



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

**FORM 8-K**

CURRENT REPORT  
Pursuant to Section 13 or 15(d) of the  
Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): August 18, 2010

**MannKind Corporation**

(Exact name of registrant as specified in its charter)

**Delaware**  
(State or other jurisdiction of  
incorporation or organization)

**000-50865**  
(Commission File Number)

**13-3607736**  
(IRS Employer  
Identification No.)

**28903 North Avenue Paine**  
**Valencia, California**  
(Address of principal executive offices)

**91355**  
(Zip Code)

Registrant's telephone number, including area code: **(661) 775-5300**

**N/A**  
(Former name or former address, if changed since last report.)

Check the appropriate box below if the Form 8-K is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
  - Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
  - Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
  - Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
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### **Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.**

The information contained in Item 8.01 below regarding the Notes and the Indenture (each as defined below) is incorporated by reference herein.

### **Item 3.02 Unregistered Sales of Equity Securities.**

The information contained in Item 8.01 below regarding the sale of the Notes (as defined below) is incorporated by reference herein.

### **Item 8.01 Other Events.**

#### **Senior Convertible Note Offering**

On August 18, 2010, we entered into a purchase agreement (the "Purchase Agreement") with Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), acting as representative of the several initial purchasers named therein, relating to the sale by us of \$100 million aggregate principal amount of 5.75% Senior Convertible Notes due 2015 (the "Notes"). Pursuant to the Purchase Agreement, we granted the initial purchasers an option to purchase up to an additional \$10 million aggregate principal amount of the Notes solely to cover over-allotments, if any. The foregoing description of the Purchase Agreement is qualified in its entirety by reference to the Purchase Agreement, which is attached hereto as Exhibit 99.1.

We offered and sold the Notes to the initial purchasers in reliance on the exemption from registration provided by Section 4(2) of the Securities Act of 1933, as amended (the "Securities Act"). The Notes were offered and sold by the initial purchasers to qualified institutional buyers pursuant to Rule 144A under the Securities Act. None of the Notes (including any shares of common stock issuable upon conversion thereof) has been registered under the Securities Act or under any state securities laws and, unless so registered, may not be offered or sold in the United States or to U.S. persons except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the Securities Act and applicable state securities laws.

The net proceeds to us from the sale of the Notes were approximately \$95.5 million (which does not include any additional proceeds we may receive if the initial purchasers exercise their over-allotment option), after deducting the discount to the initial purchasers of \$3.3 million and the estimated offering expenses payable by us. We intend to use the net proceeds from the sale of the Notes to fund the costs of our clinical trials programs and other research and development activities, to expand our manufacturing operations, both on-going and planned, and for general corporate purposes, including working capital.

The Notes were issued under an indenture (the "Indenture") entered into between us and Wells Fargo Bank, National Association, as trustee. The Notes will be our general, unsecured, senior obligations and will rank equally in right of payment with our other unsecured senior debt. The Notes bear interest at the rate of 5.75% per year on the principal amount, payable semiannually in arrears in cash on February 15 and August 15 of each year, beginning February 15, 2011. The Notes will mature on August 15, 2015.

The Notes are convertible, at the option of the holder, at any time on or prior to the close of business on the business day immediately preceding the stated maturity date, into shares of our common stock at a conversion rate of 147.0859 shares per \$1,000 principal amount of Notes, which is equal to a conversion price of approximately \$6.80 per share. The conversion rate is subject to adjustment under certain circumstances described in the Indenture.

If certain fundamental changes occur, we will be obligated to pay a fundamental change make-whole premium on any Notes converted in connection with such fundamental change by increasing the conversion rate on such Notes. In such instances, the amount of the fundamental change make-whole premium will be based on our common stock price and the effective date of the applicable fundamental change.

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If we undergo certain fundamental changes, except in certain circumstances, each holder of Notes will have the option to require us to repurchase all or any portion of that holder's Notes. The fundamental change repurchase price will be 100% of the principal amount of the Notes to be repurchased plus accrued and unpaid interest, if any.

We may elect to redeem some or all of the Notes but only if the closing price of our common stock has equaled or exceeded 150% of the conversion price for at least 20 of the 30 consecutive trading days ending on the trading day before our redemption notice. The redemption price will equal 100% of the principal amount of the notes to be redeemed, plus accrued and unpaid interest, if any, to, but excluding, the redemption date, plus a make-whole payment equal to the sum of the present values of the remaining scheduled payments of interest on the Notes to be redeemed through and including August 15, 2015 (other than the interest accrued up to, but excluding, the redemption date).

In addition, we will be obligated to make the make-whole payment on all Notes called for redemption and converted during the period from the date we mailed the notice of redemption to and including the redemption date. We may elect to pay such make-whole payment to converting holders in cash or shares of our common stock, subject to certain limitations.

The foregoing description of the Notes and the Indenture is qualified in its entirety by reference to the Indenture and form of Note, which are attached hereto as Exhibits 4.1 and 4.2, respectively.

### **Share Lending Agreement and Common Stock Offering**

In connection with the offering of the Notes, on August 18, 2010, we entered into a share lending agreement (the "Share Lending Agreement") with Bank of America, N.A. (the "Share Borrower"), an affiliate of Merrill Lynch, pursuant to which we lent 9,000,000 shares of our common stock (the "Borrowed Shares") to the Share Borrower. The Share Borrower is obligated to return the borrowed shares (or identical shares or, in certain circumstances, the cash value thereof) to us on or about the 45<sup>th</sup> business day following the date as of which the entire principal amount of the Notes ceases to be outstanding, subject to extension or acceleration in certain circumstances or early termination at the Share Borrower's option.

Also on August 18, 2010, we entered into an underwriting agreement (the "Underwriting Agreement") with Merrill Lynch and the Share Borrower. Pursuant to the Underwriting Agreement, the Borrowed Shares were offered and sold to the public at a fixed price of \$5.55 per share. We did not receive any proceeds from the sale of the Borrowed Shares to the public, but received a nominal lending fee of \$90,000 pursuant to the Share Lending Agreement for the use by the Share Borrower of the Borrowed Shares. The Share Borrower or its affiliate received all of the net proceeds from the sale of Borrowed Shares to the public.

The foregoing description of the Share Lending Agreement and the Underwriting Agreement is qualified in its entirety by reference to the Share Lending Agreement and the Underwriting Agreement, which are attached hereto as Exhibits 99.2 and 1.1, respectively.

A copy of the opinion of Cooley LLP relating to the legality of the issuance of the Borrowed Shares is attached hereto as Exhibit 5.1.

### **Letter Agreement with The Mann Group LLC**

On August 18, 2010, we entered into a letter agreement confirming a previous commitment by The Mann Group LLC to not require us to prepay amounts outstanding under the Amended and Restated Promissory Note made by us in favor of The Mann Group LLC, dated August 10, 2010, if the prepayment would require us to use our

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working capital resources, including the proceeds from the sale of the Notes. The foregoing description of the letter agreement is qualified in its entirety by reference to the letter agreement, which is attached hereto as Exhibit 99.3.

### **Updated Company Disclosure**

We are filing certain information for the purpose of updating the risk factors and description of capital stock contained in our other filings with the Securities and Exchange Commission. A copy of this additional disclosure is attached as Exhibit 99.4 to this Current Report and incorporated herein by reference.

### **Item 9.01 Financial Statements and Exhibits.**

#### *(d) Exhibits*

- 1.1 Underwriting Agreement by and among MannKind Corporation, Merrill Lynch, Pierce, Fenner & Smith Incorporated and Bank of America, N.A., dated August 18, 2010.
- 4.1 Indenture related to the 5.75% Senior Convertible Notes due 2015, dated as of August 24, 2010, by and between MannKind Corporation and Wells Fargo Bank, National Association, as trustee.
- 4.2 Form of 5.75% Senior Convertible Note due 2015.
- 5.1 Opinion of Cooley LLP.
- 23.1 Consent of Cooley LLP (included in Exhibit 5.1).
- 99.1 Purchase Agreement by and between MannKind Corporation and Merrill Lynch, Pierce, Fenner & Smith Incorporated, as representative for the initial purchasers named therein, dated August 18, 2010.
- 99.2 Share Lending Agreement by and between MannKind Corporation and Bank of America, N.A., dated August 18, 2010.
- 99.3 Letter Agreement dated August 18, 2010, related to Amended and Restated Promissory Note made by MannKind Corporation in favor of The Mann Group LLC, dated August 10, 2010.
- 99.4 Company Disclosure.

### **Forward Looking Statements**

This Current Report, including the exhibits hereto, contains forward-looking statements, including statements related to the future conversion of, redemption or payments under the Notes, our expected use of proceeds from the Note offering, the future return of the Borrowed Shares to us, the development and commercialization of our lead product candidate, AFREZZA, and our other product candidates, our ability to achieve and sustain profitability, the insufficiency of our existing capital resources to complete the commercialization of AFREZZA or the development of any of our other product candidates, the future depletion of our capital resources and our ability to raise additional funds, including from our arrangement with Seaside 88, LP, future competition, our ability to enter into a strategic collaboration with respect to AFREZZA or to achieve our objectives with respect to such a collaboration, the future performance of our suppliers, our ability to manufacture AFREZZA or any other product candidates in commercial quantities, future market acceptance of AFREZZA and our other product candidates, government and third party reimbursement policies with respect to AFREZZA and our other product candidates, the potential for future product liability claims, the potential loss of any or our key employees or scientific advisors, the ability of our chief executive officer to devote sufficient time and attention to our business, regulatory approval process with respect to AFREZZA and our other product candidates, our ability to protect our proprietary rights and potential conflicts with the proprietary rights of others, the volatility of the market price of our common stock, the control exercised by our chief executive officer through his ownership of our common stock, and our ability to conduct future financings, that involve risks and uncertainties. Words such as “anticipates”, “intends”, “plans”, “proposes”, “expects”, “will”, and similar expressions are intended to identify forward-looking statements. These forward-looking statements are based upon our current expectations. Actual results and the timing of events could differ materially from those anticipated in such forward-looking statements as a result of these risks and uncertainties, which include, without limitation, risks related to market and other general economic conditions, the fact that our management will have broad discretion in the use of the proceeds from the sale of the Notes, the ability of the Share Borrower to return the Borrowed Shares when required to do so under the Share Lending Agreement, the progress, timing and results of clinical trials, difficulties or delays in seeking or obtaining regulatory approval, the manufacture of AFREZZA, competition from other pharmaceutical or

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biotechnology companies, our ability to enter into any collaborations or strategic partnerships, intellectual property matters and stock price volatility. The foregoing list sets forth some, but not all, of the factors that could affect our ability to achieve results described in any forward-looking statements. For additional information about risks and uncertainties we face and a discussion of our financial statements and footnotes, see the risk factors set forth in Exhibit 99.4 as well as the documents we file with the Securities and Exchange Commission from time to time. You are cautioned not to place undue reliance on these forward-looking statements, which speak only as of the date of this Current Report. All forward-looking statements are qualified in their entirety by this cautionary statement, and we undertake no obligation and expressly disclaim any duty to revise or update any forward-looking statements to reflect events or circumstances after the date of this Current Report.

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**SIGNATURE**

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

**MANKIND CORPORATION**

By: /s/ David Thomson

Name: David Thomson, Ph.D., J.D.

Title: Corporate Vice President, General Counsel and  
Secretary

Dated: August 24, 2010



MANKIND CORPORATION

(A Delaware corporation)

9,000,000 Shares of Common Stock

UNDERWRITING AGREEMENT

Dated: August 18, 2010

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MANNKIND CORPORATION

(A Delaware corporation)

9,000,000 Shares of Common Stock

**UNDERWRITING AGREEMENT**

August 18, 2010

Merrill Lynch, Pierce, Fenner & Smith  
Incorporated, as Underwriter and as agent for Bank of America, N.A.  
One Bryant Park  
New York, New York 10036

Ladies and Gentlemen:

MannKind Corporation, a Delaware corporation (the "Company"), subject to the terms and conditions stated herein and pursuant to the Share Lending Agreement (the "Share Lending Agreement"), dated August 18, 2010, between the Company and Bank of America, N.A. (the "Borrower"), proposes to issue and lend to the Borrower, an affiliate of Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch"), as a share loan pursuant to and upon the terms of the Share Lending Agreement, 9,000,000 shares of Common Stock, par value \$0.01 per share, of the Company ("Common Stock"). The aforesaid shares of Common Stock are herein called, collectively, the "Securities." The Borrower will transfer, or delegate the right to receive (in accordance with the Share Lending Agreement), the borrowed Securities to Merrill Lynch, which will sell the borrowed Securities to the public as an underwriter (the "Underwriter").

The Company understands that the Underwriter proposes to make a public offering of the Securities as soon as the Underwriter deems advisable after this Agreement has been executed and delivered.

Concurrently with the issuance of the Securities, the Company is offering (the "Notes Offering") \$100,000,000 in aggregate principal amount of its 5.75% Senior Convertible Notes due 2015 (the "Notes"). Merrill Lynch is acting as representative of the several initial purchasers in the Notes Offering. The Company has granted the initial purchasers in the Notes Offering an option to purchase up to an additional \$10,000,000 in aggregate principal amount of its Notes to cover over-allotments, if any.

The Company has filed with the Securities and Exchange Commission (the "Commission") a shelf registration statement on Form S-3 (File No. 333-166404) covering the public offering and sale of certain securities, including the Securities, under the Securities Act of 1933, as amended (the "1933 Act"), and the rules and regulations promulgated thereunder (the "1933 Act Regulations"), which shelf registration statement was declared effective by the Commission on May 11, 2010. Such registration statement, as of any time, means such registration statement as amended by any post-effective amendments thereto to such time, including the exhibits and any schedules thereto at such time, the documents incorporated or deemed to be incorporated by reference therein at such time pursuant to Item

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12 of Form S-3 under the 1933 Act and the documents otherwise deemed to be a part thereof as of such time pursuant to Rule 430B under the 1933 Act Regulations (“Rule 430B”), is referred to herein as the “Registration Statement;” provided, however, that the “Registration Statement” without reference to a time means such registration statement as amended by any post-effective amendments thereto as of the time of the first contract of sale for the Securities, which time shall be considered the “new effective date” of such registration statement with respect to the Securities within the meaning of paragraph (f)(2) of Rule 430B, including the exhibits and schedules thereto as of such time, the documents incorporated or deemed incorporated by reference therein at such time pursuant to Item 12 of Form S-3 under the 1933 Act and the documents otherwise deemed to be a part thereof as of such time pursuant to the Rule 430B. Any registration statement filed pursuant to Rule 462(b) of the 1933 Act Regulations to register a portion of the Securities is herein referred to as the “Rule 462(b) Registration Statement,” and after such filing, the term “Registration Statement” shall include the Rule 462(b) Registration Statement. Each preliminary prospectus used in connection with the offering of the Securities, including the documents incorporated or deemed to be incorporated by reference therein pursuant to Item 12 of Form S-3 under the 1933 Act, are collectively referred to herein as a “preliminary prospectus.” Promptly after execution and delivery of this Agreement, the Company will prepare and file a final prospectus relating to the Securities in accordance with the provisions of Rule 424(b) under the 1933 Act Regulations (“Rule 424(b)”). The final prospectus, in the form first furnished or made available to the Underwriter for use in connection with the offering of the Securities, including the documents incorporated or deemed to be incorporated by reference therein pursuant to Item 12 of Form S-3 under the 1933 Act, are collectively referred to herein as the “Prospectus.” For purposes of this Agreement, all references to the Registration Statement, any preliminary prospectus, the Prospectus or any amendment or supplement to any of the foregoing shall be deemed to include the copy filed with the Commission pursuant to its Electronic Data Gathering, Analysis and Retrieval system (“EDGAR”) or its Interactive Data Electronic Applications system (“IDEA”).

As used in this Agreement:

“Applicable Time” means 7:00 P.M., New York City time, on August 18, 2010 or such other time as agreed by the Company and Merrill Lynch.

“General Disclosure Package” means any Issuer General Use Free Writing Prospectuses issued at or prior to the Applicable Time and the prospectus (including any documents incorporated therein by reference) that is included in the Registration Statement as of the Applicable Time, all considered together.

“Issuer Free Writing Prospectus” means any “issuer free writing prospectus,” as defined in Rule 433 of the 1933 Act Regulations (“Rule 433”), including without limitation any “free writing prospectus” (as defined in Rule 405 of the 1933 Act Regulations (“Rule 405”)) relating to the Securities that is (i) required to be filed with the Commission by the Company, (ii) a “road show that is a written communication” within the meaning of Rule 433(d)(8) (i), whether or not required to be filed with the Commission, or (iii) exempt from filing with the Commission pursuant to Rule 433(d)(5)(i) because it contains a description of the Securities or of the offering that does not reflect the final terms, in each case in the form filed or required to be filed with the Commission or, if not required to be filed, in the form retained in the Company’s records pursuant to Rule 433(g).

“Issuer General Use Free Writing Prospectus” means any Issuer Free Writing Prospectus that is intended for general distribution to prospective investors (other than a “*bona fide* electronic road show,” as defined in Rule 433), as evidenced by its being specified in Schedule A hereto.

“Issuer Limited Use Free Writing Prospectus” means any Issuer Free Writing Prospectus that is not an Issuer General Use Free Writing Prospectus.

All references in this Agreement to financial statements and schedules and other information which is “contained,” “included” or “stated” (or other references of like import) in the Registration Statement, any preliminary prospectus or the Prospectus shall be deemed to include all such financial statements and schedules and other information incorporated or deemed incorporated by reference in the Registration Statement, any preliminary prospectus or the Prospectus, as the case may be, prior to the Applicable Time; and all references in this Agreement to amendments or supplements to the Registration Statement, any preliminary prospectus or the Prospectus shall be deemed to include the filing of any document under the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder (collectively, the “1934 Act”), incorporated or deemed to be incorporated by reference in the Registration Statement, the Preliminary Prospectus or the Prospectus, as the case may be, at or after the Applicable Time.

SECTION 1. Representations and Warranties.

(a) *Representations and Warranties by the Company.* The Company represents and warrants to each of the Underwriter and the Borrower as of the date hereof, the Applicable Time and the Closing Time (as defined below), and agrees with each of the Underwriter and the Borrower, as follows:

(i) Registration Statement and Prospectuses. The Company meets the requirements for use of Form S-3 under the 1933 Act. The Registration Statement has become effective under the 1933 Act. No stop order suspending the effectiveness of the Registration Statement has been issued under the 1933 Act, no order preventing or suspending the use of any preliminary prospectus or the Prospectus has been issued and no proceedings for any of those purposes have been instituted or are pending or, to the Company’s knowledge, contemplated. The Company has complied with each request (if any) from the Commission for additional information.

Each of the Registration Statement and any post-effective amendment thereto, at the time of its effectiveness and at each deemed effective date with respect to the Underwriter pursuant to Rule 430B(f)(2) under the 1933 Act Regulations, complied in all material respects with the requirements of the 1933 Act and the 1933 Act Regulations. Each preliminary prospectus (including the prospectus filed as part of the Registration Statement as originally filed or as part of any amendment thereto), at the time it was filed, complied in all material respects with the 1933 Act Regulations and each preliminary prospectus and the Prospectus delivered to the Underwriter and the Borrower for use in connection with this offering was identical to the electronically transmitted copies thereof filed with the Commission pursuant to EDGAR or IDEA, except to the extent permitted by Regulation S-T and with respect to the 424(b) legend included in the filed version.

The documents incorporated or deemed to be incorporated by reference in the Registration Statement and the Prospectus, when they became effective or at the time they were or hereafter are filed with the Commission, complied and will comply in all material respects with the requirements of the 1934 Act and the rules and regulations of the Commission under the 1934 Act (the “1934 Act Regulations”).

(ii) Accurate Disclosure. Neither the Registration Statement nor any amendment thereto, at its effective time, at the Closing Time, contained, contains or will contain an untrue statement of a material fact or omitted, omits or will omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading. As of the Applicable

Time, neither (A) the General Disclosure Package nor (B) any individual Issuer Limited Use Free Writing Prospectus, when considered together with the General Disclosure Package, included an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. Neither the Prospectus nor any amendment or supplement thereto (including any prospectus wrapper), as of its issue date, at the time of any filing with the Commission pursuant to Rule 424(b), at the Closing Time, included, includes or will include an untrue statement of a material fact or omitted, omits or will omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. The documents incorporated or deemed to be incorporated by reference in the Registration Statement, the General Disclosure Package and the Prospectus, at the time the Registration Statement became effective or when such documents incorporated by reference were filed with the Commission, as the case may be, when read together with the other information in the Registration Statement, the General Disclosure Package or the Prospectus, as the case may be, did not and will not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading.

The representations and warranties in this subsection shall not apply to statements in or omissions from the Registration Statement (or any amendment thereto), the General Disclosure Package or the Prospectus (or any amendment or supplement thereto) made in reliance upon and in conformity with written information furnished to the Company by any Underwriter through Merrill Lynch expressly for use therein. For purposes of this Agreement, the only information so furnished shall be the information in the first, second, third, fourth and fifth sentences of the second paragraph under the caption "Underwriting" in the Prospectus (collectively, the "Underwriter Information").

(iii) Issuer Free Writing Prospectuses. No Issuer Free Writing Prospectus conflicts or will conflict with the information contained in the Registration Statement or the Prospectus, including any document incorporated by reference therein, and any preliminary or other prospectus deemed to be a part thereof that has not been superseded or modified. Any offer that is a written communication relating to the Securities made prior to the initial filing of the Registration Statement by the Company or any person acting on its behalf (within the meaning, for this paragraph only, of Rule 163(c) of the 1933 Act Regulations) has been filed with the Commission in accordance with the exemption provided by Rule 163 under the 1933 Act Regulations ("Rule 163") and otherwise complied with the requirements of Rule 163, including without limitation the legending requirement, to qualify such offer for the exemption from Section 5(c) of the 1933 Act provided by Rule 163.

If at any time following issuance of an Issuer Free Writing Prospectus through the Closing Time there occurred or occurs an event or development as a result of which such Issuer Free Writing Prospectus conflicted or would conflict with the information contained in the Prospectus that has not been superseded or modified, or included in the General Disclosure Package or included or would include an untrue statement of a material fact or omitted or would omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances prevailing at the subsequent time, not misleading, the Company has promptly notified or will promptly notify the Underwriter and the Borrower and has promptly amended or supplemented or will promptly amend or supplement, at its own expense, such Issuer Free Writing Prospectus to eliminate or correct such conflict, untrue statement or omission.

(iv) Incorporation of Documents by Reference. The documents incorporated by reference in the Registration Statement, the General Disclosure Package and the Prospectus, at the time they became effective or were filed with the Commission, as the case may be, complied in all material respects with the requirements of the 1933 Act or the 1934 Act, as applicable, and the rules and regulations of the Commission thereunder (the “1934 Act Regulations”), and none of such documents contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, and any further documents so filed and incorporated by reference in the Registration Statement, the General Disclosure Package and the Prospectus, when such documents become effective or are filed with the Commission, as the case may be, will conform in all material respects to the requirements of the 1933 Act, the 1933 Act Regulations, the 1934 Act, the 1934 Act Regulations, as applicable, and will not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they are made, not misleading.

