitate to call us for assistance.

1. PROPOSED TENANT

Name (Corporation, Individual, Corporate or Individual DBA, or Public Agency):

Standard Industrial Classification Code (SIC):

Street Address:

City, State, Zip Code:

Contact Person & Title:

Telephone Number: ( )

Facsimile Number: ( )

2. LOCATION AND ADDRESS OF PROPOSED LEASE

Street Address:

City, State, Zip Code:

Bordering Streets:

Streets to which Premises has Access:

3. DESCRIPTION OF PREMISES

Floor Area:

Number of Parking Spaces:

Date of Original Construction:

Past Uses of Premises:

Dates and Descriptions of Significant Additions, Alterations or Improvements:

Proposed Additions, Alterations or Improvements, if any:

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4. DESCRIPTION OF PROPOSED PREMISES USE

Describe proposed use and operation of Premises including (i) services to be performed, (ii) nature and types of manufacturing or assembly processes, if any, and (iii) the materials or products to be stored at the Premises.

Will the operation of your business at the Premises involve the use, generation, treatment, storage, transfer or disposal of hazardous wastes or materials? Do they now? Yes ☐ No ☐ If the answer is "yes," or if your SIC code number is between 2000 to 4000, please complete Section 5.

5. PERMIT DISCLOSURE

Does or will the operation of any facet of your business at the Premises require any permits, licenses or plan approvals from any of the following agencies?

U.S. Environmental Protection Agency	Yes ☐	No ☐
City or County Sanitation District	Yes ☐	No ☐
State Department of Health Services	Yes ☐	No ☐
U.S. Nuclear Regulatory Commission	Yes ☐	No ☐
Air Quality Management District	Yes ☐	No ☐
Bureau of Alcohol, Firearms and Tobacco	Yes ☐	No ☐
City or County Fire Department	Yes ☐	No ☐
Regional Water Quality Control Board	Yes ☐	No ☐
Other Governmental Agencies (if yes,	Yes ☐	No ☐
identify:)		

If the answer to any of the above is "yes," please indicate permit or license numbers, issuing agency and expiration date or renewal date, if applicable.

If your answer to any of the above is "yes," please complete Sections 6 and 7.

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6. HAZARDOUS MATERIALS DISCLOSURE

Will any hazardous or toxic materials or substances be stored on the Premises? Yes ☐ No ☐ If the answer is "yes," please describe the materials or substances to be stored, the quantities thereof and the proposed method of storage of the same (i.e., drums, aboveground or underground storage tanks, cylinders, other), and whether the material is a Solid (S), Liquid (L) or Gas (G):

Material/ Substance	Quantity to be Stored on Premises	Storage Method	Amount to be Stored on a Monthly Basis	Maximum Period of Premises Storage

Attach additional sheets if necessary.

Is any modification of the Premises improvements required or planned to mitigate the release of toxic or hazardous materials substance or wastes into the environment? Yes ☐ No ☐ If the answer is "yes," please describe the proposed Premises modifications:

7. HAZARDOUS WASTE DISCLOSURE

Will any hazardous waste, including recyclable waste, be generated by the operation of your business at the Premises? Yes ☐ No ☐ If the answer is "yes," please list the hazardous waste which is expected to be generated (or potentially will be generated) at the Premises, its hazard class and volume/frequency of generation on a monthly basis.

Waste Name	Hazard Class	Volume/Month	Maximum Period of Premises Storage

Attach additional sheets if necessary.

If the answer is "yes," please also indicate if any such wastes are to be stored within the Premises and the proposed method of storage (i.e., drums, aboveground or underground storage tanks, cylinders, other).

Waste Name	Storage Method

Attach additional sheets if necessary.

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If the answer is "yes," please also describe the method(s) of disposal for each waste. Indicate where disposal will take place including the methods, equipment and companies to be used to transport the waste:

Is any treatment or processing of hazardous wastes to be conducted at the Premises? Yes ☐ No ☐ If the answer is "yes," please describe proposed treatment/processing methods:

Which agencies are responsible for monitoring and evaluating compliance with respect to the storage and disposal of hazardous materials or wastes at or from the Premises? (Please list all agencies):

Have there been any agency enforcement actions regarding Tenant (or any affiliate thereof), or any existing Tenant's (or any affiliate's) facilities, or any past, pending or outstanding administrative orders or consent decrees with respect to Tenant or any affiliate thereof? Yes ☐ No ☐ If the answer is "yes," have there been any continuing compliance obligations imposed on Tenant or its affiliates as a result of the decrees or orders? Yes ☐ No ☐ If the answer is "yes," please describe:

Has Tenant or any of its affiliates been the recipient of requests for information, notice and demand letters, cleanup and abatement orders, or cease and desist orders or other administrative inquiries? Yes ☐ No ☐ If the answer is "yes," please describe:

Are there any pending citizen lawsuits, or have any notices of violations been provided to Tenant or its affiliates or with respect to any existing facilities pursuant to the citizens suit provisions of any statute? Yes ☐ No ☐ If the answer is "yes," please describe:

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Have there been any previous lawsuits against the company regarding environmental concerns? Yes ☐ No ☐ If the answer is "yes," please describe how these lawsuits were resolved:

Has an environmental audit ever been conducted at any of your company's existing facilities? Yes ☐ No ☐ If the answer is "yes," please describe:

Does your company carry environmental impairment insurance? Yes ☐ No ☐ If the answer is "yes," what is the name of the carrier and what are the effective periods and monetary limits of such coverage?