(v) Company Not Ineligible Issuer. At the time of filing the Registration Statement and any post-effective amendment thereto, at the earliest time thereafter that the Company or another offering participant made a *bona fide* offer (within the meaning of Rule 164(h)(2) of the 1933 Act Regulations) of the Securities and at the date hereof, the Company was not and is not an “ineligible issuer,” as defined in Rule 405, without taking account of any determination by the Commission pursuant to Rule 405 that it is not necessary that the Company be considered an ineligible issuer.

(vi) Independent Accountants. Deloitte & Touche LLP is and, during the periods covered by its reports, was an independent public accounting firm as required by the 1933 Act, the 1933 Act Regulations and the Public Accounting Oversight Board. Except as described in the Registration Statement, the General Disclosure Package and the Prospectus and as pre-approved in accordance with the requirements set forth in Section 10A of the 1934 Act, Deloitte & Touche LLP has not been engaged by the Company to perform any “prohibited activities” (as defined in Section 10A of the 1934 Act).

(vii) Financial Statements. The financial statements of the Company (including all notes and schedules thereto) included or incorporated by reference in the Registration Statement, the General Disclosure Package and the Prospectus present fairly, in all material respects, the financial position of the Company and its consolidated subsidiaries at the dates indicated and the statement of operations, stockholders’ equity and cash flows of the Company and its consolidated subsidiaries for the periods specified; and such financial statements and related schedules and notes thereto, and the unaudited financial information included or incorporated by reference in the Registration Statement, the General Disclosure Package and the Prospectus, have been prepared in conformity with generally accepted accounting principles, consistently applied throughout the periods involved (provided that non-year-end financial statements are subject to normal recurring year-end audit adjustments that are not expected to be material in the aggregate and do not contain all footnotes required by generally accepted accounting principles). The summary and selected financial data included in the Registration Statement, the General Disclosure Package and the Prospectus, if any, present fairly, in all material respects, the information shown therein as at the respective dates and for the respective periods specified and have been presented on a basis consistent with the consolidated financial statements set forth in the Prospectus and other financial information.

(viii) Good Standing of the Company. The Company and each of its subsidiaries is duly organized, validly existing and in good standing under the laws of their respective jurisdictions of incorporation or organization and each such entity has all requisite power and authority to carry on its business as is currently being conducted as described in the General Disclosure Package and the Prospectus, and to own, lease and operate its properties. The Company and each of its subsidiaries is duly qualified to do business and is in good standing as a foreign corporation in each jurisdiction in which the nature of the business conducted by it or location of the assets or properties owned, leased or licensed by it requires such qualification, except for such jurisdictions where the failure to so qualify or be in good standing, individually or in the aggregate, would not reasonably be expected to have a material adverse effect on the assets, properties, condition, financial or otherwise, or in the results of operations, business affairs or business prospects of the Company and its subsidiaries considered as a whole (a “Material Adverse Effect”), and to the Company’s knowledge, no proceeding has been instituted in any such jurisdiction revoking, limiting or curtailing, or seeking to revoke, limit or curtail, such power and authority or qualification. The Company has no subsidiary other than its five wholly owned subsidiaries, MannKind LLC, MannKind Limited, Technosphere International C.V., MannKind Netherlands B.V. and MannKind Deutschland GmbH, and does not control, directly or indirectly, any other corporation, partnership, joint venture, association or other business organization. Such subsidiaries, when considered in the aggregate as a single subsidiary, do not constitute a “significant subsidiary” of the Company (as such term is defined in Rule 1-02(w) of Regulation S-X under the Securities Act) and are not otherwise material to the assets and operations of the Company. All outstanding shares of capital stock of each of the Company’s subsidiaries have been duly authorized and validly issued, and are fully paid and nonassessable and are owned directly by the Company or by another wholly owned subsidiary of the Company free and clear of any security interests, liens, encumbrances, equities or claims, other than those described in the General Disclosure Package and the Prospectus.

(ix) Capitalization. The authorized, issued and outstanding shares of capital stock of the Company are as set forth in the General Disclosure Package and the Prospectus in the column entitled “Actual” under the caption “Capitalization” (except for subsequent issuances, if any, pursuant to this Agreement, the Share Lending Agreement, the purchase agreement with The Mann Group LLC and the purchase agreement with Seaside 88, LP, pursuant to reservations, agreements or employee benefit plans referred to in the General Disclosure Package and the Prospectus or pursuant to the vesting, conversion or exercise of convertible securities or options referred to in the General Disclosure Package and the Prospectus). All of the issued and outstanding shares of Common Stock have been duly and validly issued and are fully paid and nonassessable. There are no statutory preemptive or other similar rights to subscribe for or to purchase or acquire any shares of Common Stock of the Company or any of its subsidiaries or any such rights pursuant to its Certificate of Incorporation or by-laws or any agreement or instrument to or by which the Company or any of its subsidiaries is a party or bound.

(x) Authorization of Agreement. This Agreement has been duly authorized, executed and delivered by the Company.

(xi) Authorization of Securities. The Securities have been duly authorized by the Company pursuant to this Agreement and the Share Lending Agreement and, when issued and delivered by the Company pursuant to this Agreement and the Share Lending Agreement against payment of the Loan Fee (as defined in the Share Lending Agreement), will be validly issued and will be fully paid and non-assessable; no holder of the Securities will be subject to personal liability solely by reason of being such a holder; and the issuance of the Securities pursuant to this

Agreement and the Share Lending Agreement will not be subject to the preemptive or other similar rights of any securityholder of the Company.

(xii) Authorization of the Share Lending Agreement. The Share Lending Agreement has been duly authorized, executed and delivered by the Company and is a valid and binding agreement of the Company, enforceable against the Company in accordance with its terms, except as the enforcement thereof may be limited by bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium or similar laws affecting enforcement of creditors' rights generally and except as enforcement thereof is subject to general principles of equity (regardless of whether enforcement is considered in a proceeding in equity or at law).

(xiii) Description of Securities. The Common Stock and the Share Lending Agreement conform in all material respects to all statements in relation thereto contained or incorporated by reference in the Registration Statement, the General Disclosure Package and the Prospectus and such description conforms to the rights set forth in the instruments defining the same.

(xiv) Lock-Up Agreements. Each director and executive officer of the Company listed on Schedule B hereto has delivered to the Underwriter his or her executed written lock-up agreement in the form attached to this Agreement as Exhibit D hereto or in such form as may be approved in writing by the Underwriter.

(xv) Stock Options. The exercise price of each option to acquire Common Stock (each, a "Company Stock Option") is no less than the fair market value of a share of Common Stock as determined on the date of grant of such Company Stock Option. All grants of Company Stock Options were validly issued and properly approved by the Board of Directors of the Company, a committee thereof or an individual with authority duly delegated by the Board of Directors of the Company or a committee thereof, in material compliance with (i) all applicable laws and (ii) the terms of the plans under which such Company Stock Options were issued and were recorded on the Company's financial statements in accordance with generally accepted accounting principles, and no such grants involved any "back dating", "forward dating," "spring loading" or similar practices with respect to the effective date of grant.

(xvi) Absence of Violations, Defaults and Conflicts. Neither the Company nor any subsidiary (i) is in violation of its certificate or articles of incorporation or organization, by-laws, certificate of formation, limited liability company agreement, partnership agreement or other organizational documents, (ii) is in default under, and no event has occurred which, with notice or lapse of time, or both, would constitute a default under, or result in the creation or imposition of any lien, charge, mortgage, pledge, security interest, claim, limitation on voting rights, equity, trust or other encumbrance, preferential arrangement, defect or restriction of any kind whatsoever, upon, any property or assets of the Company or any subsidiary pursuant to, any bond, debenture, note, indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which it is a party or by which it is bound or to which any of its properties or assets is subject or (iii) is in violation of any statute, law, rule, regulation, ordinance, directive, judgment, decree or order of any judicial, regulatory or other legal or governmental agency or body, foreign or domestic having jurisdiction over the Company (each, a "Governmental Entity"), except (in the case of clauses (ii) and (iii) above) for violations or defaults that would not (individually or in the aggregate) reasonably be expected to have a Material Adverse Effect. Neither the execution, delivery and performance of this Agreement or the Share Lending Agreement by the Company nor the consummation of any of the transactions contemplated hereby or thereby and in the General Disclosure Package and the Prospectus (including, without



limitation, the issuance and delivery by the Company of the Securities and the receipt by the Company of the Loan Fee (as defined in the Share Lending Agreement) as described therein under the caption "Use of Proceeds") will give rise to a right to terminate or accelerate the due date of any payment due under, or conflict with or result in the breach of any term or provision of, or constitute a default (or an event which with notice or lapse of time or both would constitute a default) under, or require any consent or waiver under, or result in the execution or imposition of any lien, charge or encumbrance upon any properties or assets of the Company or its subsidiaries pursuant to the terms of, any indenture, mortgage, deed of trust or other agreement or instrument to which the Company or any of its subsidiaries is a party or by which either the Company or its subsidiaries or any of their properties or businesses is bound, or any franchise, license, permit, judgment, decree, order, statute, rule or regulation applicable to the Company or any of its subsidiaries, except where it would not reasonably be expected to have a Material Adverse Effect, or violate any provision of the charter or by-laws of the Company or any of its subsidiaries, except for such consents or waivers which have already been obtained and are in full force and effect.

(xvii) Incorporated Documents. There are no contracts or documents which are required to be described in the Registration Statement or to be filed as exhibits thereto which have not been so described and filed as required. Each description of a contract, document or other agreement in the Registration Statement, the General Disclosure Package or the Prospectus accurately reflects in all respects the material terms of the underlying contract, document or other agreement. Each contract, document or other agreement described in the Registration Statement, the General Disclosure Package or the Prospectus or incorporated by reference is in full force and effect and is valid and enforceable by and against the Company or any of its subsidiaries, as the case may be, in accordance with its terms, except as the enforceability thereof may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general equitable principles. Neither the Company nor any of its subsidiaries, if a subsidiary is a party, nor to the Company's knowledge, any other party is in default in the observance or performance of any term or obligation to be performed by it under any such agreement, and no event has occurred which with notice or lapse of time or both would constitute such a default, in any such case which default or event, individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect. No default exists, and no event has occurred which with notice or lapse of time or both would constitute a default, in the due performance and observance of any term, covenant or condition, by the Company or its subsidiary, if a subsidiary is a party thereto, of any other agreement or instrument to which the Company or any of its subsidiaries is a party or by which the Company or its properties or business or a subsidiary or its properties or business may be bound or affected which default or event, individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect.

(xviii) Corporate Action. All necessary corporate action has been duly and validly taken by the Company to authorize the execution, delivery and performance of this Agreement and the Share Lending Agreement and the issuance and delivery of the Securities by the Company.

(xix) Absence of Labor Dispute. Neither the Company nor any of its subsidiaries is involved in any labor dispute nor, to the knowledge of the Company, is any such dispute threatened, which dispute would reasonably be expected to have a Material Adverse Effect. The Company is not aware of any existing or imminent labor disturbance by the employees of any of its principal suppliers or contractors which would reasonably be expected to have a Material Adverse Effect. The Company is not aware of any threatened or pending litigation between the

Company or its subsidiaries and any of its executive officers which, if adversely determined, would reasonably be expected to have a Material Adverse Effect.

(xx) Related Party Transactions. No transaction has occurred between or among the Company and any of its officers or directors, shareholders or any affiliate or affiliates of any such officer or director or shareholder that is required to be described in and is not described in the Registration Statement, the General Disclosure Package and the Prospectus.

(xxi) Absence of Proceedings. There are no legal or governmental proceedings pending to which the Company or any of its subsidiaries is a party or of which any property of the Company or any of its subsidiaries is the subject which, if determined adversely to the Company or any of its subsidiaries could individually or in the aggregate have a Material Adverse Effect; and, to the knowledge of the Company, no such proceedings are threatened or contemplated by governmental authorities or threatened by others.

(xxii) Absence of Further Requirements. Each approval, consent, order, authorization, designation, declaration or filing of, by or with any Governmental Entity necessary in connection with the execution and delivery by the Company of this Agreement and the Share Lending Agreement, the consummation of the transactions herein and therein contemplated and the issuance and delivery of the Securities required to be obtained or performed by the Company (except such additional steps as may be necessary to qualify the Securities by the Underwriter under the state securities or Blue Sky laws) has been obtained or made and is in full force and effect.

(xxiii) Possession of Licenses and Permits. Except as set forth in the General Disclosure Package and the Prospectus, the Company and each of its subsidiaries has all requisite corporate power and authority, and all necessary authorizations, approvals, consents, orders, licenses, certificates and permits of and from all governmental or regulatory bodies or any other person or entity (collectively, the "Permits"), to own, lease and license its assets and properties and conduct its business, all of which are valid and in full force and effect, except where the lack of such Permits, individually or in the aggregate, would not reasonably be expected to have a Material Adverse Effect. The Company and each of its subsidiaries has fulfilled and performed in all material respects all of its obligations with respect to such Permits and no event has occurred that allows, or after notice or lapse of time would allow, revocation or termination thereof or results in any other material impairment of the rights of the Company or such subsidiary thereunder. Except as may be required under the 1933 Act and state and foreign Blue Sky laws, no other Permits are required to enter into, deliver and perform this Agreement or the Share Lending Agreement and to issue, lend and sell the Securities.

(xxiv) Title to Property. The Company and each of its subsidiaries has good and marketable title in fee simple to all real property owned by it, and good and marketable title to all other property owned by it, in each case free and clear of all liens, encumbrances, claims, security interests and defects, except as are described in the General Disclosure Package and the Prospectus or such as do not materially affect the value of such property and do not materially interfere with the use made of such property by the Company and its subsidiaries. All property held under lease by the Company and its subsidiaries is held by them under valid, existing and enforceable leases, free and clear of all liens, encumbrances, claims, security interests and defects, except such as are not material and do not materially interfere with the use made of such property by the Company and its subsidiaries. Subsequent to the respective dates as of which information is given in the Registration Statement, the Prospectus, (i) there has not been any event which would reasonably be expected to have a Material Adverse Effect; (ii) neither the

Company nor any of its subsidiaries has sustained any loss or interference with its assets, businesses or properties (whether owned or leased) from fire, explosion, earthquake, flood or other calamity, whether or not covered by insurance, or from any labor dispute or any court or legislative or other governmental action, order or decree which would reasonably be expected to have a Material Adverse Effect; and (iii) since the date of the latest balance sheet included or incorporated by reference in the Registration Statement and the Prospectus, except as otherwise disclosed in the Registration Statement and the Prospectus, neither the Company nor its subsidiaries has (A) issued any securities (other than securities pursuant to the Company's equity incentive plans) or incurred any liability or obligation, direct or contingent, for borrowed money, except such liabilities or obligations incurred in the ordinary course of business, (B) entered into any transaction not in the ordinary course of business or (C) declared or paid any dividend or made any distribution on any shares of its stock or redeemed, purchased or otherwise acquired or agreed to redeem, purchase or otherwise acquire any shares of its capital stock.

(xxv) Possession of Intellectual Property. Except as set forth in the General Disclosure Package and the Prospectus, the Company and each of its subsidiaries owns or possesses legally-enforceable rights (including license rights) to use all patents, patent rights, inventions, trademarks, trademark applications, trade names, service marks, copyrights, copyright applications, licenses, know-how and other similar rights and proprietary knowledge (collectively, "Intellectual Property") necessary for the conduct of its business. Neither the Company nor any of its subsidiaries has received any written notice of, or is aware of, any infringement of or conflict with asserted rights of others with respect to any Intellectual Property, except as referenced in the General Disclosure Package and the Prospectus or that would not reasonably be expected to have a Material Adverse Effect.

(xxvi) Environmental Laws. (A) Each of the Company and each of its subsidiaries is in compliance in all material respects with all rules, laws and regulation relating to the use, treatment, storage and disposal of toxic substances and protection of health or the environment ("Environmental Laws") which are applicable to its business; (B) neither the Company nor its subsidiaries has received any notice from any governmental authority or third party of an asserted claim under Environmental Laws; (C) each of the Company and each of its subsidiaries has received all permits, licenses or other approvals required of it under applicable Environmental Laws to conduct its business and is in compliance with all terms and conditions of any such permit, license or approval; (D) to the Company's knowledge, no facts currently exist that will require the Company or any of its subsidiaries to make future material capital expenditures to comply with Environmental Laws; and (E) no property which is or has been owned, leased or occupied by the Company or its subsidiaries has been designated as a Superfund site pursuant to the Comprehensive Environmental Response, Compensation of Liability Act of 1980, as amended (42 U.S.C. Section 9601, et. seq.) ("CERCLA"), or otherwise designated as a contaminated site under applicable state or local law. Neither the Company nor any of its subsidiaries has been named as a "potentially responsible party" under the CERCLA 1980.

In the ordinary course of its business, the Company periodically reviews the effect of Environmental Laws on the business, operations and properties of the Company and its subsidiaries, in the course of which the Company identifies and evaluates associated costs and liabilities (including, without limitation, any capital or operating expenditures required for clean-up, closure of properties or compliance with Environmental Laws, or any permit, license or approval, any related constraints on operating activities and any potential liabilities to third parties). On the basis of such review, the Company has reasonably concluded that such associated costs and liabilities would not, singly or in the aggregate, have a Material Adverse Effect.

(xxvii) Accounting Controls. The books, records and accounts of the Company and its subsidiaries accurately and fairly reflect, in all material respects, the transactions in, and dispositions of, the assets of, and the results of operations of, the Company and its subsidiaries. The Company and its subsidiaries maintain a system of internal accounting controls sufficient to provide reasonable assurances that (A) transactions are executed in accordance with management's general or specific authorizations, (B) transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles and to maintain asset accountability, (C) access to assets is permitted only in accordance with management's general or specific authorization and (D) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(xxviii) Disclosure Controls. The Company has established and maintains disclosure controls and procedures (as such term is defined in Rule 13a-15 under the 1934 Act), which: (A) are designed to ensure that material information relating to the Company is made known to the Company's principal executive officer and its principal financial officer by others within the Company, particularly during the periods in which the periodic reports required under the 1934 Act are required to be prepared; (B) provide for the periodic evaluation of the effectiveness of such disclosure controls and procedures at the end of the periods in which the periodic reports are required to be prepared; and (C) are effective in all material respects to perform the functions for which they were established. Based on the evaluation of its disclosure controls and procedures, the Company is not aware of (1) any significant deficiency in the design or operation of internal controls which could adversely affect the Company's ability to record, process, summarize and report financial data or any material weaknesses in internal controls; or (2) any fraud, whether or not material, that involves management or other employees who have a role in the Company's internal controls.

(xxix) Off-Balance Sheet Arrangements. Except as described in the General Disclosure Package and the Prospectus, there are no material off-balance sheet arrangements (as defined in Item 303 of Regulation S-K) that have or are reasonably likely to have a material current or future effect on the Company's financial condition, revenues or expenses, changes in financial condition, results of operations, liquidity, capital expenditures or capital resources.

(xxx) Audit Committee. The Company's Board of Directors has validly appointed an audit committee whose composition satisfies the requirements of Rule 5605(c)(2) of the Listing Rules of NASDAQ (the "NASDAQ Rules") and the Company's Board of Directors and/or the audit committee has adopted a charter that satisfies the requirements of Rule 5605(c)(1) of the NASDAQ Rules. The audit committee has reviewed the adequacy of its charter within the past twelve months.

(xxxi) Compliance with the Sarbanes-Oxley Act. There is and has been no failure on the part of the Company or any of its directors or officers, in their capacities as such, to comply with any applicable provision of the Sarbanes-Oxley Act of 2002, including, without limitation, Section 402 related to loans and Sections 302 and 906 related to certifications.

(xxxii) Payment of Taxes. The Company and each of its subsidiaries has filed all Federal, state, local and foreign tax returns which are required to be filed through the date hereof, which returns are true and correct in all material respects or has received timely extensions thereof, and has paid all taxes shown on such returns and all assessments received by it to the extent that the same are material and have become due, except in each case where such failure to file or pay would not reasonably be expected to have a Material Adverse Effect. There are no tax

audits or investigations pending which, if adversely determined, would reasonably be expected to have a Material Adverse Effect; nor to the Company's knowledge are there any material proposed additional tax assessments against the Company or any of its subsidiaries.

(xxxiii) Insurance. The Company and its subsidiaries are insured by insurers of recognized financial responsibility against such losses and risks and in such amounts as are customary in the businesses in which they are engaged or propose to engage after giving effect to the transactions described in the General Disclosure Package and the Prospectus; all policies of insurance and fidelity or surety bonds insuring the Company or any of its subsidiaries or the Company's or its subsidiaries' respective businesses, assets, employees, officers and directors are in full force and effect; the Company and each of its subsidiaries are in compliance with the terms of such policies and instruments in all material respects; and neither the Company nor any subsidiary of the Company has any reason to believe that it will not be able to renew its existing insurance coverage as and when such coverage expires or to obtain similar coverage from similar insurers as may be necessary to continue its business at a cost that is not materially greater than the current cost of such coverage. Neither the Company nor any of its subsidiaries has been denied any insurance coverage which it has sought or for which it has applied.

(xxxiv) Investment Company Act. The Company is not and, after giving effect to the issuance and sale of the Securities as contemplated by this Agreement and the Share Lending Agreement, will not be an "investment company" within the meaning of the Investment Company Act of 1940, as amended.

(xxxv) Absence of Manipulation. The Company has not taken, nor will it take, directly or indirectly, any action designed to or which might reasonably be expected to cause or result in, or which has constituted or which might reasonably be expected to constitute, the stabilization or manipulation of the price of the Common Stock or any security of the Company to facilitate the sale or resale of any of the Securities.

(xxxvi) Continued Registration of Common Stock. The Company has taken no action designed to, or likely to have the effect of, terminating the registration of the Common Stock under the 1934 Act or the listing of the Common Stock on the Nasdaq Global Market, nor has the Company received any notification that the Commission or the Nasdaq Global Market is contemplating terminating such registration or listing.

(xxxvii) Foreign Corrupt Practices Act. Neither the Company nor any other person associated with or acting on behalf of the Company including, without limitation, any director, officer, agent or employee of the Company or its subsidiaries, has, directly or indirectly, while acting on behalf of the Company or its subsidiaries (i) used any corporate funds for unlawful contributions, gifts, entertainment or other unlawful expenses relating to political activity; (ii) made any unlawful payment to foreign or domestic government officials or employees or to foreign or domestic political parties or campaigns from corporate funds; (iii) violated any provision of the Foreign Corrupt Practices Act of 1977, as amended; or (iv) made any other unlawful payment.

(xxxviii) Money Laundering Laws. The operations of the Company and its subsidiaries are in compliance in all material respects with applicable financial recordkeeping and reporting requirements of the Currency and Foreign Transactions Reporting Act of 1970, as amended, the money laundering statutes of all required jurisdictions, the rules and regulations thereunder and any related or similar rules, regulations or guidelines, issued, administered or enforced by any governmental agency having jurisdiction over the Company (collectively, the

“Money Laundering Laws”) and no action, suit or proceeding by or before any court or governmental agency, authority or body or any arbitrator involving the Company or any of its subsidiaries with respect to the Money Laundering Laws is pending, or to the best knowledge of the Company, threatened.