8. EQUIPMENT LOCATED OR TO BE LOCATED AT THE PREMISES

Is (or will there be) any electrical transformer or other equipment containing polychlorinated biphenyls located at the Premises?

Yes ☐ No ☐ If the answer is "yes," please specify the size, number and location (or proposed location):

Is (or will there be) any tank for storage of a petroleum product located at the Premises? Yes ☐ No ☐ If the answer is "yes," please specify capacity and contents of tank; permits, licenses and/or approvals received or to be received therefor and any spill prevention control or conformance plan to be taken in connection therewith:

9. ONGOING ACTIVITIES (APPLICABLE TO TENANTS IN POSSESSION)

Has any hazardous material, substance or waste spilled, leaked, discharged, leached, escaped or otherwise been released into the environment at the Premises? Yes ☐ No ☐ If the answer is "yes," please describe including (i) the date and duration of each such release, (ii) the material, substance or waste released, (iii) the extent of the spread of such release into or onto the air, soil and/or water, (iv) any action to clean up the release, (v) any reports or notifications made of filed with any federal, state, or local agency, or

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any quasi-governmental agency (please provide copies of such reports or notifications) and (vi) describe any legal, administrative or other action taken by any of the foregoing agencies or by any other person as a result of the release:

This Hazardous Materials Questionnaire is certified as being true and accurate and has been completed by the party whose signature appears below on behalf of Tenant as of the date set forth below.

DATED: _____

Signature _____

Print Name _____

Title _____

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EXHIBIT H — APPROVED HAZARDOUS MATERIALS

**attached to and made a part of the Lease bearing the
Lease Reference Date of December 11, 2012 between
SFERS REAL ESTATE CORP. U, a Delaware corporation, as Landlord and
VIVUS, INC., a Delaware corporation, as Tenant**

De minimis quantities of Tenant's finished pharmaceutical products.

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EXHIBIT I — FORM OF SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENT

**attached to and made a part of the Lease bearing the
Lease Reference Date of December 11, 2012 between
SFERS REAL ESTATE CORP. U, a Delaware corporation, as Landlord and
VIVUS, INC., a Delaware corporation, as Tenant**

Record and return to:

[>Principal Life Insurance Company/>Principal Commercial Funding, LLC/>Principal Real Estate Investors, LLC/U.S. BANK NATIONAL ASSOCIATION]>
801 Grand Avenue
Des Moines, IA 50392-1360
ATTN: >

SUBORDINATION, NON-DISTURBANCE
AND ATTORNMENT AGREEMENT
>

THIS AGREEMENT, made and entered into as of the > day of >, 20>, by and between [>PRINCIPAL LIFE INSURANCE COMPANY, an Iowa corporation/>PRINCIPAL COMMERCIAL FUNDING, LLC, a Delaware limited liability company/>U.S. BANK NATIONAL ASSOCIATION, a national banking association/>(list other client)]>, with an address for purposes of notice at c/o Principal Real Estate Investors, LLC, 801 Grand Avenue, Des Moines, Iowa 50392-1450 (hereinafter called "Lender") and >, with its principal office at > (hereinafter called "Lessee");

WITNESSETH:

WHEREAS, Lessee has by a written lease dated >, as amended by > (hereinafter called the "Lease") leased from the landlord named in the Lease (hereinafter called "Lessor"), all or part of certain real estate and improvements thereon located in the city of >, state of >, as more particularly described in Exhibit A attached hereto (the "Demised Premises"); and

WHEREAS, Lessor is encumbering (or has previously encumbered) the Demised Premises as security for a loan (the "Loan") from Lender to Lessor (the "Mortgage"); and

WHEREAS, Lessee and Lender have agreed to the following with respect to their mutual rights and obligations pursuant to the Lease and the Mortgage;

NOW, THEREFORE, for and in consideration of Ten Dollars ($10.00) paid by each party to the other and the mutual covenants and agreements herein contained and other good and valuable consideration, the receipt whereof is hereby acknowledged, the parties hereto do hereby covenant and agree as follows:

(1) Lessee's interest in the Lease and all rights of Lessee thereunder, including but not limited to, any purchase option or right of first refusal in connection with a sale of the Demised Premises, if any, shall be and are hereby declared subject and subordinate to the Mortgage upon the Demised Premises and its terms, and the term "Mortgage" as used herein shall also include any amendment, supplement, modification, renewal, refinance or replacement thereof. Lender further agrees not to join Lessee in any foreclosure proceeding except to the extent necessary under applicable law, but such joinder shall not be in derogation of the rights of Lessee as set forth in this Agreement.