(xxxix) OFAC. Neither the Company nor any of its subsidiaries nor, to the knowledge of the Company, any director, officer, agent, employee or affiliate of the Company or any of its subsidiaries is currently subject to any U.S. sanctions administered by the Office of Foreign Assets Control of the U.S. Treasury Department (“OFAC”); and the Company will not directly or indirectly use the Loan Fee, or lend, contribute or otherwise make available such Loan Fee to any subsidiary, joint venture partner or other person or entity, for the purpose of financing the activities of any person known by the Company to be currently subject to any U.S. sanctions administered by OFAC.

(xl) ERISA. The Company has fulfilled its obligations, if any, under the minimum funding standards of Section 302 of the U.S. Employee Retirement Income Security Act of 1974 (“ERISA”) and the regulations and published interpretations thereunder with respect to each “plan” as defined in Section 3(3) of ERISA and such regulations and published interpretations in which its employees are eligible to participate and each such plan is in compliance in all material respects with the presently applicable provisions of ERISA and such regulations and published interpretations. No “Reportable Event” (as defined in Section 4043 of ERISA) has occurred with respect to any “Pension Plan” (as defined in ERISA) for which the Company could have any material liability.

(xli) Clinical and Pre-Clinical Studies. The clinical, pre-clinical and other studies and tests conducted by the Company or in which the Company or its products or product candidates have participated, or that are described in the Registration Statement, the General Disclosure Package and the Prospectus or the results of which are referred to in the Registration Statement, the General Disclosure Package or the Prospectus, and such studies and tests conducted on behalf of or sponsored by the Company or that the Company intends to rely on in support of regulatory approval by the U.S. Food and Drug Administration (the “FDA”) or foreign regulatory agencies, were and, if still pending, are, to the Company’s knowledge, being conducted in all material respects in accordance with standard accepted medical and scientific research procedures and, to the Company’s knowledge, the protocols established by the Company for such studies and tests. The descriptions in the Registration Statement, the General Disclosure Package and the Prospectus of the results of such studies and tests are accurate and complete in all material respects and fairly present the data derived from such studies and tests, and except as set forth in the Registration Statement, the General Disclosure Package and the Prospectus, the Company has no knowledge of any other studies or tests, the results of which the Company believes reasonably call into question the results described or referred to in the Registration Statement, the General Disclosure Package and the Prospectus when viewed in the context in which such results are described. Except to the extent disclosed in the Registration Statement, the General Disclosure Package and the Prospectus, the Company has not received any written notices or other correspondence from the FDA or any other domestic or foreign governmental agency requiring the termination, suspension or modification (other than such modifications as are normal in the regulations, any such modification which are material have been disclosed to you) of any clinical or pre-clinical studies or tests that are described in the Registration Statement, the General Disclosure Package or the Prospectus or the results of which are referred to in the Registration Statement, the General Disclosure Package or the Prospectus.

(xlii) Lending Relationship. Except as disclosed in the General Disclosure Package and the Prospectus, the Company (i) does not have any material lending or other relationship with any bank or lending affiliate of the Underwriter and (ii) does not intend to use any of the proceeds from the sale of the Securities to repay any outstanding debt owed to any affiliate of the Underwriter.

(xliii) Statistical and Market-Related Data. The statistical and market related data included in the Registration Statement, the General Disclosure Package or the Prospectus are based on or derived from sources that the Company believes to be reliable and accurate.

## SECTION 2. Issuance, Offering and Delivery of the Securities; Closing.

(a) *Securities*. On the basis of the representations and warranties herein contained, and subject to the terms and conditions set forth herein and in the Share Lending Agreement, the Company agrees to issue to Merrill Lynch, as delagatee of the Borrower, in exchange for payment of the Loan Fee, and Merrill Lynch agrees to sell the Securities, and the Underwriter agrees to purchase such Securities from Merrill Lynch on the basis of the representations, warranties and agreements herein contained, and upon the terms, subject to the conditions thereto, set forth herein and in the Share Lending Agreement.

(b) *Closing Time*. In accordance with the Share Lending Agreement, delivery of the Securities to Merrill Lynch, as delagatee of the Borrower, shall be made at the offices of Davis Polk & Wardwell LLP (or such other place as shall be agreed upon by Merrill Lynch, as delagatee of the Borrower, and the Company)(the “Closing Location”) and shall occur at the time specified by the Borrower (or Merrill Lynch as its agent) in a Borrowing Notice and confirmed by the Company in accordance with the Share Lending Agreement, which shall be on or prior to 9:00 A.M. (New York City time) on the third (fourth, if the pricing occurs after 4:30 P.M. (New York City time) on any given day) business day after the date hereof, or such other time not later than ten business days after such date as shall be agreed upon by Merrill Lynch, as delagatee of the Borrower, and the Company (such time and date of payment and delivery being herein called “Closing Time”).

(c) *Public Offering of the Securities*. The Underwriter hereby advises the Company that it intends to offer for sale to the public, as described in the Prospectus, the Securities from time to time.

(d) *Payment of Loan Fee*. Payment of the Loan Fee by Merrill Lynch, as delagatee of the Borrower, shall be made at the Closing Time by wire transfer of immediately available funds pursuant to the order of the Company. The Underwriter agrees to make any payment due to Merrill Lynch in respect of the Securities in the manner agreed between the Underwriter and Merrill Lynch.

(e) *Denominations; Registration*. The Securities to be purchased by the Underwriter hereunder will be represented by one or more definitive global shares in book-entry form which will be deposited by or on behalf of the Company with the Depository Trust Company or its designated custodian. The documents to be delivered at the Closing Time by or on behalf of the parties hereto, including the cross receipt for the Securities and any additional documents requested by the Underwriter, and the Securities will be delivered at the Closing Location, all at such Closing Time. A meeting will be held at the Closing Location at approximately 3:00 P.M., California time, on the business day preceding such Closing Time, at which meeting the final drafts of the documents to be delivered pursuant to the preceding sentence will be available for review by the parties hereto.

SECTION 3. Covenants of the Company. The Company covenants with each of the Underwriter and the Borrower as follows:

(a) *Compliance with Securities Regulations and Commission Requests*. The Company, subject to Section 3(b), will comply with the requirements of Rule 430B, and will notify the Underwriter and the Borrower promptly, and confirm the notice in writing, (i) when any post-effective amendment to the Registration Statement shall become effective or any amendment or supplement to the Prospectus shall have been filed, (ii) of the receipt of any comments from the Commission, (iii) of any request by the Commission for any amendment to the Registration Statement or any amendment or supplement to the Prospectus, including any document incorporated by reference therein or for additional information, (iv) of the issuance by the Commission of any stop order suspending the effectiveness of the Registration Statement or any post-effective amendment or of any order preventing or suspending the use of any preliminary prospectus or the Prospectus, or of the suspension of the qualification of the Securities for offering or sale in any jurisdiction, or of the initiation or threatening of any proceedings for any of such purposes or of any examination pursuant to Section 8(e) of the 1933 Act concerning the Registration Statement and (v) if the Company becomes the subject of a proceeding under Section 8A of the 1933 Act in connection with the offering of the Securities. The Company will effect all filings required under Rule 424(b), in the manner and within the time period required by Rule 424(b) (without reliance on Rule 424(b)(8)), and will take such steps as it deems necessary to ascertain promptly whether the form of prospectus transmitted for filing under Rule 424(b) was received for filing by the Commission and, in the event that it was not, it will promptly file such prospectus. The Company will make every reasonable effort to prevent the issuance of any stop order, prevention or suspension and, if any such order is issued, to obtain the lifting thereof at the earliest possible moment.

(b) *Continued Compliance with Securities Laws*. The Company will comply with the 1933 Act, the 1933 Act Regulations, the 1934 Act and the 1934 Act Regulations so as to permit the completion of the distribution of the Securities as contemplated in this Agreement and in the General Disclosure Package and the Prospectus. If at any time when a prospectus relating to the Securities is (or, but for the exception afforded by Rule 172 of the 1933 Act Regulations (“Rule 172”), would be) required by the 1933 Act to be delivered in connection with sales of the Securities, any event shall occur or condition shall exist as a result of which it is necessary, in the opinion of counsel for the Underwriter and the Borrower or for the Company, to (i) amend the Registration Statement in order that the Registration Statement will not include an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading, (ii) amend or supplement the General Disclosure Package or the Prospectus in order that the General Disclosure Package or the Prospectus, as the case may be, will not include any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein not misleading in the light of the circumstances existing at the time it is delivered to a purchaser or (iii) amend the Registration Statement or amend or supplement the General Disclosure Package or the Prospectus, as the case may be, in order to comply with the requirements of the 1933 Act or the 1933 Act Regulations, the Company will promptly (A) give the Underwriter and the Borrower notice of such event, (B) prepare any amendment or supplement as may be necessary to correct such statement or omission or to make the Registration Statement, the General Disclosure Package or the Prospectus comply with such requirements and, a reasonable amount of time prior to any proposed filing or use, furnish the Underwriter and the Borrower with copies of any such amendment or supplement and (C) file with the Commission any such amendment or supplement; provided that the Company shall not file or use any such amendment or supplement to which the Underwriter, the Borrower or counsel for the Underwriter and the Borrower shall object. The Company will furnish to the Underwriter and the Borrower such number of copies of such amendment or supplement as the Underwriter and the Borrower may reasonably request. The Company has given the Underwriter and the Borrower notice of any filings made pursuant to the 1934 Act or 1934 Act Regulations within 48 hours prior to the Applicable Time; the Company will give the Underwriter



and the Borrower notice of its intention to make any such filing from the Applicable Time to the Closing Time and will furnish the Underwriter and the Borrower with copies of any such documents a reasonable amount of time prior to such proposed filing, as the case may be, and will not file or use any such document to which the Underwriter, the Borrower or counsel for the Underwriter and the Borrower shall reasonably object.

(c) *Delivery of Registration Statements.* The Company has furnished or will deliver to the Underwriter, the Borrower and counsel for the Underwriter and the Borrower, upon request and without charge, signed copies of the Registration Statement as originally filed and each amendment thereto (including exhibits filed therewith or incorporated by reference therein and documents incorporated or deemed to be incorporated by reference therein) and signed copies of all consents and certificates of experts. The copies of the Registration Statement and each amendment thereto furnished to the Underwriter and the Borrower will be identical to the electronically transmitted copies thereof filed with the Commission pursuant to EDGAR, except to the extent permitted by Regulation S-T and with respect to the 424(b) legend included in the filed version.

(d) *Delivery of Prospectuses.* The Company has delivered to the Underwriter and the Borrower, without charge, as many copies of each preliminary prospectus as the Underwriter and the Borrower reasonably requested, and the Company hereby consents to the use of such copies for purposes permitted by the 1933 Act. The Company will furnish to the Underwriter and the Borrower, without charge, during the period when a prospectus relating to the Securities is (or, but for the exception afforded by Rule 172, would be) required to be delivered under the 1933 Act, such number of copies of the Prospectus (as amended or supplemented) as the Underwriter and the Borrower may reasonably request. The Prospectus and any amendments or supplements thereto furnished to the Underwriter and the Borrower will be identical to the electronically transmitted copies thereof filed with the Commission pursuant to EDGAR, except to the extent permitted by Regulation S-T and with respect to the 424(b) legend included in the filed version.

(e) *Blue Sky Qualifications.* The Company will use its best efforts, in cooperation with the Underwriter, to qualify the Securities for offering and lending under the applicable securities laws of such states and other jurisdictions (domestic or foreign) as the Underwriter may designate and to maintain such qualifications in effect so long as required to complete the distribution of the Securities; provided, however, that the Company shall not be obligated to file any general consent to service of process or to qualify as a foreign corporation or as a dealer in securities in any jurisdiction in which it is not so qualified or to subject itself to taxation in respect of doing business in any jurisdiction in which it is not otherwise so subject.

(f) *Rule 158.* The Company will timely file such reports pursuant to the 1934 Act as are necessary in order to make generally available to its securityholders as soon as practicable, but in any event not later than 45 days after the end of the 12-month period beginning at the end of the fiscal quarter of the Company during which the most recent effective date of the Registration Statement occurs (or 90 days after the end of such 12-month period if such 12-month period coincides with the Company's fiscal year), an earnings statement (which need not be audited) for the purposes of, and to provide to the Underwriter the benefits contemplated by, the last paragraph of Section 11(a) of the 1933 Act.

(g) *Use of Proceeds.* The Company will not receive any proceeds from the sale of the Securities, but will receive the Loan Fee, each as set described in the General Disclosure Package and the Prospectus under the caption "Use of Proceeds."

(h) *Listing.* The Company will use its commercially reasonable efforts to effect and maintain the listing of the Securities on the Nasdaq Global Market.

(i) *Restriction on Sale of Securities.* During a period of 90 days from the date of the Prospectus (the “Lock-Up Period”), the Company will not, without the prior written consent of the Underwriter and the Borrower, (i) directly or indirectly, offer, pledge, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase or otherwise transfer or dispose of any shares of Common Stock or any securities convertible into or exercisable or exchangeable for Common Stock or file any registration statement under the 1933 Act with respect to any of the foregoing or (ii) enter into any swap or any other agreement or any transaction that transfers, in whole or in part, directly or indirectly, the economic consequence of ownership of the Common Stock, whether any such swap or transaction described in clause (i) or (ii) above is to be settled by delivery of Common Stock or such other securities, in cash or otherwise. The foregoing sentence shall not apply to (A) the Securities to be sold hereunder, (B) the Notes and any shares of Common Stock issuable upon conversion of the Notes, (C) up to an aggregate of 8,400,000 shares of Common Stock to be sold and issued by the Company pursuant to the Common Stock Purchase Agreement by and between the Company and Seaside 88, LP and the Common Stock Purchase Agreement by and between the Company and The Mann Group LLC, each dated as of August 10, 2010, (D) any shares of Common Stock issued by the Company upon the exercise of an option or warrant or the conversion of a security outstanding on the date hereof and referred to in the General Disclosure Package and the Prospectus, (E) any shares of Common Stock issued or options to purchase Common Stock granted pursuant to existing employee benefit plans of the Company referred to in the General Disclosure Package and the Prospectus, (F) any shares of Common Stock issued pursuant to any non-employee director stock plan or dividend reinvestment plan referred to in the General Disclosure Package and the Prospectus or (G) any shares of Common Stock issued to one or more counterparties in connection with the consummation of a strategic partnership, joint venture, collaboration, merger or the acquisition or license of any business products or technology complementary to the Company’s business; provided that, with respect to this subsection (G), (1) the sum of the aggregate number of Common Stock so issued shall not exceed 10% of the total number of shares of Common Stock outstanding as of the date hereof and (2) prior to the issuance of such Common Stock each recipient of such Common Stock shall have executed and delivered to the Underwriter an agreement substantially in the form of Exhibit D hereto.

(j) *Reporting Requirements.* The Company, during the period when a Prospectus relating to the Securities is (or, but for the exception afforded by Rule 172, would be) required to be delivered under the 1933 Act, will file all documents required to be filed with the Commission pursuant to the 1934 Act within the time periods required by the 1934 Act and 1934 Act Regulations. Additionally, the Company shall report the use of proceeds from the issuance of the Securities as may be required under Rule 463 under the 1933 Act.

(k) *Issuer Free Writing Prospectuses.* The Company agrees that, unless it obtains the prior written consent of the Underwriter and the Borrower, it will not make any offer relating to the Securities that would constitute an Issuer Free Writing Prospectus or that would otherwise constitute a “free writing prospectus,” or a portion thereof, required to be filed by the Company with the Commission or retained by the Company under Rule 433; provided that the Underwriter and the Borrower will be deemed to have consented to the Issuer Free Writing Prospectuses listed on Schedule A hereto and any “road show that is a written communication” within the meaning of Rule 433(d)(8)(i) that has been reviewed by the Underwriter and the Borrower. The Company represents that it has treated or agrees that it will treat each such free writing prospectus consented to, or deemed consented to, by the Underwriter and the Borrower as an “issuer free writing prospectus,” as defined in Rule 433, and that it has complied and will comply with the applicable requirements of Rule 433 with respect thereto, including timely filing with the Commission where required, legending and record keeping. If at any time following issuance of an Issuer Free Writing Prospectus there occurred or occurs an event or development as a result of which such Issuer Free Writing Prospectus conflicted or would conflict with the information contained in the Registration Statement or included or would include an untrue statement of a material fact or omitted or would omit to

state a material fact necessary in order to make the statements therein, in the light of the circumstances existing at that subsequent time, not misleading, the Company will promptly notify the Underwriter and the Borrower and will promptly amend or supplement, at its own expense, such Issuer Free Writing Prospectus to eliminate or correct such conflict, untrue statement or omission.

#### SECTION 4. Payment of Expenses.

(a) *Expenses.* The Company will pay or cause to be paid all expenses incident to the performance of their obligations under this Agreement, including (i) the preparation, printing and filing of the Registration Statement (including financial statements and exhibits) as originally filed and each amendment thereto, (ii) the preparation, printing and delivery to the Underwriter and the Borrower of copies of each preliminary prospectus, each Issuer Free Writing Prospectus and the Prospectus and any amendments or supplements thereto and any costs associated with electronic delivery of any of the foregoing by the Underwriter to investors, (iii) the preparation, issuance and delivery of the certificates for the Securities to the Underwriter and the Borrower (or Merrill Lynch, as delagatee), including any stock or other transfer taxes and any stamp or other duties payable upon the sale, issuance or delivery of the Securities to the Underwriter and the Borrower (or Merrill Lynch, as delagatee), (iv) the fees and disbursements of the Company's counsel, accountants and other advisors, (v) the qualification of the Securities under securities laws in accordance with the provisions of Section 3(e) hereof, including filing fees and the reasonable fees and disbursements of counsel for the Underwriter and the Borrower in connection therewith and in connection with the preparation of the Blue Sky Survey and any supplement thereto, provided such fees and disbursements do not exceed \$10,000 in the aggregate, (vi) the fees and expenses of any transfer agent or registrar for the Securities, (vii) the costs and expenses of the Company relating to investor presentations on any "road show" undertaken in connection with the marketing of the Securities, including without limitation, expenses associated with the production of road show slides and graphics, fees and expenses of any consultants engaged in connection with the road show presentations, travel and lodging expenses of the representatives and officers of the Company and any such consultants, and the cost of aircraft and other transportation chartered in connection with the road show, (viii) the fees and expenses incurred in connection with the listing of the Securities on the Nasdaq Global Market and (ix) the costs and expenses (including, without limitation, any damages or other amounts payable in connection with legal or contractual liability) associated with the reforming of any contracts for sale of the Securities made by the Underwriter caused by a breach of the representation contained in the third sentence of Section 1(a)(ii). Subject to the provisions of Section 4(b) below, the Underwriter and the Borrower agree to pay, whether or not the transactions contemplated hereby are consummated or this Agreement is terminated, all costs and expenses incident to the performance of their respective obligations under this Agreement not payable by the Company pursuant to the preceding sentence, including, without limitation, the fees and disbursements of any counsel for the Underwriter or the Borrower.

This Section 4(a) shall not affect or modify any separate, valid agreement relating to the allocation of payment of expenses between the Company, on the one hand, and the Borrower, on the other hand.

(b) *Termination of Agreement.* If this Agreement is terminated by the Underwriter or the Borrower in accordance with the provisions of Section 5(a)-(d), Section 5(f)-(o), Section 9(a)(i) or Section 9(a)(iii) hereof, the Company shall reimburse the Underwriter and the Borrower for all of their out-of-pocket expenses, including the reasonable fees and disbursements of counsel for the Underwriter and the Borrower.

(c) *Allocation of Expenses.* The provisions of this Section shall not affect any agreement that the Company may make for the sharing of such costs and expenses.

SECTION 5. Conditions of the Obligations of the Underwriter and the Borrower. The obligations of the Underwriter and the other obligations of Merrill Lynch hereunder are subject to the accuracy of the representations and warranties of the Company contained herein or in certificates of any officer of the Company or any of its subsidiaries delivered pursuant to the provisions hereof, to the performance by the Company of its respective covenants and other obligations hereunder, and to the following further conditions:

(a) *Effectiveness of Registration Statement.* The Registration Statement shall have been declared effective and at the Closing Time no stop order suspending the effectiveness of the Registration Statement or any post-effective amendment thereto has been issued under the 1933 Act, no order preventing or suspending the use of any preliminary prospectus or the Prospectus has been issued and no proceedings for any of those purposes have been instituted or are pending or, to the Company's knowledge, contemplated; and the Company has complied with each request (if any) from the Commission for additional information.

(b) *Opinion and Negative Assurance Letter of Counsel for Company.* At the Closing Time, the Underwriter and the Borrower shall have received an opinion and negative assurance letter, each dated the Closing Time, of Cooley LLP, counsel for the Company, substantially in the forms attached as Exhibit A-1 and A-2 hereto, respectively.

(c) *Opinion of Intellectual Property Counsel for Company.* At the Closing Time, the Underwriter and the Borrower shall have received an opinion, dated the Closing Time, of K&L Gates LLP, intellectual property counsel for the Company, substantially in the form attached as Exhibit B hereto.

(d) *Certificate of the General Counsel of the Company.* At the Closing Time, the Underwriter and the Borrower shall have received a certificate, addressed to each of them, of the General Counsel of the Company, dated the Closing Time, substantially in the form attached as Exhibit C hereto.

(e) *Opinion of Counsel for the Underwriter and the Borrower.* At the Closing Time, the Underwriter and the Borrower shall have received the favorable opinion, dated the Closing Time, of Davis Polk & Wardwell LLP, counsel for the Underwriter and the Borrower, together with signed or reproduced copies of such letter for each of the Underwriter and the Borrower in form and substance satisfactory to the Underwriter and the Borrower. In giving such opinion such counsel may rely, as to all matters governed by the laws of jurisdictions other than the law of the State of New York, the General Corporation Law of the State of Delaware and the federal securities laws of the United States, upon the opinions of counsel satisfactory to the Underwriter and the Borrower. Such counsel may also state that, insofar as such opinion involves factual matters, they have relied, to the extent they deem proper, upon certificates of officers and other representatives of the Company and its subsidiaries and certificates of public officials.

(f) *Officers' Certificate.* At the Closing Time, there shall not have been, since the date hereof or since the respective dates as of which information is given in the General Disclosure Package or the Prospectus, any material adverse change in the condition, financial or otherwise, or in the earnings, business affairs or business prospects of the Company and its subsidiaries considered as one enterprise, whether or not arising in the ordinary course of business, and the Underwriter and the Borrower shall have received a certificate of the Chief Executive Officer or the President of the Company and of the chief financial or chief accounting officer of the Company, dated the Closing Time, to the effect that (i) there has been no such material adverse change, (ii) the representations and warranties of the Company in this Agreement are true and correct with the same force and effect as though expressly made at and as of the Closing Time, (iii) the Company has complied with all agreements and satisfied all conditions on its

part to be performed or satisfied at or prior to the Closing Time, and (iv) no stop order suspending the effectiveness of the Registration Statement under the 1933 Act has been issued, no order preventing or suspending the use of any preliminary prospectus or the Prospectus has been issued and no proceedings for any of those purposes have been instituted or are pending or, to their knowledge, contemplated.