Notwithstanding anything herein to the contrary, Lender agrees to recognize Lessee's purchase option or right of first refusal only to the extent the purchase price for the sale of the Demised Premises is paid directly and immediately to Lender and is sufficient to pay in full the then outstanding indebtedness under the Loan, including any applicable premium.

(2) In the event of any foreclosure of the Mortgage or any conveyance in lieu of foreclosure, provided that the Lessee shall not then be in default beyond any grace period under the Lease and that the Lease shall then be in full force and effect, then Lender shall neither terminate the Lease nor join Lessee in foreclosure proceedings (except to the extent necessary under applicable law, but such joinder shall not be in derogation of the rights of Lessee as set forth in this

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Agreement), nor disturb Lessee's possession, and the Lease shall continue in full force and effect as a direct lease between Lessee and Lender. In the event Lender, its successors and/or assigns acquire the Demised Premises through foreclosure proceedings, deed-in-lieu of foreclosure, or otherwise, such event shall not activate Lessee's purchase option or right of first refusal.

(3) After the receipt by Lessee of notice from Lender of any foreclosure of the Mortgage or any conveyance of the Demised Premises in lieu of foreclosure, Lessee will thereafter attorn to and recognize Lender or any purchaser at any foreclosure sale or otherwise as its substitute lessor on the terms and conditions set forth in the Lease.

(4) Lessee hereby agrees that if Lessee has the right to terminate the Lease or to claim a partial or total eviction, or to abate or reduce rent due to a Lessor default under the Lease, Lessee will not exercise such right until it has given written notice to Lender, and Lender has failed within thirty (30) days after both receipt of such notice and the date when it shall have become entitled to remedy the same, to commence to cure such default and thereafter diligently prosecute such cure to completion within ninety (90) days of Lender's commencement to cure such default.

(5) There shall be no merger of the Lease or the leasehold estate created thereby with any other estate in the Demised Premises, including without limitation the fee estate, by reason of the same person or entity acquiring or holding, directly or indirectly, the Lease and said leasehold estate and any such other estate.

(6) Lessee agrees that if the Lease is terminated pursuant to the terms of the Lease, or otherwise, Lessee will remit any payments made in connection with such termination directly and immediately to Lender. Lessor hereby agrees that such payments shall be held by Lender as additional security for the Loan, and applied at Lender's sole discretion.

(7) In no event shall Lender be liable for: (a) the return of any security deposit provided to Lessor under the Lease; (b) any act or omission of the Lessor; (c) any covenant of Lessor to undertake or complete the initial construction or installation of improvements on the Demised Premises; (d) any sums due Lessee under the Lease related to the costs of preparing, furnishing or moving into the Demised Premises (for example, a construction or tenant improvement allowance); or (e) any covenant of Lessor related to restrictive uses or exclusives which pertain to properties outside of the Demised Premises and which Lender could not reasonably comply with if it became Lessor under the Lease. Further, Lender shall not be subject to any offsets or deficiencies which Lessee may be entitled to assert against the Lessor as a result of any act or omission of Lessor occurring prior to Lender's obtaining title to the Demised Premises, it being understood that nothing in this clause shall be deemed to exclude Lender from responsibility for repairs and maintenance required of the Lessor under the Lease from and after the date Lender takes title to the Demised Premises, whether or not the need for such repairs or maintenance accrued before or after such date; provided, however, that in no event shall Lender be responsible for consequential damages resulting from the failure of Lessor to undertake such repairs and maintenance.

(8) This Agreement and its terms shall be governed by the laws of the state where the Demised Premises are located and shall be binding upon and inure to the benefit of Lender and Lessee and their respective successors and assigns, including, without limitation, any purchaser at any foreclosure sale or otherwise. This Agreement may not be modified orally or in any manner other than by an agreement, in writing, signed by the parties.

(9) This Agreement may be executed in counterparts, each of which shall be deemed to be an original, and such counterparts when taken together shall constitute but one agreement.

(Signatures on next page)

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IN WITNESS WHEREOF, this Agreement has been duly authorized, fully executed and delivered on the day and year first above written.

>

>, Lessee

By _____
Name:
Title:

By _____
Name:
Title:

[>Insert Client notary form here]>

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Exhibit 21.1

LIST OF SUBSIDIARIES

The following is a list of subsidiaries of VIVUS, Inc.

1. VIVUS UK Limited (United Kingdom), a wholly owned subsidiary of VIVUS, Inc.
2. VIVUS BV (Netherlands), a wholly owned subsidiary of VIVUS, Inc.
3. Vivus Limited (Bermuda), a wholly owned subsidiary of VIVUS, Inc.
4. Vivus International, L.P. (Bermuda), General Partner Vivus Limited

QuickLinks

Exhibit 21.1

LIST OF SUBSIDIARIES

Exhibit 23.1

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We consent to the incorporation by reference in the Registration Statements on Forms S-8 (No. 033-75698, No. 333-06486, No. 333-29939, No. 333-57374, No. 333-73394, No. 333-104287, No. 333-107006, No. 333-142354, No. 333-150647, No. 333-157787, No. 333-164921, No. 333-168106 and No. 333-175926) and Forms S-3 (No. 333-105985, No. 333-121519, No. 333-135793, No. 333-150649 and No. 333-161948) of VIVUS, Inc. of our reports dated February 26, 2013, relating to the consolidated financial statements and schedule of VIVUS, Inc. and the effectiveness of internal control over financial reporting of VIVUS, Inc., included in the Annual Report on Form 10-K for the year ended December 31, 2012.

/s/ OUM & CO. LLP

San Francisco, California

February 26, 2013

QuickLinks

Exhibit 23.1

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

QuickLinks -- Click here to rapidly navigate through this document

Exhibit 31.1

CERTIFICATION OF CHIEF EXECUTIVE OFFICER PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

I, Leland F. Wilson, Chief Executive Officer, certify that:

1. I have reviewed this annual report on Form 10-K of VIVUS, Inc.;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

   a. Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

   b. Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

   c. Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

   d. Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

   a. All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

   b. Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: February 26, 2013

By: /s/ LELAND F. WILSON

Name: Leland F. Wilson
Title: *Chief Executive Officer*

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Exhibit 31.1

CERTIFICATION OF CHIEF EXECUTIVE OFFICER PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

Exhibit 31.2

CERTIFICATION OF CHIEF FINANCIAL OFFICER PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

I, Timothy E. Morris, Sr. Vice President Finance and Global Corporate Development, Chief Financial Officer, certify that:

1. I have reviewed this annual report on Form 10-K of VIVUS, Inc.;

2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;

3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:

   a. Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;

   b. Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;

   c. Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

   d. Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

   a. All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

   b. Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: February 26, 2013

By: /s/ TIMOTHY E. MORRIS

Name: Timothy E. Morris
Title: *Sr. Vice President Finance and Global Corporate Development, Chief Financial Officer*

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Exhibit 31.2

CERTIFICATION OF CHIEF FINANCIAL OFFICER PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002

Exhibit 32.1

CERTIFICATION OF CHIEF EXECUTIVE OFFICER AND CHIEF FINANCIAL OFFICER
PURSUANT TO
18 U.S.C. SECTION 1350,
AS ADOPTED PURSUANT TO
SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002

I, Leland F. Wilson, Chief Executive Officer of VIVUS, Inc., certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Annual Report of VIVUS, Inc. on Form 10-K for the period ending December 31, 2012 fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that information contained in such Annual Report on Form 10-K fairly presents in all material respects the financial condition and results of operations of VIVUS, Inc. This written statement is being furnished to the Securities and Exchange Commission as an exhibit to such Annual Report on Form 10-K. A signed original of this statement has been provided to VIVUS, Inc. and will be retained by VIVUS, Inc. and furnished to the Securities and Exchange Commission or its staff upon request.

Date: February 26, 2013 By: /s/ LELAND F. WILSON

Leland F. Wilson
Chief Executive Officer

I, Timothy E. Morris, Sr. Vice President Finance and Global Corporate Development, Chief Financial Officer, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that the Annual Report of VIVUS, Inc. on Form 10-K for the period ending December 31, 2012 fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934 and that information contained in such Annual Report on Form 10-K fairly presents in all material respects the financial condition and results of operations of VIVUS, Inc. This written statement is being furnished to the Securities and Exchange Commission as an exhibit to such Annual Report on Form 10-K. A signed original of this statement has been provided to VIVUS, Inc. and will be retained by VIVUS, Inc. and furnished to the Securities and Exchange Commission or its staff upon request.

Date: February 26, 2013 By: /s/ TIMOTHY E. MORRIS

Timothy E. Morris
Sr. Vice President Finance and Global Corporate Development, Chief Financial Officer

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Exhibit 32.1

CERTIFICATION OF CHIEF EXECUTIVE OFFICER AND CHIEF FINANCIAL OFFICER PURSUANT TO 18 U.S.C. SECTION 1350, AS ADOPTED PURSUANT TO SECTION 906 OF THE SARBANES-OXLEY ACT OF 2002