(g) *Accountant's Comfort Letter.* At the time of the execution of this Agreement, the Underwriter and the Borrower shall have received from Deloitte & Touche LLP a letter, dated such date, in form and substance satisfactory to the Underwriter and the Borrower, together with signed or reproduced copies of such letter for each of the Underwriter and the Borrower containing statements and information of the type ordinarily included in accountants' "comfort letters" to underwriters with respect to the financial statements and certain financial information contained in the Registration Statement, the General Disclosure Package and the Prospectus.

(h) *Bring-down Comfort Letter.* At the Closing Time, the Underwriter and the Borrower shall have received from Deloitte & Touche LLP a letter, dated as of the Closing Time, to the effect that they reaffirm the statements made in the letter furnished pursuant to subsection (g) of this Section, except that the specified date referred to shall be a date not more than three business days prior to the Closing Time.

(i) *Nasdaq Listing.* At the Closing Time, (1) a listing application for the Securities shall have been submitted to NASDAQ and (2) NASDAQ shall not have rejected such application.

(j) *Lock-up Agreements.* At the date of this Agreement, the Underwriter shall have received an agreement substantially in the form of Exhibit D hereto signed by the persons listed on Schedule B hereto.

(k) *Maintenance of Rating.* Since the execution of this Agreement, there shall not have been any decrease in or withdrawal of the rating of any securities of the Company or any of its subsidiaries by any "nationally recognized statistical rating organization" (as defined for purposes of Rule 436(g) under the 1933 Act) or any notice given of any intended or potential decrease in or withdrawal of any such rating or of a possible change in any such rating that does not indicate the direction of the possible change.

(l) *Additional Documents.* At the Closing Time, counsel for the Underwriter and the Borrower shall have been furnished with such documents and opinions as they may reasonably require for the purpose of enabling them to pass upon the issuance and sale of the Securities as herein contemplated, or in order to evidence the accuracy of any of the representations or warranties, or the fulfillment of any of the conditions, herein contained; and all proceedings taken by the Company in connection with the issuance and sale of the Securities as herein contemplated shall be satisfactory in form and substance to the Underwriter and the Borrower and counsel for the Underwriter and the Borrower.

(m) *Notes Offering.* The Notes Offering, substantially on the terms described in the Prospectus, shall have been consummated at the Closing Time.

(n) *Delivery of Securities.* The Share Lending Agreement shall have become effective and the Company shall have delivered the Securities to Merrill Lynch, as delagatee of the Borrower, in accordance therewith.

(o) *Accounting.* As of the Closing Time, the Company intends to account for the transaction contemplated by the Share Loan Agreement as a single transaction under EITF 09-01, not representing

the repurchase of shares of Common Stock or another equivalent transaction but rather, consistent with the intent of the parties, representing a loan of the Securities by the Company to the Borrower.

(p) *Termination of Agreement.* If any condition specified in this Section shall not have been fulfilled when and as required to be fulfilled, this Agreement may be terminated by the Underwriter and the Borrower by notice to the Company at any time at or prior to Closing Time, and such termination shall be without liability of any party to any other party except as provided in Section 4 and except that Sections 1, 6, 7, 8, 13 and 14 shall survive any such termination and remain in full force and effect.

#### SECTION 6. Indemnification.

(a) *Indemnification of Underwriter and the Borrower.* The Company agrees to indemnify and hold harmless each of the Underwriter and the Borrower, their respective affiliates (as such term is defined in Rule 501(b) under the 1933 Act (each, an “Affiliate”)), their respective selling agents and each person, if any, who controls the Underwriter or the Borrower within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act as follows:

(i) against any and all loss, liability, claim, damage and expense whatsoever, as incurred, arising out of any untrue statement or alleged untrue statement of a material fact contained in the Registration Statement (or any amendment thereto), including any information deemed to be a part thereof pursuant to Rule 430B, or the omission or alleged omission therefrom of a material fact required to be stated therein or necessary to make the statements therein not misleading or arising out of any untrue statement or alleged untrue statement of a material fact included (A) in any preliminary prospectus, any Issuer Free Writing Prospectus or the Prospectus (or any amendment or supplement thereto) or (B) in any materials or information provided to investors by, or with the approval of, the Company in connection with the marketing of the offering of the Stock (“Marketing Materials”), including any roadshow or investor presentations made to investors by the Company (whether in person or electronically), or the omission or alleged omission in any preliminary prospectus, Issuer Free Writing Prospectus, Prospectus or in any Marketing Materials of a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading;

(ii) against any and all loss, liability, claim, damage and expense whatsoever, as incurred, to the extent of the aggregate amount paid in settlement of any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or of any claim whatsoever based upon any such untrue statement or omission, or any such alleged untrue statement or omission; provided that (subject to Section 6(d) below) any such settlement is effected with the written consent of the Company;

(iii) against any and all expense whatsoever, as incurred (including the fees and disbursements of counsel chosen by the Underwriter and the Borrower), reasonably incurred in investigating, preparing or defending against any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or any claim whatsoever based upon any such untrue statement or omission, or any such alleged untrue statement or omission, to the extent that any such expense is not paid under (i) or (ii) above;

provided, however, that this indemnity agreement shall not apply to any loss, liability, claim, damage or expense to the extent arising out of any untrue statement or omission or alleged untrue statement or omission made in the Registration Statement (or any amendment thereto), including any information deemed to be a part thereof pursuant to Rule 430B, the General Disclosure Package or the Prospectus (or

any amendment or supplement thereto) in reliance upon and in conformity with the Underwriter Information.

(b) *Indemnification of Company, Directors and Officers.* The Underwriter agrees to indemnify and hold harmless the Company, its directors, each of its officers who signed the Registration Statement, and each person, if any, who controls the Company within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act, against any and all loss, liability, claim, damage and expense described in the indemnity contained in subsection (a) of this Section, as incurred, but only with respect to untrue statements or omissions, or alleged untrue statements or omissions, made in the Registration Statement (or any amendment thereto), including any information deemed to be a part thereof pursuant to Rule 430B, the General Disclosure Package or the Prospectus (or any amendment or supplement thereto) in reliance upon and in conformity with the Underwriter Information.

(c) *Actions against Parties; Notification.* Each indemnified party shall give notice as promptly as reasonably practicable to each indemnifying party of any action commenced against it in respect of which indemnity may be sought hereunder, but failure to so notify an indemnifying party shall not relieve such indemnifying party from any liability hereunder to the extent it is not materially prejudiced as a result thereof and in any event shall not relieve it from any liability which it may have otherwise than on account of this indemnity agreement. In the case of parties indemnified pursuant to Section 6(a) above, counsel to the indemnified parties shall be selected by the Underwriter and the Borrower, and, in the case of parties indemnified pursuant to Section 6(b) above, counsel to the indemnified parties shall be selected by the Company. An indemnifying party may participate at its own expense in the defense of any such action; provided, however, that counsel to the indemnifying party shall not (except with the consent of the indemnified party) also be counsel to the indemnified party. In no event shall the indemnifying parties be liable for fees and expenses of more than one counsel (in addition to any local counsel) separate from their own counsel for all indemnified parties in connection with any one action or separate but similar or related actions in the same jurisdiction arising out of the same general allegations or circumstances. No indemnifying party shall, without the prior written consent of the indemnified parties, settle or compromise or consent to the entry of any judgment with respect to any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or any claim whatsoever in respect of which indemnification or contribution could be sought under this Section 6 or Section 7 hereof (whether or not the indemnified parties are actual or potential parties thereto), unless such settlement, compromise or consent (i) includes an unconditional release of each indemnified party from all liability arising out of such litigation, investigation, proceeding or claim and (ii) does not include a statement as to or an admission of fault, culpability or a failure to act by or on behalf of any indemnified party.

(d) *Settlement without Consent if Failure to Reimburse.* If at any time an indemnified party shall have requested an indemnifying party to reimburse the indemnified party for fees and expenses of counsel, such indemnifying party agrees that it shall be liable for any settlement of the nature contemplated by Section 6(a)(ii) effected without its written consent if (i) such settlement is entered into more than 45 days after receipt by such indemnifying party of the aforesaid request, (ii) such indemnifying party shall have received notice of the terms of such settlement at least 30 days prior to such settlement being entered into and (iii) such indemnifying party shall not have reimbursed such indemnified party in accordance with such request prior to the date of such settlement.

SECTION 7. Contribution. If the indemnification provided for in Section 6 hereof is for any reason unavailable to or insufficient to hold harmless an indemnified party in respect of any losses, liabilities, claims, damages or expenses referred to therein, then each indemnifying party shall contribute to the aggregate amount of such losses, liabilities, claims, damages and expenses incurred by such indemnified party, as incurred, (i) in such proportion as is appropriate to reflect the relative benefits

received by the Company, the Underwriter and the Borrower from the offering of the Securities pursuant to this Agreement or (ii) if the allocation provided by clause (i) is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) above but also the relative fault of the Company, the Underwriter and the Borrower in connection with the statements or omissions which resulted in such losses, liabilities, claims, damages or expenses, as well as any other relevant equitable considerations.

The relative benefits received by the Company, on the one hand, and the Underwriter, on the other hand, in connection with the offering of the Securities pursuant to this Agreement shall be deemed to be in the same respective proportions as the total net proceeds of the Notes in the Notes Offering (before deducting expenses) received by the Company, on the one hand, and the total discount received by the Underwriter in the Notes Offering, on the other hand, bear to the aggregate initial offering price of the Notes as set forth on the cover of the Final Offering Memorandum.

The relative fault of any party shall be determined by reference to, among other things, whether any such untrue or alleged untrue statement of a material fact or omission or alleged omission to state a material fact relates to information supplied by such party and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission.

The Company, the Underwriter and the Borrower agree that it would not be just and equitable if contribution pursuant to this Section 7 were determined by pro rata allocation (even if the Underwriter and the Borrower were treated as one entity for such purpose) or by any other method of allocation which does not take account of the equitable considerations referred to above in this Section 7. The aggregate amount of losses, liabilities, claims, damages and expenses incurred by an indemnified party and referred to above in this Section 7 shall be deemed to include any legal or other expenses reasonably incurred by such indemnified party in investigating, preparing or defending against any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or any claim whatsoever based upon any such untrue or alleged untrue statement or omission or alleged omission.

Notwithstanding the provisions of this Section 7, the Underwriter shall not be required to contribute any amount in excess of the purchase discount or commissions received by the Underwriter in connection with the Notes purchased by it and distributed to the investors in the Notes Offering.

No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the 1933 Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation.

For purposes of this Section 7, each person, if any, who controls the Underwriter or the Borrower within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act and the Underwriter and the Borrower's affiliates and selling agents shall have the same rights to contribution as such Underwriter and Borrower, and each director of the Company, each officer of the Company who signed the Registration Statement, and each person, if any, who controls the Company within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act shall have the same rights to contribution as the Company.

SECTION 8. Representations, Warranties and Agreements to Survive. All representations, warranties and agreements contained in this Agreement or in certificates of officers of the Company or any of its subsidiaries submitted pursuant hereto, shall remain operative and in full force and effect regardless of (i) any investigation made by or on behalf of the Underwriter or the Borrower or their respective affiliates or selling agents, any person controlling the Underwriter or the Borrower, their



respective officers or directors, any person controlling the Company and (ii) delivery of and payment for the Securities.

**SECTION 9. Termination of Agreement.**

(a) *Termination.* The Underwriter and the Borrower may terminate this Agreement, by notice to the Company, at any time at or prior to the Closing Time (i) if there has been, in the judgment of the Underwriter and the Borrower, since the time of execution of this Agreement or since the respective dates as of which information is given in the General Disclosure Package or the Prospectus, any material adverse change in the condition, financial or otherwise, or in the earnings, business affairs or business prospects of the Company and its subsidiaries considered as one enterprise, whether or not arising in the ordinary course of business, or (ii) if there has occurred any material adverse change in the financial markets in the United States or the international financial markets, any outbreak of hostilities or escalation thereof or other calamity or crisis or any change or development involving a prospective change in national or international political, financial or economic conditions, in each case the effect of which is such as to make it, in the judgment of the Underwriter and the Borrower, impracticable or inadvisable to proceed with the completion of the offering or to enforce contracts for the sale of the Securities, or (iii) if trading in any securities of the Company has been suspended or materially limited by the Commission or the Nasdaq Global Market, or (iv) if trading generally on the American Stock Exchange or the New York Stock Exchange or in the Nasdaq Global Market has been suspended or materially limited, or minimum or maximum prices for trading have been fixed, or maximum ranges for prices have been required, by any of said exchanges or by order of the Commission, FINRA or any other governmental authority, or (v) a material disruption has occurred in commercial banking or securities settlement or clearance services in the United States or with respect to Clearstream or Euroclear systems in Europe, or (vi) if a banking moratorium has been declared by either Federal or New York authorities.

(b) *Liabilities.* If this Agreement is terminated pursuant to this Section, such termination shall be without liability of any party to any other party except as provided in Section 4 hereof, and provided further that Sections 1, 6, 7, 8, 13 and 14 shall survive such termination and remain in full force and effect.

**SECTION 10. Notices.** All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given if mailed or transmitted by any standard form of telecommunication. Notices to the Underwriter shall be directed to Merrill Lynch at One Bryant Park, New York, New York 10036, attention of Syndicate Department, with a copy to ECM Legal; notices to the Borrower shall be directed to Bank of America, N.A. at 9 West 57<sup>th</sup> Street, New York, NY 10019, attention of John Servidio; notices to the Company shall be directed to it at 28903 North Avenue Paine, Valencia, California 91355 (fax: (661) 755-2086), attention of David Thomson, with a copy to Cooley LLP, 4401 Eastgate Mall, San Diego, California 92121 (fax: (858) 550-6420), attention of D. Bradley Peck.

**SECTION 11. No Advisory or Fiduciary Relationship.** The Company acknowledges and agrees that (a) the purchase and sale of the Securities pursuant to this Agreement, including the determination of the initial public offering price of the Securities and any related discounts and commissions, is an arm's-length commercial transaction between the Company, on the one hand, and the Underwriter, on the other hand, (b) in connection with the offering of the Securities and the process leading thereto, each of the Underwriter and the Borrower is and has been acting solely as a principal and is not the agent or fiduciary of the Company, any of its subsidiaries or its respective stockholders, creditors, employees or any other party, (c) neither the Underwriter nor the Borrower has assumed or will assume an advisory or fiduciary responsibility in favor of the Company with respect to the offering of the Securities or the process leading thereto (irrespective of whether such Underwriter or Borrower has advised or is currently advising the

Company or any of its subsidiaries on other matters) and neither the Underwriter nor the Borrower has any obligation to the Company with respect to the offering of the Securities except the obligations expressly set forth in this Agreement, (d) the Underwriter and the Borrower and their respective affiliates may be engaged in a broad range of transactions that involve interests that differ from those of the Company, and (e) the Underwriter and the Borrower have not provided any legal, accounting, regulatory or tax advice with respect to the offering of the Securities and the Company and has consulted its own respective legal, accounting, regulatory and tax advisors to the extent it deemed appropriate.

SECTION 12. Parties. This Agreement shall inure to the benefit of and be binding upon the Underwriter, the Company and their respective successors. Nothing expressed or mentioned in this Agreement is intended or shall be construed to give any person, firm or corporation, other than the Underwriter, the Borrower, the Company and their respective successors and the controlling persons and officers and directors referred to in Sections 6 and 7 and their heirs and legal representatives, any legal or equitable right, remedy or claim under or in respect of this Agreement or any provision herein contained. This Agreement and all conditions and provisions hereof are intended to be for the sole and exclusive benefit of the Underwriter, the Borrower, the Company and their respective successors, and said controlling persons and officers and directors and their heirs and legal representatives, and for the benefit of no other person, firm or corporation. No purchaser of Securities from the Underwriter shall be deemed to be a successor by reason merely of such purchase.

SECTION 13. Trial by Jury. The Company (on its behalf and, to the extent permitted by applicable law, on behalf of its stockholders and affiliates) and each of the Underwriter and the Borrower hereby irrevocably waives, to the fullest extent permitted by applicable law, any and all right to trial by jury in any legal proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

SECTION 14. GOVERNING LAW. THIS AGREEMENT AND ANY CLAIM, CONTROVERSY OR DISPUTE ARISING UNDER OR RELATED TO THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF, THE STATE OF NEW YORK WITHOUT REGARD TO ITS CHOICE OF LAW PROVISIONS.

SECTION 15. TIME. TIME SHALL BE OF THE ESSENCE OF THIS AGREEMENT. EXCEPT AS OTHERWISE SET FORTH HEREIN, SPECIFIED TIMES OF DAY REFER TO NEW YORK CITY TIME.

SECTION 16. Partial Unenforceability. The invalidity or unenforceability of any Section, paragraph or provision of this Agreement shall not affect the validity or enforceability of any other Section, paragraph or provision hereof. If any Section, paragraph or provision of this Agreement is for any reason determined to be invalid or unenforceable, there shall be deemed to be made such minor changes (and only such minor changes) as are necessary to make it valid and enforceable.

SECTION 17. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such counterparts shall together constitute one and the same Agreement.

SECTION 18. Effect of Headings. The Section headings herein are for convenience only and shall not affect the construction hereof.

SECTION 19. Entire Agreement. This Agreement, together with the schedules and exhibits hereto, and the Share Lending Agreement contains the entire understanding of the parties with respect to

the subject matter hereof and supersedes all prior agreements and understandings, oral or written, with regard to such matters.

[Signature page follows]

If the foregoing is in accordance with your understanding of our agreement, please sign and return to the Company a counterpart hereof, whereupon this instrument, along with all counterparts, will become a binding agreement between Merrill Lynch and the Company in accordance with its terms.

Very truly yours,

MANKIND CORPORATION

By /s/ Matthew J. Pfeffer  
Title: Chief Financial Officer

---

CONFIRMED AND ACCEPTED,  
as of the date first above written:

MERRILL LYNCH, PIERCE, FENNER & SMITH  
INCORPORATED

By /s/ Benjamin Perkins  
Authorized Signatory

BANK OF AMERICA, N.A.  
solely as the recipient and/or beneficiary of certain representations, warranties, covenants and  
indemnities set forth in the foregoing Agreement

By /s/ Charles J. Nelsen  
Authorized Signatory

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Free Writing Prospectuses

Free writing prospectus filed August 19, 2010

Sch A-1

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List of Persons Subject to Lock-up

Alfred E. Mann  
Hakan S. Edstrom  
Matthew J. Pfeffer  
Juergen A. Martens, Ph.D.  
Diane M. Palumbo  
Dr. Peter C. Richardson  
David Thomson, Ph.D., J.D.  
Abraham E. Cohen  
Ronald Consiglio  
Michael Friedman  
Kent Kresa  
David H. MacCallum  
Henry L. Nordhoff  
James S. Shannon

Sch B-1

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MANNKIND CORPORATION

AND

WELLS FARGO BANK, NATIONAL ASSOCIATION

as Trustee

INDENTURE

Dated as of August 24, 2010

5.75% Convertible Senior Notes due 2015

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Exhibit A — Form of Note

INDENTURE dated as of August 24, 2010 between MannKind Corporation, a Delaware corporation, as issuer (the “**Company**”) and Wells Fargo Bank, National Association, a national banking association, as trustee (the “**Trustee**”).

WITNESSETH:

WHEREAS, for its lawful corporate purposes, the Company has duly authorized the issue of its 5.75% Convertible Senior Notes due 2015 (the “**Notes**”), initially in an aggregate principal amount of \$100,000,000, and in order to provide the terms and conditions upon which the Notes are to be authenticated, issued and delivered, the Company has duly authorized the execution and delivery of this Indenture; and

WHEREAS, the Form of Note, the certificate of authentication to be borne by each Note, the Form of Notice of Conversion, the Form of Fundamental Change Purchase Notice and the Form of Assignment and Transfer to be borne by the Notes are to be substantially in the forms hereinafter provided; and

WHEREAS, all acts and things necessary to make the Notes, when executed by the Company and authenticated and delivered by the Trustee or a duly authorized authenticating agent, as in this Indenture provided, the valid, binding and legal obligations of the Company, and to constitute these presents a valid agreement according to its terms, have been done and performed, and the execution of this Indenture and the issue hereunder of the Notes have in all respects been duly authorized.

NOW, THEREFORE, THIS INDENTURE WITNESSETH:

That in order to declare the terms and conditions upon which the Notes are, and are to be, authenticated, issued and delivered, and in consideration of the premises and of the purchase and acceptance of the Notes by the Holders thereof, the Company covenants and agrees with the Trustee for the equal and proportionate benefit of the respective Holders from time to time of the Notes (except as otherwise provided below), as follows:

ARTICLE 1

DEFINITIONS; INTERPRETATIONS

Section 1.01. *Definitions.* The terms defined in this Section 1.01 (except as herein otherwise expressly provided or unless the context otherwise requires) for all purposes of this Indenture and of any indenture supplemental hereto shall have the respective meanings specified in this Section 1.01. All other terms used in this Indenture that are defined in the Trust Indenture Act or that are by

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reference therein defined in the Securities Act (except as herein otherwise expressly provided or unless the context otherwise requires) shall have the meanings assigned to such terms in said Trust Indenture Act and in the Securities Act as in force at the date of the execution of this Indenture. The words “herein,” “hereof,” “hereunder,” and words of similar import refer to this Indenture as a whole and not to any particular Article, Section or other subdivision. The terms defined in this Article include the plural as well as the singular. Unless otherwise noted, references to “U.S. Dollars” or “\$” shall mean the currency of the United States.

“**5-day Volume-Weighted Average Price**” means, with respect to any five Trading Day period, the per share volume-weighted average price as displayed under the heading “Bloomberg VWAP” on Bloomberg page “MNKD.UQ <equity> AQR” (or its equivalent successor if such page is not available) in respect of such five Trading Day period from the scheduled open of trading on the first Trading Day of such five Trading Day period until the scheduled close of trading of the primary trading session on the last Trading Day of such five Trading Day period (or if such volume-weighted average price is unavailable, the market value of one share of the Common Stock during such five Trading Day period determined, using a volume-weighted average method, by a nationally recognized independent investment banking firm retained for this purpose by the Company). The “**5-day Volume-Weighted Average Price**” shall be determined without regard to after hours trading or any other trading outside of the regular trading session trading hours.

“**Additional Interest**” shall have the meaning specified in Section 12.01(a).

“**Additional Interest Event**” shall have the meaning specified in Section 12.01(a).

“**Affiliate**” of any specified Person means any other Person directly or indirectly controlling or controlled by or under direct or indirect common control with such specified Person. For the purposes of this definition, “control,” when used with respect to any specified Person means the power to direct or cause the direction of the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms “controlling” and “controlled” have meanings correlative to the foregoing.

“**Applicable Procedures**” means, with respect to any conversion, transfer or exchange of beneficial ownership interests in a Global Note, the rules and procedures of the Depository, to the extent applicable to such conversion, transfer or exchange.

“**Bankruptcy Law**” shall have the meaning specified in Section 6.01.

“**Board of Directors**” means the Board of Directors of the Company or any duly authorized committee of such Board.

“**Board Resolution**” means a copy of a resolution certified by the Secretary or an Assistant Secretary of the Company to have been duly adopted by the Board of Directors, and to be in full force and effect on the date of such certification.

“**Business Day**” means any day other than a day on which federal or state banking institutions in the Borough of Manhattan, the City of New York, or in the city of the Corporate Trust Office of the Trustee, are authorized or obligated by law, executive order or regulation to close.

“**Capital Stock**” of any Person means any and all shares, interests, rights to purchase, warrants, options, participations or other equivalents of or interests in (however designated) the equity of such Person, but excluding any debt securities convertible into such equity.

“**Cash**” or “**cash**” means such coin or currency of the United States as at any time of payment is legal tender for the payment of public and private debts.

“**Change of Control**” means the occurrence of any of the following events from and after the Issue Date:

(i) the acquisition by any “**person**”, including any syndicate or group deemed to be a “person” under Section 13(d)(3) of the Exchange Act is or becomes the “**beneficial owner**” (as defined in Rule 13d-3 under the Exchange Act) of the beneficial ownership, directly or indirectly, through a purchase, merger or other acquisition transaction or series of transactions of shares of the Company’s Capital Stock entitling that person to exercise 50% or more of the total voting power of all shares of the Company’s Voting Stock, other than (x) any acquisition by the Company, any Subsidiary or any of the Company’s employee benefit plans; (y) any acquisition during the lifetime of Mann by Mann or his estate, by any trust where Mann is the trustee or grantor, by any not-for-profit entity where the acquisition is directed by Mann or by any entity wholly-owned by Mann or his estate; *provided* that the total beneficial ownership of all such Persons, together with the Persons in (z), does not exceed 70% or more of the total voting power of all shares of the Company’s Voting Stock; and (z) any acquisition by any Person so long as the shares acquired by such Person are acquired directly from one of the Persons listed in (y) and no consideration is paid in connection with such acquisition;



(ii) the Company (A) recapitalizes, reclassifies or changes the Common Stock (other than changes resulting from a subdivision or combination) as a result of which the Common Stock would be converted into, or exchanged for, stock, other securities, other property or assets or (B) exchanges its shares of Common Stock with, consolidates with, or merges with or into, another Person or any Person exchanges its shares of common stock with, consolidates or merges with or into the Company, or (C) conveys, transfers, sells, leases or otherwise disposes of all or substantially all of its properties and assets to another Person, in each case other than (x) any transaction pursuant to which holders of the Company's Capital Stock immediately prior to the transaction have the entitlement to exercise, directly or indirectly, 50% or more of the total voting power of all shares of the Voting Stock of the continuing or surviving entity of such transaction; or (y) any merger solely for the purpose of changing the Company's jurisdiction of incorporation and resulting in a reclassification, conversion or exchange of outstanding shares of Common Stock solely into shares of common stock of the surviving entity traded or quoted on a U.S. national securities exchange, and as a result of such merger the Notes become convertible into such shares; or

(iii) the Company's stockholders approve a plan of liquidation or dissolution.

Notwithstanding anything to the contrary set forth herein, a Change of Control will be deemed not to have occurred if, in the case of a merger or consolidation, at least 90% of the consideration (excluding cash payments for fractional shares and cash payments pursuant to dissenters' appraisal rights) in a transaction or transactions otherwise constituting a Change of Control consists of shares of common stock or American depository receipts traded or quoted on a U.S. national securities exchange, or which will be so traded or quoted when issued or exchanged in connection with the transaction or transactions, and as a result of the transaction or transactions the Notes become convertible solely into such consideration.

**"close of business"** means 5:00 p.m. (New York City time).

**"Commission"** means the Securities and Exchange Commission.

**"Common Stock"** means the shares of common stock of the Company, par value \$0.01 per share, as it exists on the date of this Indenture or any other shares of Capital Stock of the Company into which the Common Stock shall be reclassified or changed.

**"Company"** means MannKind Corporation, a corporation duly organized and existing under the laws of the State of Delaware, until a successor Person

shall have become such pursuant to the applicable provisions of this Indenture, and thereafter “Company” shall mean such successor Person.

“**Company Order**” means a written order of the Company, signed by the Company’s Chief Executive Officer, Chief Financial Officer, President, Executive Vice President or any Vice President (whether or not designated by a number or numbers or word or words added before or after the title “Vice President”), Treasurer or Assistant Treasurer or Secretary or any Assistant Secretary, and delivered to the Trustee.

“**Conversion Agent**” means the office or agency designated by the Company pursuant to Section 4.05 where Notes may be presented for conversion.

“**Conversion Date**” shall have the meaning specified in Section 13.02(a).

“**Conversion Price**” per share of Common Stock as of any day means the result obtained by dividing (i) \$1,000 by (ii) the then applicable Conversion Rate.

“**Conversion Rate**” means the rate at which shares of Common Stock shall be delivered upon conversion, which rate shall be initially 147.0859 shares of Common Stock for each \$1,000 principal amount of Notes, as adjusted from time to time pursuant to the provisions of this Indenture.

“**Corporate Trust Office**” means the office of the Trustee at which, at any particular time, its corporate trust business shall be principally administered, which office at the date hereof is located at Wells Fargo Bank, National Association, Sixth & Marquette, MAC N9303-120, Minneapolis, MN 55479.

“**Custodian**” means Wells Fargo Bank, National Association, as custodian for The Depository Trust Company, with respect to the Global Notes, or any successor entity thereto.

“**Default**” means any event, act or condition that with notice or lapse of time, or both, would constitute an Event of Default.

“**Defaulted Interest**” means any interest on any Note that is payable, but is not punctually paid or duly provided for, on any February 15 or August 15.

“**Depository**” means, with respect to the Global Notes, the Person specified in Section 2.05(c) as the Depository with respect to such Notes, until a successor shall have been appointed and become such pursuant to the applicable provisions of this Indenture, and thereafter, “**Depository**” shall mean or include such successor.

“**DTC**” shall have the meaning specified in Section 2.05(c).

**“Ex-Dividend Date”** means, in respect of an issuance, a dividend or distribution to holders of Common Stock, the first date on which shares of Common Stock trade on the applicable exchange or in the applicable market, regular way, without the right to receive such issuance, dividend or distribution in question.

**“Exchange Act”** means the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

**“Exchange Settlement Property”** shall have the meaning specified in Section 13.14(b)

**“Expiration Date”** shall have the meaning specified in Section 13.06(e).

**“Expiration Time”** shall have the meaning specified in Section 13.06(e).

**“Event of Default”** shall have the meaning specified in Section 6.01.

**“Financial Institution”** shall have the meaning specified in Section 13.14(a).

**“Form of Assignment and Transfer”** shall mean the “Form of Assignment and Transfer” attached as Attachment 3 to the Form of Note attached hereto as Exhibit A.

**“Form of Fundamental Change Purchase Notice”** shall mean the “Form of Fundamental Change Purchase Notice” attached as Attachment 2 to the Form of Note attached hereto as Exhibit A.

**“Form of Note”** shall mean the “Form of Note” attached hereto as Exhibit A.

**“Form of Notice of Conversion”** shall mean the “Form of Notice of Conversion” attached as Attachment 1 to the Form of Note attached hereto as Exhibit A.

**“Fundamental Change”** means the occurrence of either a Change of Control or a Termination of Trading.

**“Fundamental Change Company Notice”** shall have the meaning specified in Section 15.01(b).

**“Fundamental Change Effective Date”** means the date on which any Fundamental Change becomes effective.

“**Fundamental Change Make-Whole Premium**” shall have the meaning specified in Section 13.01(e).

“**Fundamental Change Purchase Date**” shall have the meaning specified in Section 15.01(a).

“**Fundamental Change Purchase Notice**” shall have the meaning specified in Section 15.01(c).

“**Fundamental Change Purchase Price**” of any Note, means 100% of the principal amount of the Note to be repurchased plus unpaid interest, if any, accrued and unpaid to, but excluding, the Fundamental Change Purchase Date; *provided* that if the Fundamental Change Purchase Date is after a Regular Record Date and on or prior to the corresponding Interest Payment Date, the Fundamental Change Purchase Price shall not include any accrued and unpaid interest.

“**Global Note**” shall have the meaning specified in Section 2.05(b).

“**Holder**” or “**Holder of a Note**” means the person in whose name a Note is registered on the Note Registrar’s books.

“**Indenture**” means this instrument as originally executed or, if amended or supplemented as herein provided, as so amended or supplemented.

“**Initial Purchasers**” means Merrill Lynch, Pierce, Fenner & Smith Incorporated, Wells Fargo Securities, LLC, Rodman & Renshaw, LLC and Imperial Capital, LLC.

“**Interest Payment Date**” means each February 15 and August 15 of each year, beginning on February 15, 2011; *provided, however*, that if any Interest Payment Date falls on a date that is not a Business Day, such payment of interest will be postponed until the next succeeding Business Day, and no interest or other amount will be paid as a result of such postponement.

“**Issue Date**” of any Note means the date on which the Note was originally issued or deemed issued as set forth on the face of the Note.

“**Last Reported Sale Price**” means on any Business Day or Trading Day, the reported last sale price per share of the Company’s Common Stock (or if no last sale price is reported, the average of the bid and ask prices per share or, if more than one in either case, the average of the average bid and the average ask prices per share) on such date reported by the Nasdaq Global Market or, if the Company’s Common Stock (or the applicable security) is not quoted on the Nasdaq Global Market, as reported by the principal national securities exchange on which the Company’s Common Stock (or such other security) is listed, or if no such prices are available, the Last Reported Sale Price per share shall be the fair

value of a share of Common Stock (or such other security) as reasonably determined by the Board of Directors (which determination shall be conclusive and shall be evidenced by an Officer's Certificate delivered to the Trustee).

**"Make-Whole Fundamental Change"** means any Fundamental Change as described in the definition thereof, and determined after giving effect to any exceptions or exclusions to such definition, but without regard to clause (ii)(x) of the definition of Change of Control and excluding a Fundamental Change described under clause (iii) of the definition of Change of Control.

**"Make-Whole Fundamental Change Effective Date"** means the date on which any Make-Whole Fundamental Change becomes effective.

**"Make-Whole Fundamental Change Notice"** has the meaning specified in Section 13.01(e).

**"Make-Whole Payment"** means, with respect to each \$1,000 in principal amount of Notes being redeemed on a Redemption Date, a payment in cash equal to the present values of the remaining scheduled payments of interest that would have been made on such Notes to be redeemed had such Notes remained Outstanding from such Redemption Date through and including August 15, 2015 (excluding interest accrued to, but excluding, such Redemption Date, which is otherwise paid pursuant to clause (ii) of the definition of Redemption Price). The present values of such remaining interest payments shall be computed using a discount rate equal to 2.5%; *provided* that in respect of a Redemption Date that is after a Regular Record Date and on or prior to the corresponding Interest Payment Date, the Make-Whole Payment will not include the interest payment to be paid on such Interest Payment Date.

**"Mann"** means the individual Alfred E. Mann.

**"Market Disruption Event"** means (1) a failure by the primary exchange or quotation system on which the Common Stock trades or is quoted to open for trading during its regular trading session or (2) the occurrence or existence, prior to 1:00 p.m., New York City time, on any Trading Day for the Common Stock, of an aggregate one half-hour period of any suspension or limitation imposed on trading (by reason of movements in price exceeding limits permitted by the stock exchange or otherwise) in the Common Stock or in any options, contracts or future contracts relating to the Common Stock.

**"Maturity Date"** means August 15, 2015.

**"Note"** or **"Notes"** shall have the meaning specified in the first "Whereas" clause of this Indenture.

“**Note Register**” shall have the meaning specified in Section 2.05(a).

“**Note Registrar**” shall have the meaning specified in Section 2.05(a).

“**Notice of Redemption**” has the meaning set forth in Section 14.03.

“**Offering Memorandum**” means the final offering memorandum dated August 18, 2010 relating to the offering and sale of the Notes pursuant to the Purchase Agreement.

“**Officer**” means, with respect to the Company, the chairman of the Board of Directors, a chief executive officer, a president, a chief financial officer, chief operating officer, any executive vice president, any senior vice president, any vice president, the treasurer or any assistant treasurer, the controller or any assistant controller or the secretary or any assistant secretary.

“**Officer’s Certificate**,” means a certificate signed by any Officer. Each such certificate shall include the statements provided for in Section 17.05, if and to the extent required by the provisions thereof.

“**open of business**” means 9:00 a.m. (New York City time).

“**Opinion of Counsel**” means a written opinion, subject to customary exceptions, from legal counsel who is reasonably acceptable to the Trustee that is delivered to the Trustee in accordance with the terms hereof. The counsel may be an employee of or counsel to the Company or the Trustee. Each such opinion shall include the statements provided for in Section 17.05 if and to the extent required by the provisions thereof.

“**Outstanding**,” when used with reference to Notes, shall, subject to the provisions of Section 8.04, mean, as of any particular time, all Notes authenticated and delivered by the Trustee under this Indenture, except:

(a) Notes theretofore canceled by the Trustee or accepted by the Trustee for cancellation;

(b) Notes that have been paid pursuant to Section 2.08 or Notes in lieu of which, or in substitution for which, other Notes shall have been authenticated and delivered pursuant to the terms of Section 2.06 unless proof satisfactory to the Trustee is presented that any such Notes are held by protected purchasers in due course; and

(c) Notes converted pursuant to Article 13.

“**Paying Agent**” means the office or agency designated by the Company pursuant to Section 4.05 where Notes may be presented for payment.

“**Person**” or “**person**” means any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization, government or any agency or political subdivision thereof or any syndicate or group that would be deemed to be a “**person**” under Section 13(d)(3) of the Exchange Act or any other entity.

“**Predecessor Note**” of any particular Note means every previous Note evidencing all or a portion of the same debt as that evidenced by such particular Note; and, for the purposes of this definition, any Note authenticated and delivered under Section 2.06 in lieu of or in exchange for a mutilated, lost, destroyed or stolen Note shall be deemed to evidence the same debt as the mutilated, lost, destroyed or stolen Note that it replaces.

“**Purchase Agreement**” means that certain Purchase Agreement, dated as of August 18, 2015, among the Company and the Initial Purchasers.

“**Receiver**” shall have the meaning specified in Section 6.01.

“**Redemption Date**” shall have the meaning specified in Section 14.01(c).

“**Redemption Price**” shall have the meaning specified in Section 14.01(b).

“**Reference Property**” shall have the meaning specified in Section 13.10.

“**Regular Record Date**,” with respect to any Interest Payment Date, shall mean the February 1 or August 1 (whether or not such day is a Business Day) immediately preceding such Interest Payment Date.

“**Resale Restriction Termination Date**” shall have the meaning specified in Section 2.05(c).

“**Responsible Officer**” means any officer within the corporate trust department of the Trustee, including any vice president, assistant vice president, assistant secretary, assistant treasurer, trust officer or any other officer of the Trustee who customarily performs functions similar to those performed by the Persons who at the time shall be such officers, respectively, or to whom any corporate trust matter is referred because of such Person’s knowledge of and familiarity with the particular subject and who shall have direct responsibility for the administration of this Indenture.

“**Restricted Securities**” shall have the meaning specified in Section 2.05(c).

“**Rights**” means any common stock or preferred stock purchase right or warrant, as the case may be, that all or substantially all shares of Common Stock may be entitled to receive under a Rights Plan.

“**Rights Plan**” means any common stock or preferred stock rights plan or any similar plan adopted by the Company after the date hereof.

“**Rule 144**” means Rule 144 as promulgated under the Securities Act.

“**Rule 144A**” means Rule 144A as promulgated under the Securities Act.

“**Securities Act**” means the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

“**Special Interest**” shall have the meaning specified in Section 6.02.

“**Spin-Off**” shall have the meaning specified in Section 13.06(c).

“**Stock Price**” means the price paid or deemed to be paid per share of the Common Stock in connection with a Make-Whole Fundamental Change subject to adjustment as determined pursuant to Section 13.01(e).

“**Subsidiary**” means a corporation or other entity more than 50% of the outstanding Voting Stock of which is owned, directly or indirectly, by the Company or by one or more other Subsidiaries of the Company, or by the Company and one or more other Subsidiaries of the Company.

“**Termination of Trading**” means the occurrence of the Common Stock (or other common stock into which the Notes are convertible) not being listed for trading on a United States national securities exchange nor approved for listing on any United States system of automated dissemination of quotations of securities prices nor traded in over-the-counter securities markets and no American Depositary Shares or similar instruments for the Common Stock are so listed or approved for listing in the United States.

“**Trading Day**” means any day during which trading in the Common Stock generally occurs on the primary exchange or quotation system on which the Common Stock then trades or is quoted and there is no Market Disruption Event, unless the Common Stock is not so traded or quotes, in which case

“**Trading Day**” means a Business Day.

“**transfer**” shall have the meaning specified in Section 2.05(c).

“**Trust Indenture Act**” means the Trust Indenture Act of 1939, as amended.

“**Trustee**” means the Person named as the “Trustee” in the first paragraph of this Indenture until a successor Trustee shall have become such pursuant to the applicable provisions of this Indenture, and thereafter “Trustee” shall mean or include each Person who is then a Trustee hereunder.



“**United States**” means the United States of America.

“**Valuation Period**” shall have the meaning specified in Section 13.06(c).

“**Voting Stock**” of a Person means all classes of Capital Stock or other interests (including partnership interests) of such Person then outstanding and normally entitled (without regard to the occurrence of any contingency within the control of such person to satisfy) to vote in the election of directors, managers or trustees thereof.

Section 1.02. *References to Interest.* Any reference to the payment of interest on, or in respect of, any Note in this Indenture shall be deemed to include mention of the payment of Special Interest (if applicable) and Additional Interest (if applicable) if, in such context, Special Interest and Additional Interest, as applicable, was, or would be, payable pursuant to Section 6.01 and Section 12.01, respectively. An express mention of the payment of Special Interest (if applicable) or Additional Interest (if applicable) in any provision hereof shall not be construed as excluding Additional Interest or Special Interest, as applicable, in those provisions hereof where such express mention is not made.

## ARTICLE 2

### ISSUE, DESCRIPTION, EXECUTION, REGISTRATION AND EXCHANGE OF NOTES

Section 2.01. *Designation and Amount.* The Notes shall be designated as the “5.75% Convertible Senior Notes due 2015.” The aggregate principal amount of Notes that may be authenticated and delivered under this Indenture is initially limited to \$100,000,000 (as increased by an amount equal to the aggregate principal amount of any additional Notes purchased by the Initial Purchasers pursuant to the exercise of their option to purchase additional Notes set forth in the Purchase Agreement), subject to Section 2.10 and except for Notes authenticated and delivered upon registration or transfer of, or in exchange for, or in lieu of other Notes pursuant to Section 2.05, Section 2.06 and Section 2.07.

Section 2.02. *Form of Notes.* The Notes and the Trustee’s certificate of authentication to be borne by such Notes shall be substantially in the respective forms set forth in Exhibit A, which are incorporated in and made a part of this Indenture.

Any of the Notes may have such letters, numbers or other marks of identification and such notations, legends or endorsements as the officer executing the same may approve (execution thereof to be conclusive evidence of such approval) and as are not inconsistent with the provisions of this Indenture, or as may be required to comply with any law or with any rule or regulation made pursuant thereto or with any rule or regulation of any securities exchange or

automated quotation system on which the Notes may be listed or designated for issuance, or to conform to usage or to indicate any special limitations or restrictions to which any particular Notes are subject.

The Global Note shall represent such principal amount of the Outstanding Notes as shall be specified therein and shall provide that it shall represent the aggregate principal amount of Outstanding Notes from time to time endorsed thereon and that the aggregate principal amount of Outstanding Notes represented thereby may from time to time be increased or reduced to reflect purchases, conversions, transfers, exchanges or issuances of additional Notes permitted hereby. Any endorsement of the Global Note to reflect the amount of any increase or decrease in the amount of Outstanding Notes represented thereby shall be made by the Trustee or the Custodian, at the direction of the Trustee, in such manner and upon instructions given by the Holder of such Notes in accordance with this Indenture. Payment of principal (including any Fundamental Change Purchase Price or Redemption Price, as applicable) of, and accrued and unpaid interest, if any, on, the Global Note shall be made to the Holder of such Note on the date of payment, unless a record date or other means of determining Holders eligible to receive payment is provided for herein.

The terms and provisions contained in the Form of Note attached as Exhibit A hereto shall constitute, and are hereby expressly made, a part of this Indenture and, to the extent applicable, the Company and the Trustee, by their execution and delivery of this Indenture, expressly agree to such terms and provisions and to be bound thereby.

Section 2.03. *Date and Denomination of Notes; Payments of Interest.* The Notes shall be issuable in registered form without coupons in denominations of \$1,000 principal amount and multiples thereof. Each Note shall be dated the date of its authentication and shall bear interest from the date specified on the face of the Form of Note attached as Exhibit A hereto. Interest on the Notes shall be computed on the basis of a 360-day year comprised of twelve 30-day months.

The Person in whose name any Note (or its Predecessor Note) is registered on the Note Register at the close of business on any Regular Record Date with respect to any Interest Payment Date shall be entitled to receive the interest payable on such Interest Payment Date. Interest shall be payable at the office of the Paying Agent, which shall initially be the Corporate Trust Office of the Trustee as the Company's Paying Agent and Note Registrar. The Company shall pay interest on any Notes in certificated form (i) to the Person entitled thereto having an aggregate principal amount of \$2,000,000 or less, by check mailed to such Person at the address set forth in the Note Register and (ii) to the Person entitled thereto having an aggregate principal amount of more than \$2,000,000, either by check mailed to such Person or, upon application by such Person to the Note Registrar not later than the relevant Regular Record Date, by wire transfer in

immediately available funds to such Person's account within the United States, which application and wire transfer instructions shall remain in effect until such Person notifies, in writing, the Note Registrar to the contrary.

Any Defaulted Interest shall forthwith cease to be payable to the Holder of such Note on the relevant Regular Record Date by virtue of its having been such Holder, and such Defaulted Interest shall be paid by the Company, at its election in each case, as provided in clause (1) or (2) below:

(1) The Company may elect to make payment of any Defaulted Interest to the Persons in whose names the Notes (or their respective Predecessor Notes) are registered at the close of business on a special record date for the payment of such Defaulted Interest, which shall be fixed in the following manner. The Company shall notify the Trustee in writing of the amount of Defaulted Interest proposed to be paid on each Note and the date of the proposed payment (which shall be not less than 20 days after the receipt by the Trustee of such notice, unless the Trustee shall consent to an earlier date), and at the same time the Company shall deposit with the Trustee an amount of money equal to the aggregate amount to be paid in respect of such Defaulted Interest or shall make arrangements satisfactory to the Trustee for such deposit on or prior to the date of the proposed payment, such money when deposited to be held in trust for the benefit of the Persons entitled to such Defaulted Interest as in this clause provided. Thereupon the Company shall fix a special record date for the payment of such Defaulted Interest which shall be not more than fifteen days and not less than ten days prior to the date of the proposed payment, and not less than ten days after the receipt by the Trustee of the notice of the proposed payment. The Company shall promptly notify the Trustee in writing of such special record date and the Trustee, in the name and at the expense of the Company, shall cause notice of the proposed payment of such Defaulted Interest and the special record date therefor to be mailed, first-class postage prepaid, to each Holder at its address as it appears in the Note Register, not less than ten days prior to such special record date. Notice of the proposed payment of such Defaulted Interest and the special record date therefor having been so mailed, such Defaulted Interest shall be paid to the Persons in whose names the Notes (or their respective Predecessor Notes) are registered at the close of business on such special record date and shall no longer be payable pursuant to the following clause (2) of this Section 2.03.

(2) The Company may make payment of any Defaulted Interest in any other lawful manner not inconsistent with the requirements of any securities exchange or automated quotation system on which the Notes may be listed or designated for issuance, and upon such notice as may be required by such exchange or automated quotation system, if, after notice given by the Company to the Trustee of the proposed payment pursuant to this clause, such manner of payment shall be deemed practicable by the Trustee.

If the Company makes a distribution of property to holders of Common Stock that would be taxable to them as a dividend for United States federal income tax purposes and the Conversion Rate is increased, the Company may offset any withholding tax applicable to non-United States Holders against cash payments of interest payable on the Notes.

Section 2.04. *Execution, Authentication and Delivery of Notes.* The Notes shall be signed in the name and on behalf of the Company by the manual or facsimile signature of any Officer.

At any time and from time to time after the date of the execution and delivery of this Indenture, the Company may, in accordance with the terms of this Indenture, deliver additional Notes executed by the Company to the Trustee for authentication, together with a Company Order for the authentication and delivery of such Notes, and the Trustee in accordance with such Company Order shall authenticate and deliver such Notes, without any further action by the Company hereunder.

Only such Notes as shall bear thereon a certificate of authentication substantially in the form set forth on the Form of Note attached as Exhibit A hereto, executed manually by a Responsible Officer of the Trustee (or an authorized officer of an authenticating agent appointed by the Trustee), shall be entitled to the benefits of this Indenture or be valid or obligatory for any purpose. Such certificate of authentication executed by the Trustee (or such an authenticating agent) upon any Note executed by the Company shall be conclusive evidence that the Note so authenticated has been duly authenticated and delivered hereunder and that the Holder is entitled to the benefits of this Indenture.

All Notes shall be dated that date of their authentication.

In case any Officer of the Company who shall have signed any of the Notes shall cease to be such Officer before the Notes so signed shall have been authenticated and delivered by the Trustee, or disposed of by the Company, such Notes nevertheless may be authenticated and delivered or disposed of as though the Person who signed such Notes had not ceased to be such Officer of the Company; and any Note may be signed on behalf of the Company by such Person as, at the actual date of the execution of such Note, shall be an Officer of the Company, although at the date of the execution of this Indenture any such person was not such an Officer.

The Trustee shall have the right to decline to authenticate and deliver any Notes under this Indenture if the Trustee, being advised by counsel, determines that such action may not lawfully be taken or if the Trustee in good faith shall

determine that such action would expose the Trustee to personal liability to existing Holders.

Section 2.05. *Exchange and Registration of Transfer of Notes; Restrictions on Transfer; Depositary; Automatic Exchange.* (a) The Company shall cause to be kept at the Corporate Trust Office a register (the register maintained in such office or in any other office or agency of the Company being herein sometimes collectively referred to as the “**Note Register**”) in which, subject to such reasonable regulations as it may prescribe, the Company shall provide for the registration of Notes and of transfers of Notes. The Note Register shall be in written form or in any form capable of being converted into written form within a reasonable period of time. The Trustee is hereby appointed “**Note Registrar**” for the purpose of registering Notes and transfers of Notes as herein provided. The Company may appoint a new Note Registrar without prior notice to Holders. The Company may appoint one or more co-registrars.

Upon surrender for registration of transfer of any Note to the Note Registrar or any co-registrar, and satisfaction of the requirements for such transfer set forth in this Section 2.05, the Company shall execute, and the Trustee shall authenticate and deliver, in the name of the designated transferee or transferees, one or more new Notes of any authorized denominations and of a like aggregate principal amount and bearing such restrictive legends as may be required by this Indenture.

Notes may be exchanged for other Notes of any authorized denominations and of a like aggregate principal amount, upon surrender of the Notes to be exchanged at any such office or agency maintained by the Company pursuant to Section 4.05. Whenever any Notes are so surrendered for exchange, the Company shall execute, and the Trustee shall authenticate and deliver, the Notes that the Holder making the exchange is entitled to receive, bearing registration numbers not contemporaneously outstanding.

All Notes presented or surrendered for registration of transfer or for exchange, purchase or conversion shall (if so required by the Company, the Trustee, the Note Registrar or any co-registrar) be duly endorsed, or be accompanied by a written instrument or instruments of transfer in form satisfactory to the Company and duly executed, by the Holder thereof or its attorney-in-fact duly authorized in writing.

No service charge shall be charged by the Company, the Trustee or the Notes Registrar to the Holder for any exchange or registration of transfer of Notes, but the Holder may be required by the Company, the Trustee, the Notes Registrar or otherwise to pay a sum sufficient to cover any tax, assessments or other governmental charges that may be imposed in connection therewith as a result of the name of the Holder of the new Notes issued upon such exchange or

registration of transfer of Notes being different from the name of the Holder of the old Notes presented or surrendered for such exchange or registration of transfer.

None of the Company, the Trustee, the Note Registrar or any co-registrar shall be required to exchange or register a transfer of any Notes surrendered for conversion, redemption or repurchase except for any portion of that Note that is not being repurchased, redeemed or converted, as the case may be.

All Notes issued upon any registration of transfer or exchange of Notes in accordance with this Indenture shall be the valid obligations of the Company, evidencing the same debt, and entitled to the same benefits under this Indenture as the Notes surrendered upon such registration of transfer or exchange. For greater certainty, all Notes issued upon any registration of transfer or exchange of Notes will be issued as evidence of the same continuing indebtedness of the Company under this Indenture and in no circumstances is the Company obligated under the Indenture to repay the principal amount of the exchanged Notes by virtue of the registration of a transfer or exchange.

(b) So long as the Notes are eligible for book-entry settlement with the Depositary, unless otherwise required by law or except as provided in Section 2.05(c), all Notes shall be represented by one or more Notes in global form (each, a “**Global Note**”) registered in the name of the Depositary or the nominee of the Depositary. The transfer and exchange of beneficial interests in a Global Note that does not involve the issuance of a Note in certificated form shall be effected through the Depositary (but not the Trustee or the Custodian) in accordance with this Indenture (including the restrictions on transfer set forth herein) and the procedures of the Depositary therefor. Members of, or participants in, the Depositary (“**Agent Members**”) shall have no rights under this Indenture with respect to any Global Note held on their behalf by the Depositary, or the Trustee as its custodian, or under the Global Note, and the Depositary may be treated by the Company, the Trustee and any agent of the Company or the Trustee as the absolute owner of the Global Note for all purposes whatsoever. Notwithstanding the foregoing, nothing herein shall prevent the Company, the Trustee or any agent of the Company or the Trustee from giving effect to any written certification, proxy or other authorization furnished by the Depositary or impair, as between the Depositary and its Agent Members, the operation of customary practices governing the exercise of the rights of any Holder.

(c) Every Note that bears or is required under this Section 2.05(c) to bear the legend set forth in this Section 2.05(c) (together with any Common Stock issued upon conversion of the Notes and required to bear a similar legend, the “**Restricted Securities**”) shall be subject to the restrictions on transfer set forth in this Section 2.05(c) (including the legend set forth below), and the holder of each such Restricted Security, by such holder’s acceptance thereof, agrees to be bound by all such restrictions on transfer. As used in this Section 2.05(c), the term

“transfer” encompasses any sale, pledge, transfer or other disposition whatsoever of any Restricted Security.

Until the date (the “Resale Restriction Termination Date”) that is the later of (1) the date that is one year after the last date of original issuance of the Notes and (2) such later date, if any, as may be required by applicable laws, any certificate evidencing such Note (and all securities issued in exchange therefor or substitution thereof, and all shares of Common Stock, if any, issued upon conversion thereof, if applicable) shall bear a legend in substantially the following form (unless such Notes or shares of Common Stock, if any, have been transferred pursuant to a registration statement that has become or been declared effective under the Securities Act and that continues to be effective at the time of such transfer, pursuant to the exemption from registration provided by Rule 144 or any similar provision then in force under the Securities Act, or unless otherwise agreed by the Company in writing, with written notice thereof to the Trustee):

THE SALE OF THIS NOTE HAS NOT BEEN REGISTERED UNDER THE U.S. SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), AND ACCORDINGLY, THIS NOTE MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT AS SET FORTH IN THE FOLLOWING SENTENCE. BY ITS ACQUISITION HEREOF, OR OF A BENEFICIAL OWNERSHIP HEREIN, THE ACQUIRER: (I) REPRESENTS THAT IT, AND ANY ACCOUNT FOR WHICH IT IS ACTING, IS A “QUALIFIED INSTITUTIONAL BUYER” (WITHIN THE MEANING OF RULE 144A UNDER THE SECURITIES ACT) AND THAT IT EXERCISES SOLE INVESTMENT DISCRETION WITH RESPECT TO EACH SUCH ACCOUNT, AND (II) AGREES (1) THAT IT WILL NOT WITHIN THE LATER OF (X) ONE YEAR AFTER THE LAST DATE OF ORIGINAL ISSUANCE OF NOTES (INCLUDING THROUGH THE EXERCISE OF THE OPTION TO PURCHASE ADDITIONAL NOTES) AND (Y) 90 DAYS AFTER IT CEASES TO BE AN AFFILIATE (WITHIN THE MEANING OF RULE 144 UNDER THE SECURITIES ACT) OF MANNKIND CORPORATION (THE “COMPANY”), OFFER, RESELL, PLEDGE OR OTHERWISE TRANSFER THE NOTES EVIDENCED HEREBY, THE COMMON STOCK ISSUABLE UPON CONVERSION OF SUCH NOTES OR ANY BENEFICIAL OWNERSHIP HEREIN, EXCEPT: (A) TO THE COMPANY OR ANY SUBSIDIARY THEREOF; (B) UNDER A REGISTRATION STATEMENT THAT HAS BECOME EFFECTIVE UNDER THE SECURITIES ACT; (C) TO A PERSON THE SELLER REASONABLY BELIEVES IS A QUALIFIED INSTITUTIONAL BUYER (AS DEFINED IN RULE 144A UNDER THE SECURITIES ACT) THAT IS PURCHASING FOR ITS OWN ACCOUNT OR FOR THE ACCOUNT OF ANOTHER QUALIFIED INSTITUTIONAL BUYER AND TO WHOM NOTICE IS GIVEN THAT THE TRANSFER IS BEING MADE IN RELIANCE ON RULE 144A, ALL IN COMPLIANCE WITH RULE 144A (IF AVAILABLE); OR (D) UNDER ANY OTHER AVAILABLE

EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT, INCLUDING RULE 144, IF AVAILABLE; AND (2) THAT IT WILL, PRIOR TO ANY TRANSFER OF THIS NOTE WITHIN THE LATER OF (X) SIX MONTHS (OR, IF THE COMPANY HAS NOT SATISFIED THE CURRENT PUBLIC INFORMATION REQUIREMENTS OF RULE 144, ONE YEAR) AFTER THE LAST DATE OF ORIGINAL ISSUANCE OF NOTES (INCLUDING THROUGH THE EXERCISE OF THE OPTION TO PURCHASE ADDITIONAL NOTES) AND (Y) 90 DAYS AFTER IT CEASES TO BE AN AFFILIATE (WITHIN THE MEANING OF RULE 144) OF THE COMPANY, FURNISH TO THE TRUSTEE AND THE COMPANY SUCH CERTIFICATIONS, LEGAL OPINIONS OR OTHER INFORMATION AS THEY MAY REQUIRE AND MAY RELY UPON TO CONFIRM THAT SUCH TRANSFER IS BEING MADE PURSUANT TO AN EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT AND APPLICABLE STATE SECURITIES LAWS. IN ANY EVENT, NO AFFILIATE OF THE COMPANY MAY RESELL THIS NOTE OTHER THAN UNDER A REGISTRATION STATEMENT THAT HAS BECOME EFFECTIVE UNDER THE SECURITIES ACT OR PURSUANT TO AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT IN A TRANSACTION THAT RESULTS IN SUCH NOTE NO LONGER BEING "RESTRICTED SECURITIES" (AS DEFINED UNDER RULE 144). NO REPRESENTATION IS MADE AS TO THE AVAILABILITY OF ANY EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT. EACH PURCHASER AND TRANSFEREE OF A NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF A NOTE WILL BE DEEMED TO HAVE REPRESENTED BY ITS PURCHASE AND HOLDING OF THE NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF THE NOTE THAT (A) ITS PURCHASE AND HOLDING OF THE NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF THE NOTE IS NOT MADE ON BEHALF OF OR WITH "PLAN ASSETS" OF ANY PLAN SUBJECT TO TITLE I OF ERISA, SECTION 4975 OF THE CODE OR ANY SIMILAR LAW OR (B) ITS PURCHASE AND HOLDING OF THE NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF THE NOTE WILL NOT RESULT IN A NON-EXEMPT PROHIBITED TRANSACTION UNDER SECTION 406 OF ERISA, SECTION 4975 OF THE CODE OR ANY SIMILAR LAW.

Any Common Stock issued upon conversion of the Notes prior to the Resale Restriction Termination Date shall bear a similar legend.

No transfer of any Note prior to the Resale Restriction Termination Date will be registered by the Note Registrar unless the applicable box on the Form of Assignment and Transfer has been checked.



Notwithstanding anything to the contrary contained in this Indenture or the Note, such Note (or security issued in exchange or substitution therefor) as to which such restrictions on transfer shall have expired in accordance with their terms may, upon surrender of such Note for exchange to the Note Registrar in accordance with the provisions of this Section 2.05, be exchanged for a new Note or Notes, of like tenor and aggregate principal amount, which shall not bear the restrictive legend required by this Section 2.05(c).

Notwithstanding any other provisions of this Indenture (other than the provisions set forth in this Section 2.05(c)), a Global Note may not be transferred as a whole or in part except by the Depositary to a nominee of the Depositary or by a nominee of the Depositary to the Depositary or another nominee of the Depositary or by the Depositary or any such nominee to a successor Depositary or a nominee of such successor Depositary.

The Depositary shall be a clearing agency registered under the Exchange Act. The Company initially appoints The Depository Trust Company (“DTC”) to act as Depositary with respect to the Global Note. Initially, the Global Notes shall be issued to the Depositary, registered in the name of Cede & Co., as the nominee of the Depositary, and deposited with the Trustee as custodian for DTC.

If (i) the Depositary notifies the Company at any time that the Depositary is unwilling or unable to continue as depositary for the Global Notes and a successor depositary is not appointed within 90 days, (ii) the Depositary ceases to be registered as a clearing agency under the Exchange Act and a successor depositary is not appointed within 90 days or (iii) an Event of Default with respect to the Notes has occurred and is continuing, upon the request of the beneficial owner of the Notes, the Company will execute, and the Trustee, upon receipt of an Officer’s Certificate and a Company Order for the authentication and delivery of Notes, will authenticate and deliver Notes in definitive form to each such beneficial owner of the related Notes (or a portion thereof) in an aggregate principal amount equal to the principal amount of such Global Note, in exchange for such Global Note, and upon delivery of the Global Note to the Trustee such Global Note shall be canceled.

Notes in certificated form issued in exchange for all or a part of the Global Note pursuant to this Section 2.05(c) shall be registered in such names and in such authorized denominations as the Depositary, pursuant to instructions from its direct or indirect participants or otherwise, shall instruct the Trustee. Upon execution and authentication, the Trustee shall deliver such Notes in certificated form to the Persons in whose names such Notes are so registered.

At such time as all interests in a Global Note have been converted, canceled, redeemed, purchased or transferred, such Global Note shall be, upon receipt thereof, canceled by the Trustee in accordance with standing procedures

and instructions existing between the Depositary and the Custodian. At any time prior to such cancellation, if any interest in a Global Note is exchanged for Notes in certificated form, converted, canceled, purchased or transferred to a transferee who receives Notes in certificated form therefor or any Note in certificated form is exchanged or transferred for part of such Global Note, the principal amount of such Global Note shall, in accordance with the standing procedures and instructions existing between the Depositary and the Custodian, be appropriately reduced or increased, as the case may be, and an endorsement shall be made on such Global Note, by the Trustee or the Custodian, at the direction of the Trustee, to reflect such reduction or increase.

None of the Company, the Trustee nor any agent of the Company or the Trustee will have any responsibility or liability for any aspect of the records relating to or payments made on account of beneficial ownership interests of a Global Note or maintaining, supervising or reviewing any records relating to such beneficial ownership interests.

(d) The Company may cause the removal of the legends required by Sections 2.06(c) from any Global Note at any time on or after the Resale Restriction Date by: (i) instructing the Trustee to remove the such legends from such Global Note; (ii) providing to the Trustee and the Depositary written notice to change the CUSIP number for the Notes to the applicable unrestricted CUSIP number; and (iv) complying with any Applicable Procedures for delegending or otherwise exchanging such Global Note for a Global Note not bearing the restrictive legend (including DTC's mandatory exchange process, if applicable); whereupon any legends otherwise required by Section 2.06(c) shall be removed from any Global Notes without any further action on the part of the Holders.

Section 2.06. *Mutilated, Destroyed, Lost or Stolen Notes.* In case any Note shall become mutilated or be destroyed, lost or stolen, the Company in its discretion may execute, and upon its written request the Trustee or an authenticating agent appointed by the Trustee shall authenticate and deliver, a new Note, bearing a number not contemporaneously outstanding, in exchange and substitution for the mutilated Note, or in lieu of and in substitution for the Note so destroyed, lost or stolen. In every case the applicant for a substituted Note shall furnish to the Company, to the Trustee and, if applicable, to the authenticating agent, such security or indemnity as may be required by them to save each of them harmless from any loss, liability, cost or expense caused by or connected with such substitution, and, in every case of destruction, loss or theft, the applicant shall also furnish to the Company, to the Trustee and, if applicable, to the authenticating agent, evidence to their satisfaction of the destruction, loss or theft of such Note and of the ownership thereof.

The Trustee or the authenticating agent, if applicable, may authenticate any such substituted Note and deliver the same upon the receipt of such security

or indemnity as the Trustee, the Company and, if applicable, the authenticating agent may require. Upon the issuance of any substitute Note, the Company or the Trustee may require the payment by the Holder of a sum sufficient to cover any tax, assessment or other governmental charge that may be imposed in relation thereto and any other expenses connected therewith. In case any Note that has matured or is about to mature or has been tendered for redemption or purchase upon a Fundamental Change or is about to be converted shall become mutilated or be destroyed, lost or stolen, the Company may, in its sole discretion, instead of issuing a substitute Note, pay or authorize the payment of or convert or authorize the conversion of the same (without surrender thereof except in the case of a mutilated Note), as the case may be, if the applicant for such payment or conversion shall furnish to the Company, to the Trustee and, if applicable, to the authenticating agent, such security or indemnity as may be required by them to save each of them harmless for any loss, liability, cost or expense caused by or connected with such substitution, and, in every case of destruction, loss or theft, evidence satisfactory to the Company, the Trustee and, if applicable, any Paying Agent or Conversion Agent evidence of their satisfaction of the destruction, loss or theft of such Note and of the ownership thereof.

Every substitute Note issued pursuant to the provisions of this Section 2.06 by virtue of the fact that any Note is destroyed, lost or stolen shall constitute an additional contractual obligation of the Company, whether or not the destroyed, lost or stolen Note shall be found at any time, and shall be entitled to all the benefits of (but shall be subject to all the limitations set forth in) this Indenture equally and proportionately with any and all other Notes duly issued hereunder. To the extent permitted by law, all Notes shall be held and owned upon the express condition that the foregoing provisions are exclusive with respect to the replacement or payment or conversion or purchase of mutilated, destroyed, lost or stolen Notes and shall preclude any and all other rights or remedies, notwithstanding any law or statute existing or hereafter enacted to the contrary with respect to the replacement or payment or conversion of negotiable instruments or other securities without their surrender.

For greater certainty, every substitute Note issued pursuant to the provisions of this Section 2.06 by virtue of the fact that any Note is mutilated, destroyed, lost or stolen will be issued as evidence of the same continuing indebtedness of the Company under this Indenture and in no circumstances is the Company obligated under the Indenture to repay the principal amount of the substituted Note by virtue of such mutilation, destruction or loss.

Section 2.07. *Temporary Notes.* Pending the preparation of Notes in certificated form, the Company may execute and the Trustee or an authenticating agent appointed by the Trustee shall, upon written request of the Company, authenticate and deliver temporary Notes (printed or lithographed). Temporary Notes shall be issuable in any authorized denomination, and substantially in the

form of the Notes in certificated form but with such omissions, insertions and variations as may be appropriate for temporary Notes, all as may be determined by the Company. Every such temporary Note shall be executed by the Company and authenticated by the Trustee or such authenticating agent upon the same conditions and in substantially the same manner, and with the same effect, as the Notes in certificated form. Without unreasonable delay, the Company will execute and deliver to the Trustee or such authenticating agent Notes in certificated form (other than any Global Note) and thereupon any or all temporary Notes (other than any Global Note) may be surrendered in exchange therefor, at each office or agency maintained by the Company pursuant to Section 4.05 and the Trustee or such authenticating agent shall authenticate and deliver in exchange for such temporary Notes an equal aggregate principal amount of Notes in certificated form. Such exchange shall be made by the Company at its own expense and without any charge therefor. Until so exchanged, the temporary Notes shall in all respects be entitled to the same benefits and subject to the same limitations under this Indenture as Notes in certificated form authenticated and delivered hereunder.

For greater certainty, each Note issued pursuant to the provisions of this Section 2.07 in exchange for a temporary Note will be issued as evidence of the same continuing indebtedness of the Company under this Indenture and in no circumstances is the Company obligated under the Indenture to repay the principal amount of the temporary Note by virtue of the exchange.

Section 2.08. *Cancellation of Notes Paid, Etc.* All Notes surrendered for the purpose of payment, purchase, conversion, exchange or registration of transfer, shall, if surrendered to the Company or any Paying Agent or any Note Registrar or any Conversion Agent, be surrendered to the Trustee and promptly canceled by it, or, if surrendered to the Trustee, shall be promptly canceled by it, and no Notes shall be issued in lieu thereof except as expressly permitted by any of the provisions of this Indenture. The Trustee shall dispose of canceled Notes in accordance with its customary procedures and, after such disposition, shall deliver a written confirmation of such disposition to the Company, at the Company's written request. If the Company shall acquire any of the Notes, such acquisition shall not operate as satisfaction of the indebtedness represented by such Notes unless and until the same are delivered to the Trustee for cancellation.

Section 2.09. *CUSIP and ISIN Numbers.* The Company in issuing the Notes may use "CUSIP" and "ISIN" numbers (if then generally in use), and, if so, the Trustee shall use "CUSIP" and "ISIN" numbers in all notices issued to Holders of the Notes as a convenience to such Holders; *provided* that any such notice may state that no representation is made as to the correctness of such numbers either as printed on the Notes or on such notice and that reliance may be placed only on the other identification numbers printed on the Notes. The

Company will promptly notify the Trustee in writing of any change in the “CUSIP” or “ISIN” numbers.

Section 2.10. *Additional Notes; Purchases.* The Company may, without the consent of the Holders of the Notes and notwithstanding Section 2.01, issue additional Notes hereunder with the same terms and with the same CUSIP and ISIN number as the Notes initially issued hereunder in an unlimited aggregate principal amount, which will form the same series with the Notes initially issued hereunder; *provided* that no such additional Notes may be issued unless they would constitute a “qualified reopening” (as defined in Treas. Reg. Sec. 1.1275-2(k)) or both the original Notes and the additional Notes are issued with no more than *de minimis* original issue discount for U.S. federal income tax purposes. Prior to the issuance of any such additional Notes, the Company shall deliver to the Trustee a Company Order, an Officer’s Certificate to the effect that such issuance of additional Notes complies with the provisions of the Indenture (including this Section 2.10). The Company may also from time to time purchase the Notes in open market purchases or negotiated transactions without prior notice to Holders. Any Notes purchased by the Company shall be deemed to be no longer Outstanding under this Indenture.

ARTICLE 3  
SATISFACTION AND DISCHARGE

Section 3.01. *Satisfaction and Discharge.* This Indenture shall upon request of the Company contained in an Officer’s Certificate cease to be of further effect, and the Trustee, at the expense of the Company, shall execute proper instruments acknowledging satisfaction and discharge of this Indenture, when (a) (i) the Company delivers to the Trustee all Outstanding Notes (other than Notes replaced pursuant to Section 2.06) for cancellation; or (ii) the Company has deposited with the Trustee or delivered to Holders of Notes, as applicable, after the Notes have become due and payable, whether at the Maturity Date, or any Fundamental Change Purchase Date, or upon conversion or otherwise, cash and/or (in the case of conversion) shares of Common Stock (together with cash in lieu of fractional shares), as applicable, sufficient to pay all of the Outstanding Notes and all other sums payable under this Indenture by the Company; and (b) the Company has delivered to the Trustee an Officer’s Certificate and an Opinion of Counsel, each stating that all conditions precedent herein provided for relating to the satisfaction and discharge of this Indenture have been complied with. Notwithstanding the satisfaction and discharge of this Indenture, the obligations of the Company to the Trustee under Section 7.06 shall survive such satisfaction and discharge.

Section 3.02. *Deposited Monies To Be Held In Trust.* Subject to Section 3.03 hereof, all monies deposited with the Trustee pursuant to Section 3.01 hereof

shall be held in trust and applied by it to the payment, either directly or through any Paying Agent (including the Company if acting as its own Paying Agent), to the Holders for the payment or repurchase of which such monies have been deposited with the Trustee, of all sums due and to become due thereon for principal, premium, if any, and interest. All monies deposited with the Trustee pursuant to Section 3.01 hereof (and held by it or any Paying Agent) for the payment of Notes subsequently converted shall be returned to the Company upon request of the Company.

Section 3.03. *Return Of Unclaimed Monies.* The Trustee and the Paying Agent shall pay to the Company upon written request any money held by them for the payment of principal of or accrued and unpaid interest on the Notes that remains unclaimed for two years after the date upon which such payment shall have become due. Notwithstanding the foregoing, the Trustee and Paying Agent shall have the right to withhold payment of such money to the Company until the Trustee or Paying Agent at the expense of the Company publishes in a newspaper of general circulation in New York City, or mails to each Holder, a notice stating that such money shall be repaid to the Company if unclaimed after a date no less than 30 days from the publication of such press release or mailing. After payment to the Company by the Trustee or Paying Agent, all liability of the Trustee and the Paying Agent with respect to such money shall cease, and Holders entitled to the money must look to the Company for payment as general creditors, subject to applicable law.

#### ARTICLE 4

##### PARTICULAR COVENANTS OF THE COMPANY

Section 4.01. *Payment of Principal and Interest.* (a) The Company shall promptly make all payments in respect of the Notes on the dates and in the manner provided in the Notes and this Indenture. A payment of principal or interest shall be considered paid on the date it is due if the Paying Agent holds by 10:00 a.m. (New York City time) on that date money or securities, deposited by or on behalf of the Company sufficient to make the payment. The Company shall, to the fullest extent permitted by law, pay interest in immediately available funds on overdue principal amount and interest at the annual rate borne by the Notes compounded semiannually, which interest shall accrue from the date such overdue amount was originally due to the date payment of such amount, including interest thereon, has been made or duly provided for. All such interest shall be payable on demand.

(b) Payment of the principal of and interest, if any, on the Notes shall be made at the office or agency of the Company maintained for that purpose, which shall initially be at the Trustee's Corporate Trust Office, in such coin or currency of the United States of America as at the time of payment is legal tender for

payment of public and private debts; provided, however, that, subject to Section 2.03, the Company may pay principal and interest in respect of any Note in certificated form by check or wire transfer payable in such money. Notwithstanding the foregoing, so long as the Notes are registered in the name of a Depository or its nominee, all payments thereon shall be made by wire transfer of immediately available funds to the account of the Depository or its nominee.

Section 4.02. *Corporate Existence.* Subject to Article 10 hereof, the Company will do or cause to be done all things necessary to preserve and keep in full force and effect its corporate existence and rights (charter and statutory); provided, however, that the Company shall not be required to preserve any such right or franchise if the Company determines that the preservation thereof is no longer desirable in the conduct of the business of the Company and that the loss thereof is not disadvantageous in any material respect to the Holders.

Section 4.03. *Rule 144A Information Requirement and Reports.* (a) At any time the Company is not subject to Sections 13 or 15(d) of the Exchange Act, the Company shall, so long as any of the Notes or any shares of Common Stock issuable upon conversion thereof shall, at such time, constitute “restricted securities” within the meaning of Rule 144(a)(3) under the Securities Act, upon written request, provide to any Holder, beneficial owner or prospective purchaser of such Notes or any shares of Common Stock issued upon conversion of such Notes, the information required to be delivered pursuant to Rule 144A(d)(4) under the Securities Act to facilitate the resale of such Notes or shares of Common Stock pursuant to Rule 144A under the Securities Act.

(b) The Company shall furnish to the Trustee within 15 calendar days after the Company is required to file any documents or reports with the Commission pursuant to Sections 13 or 15(d) of the Exchange Act (giving effect to all applicable grace periods provided under the Exchange Act including that provided by Rule 12b-25 under the Exchange Act) copies of such documents or reports. Any such document or report that the Company files with the Commission through the Commission’s EDGAR system shall be deemed furnished to the Trustee for purposes of this Section 4.03(b) at the time such documents are filed or furnished via the Commission’s EDGAR system, *provided* that the Trustee shall have no responsibility for determining whether such filing has taken place, nor shall the Trustee have any liability for the timeliness or content of any filing or report hereunder.

Section 4.04. *Compliance Certificate.* The Company shall deliver to the Trustee, within 120 days after the end of each fiscal year of the Company (beginning with the fiscal year ending December 31, 2010) an Officer’s Certificate stating whether or not, to the knowledge of such officer, the Company is in default in the performance and observance of any of the terms, provisions and conditions of this Indenture and, if the Company shall be in default,

specifying all such defaults and the nature and status thereof of which they may have knowledge. Within five Business Days of an Officer of the Company coming to have actual knowledge of a Default or Event of Default, regardless of the date, the Company shall deliver an Officer's Certificate to the Trustee specifying such Default or Event of Default and the nature and status thereof.

Section 4.05. *Maintenance of Office or Agency.* So long as any Notes remain Outstanding, the Company agrees to maintain an office or agency with respect to such Notes and at such other location or locations as may be designated as provided in this Section 4.05, where (i) Notes may be presented for conversion ("**Conversion Agent**"), (ii) Notes may be presented for payment ("**Paying Agent**"), (ii) Notes may be presented as herein above authorized for registration of transfer and exchange, and (iii) notices and demands to or upon the Company in respect of the Notes and this Indenture may be given or served, such designation to continue with respect to such office or agency until the Company shall, by written notice signed by any officer authorized to sign an Officer's Certificate and delivered to the Trustee, designate some other office or agency for such purposes or any of them. If at any time the Company shall fail to maintain any such required office or agency or shall fail to furnish the Trustee with the address thereof, such presentations, notices and demands may be made or served at the Corporate Trust Office of the Trustee, and the Company hereby appoints the Trustee as its agent to receive all such presentations, notices and demands. The Company initially appoints the Corporate Trust Office of the Trustee as Conversion Agent and Paying Agent with respect to the Notes.

Section 4.06. *Paying Agents.* (a) If the Company shall appoint one or more paying agents for the Notes, other than the Trustee, the Company will cause each such paying agent to execute and deliver to the Trustee an instrument in which such agent shall agree with the Trustee, subject to the provisions of this Section 4.06:

(i) that it will hold all sums held by it as such agent for the payment of the principal of (and premium, if any) or interest on the Notes (whether such sums have been paid to it by the Company or by any other obligor of such Notes) in trust for the benefit of the Persons entitled thereto;

(ii) that it will give the Trustee notice of any failure by the Company to make any payment of the principal of (and premium, if any) or interest on the Notes when the same shall be due and payable;

(iii) that it will, at any time during the continuance of any failure referred to in the preceding paragraph (a)(ii) above, upon the written request of the Trustee, forthwith pay to the Trustee all sums so held in trust by such paying agent; and



(iv) that it will perform all other duties of paying agent as set forth in this Indenture.

(b) If the Company shall act as its own paying agent with respect to any Notes, it will on or before each due date of the principal of (and premium, if any) or interest on the Notes, set aside, segregate and hold in trust for the benefit of the Persons entitled thereto a sum sufficient to pay such principal (and premium, if any) or interest so becoming due on Notes until such sums shall be paid to such Persons or otherwise disposed of as herein provided and will promptly notify the Trustee of such action, or any failure to take such action. The Trustee shall have no liability or responsibility for the action or inaction of any Paying Agent (that is not the Trustee).

(c) Notwithstanding anything in this Section 4.06 to the contrary, (i) the agreement to hold sums in trust as provided in this Section 4.06 is subject to the provisions of Section 3.02 and Section 3.03, and (ii) the Company may at any time, for the purpose of obtaining the satisfaction and discharge of this Indenture or for any other purpose, pay, or direct any paying agent to pay, to the Trustee all sums held in trust by the Company or such paying agent, such sums to be held by the Trustee upon the same terms and conditions as those upon which such sums were held by the Company or such paying agent; and, upon such payment by the Company or any paying agent to the Trustee, the Company or such paying agent shall be released from all further liability with respect to such money.

Section 4.07. *Appointment to Fill Vacancy in Office of Trustee.* The Company, whenever necessary to avoid or fill a vacancy in the office of Trustee, will appoint, in the manner provided in Section 7.10, a Trustee, so that there shall at all times be a Trustee hereunder.

## ARTICLE 5

### HOLDERS' LISTS AND REPORTS BY THE COMPANY AND THE TRUSTEE

Section 5.01. *Company to Furnish Trustee Names and Addresses of Holders.* The Company will furnish or cause to be furnished to the Trustee (a) within 10 days after each Regular Record Date, a list, in such form as the Trustee may reasonably require, of the names and addresses of the Holders as of such regular record date, provided that the Company shall not be obligated to furnish or cause to furnish such list at any time that the list shall not differ in any respect from the most recent list furnished to the Trustee by the Company and (b) at such other times as the Trustee may request in writing within 30 days after the receipt by the Company of any such request, a list of similar form and content as of a date not more than 15 days prior to the time such list is furnished; provided, however, that, in either case, no such list need be furnished for any Notes for which the Trustee shall be the Note Registrar.

Section 5.02. *Preservation Of Information; Communications With Holders.*

(a) The Trustee shall preserve, in as current a form as is reasonably practicable, all information as to the names and addresses of the Holders of Notes contained in the most recent list furnished to it as provided in Section 5.01 and as to the names and addresses of Holders of Notes received by the Trustee in its capacity as Note Registrar (if acting in such capacity).

(b) The Trustee may destroy any list furnished to it as provided in Section 5.01 upon receipt of a new list so furnished.

(c) The rights of Holders to communicate with other Holders with respect to their rights under this Indenture or under the Notes, and the corresponding rights and duties of the Trustee, shall be as provided by the Trust Indenture Act.

(d) Every Holder, by receiving and holding the same, agrees with the Company and the Trustee that neither the Company nor the Trustee nor any agent of either of them shall be held accountable by reason of any disclosure of information as to names and addresses of Holders made pursuant hereto or otherwise in accordance with the Trust Indenture Act.

Section 5.03. *Reports by the Trustee.*

(a) On or before July 1 in each year, commencing July 1, 2011, in which any of the Notes are Outstanding, the Trustee shall transmit by mail, first class postage prepaid, to the Holders, as their names and addresses appear upon the Note Register, a brief report dated as of the preceding May 1, if and to the extent required under Section 313(a) of the Trust Indenture Act.

(b) The Trustee shall comply with Section 313(b) and 313(c) of the Trust Indenture Act.

(c) A copy of each such report shall, at the time of such transmission to Holders, be filed by the Trustee with the Company, with each securities exchange upon which any Notes are listed (if so listed) and also with the Securities and Exchange Commission. The Company agrees to notify the Trustee when any Notes become listed on any securities exchange.

ARTICLE 6  
DEFAULT AND REMEDIES

Section 6.01. *Events of Default.* An “**Event of Default**” shall occur when any of the following occurs:

- (a) the Company fails to pay when due the principal of or premium, if any, on any of the Notes at the Maturity Date, upon repurchase, redemption, acceleration or otherwise; or
- (b) the Company fails to pay an installment of interest on any of the Notes for 30 days after the date when due; or
- (c) the Company fails to deliver when due all shares of Common Stock, together with cash instead of fractional shares, and/or other property, if applicable, deliverable upon conversion of the Notes pursuant to Article 13, which failure continues for 10 days; or
- (d) the Company fails to perform or observe any other term, covenant or agreement contained in the Notes or this Indenture for a period of 60 days after written notice of such failure, requiring the Company to remedy the same, shall have been given to the Company by the Trustee or to the Company and the Trustee by the Holders of at least 25% in aggregate principal amount of the then-Outstanding Notes; or
- (e) (i) the Company fails to make any payment by the end of the applicable grace period, if any, after the maturity of any indebtedness for borrowed money in an amount in excess of \$25,000,000 or (ii) there is an acceleration of any indebtedness for borrowed money in an amount in excess of \$25,000,000 because of a default with respect to such indebtedness without such indebtedness having been discharged or such acceleration having been cured, waived, rescinded or annulled, in the case of either (i) or (ii) above, for a period of 30 days after written notice to the Company by the Trustee or to the Company and the Trustee by Holders of at least 25% in aggregate principal amount of the then-Outstanding Notes; or
- (f) the Company fails to provide a Fundamental Change Company Notice in accordance with Section 15.01; or
- (g) a court having jurisdiction enters a decree or order under any Bankruptcy Law that: (i) for relief against the Company in an involuntary case or proceeding; or adjudicates the Company bankrupt or insolvent; or (ii) appoints a Receiver of the Company or of any substantial part of its property; or (iii) orders the winding up or liquidation of the Company, and (iv) the decree or order remains unstayed and in effect for a period of 90 days; or

(h) the Company pursuant to or within the meaning of any Bankruptcy Law:

- (i) commences as a debtor a voluntary case or proceeding;
- (ii) consents to the entry of an order for relief against it in an involuntary case or proceeding or the commencement of any case against it;
- (iii) consents to the appointment of a Receiver of it or for all or substantially all of its property;
- (iv) makes a general assignment for the benefit of its creditors;
- (v) files a petition in bankruptcy or answer or consent seeking reorganization or relief; or
- (vi) consents to the filing of such a petition or the appointment of or taking possession by a Receiver.

The term “**Bankruptcy Law**” means Title 11 of the United States Code (or any successor thereto) or any similar federal or state law for the relief of debtors. The term “**Receiver**” means any receiver, trustee, assignee, liquidator, sequestrator or similar official under any Bankruptcy Law.

Section 6.02. *Acceleration of Maturity; Rescission and Annulment.* If an Event of Default with respect to Outstanding Notes (other than an Event of Default specified Section 6.01(g) or 6.01(h) hereof in respect of the Company) occurs and is continuing, the Trustee or the Holders of at least 25% in aggregate principal amount of the then-Outstanding Notes, by written notice to the Trustee, may declare the Notes due and payable at their principal amount plus any accrued and unpaid interest, and thereupon the Trustee may, at its discretion, proceed to protect and enforce the rights of the Holders by the appropriate judicial proceedings. Such declaration may be rescinded and annulled with the written consent of the Holders of a majority in aggregate principal amount of the then-Outstanding Notes, subject to the provisions of this Indenture.

If an Event of Default specified in Section 6.01(g) or 6.01(h) hereof occurs and is continuing, then all unpaid principal of and accrued and unpaid interest on the Outstanding Notes shall become immediately due and payable, without any declaration or other act on the part of the Trustee or any Holder.

Notwithstanding the foregoing, at the election of the Company, the sole remedy for an Event of Default specified in Section 6.01(d) relating to the failure by the Company to comply with its reporting obligations under Section 4.03 and for any failure to comply with the requirements of Section 314(a)(1) of the Trust

Indenture Act, shall (i) for the first 90 days after the occurrence of such an Event of Default, consist exclusively of the right to receive special interest on Notes (the “**Special Interest**”) at an annual rate equal to 0.25% of the principal amount of the Outstanding Notes, and (ii) for the next 90 days after the expiration of such 90 day period, consist exclusively of the right to receive Special Interest on the Notes at an annual rate equal to 0.50% of the principal amount of the Outstanding Notes.

The Special Interest shall be paid semi-annually in arrears, with the first semi-annual payment due on the first Interest Payment Date following the date on which the Special Interest began to accrue on any Notes. The Special Interest will accrue on all Outstanding Notes from and including the date on which an Event of Default relating to a failure to comply with the reporting obligations under Section 4.03 or a failure to comply with the requirements of Section 314(a)(1) of the Trust Indenture Act first occurs to but not including the 180th day thereafter (or such earlier date on which the Event of Default relating to such reporting obligations shall have been cured or waived). On such 180th day (or earlier, if such Event of Default is cured or waived pursuant to Section 6.04 prior to such 180th day), such Special Interest will cease to accrue and, if such Event of Default relating to such reporting obligations has not been cured or waived prior to such 180th day the Notes shall be subject to acceleration as provided above in this Section 6.02. The provisions described in this paragraph shall not affect the rights of the Holders in the event of the occurrence of any other Event of Default. In the event the Company does not elect to pay Special Interest upon an Event of Default in accordance with this paragraph, the Notes will be subject to acceleration as provided in this Section 6.02. If the Company elects to pay Special Interest as the sole remedy for an Event of Default specified in Section 6.01(d) relating to the failure by the Company to comply with its obligations under Section 4.03 or any failure to comply with the requirements of Section 314(a)(1) of the Trust Indenture Act, the Company shall notify in writing, in the manner provided for in Section 17.03, the Holders and the Trustee of such election at any time on or before the close of business on the date on which such Event of Default first occurs.

The Holders of a majority in aggregate principal amount of the then-Outstanding Notes by written notice to the Trustee may rescind and annul an acceleration and its consequences if:

- (1) all existing Events of Default, other than the nonpayment of principal (including the Redemption Price and the Fundamental Change Purchase Price, if applicable) or of interest on the Notes which has become due solely because of the acceleration, have been remedied, cured or waived, and
- (2) the rescission would not conflict with any judgment or decree of a court of competent jurisdiction;

*provided, however*, that in the event such declaration of acceleration has been made based on the existence of an Event of Default under Section 6.01(e) hereof and such Event of Default has been remedied, cured or waived in accordance with Section 6.01(e) hereof, then, without any further action by the Holders, such declaration of acceleration shall be rescinded automatically and the consequences of such declaration shall be annulled. No such rescission or annulment shall affect any subsequent Default or impair any right consequent thereon.

Section 6.03. *Other Remedies*. If an Event of Default with respect to Outstanding Notes occurs and is continuing, the Trustee may pursue any available remedy by proceeding at law or in equity to collect the payment of principal of or interest on the Notes or to enforce the performance of any provision of the Notes.

Section 6.04. *Waiver of Past Defaults*. The Holders, either (a) through the written consent of not less than a majority in aggregate principal amount of the Notes then Outstanding or (b) by the adoption of a resolution, at a meeting of Holders of the Notes then Outstanding at which a quorum is present, by the Holders of at least a majority in aggregate principal amount of the Outstanding Notes represented at such meeting, may, on behalf of the Holders of all of the Notes, waive an existing Default or Event of Default, except a Default or Event of Default:

- (1) in the payment of the principal of or premium, if any, or interest on any Note;
- (2) in respect of the right to convert any Note in accordance with Article 13; or
- (3) in respect of the covenants or provisions hereof which, under Section 9.02 hereof, cannot be modified or amended without the consent of the Holder of each Outstanding Note affected.

Upon any such waiver, such Default shall cease to exist, and any Event of Default arising therefrom shall be deemed to have been cured, for every purpose of this Indenture; provided, however, that no such waiver shall extend to any subsequent or other Default or impair any right consequent thereon.

Section 6.05. *Control by Majority*. The Holders, either (a) through the written consent of not less than a majority in aggregate principal amount of the Notes then Outstanding, or (b) by the adoption of a resolution, at a meeting of Holders of the Notes then Outstanding at which a quorum is present, by the Holders of at least a majority in aggregate principal amount of the Outstanding Notes represented at such meeting, shall have the right to direct the time, method and place of conducting any proceeding for any remedy available to the Trustee

or exercising any trust or power conferred on the Trustee, subject to the provisions of this Indenture. However, the Trustee may refuse to follow any direction that:

- (a) conflicts with any law or with this Indenture,
- (b) the Trustee determines may be unduly prejudicial to the rights of the Holders not joining therein, or
- (c) in the Trustee's reasonable judgment may expose the Trustee to personal liability.

The Trustee may take any other action deemed proper by the Trustee which is not inconsistent with such direction.

Section 6.06. *Limitation On Suit.* No Holder of any Note may pursue any remedy with respect to this Indenture or the Notes (including instituting any proceeding, judicial or otherwise, with respect to this Indenture or for the appointment of a receiver or trustee), except, in the case of a Default or Event of Default in the payment of the principal of or premium on, if any, or interest on the Notes unless:

- (a) such Holder has previously given written notice to the Trustee of an Event of Default that is continuing;
- (b) the Holders of at least 25% in aggregate principal amount of the Notes then Outstanding shall have made a written request to the Trustee, and shall have offered to the Trustee indemnity satisfactory to the Trustee, to pursue the remedy;
- (c) no direction inconsistent with such written request has been given to the Trustee by the Holders of a majority in aggregate principal amount of the Notes then Outstanding (or such amount as shall have acted at a meeting pursuant to the provisions of this Indenture);
- (d) such Holder or Holders have offered the Trustee security or indemnity satisfactory to the Trustee against any costs, liabilities or expenses incurred in complying with such request; and
- (e) the Trustee has failed to comply with the request for 60 days after the receipt of such request and an offer of indemnity.

A Holder of Notes may not use this Indenture to prejudice the rights of another Holder of Notes or to obtain a preference or priority over another Holder of Notes (it being understood that the Trustee does not have an affirmative duty to

ascertain whether or not such actions or forbearances are unduly prejudicial to such Holders).

Section 6.07. *Unconditional Rights of Holders to Receive Payment and to Convert.* In addition to the other rights and remedies set forth in this Article 6, the following shall apply with respect to the Notes under this Indenture.

Notwithstanding any other provision in this Indenture, the Holder of any Note shall have the right, which is absolute and unconditional, to receive payment of the principal amount (including the Redemption Price and the Fundamental Change Purchase Price, if applicable), interest, the Make-Whole Payment, if any, and Fundamental Change Make-Whole Premium, if any, in respect of the Notes held by such Holder, on or after the respective due dates expressed in the Notes and this Indenture, and to convert such Note in accordance with Article 13, and to bring suit for the enforcement of any such payment on or after such respective due dates or for the right to convert in accordance with Article 13, and shall not be impaired or affected without the consent of such Holder.

Section 6.08. *Collection of Indebtedness and Suits For Enforcement By the Trustee.* The Company covenants that if an Event of Default occurs under Section 6.01(a) or Section 6.01(b), then the Company shall, upon demand of the Trustee, pay to it, for the benefit of the Holders of such Notes, the whole amount then due and payable (as expressed therein or as a result of any acceleration effected pursuant to Section 6.02 hereof) on such Notes for principal (including the Redemption Price and Fundamental Change Purchase Price, if applicable) and premium, if any, and interest and, to the extent that payment of such interest shall be legally enforceable, interest on any overdue principal (including the Redemption Price and the Fundamental Change Purchase Price, if applicable) and premium, if any, and on any overdue interest, in each case at the rate borne by the Notes from the required payment date, and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel.

If the Company fails to pay such amounts forthwith upon such demand, the Trustee, in its own name and as trustee of an express trust, may institute a judicial proceeding for the collection of the sums so due and unpaid, may prosecute such proceeding to judgment or final decree and may enforce the same against the Company and collect the moneys adjudged or decreed to be payable in the manner provided by law out of the property of the Company, wherever situated.

If an Event of Default occurs and is continuing, the Trustee may in its discretion proceed to protect and enforce its rights and the rights of the Holders of Notes by such appropriate judicial proceedings as the Trustee shall deem most



effectual to protect and enforce any such rights, whether for the specific enforcement of any covenant or agreement in this Indenture or in aid of the exercise of any power granted herein, or to enforce any other proper remedy.

Section 6.09. *Trustee May File Proofs of Claim.* In case of the pendency of any receivership, insolvency, liquidation, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceeding relative to the Company or the property of the Company or its creditors, the Trustee (irrespective of whether the principal of the Notes shall then be due and payable as therein expressed or by declaration or otherwise and irrespective of whether the Trustee shall have made any demand on the Company for the payment of overdue principal or interest) shall be entitled and empowered, by intervention in such proceeding or otherwise, (1) to file and prove a claim for the whole amount of principal (including the Redemption Price and the Fundamental Change Purchase Price, if applicable) and premium, if any, and interest owing and unpaid in respect of the Notes and to file such other papers or documents as may be necessary or advisable in order to have the claims of the Trustee (including any claim for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel, and any other amounts due to the Trustee hereunder) and of the Holders of Notes allowed in such judicial proceeding, and (2) to collect and receive any moneys or other property payable or deliverable on any such claim and to distribute the same; and any custodian, receiver, assignee, trustee, liquidator, sequestrator or other similar official in any such judicial proceedings is hereby authorized by each Holder of Notes to make such payments to the Trustee and, in the event that the Trustee shall consent to the making of such payments directly to the Holders of Notes, to pay to the Trustee any amount due to it for the reasonable compensation, expenses, disbursements and advances of the Trustee, its agents and counsel and any other amounts due the Trustee under this Indenture.

Nothing contained herein shall be deemed to authorize the Trustee to authorize or consent to or accept, or adopt on behalf of any Holder of a Note, any plan of reorganization, arrangement, adjustment or composition affecting the Notes or the rights of any Holder thereof or to authorize the Trustee to vote in respect of the claim of any Holder of a Note in any such proceeding.

Section 6.10. *Restoration of Rights and Remedies.* If the Trustee or any Holder of a Note has instituted any proceeding to enforce any right or remedy under this Indenture and such proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the Trustee or to such Holder, then and in every such case, subject to any determination in such proceeding, the Company, the Trustee and the Holders of Notes shall be restored severally and respectively to their former positions hereunder and thereafter all rights and remedies of the Trustee and the Holders shall continue as though no such proceeding had been instituted.

Section 6.11. *Rights and Remedies Cumulative.* Except as otherwise provided with respect to the replacement or payment of mutilated, destroyed, lost or stolen Notes in Section 2.05(d), no right or remedy conferred in this Indenture upon or reserved to the Trustee or to the Holders of Notes is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder or hereafter existing at law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

Section 6.12. *Delay or Omission Not Waiver.* No delay or omission of the Trustee or of any Holder of any Note to exercise any right or remedy accruing upon any Event of Default shall impair any such right or remedy or constitute a waiver of any such Event of Default or any acquiescence therein. Every right and remedy given by this Article or by law to the Trustee or to the Holders of Notes may be exercised from time to time, and as often as may be deemed expedient, by the Trustee or by the Holders of Notes, as the case may be.

Section 6.13. *Application of Money Collected.* Any money and property collected by the Trustee pursuant to this Article 6 shall be applied in the following order, at the date or dates fixed by the Trustee and, in case of the distribution of such money and property on account of principal (including the Redemption Price and the Fundamental Change Purchase Price, if applicable) or premium, if any, or interest, upon presentation of the Notes and the notation thereon of the payment if only partially paid and upon surrender thereof if fully paid:

FIRST: To the payment of all amounts due the Trustee, including its agents and counsel;

SECOND: To the payment of the amounts then due and unpaid for principal (including the Redemption Price and the Fundamental Change Purchase Price, if applicable) of and premium, if any, and interest on the Notes and coupons in respect of which or for the benefit of which such money has been collected, ratably, without preference or priority of any kind, according to the amounts due and payable on such Notes for principal (including the Redemption Price and the Fundamental Change Purchase Price, if applicable) and premium, if any, and interest, respectively; and

THIRD: Any remaining amounts shall be repaid to the Company.

Section 6.14. *Undertaking For Costs.* All parties to this Indenture agree, and each Holder of any Note by such Holder's acceptance thereof shall be deemed to have agreed, that any court may in its discretion require, in any suit for the enforcement of any right or remedy under this Indenture, or in any suit against

the Trustee for any action taken, suffered or omitted by it as Trustee, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant; but the provisions of this Section 6.14 shall not apply to any suit instituted by the Company, to any suit instituted by the Trustee, to any suit instituted by any Holder, or group of Holders, holding in the aggregate more than 10% in aggregate principal amount of the Notes then Outstanding, or to any suit instituted by any Holder of any Note for the enforcement of the payment of the principal (including the Redemption Price and the Fundamental Change Purchase Price, if applicable) of or premium, if any, or interest on any Note on or after the stated maturity expressed in such Note ( or in the case of a redemption, on or after the Redemption Date or, in the case of exercise of a repurchase right in connection with a Fundamental Change, on or after the Fundamental Change Purchase Date) or for the enforcement of the right to convert any Note in accordance with Article 13.

Section 6.15. *Waiver of Stay or Extension Laws.* The Company covenants (to the extent that it may lawfully do so) that it will not at any time insist upon, or plead, or in any manner whatsoever claim to take the benefit or advantage of, any stay or extension law wherever enacted, now or at any time hereafter in force, which may affect the covenants or the performance of this Indenture; and the Company (to the extent that it may lawfully do so) hereby expressly waives all benefit or advantage of any such law and covenants that it will not hinder, delay or impede the execution of any power herein granted to the Trustee, but will suffer and permit the execution of every such power as though no such law had been enacted.

Section 6.16. *Notice of Default.* If any Default or any Event of Default occurs and is continuing and if such Default or Event of Default is actually known to a Responsible Officer of the Trustee, the Trustee shall within 90 days of the occurrence of a Default or Event of Default, mail to each Holder notice of all uncured Defaults or Events of Default known to the Trustee, unless such Default or Event of Default has been cured; provided, however, that, except in the case of a default in the payment of the principal of (including upon redemption or repurchase, as applicable) or premium, if any, or interest on any Note, the Trustee shall be protected in withholding such notice if the Trustee in good faith determines that the withholding of such notice is in the best interest of such Holders.

ARTICLE 7  
CONCERNING THE TRUSTEE

Section 7.01. *Certain Duties and Responsibilities of Trustee.*

(a) The Trustee, prior to the occurrence of an Event of Default and after the curing of all Events of Default that may have occurred, shall undertake to perform with respect to the Notes such duties and only such duties as are specifically set forth in this Indenture, and no implied covenants shall be read into this Indenture against the Trustee. In case an Event of Default has occurred (that has not been cured or waived), the Trustee shall exercise with respect to the Notes such of the rights and powers vested in it by this Indenture, and use the same degree of care and skill in their exercise, as a prudent person would exercise or use under the circumstances in the conduct of his or her own affairs.

(b) No provision of this Indenture shall be construed to relieve the Trustee from liability for its own negligent action, its own negligent failure to act, or its own willful misconduct, except that:

(i) prior to the occurrence of an Event of Default and after the curing or waiving of all such Events of Default that may have occurred:

(A) the duties and obligations of the Trustee shall with respect to the Notes be determined solely by the express provisions of this Indenture, and the Trustee shall not be liable with respect to the Notes except for the performance of such duties and obligations as are specifically set forth in this Indenture and subject to the terms of this Indenture, and no implied covenants or obligations shall be read into this Indenture against the Trustee; and

(B) in the absence of bad faith on the part of the Trustee, the Trustee may with respect to the Notes conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture; but in the case of any such certificates or opinions that by any provision hereof are specifically required to be furnished to the Trustee, the Trustee shall be under a duty to examine the same to determine whether or not they conform to the requirements of this Indenture;

(ii) the Trustee shall not be liable for any error of judgment made in good faith by a Responsible Officer or Responsible Officers of

the Trustee, unless it shall be proved that the Trustee was negligent in ascertaining the pertinent facts;

(iii) the Trustee shall not be liable with respect to any action taken or omitted to be taken by it in good faith in accordance with the direction of the Holders of not less than a majority in principal amount of the Notes at the time Outstanding relating to the time, method and place of conducting any proceeding for any remedy available to the Trustee, or exercising any trust or power conferred upon the Trustee under this Indenture with respect to the Notes; and

(iv) None of the provisions contained in this Indenture shall require the Trustee to expend or risk its own funds or otherwise incur personal financial liability in the performance of any of its duties or in the exercise of any of its rights or powers if there is reasonable ground for believing that the repayment of such funds or liability is not reasonably assured to it under the terms of this Indenture or adequate indemnity against such risk is not reasonably assured to it.

Section 7.02. *Certain Rights of Trustee.* Except as otherwise provided in Section 7.01:

(a) the Trustee may rely conclusively and shall be protected in acting or refraining from acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, bond, security or other paper or document believed by it to be genuine and to have been signed or presented by the proper party or parties;

(b) any request, direction, order or demand of the Company mentioned herein shall be sufficiently evidenced by a Board Resolution or an instrument signed in the name of the Company by any authorized officer of the Company (unless other evidence in respect thereof is specifically prescribed herein);

(c) the Trustee may consult with counsel and the written advice of such counsel or any Opinion of Counsel shall be full and complete authorization and protection in respect of any action taken or suffered or omitted hereunder in good faith and in reliance thereon;

(d) the Trustee shall be under no obligation to exercise any of the rights or powers vested in it by this Indenture at the request, order or direction of any of the Holders pursuant to the provisions of this Indenture, unless such Holders shall have offered the Trustee security or indemnity satisfactory to the Trustee against the costs, expenses and liabilities that may be incurred therein or thereby;

(e) the Trustee shall not be liable for any action taken or omitted to be taken by it in good faith and believed by it to be authorized or within the discretion or rights or powers conferred upon it by this Indenture;

(f) the Trustee shall not be bound to make any investigation into the facts or matters stated in any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order, approval, bond, security, or other papers or documents, unless requested in writing so to do by the Holders of not less than a majority in principal amount of the Outstanding Notes affected thereby (determined as provided in Section 8.04); *provided, however*, that if the payment within a reasonable time to the Trustee of the costs, expenses or liabilities likely to be incurred by it in the making of such investigation is, in the opinion of the Trustee, not reasonably assured to the Trustee by the security afforded to it by the terms of this Indenture, the Trustee may require reasonable indemnity against such costs, expenses or liabilities as a condition to so proceeding. The reasonable expense of every such examination shall be paid by the Company or, if paid by the Trustee, shall be repaid by the Company upon demand;

(g) the Trustee may execute any of the trusts or powers hereunder or perform any duties hereunder either directly or by or through agents, attorneys or other professionals or consultants and may retain such parties in furtherance of its administration hereunder and the Trustee shall not be responsible for any misconduct or negligence on the part of any such agent, attorney or other professional appointed with due care by it hereunder;

(h) in no event shall the Trustee be responsible or liable for special, indirect, punitive or consequential loss or damage of any kind whatsoever (including, but not limited to, loss of profit) irrespective of whether the Trustee has been advised of the likelihood of such loss or damage and regardless of the form of action;

(i) the rights, privileges, protections, immunities and benefits given to the Trustee, including, without limitation, its right to be indemnified, are extended to, and shall be enforceable by, the Trustee in each of its capacities hereunder, and each agent, custodian and other Person employed to act hereunder;

(j) the Trustee shall not be required to give any bond or surety in respect of the performance of its powers and duties hereunder; and

(k) the Trustee may request that the Company deliver a certificate setting forth the names of individuals and/or titles of officers authorized at such time to take specified actions pursuant to this Indenture.

In addition, the Trustee shall not be deemed to have knowledge of any Default or Event of Default except (1) any Event of Default occurring pursuant to

Section 6.01(a) and 6.01(b)) or (2) any Default or Event of Default of which the Trustee shall have received written notification in the manner set forth in this Indenture or a Responsible Officer of the Trustee shall have obtained actual knowledge. Delivery of reports, information and documents to the Trustee under Section 4.03 is for informational purposes only and the information and the Trustee's receipt of the foregoing shall not constitute constructive notice of any information contained therein, or determinable from information contained therein including the Company's compliance with any of their covenants thereunder (as to which the Trustee is entitled to rely conclusively on an Officer's Certificate).

Section 7.03. *Trustee Not Responsible for Recitals or Issuance or Notes.*

(a) The recitals contained herein and in the Notes shall be taken as the statements of the Company, and the Trustee assumes no responsibility for the correctness of the same.

(b) The Trustee makes no representations as to the validity or sufficiency of this Indenture or of the Notes;

(c) The Trustee shall not be accountable for the use or application by the Company of any of the Notes or of the proceeds of such Notes, or for the use or application of any moneys paid over by the Trustee in accordance with any provision of this Indenture, or for the use or application of any moneys received by any Paying Agent other than the Trustee, acting in such capacity.

Section 7.04. *May Hold Notes.* The Trustee or any Paying Agent or Note Registrar, in its individual or any other capacity, may become the owner or pledgee of Notes with the same rights it would have if it were not Trustee, Paying Agent or Note Registrar.

Section 7.05. *Moneys Held in Trust.* Subject to the provisions of Section 3.03, all moneys received by the Trustee shall, until used or applied as herein provided, be held in trust for the purposes for which they were received, but need not be segregated from other funds except to the extent required by law. The Trustee shall be under no liability for interest on any moneys received by it hereunder except such as it may agree to in writing with the Company to pay thereon.

Section 7.06. *Compensation and Reimbursement.*

(a) The Company covenants and agrees to pay to the Trustee, and the Trustee shall be entitled to, such compensation (which shall not be limited by any provision of law in regard to the compensation of a trustee of an express trust) as the Company and the Trustee may from time to time agree in writing, for all

services rendered by it in the execution of the trusts hereby created and in the exercise and performance of any of the powers and duties hereunder of the Trustee, and, except as otherwise expressly provided herein, the Company will pay or reimburse the Trustee upon its request for all reasonable expenses, disbursements and advances incurred or made by the Trustee in accordance with any of the provisions of this Indenture (including the reasonable compensation and the expenses and disbursements of its counsel and of all Persons not regularly in its employ), except any such expense, disbursement or advance as may arise from its negligence or bad faith and except as the Company and Trustee may from time to time agree in writing. The Company also covenants to indemnify the Trustee (and its officers, agents, directors and employees) for, and to hold it harmless against, any loss, liability or expense incurred without negligence or bad faith on the part of the Trustee and arising out of or in connection with the acceptance or administration of this trust, including the reasonable costs and expenses of defending itself against any claim of liability in the premises.

(b) The obligations of the Company under this Section 7.06 to compensate and indemnify the Trustee and to pay or reimburse the Trustee for reasonable expenses, disbursements and advances shall constitute additional indebtedness hereunder. Such additional indebtedness shall be secured by a lien prior to that of the Notes upon all property and funds held or collected by the Trustee as such, except funds held in trust for the benefit of the Holders.

(c) The Company covenants and agrees to indemnify the Trustee for, and hold it harmless from and against, any loss, liability or expense reasonably incurred by it arising out of or in connection with the acceptance or administration of the trust or trusts hereunder or the performance of its duties hereunder, including the reasonable costs and expenses of defending itself against any claim or liability in connection with the exercise or performance of any of its powers or duties hereunder except to the extent any such loss, liability or expense may be attributable to its negligence, willful misconduct or bad faith.

(d) In addition and without prejudice to the rights provided to the Trustee under any of the provisions of this Indenture, when the Trustee incurs expenses or renders services in connection with an Event of Default specified in Section 6.01(g) or Section 6.01(h), the expenses (including the reasonable charges and expenses of its counsel) and the compensation for the services are intended to constitute expenses of administration under any applicable Federal and State bankruptcy, insolvency or other similar law.

(e) The Company's obligations under this Section 7.06 and the lien referred to in Section 7.06(b) shall survive the resignation or removal of the Trustee, the discharge of the Company's obligations under Article Eleven of this Indenture and/or the termination of this Indenture.



Section 7.07. *Reliance on Officer's Certificate and Opinions.* Except as otherwise provided in Section 7.01, whenever in the administration of the provisions of this Indenture the Trustee shall deem it reasonably necessary or desirable that a matter be proved or established prior to taking or suffering or omitting to take any action hereunder, such matter (unless other evidence in respect thereof be herein specifically prescribed) may, in the absence of negligence or bad faith on the part of the Trustee, be deemed to be conclusively proved and established by an Officer's Certificate and Opinion of Counsel delivered to the Trustee and such certificate or opinion, in the absence of negligence or bad faith on the part of the Trustee, shall be full warrant to the Trustee for any action taken, suffered or omitted to be taken by it under the provisions of this Indenture upon the faith thereof.

Section 7.08. *Disqualification; Conflicting Interests.* If the Trustee has or shall acquire any "conflicting interest" within the meaning of Section 310(b) of the Trust Indenture Act.

Section 7.09. *Corporate Trustee Required; Eligibility.* There shall at all times be a Trustee with respect to the Notes issued hereunder which shall at all times be a corporation organized and doing business under the laws of the United States of America or any state or territory thereof or of the District of Columbia, or a corporation or other Person permitted to act as trustee by the Securities and Exchange Commission, authorized under such laws to exercise corporate trust powers, having a combined capital and surplus of at least fifty million U.S. dollars (\$50,000,000), and subject to supervision or examination by federal, state, territorial, or District of Columbia authority.

If such corporation or other Person publishes reports of condition at least annually, pursuant to law or to the requirements of the aforesaid supervising or examining authority, then for the purposes of this Section 7.09, the combined capital and surplus of such corporation or other Person shall be deemed to be its combined capital and surplus as set forth in its most recent report of condition so published. The Company may not, nor may any Person directly or indirectly controlling, controlled by, or under common control with the Company, serve as Trustee. In case at any time the Trustee shall cease to be eligible in accordance with the provisions of this Section 7.09, the Trustee shall resign immediately in the manner and with the effect specified in Section 7.10.

Section 7.10. *Resignation and Removal; Appointment of Successor.*

(a) The Trustee or any successor hereafter appointed may at any time resign with respect to the Notes by giving written notice thereof to the Company. Upon receiving such notice of resignation, the Company shall promptly appoint a successor trustee with respect to the Notes by written instrument, in duplicate, executed by order of the Board of Directors, one copy of which instrument shall

be delivered to the resigning Trustee and one copy to the successor trustee. If no successor trustee shall have been so appointed and have accepted appointment within 30 days after the mailing of such notice of resignation, the resigning Trustee, at the expense of the Company, may petition any court of competent jurisdiction for the appointment of a successor trustee with respect to the Notes, or any Holder who has been a bona fide Holder of Notes for at least six months may on behalf of himself and all others similarly situated, petition any such court for the appointment of a successor trustee. Such court may thereupon after such notice, if any, as it may deem proper and prescribe, appoint a successor trustee.

(b) In case at any time any one of the following shall occur:

(i) the Trustee shall fail to comply with the provisions of Section 7.08 after written request therefor by the Company or by any Holder who has been a bona fide Holder of Notes for at least six months;

(ii) the Trustee shall cease to be eligible in accordance with the provisions of Section 7.09 and shall fail to resign after written request therefor by the Company or by any such Holder; or

(iii) the Trustee shall become incapable of acting, or shall be adjudged a bankrupt or insolvent, or commence a voluntary bankruptcy proceeding, or a receiver of the Trustee or of its property shall be appointed or consented to, or any public officer shall take charge or control of the Trustee or of its property or affairs for the purpose of rehabilitation, conservation or liquidation,

then, in any such case, the Company may remove the Trustee with respect to the Notes and appoint a successor trustee by written instrument, in duplicate, executed by order of the Board of Directors, one copy of which instrument shall be delivered to the Trustee so removed and one copy to the successor trustee, or any Holder who has been a bona fide Holder of Notes for at least six months may, on behalf of that Holder and all others similarly situated, petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor trustee. Such court may thereupon after such notice, if any, as it may deem proper and prescribe, remove the Trustee and appoint a successor trustee.

(c) The Holders of a majority in aggregate principal amount of the Notes at the time Outstanding may at any time remove the Trustee by so notifying the Trustee and the Company in writing and may appoint a successor Trustee with the consent of the Company.

(d) Any resignation or removal of the Trustee and appointment of a successor trustee with respect to the Notes pursuant to any of the provisions of

this Section 7.10 shall become effective upon acceptance of appointment by the successor trustee as provided in Section 7.11.

*Section 7.11. Acceptance of Appointment By Successor.*

(a) In case of the appointment hereunder of a successor trustee with respect to all Notes, every such successor trustee so appointed shall execute, acknowledge and deliver to the Company and to the retiring Trustee an instrument accepting such appointment, and thereupon the resignation or removal of the retiring Trustee shall become effective and such successor trustee, without any further act, deed or conveyance, shall become vested with all the rights, powers, trusts and duties of the retiring Trustee; but, on the request of the Company or the successor trustee, such retiring Trustee shall, upon payment of its charges, execute and deliver an instrument transferring to such successor trustee all the rights, powers, and trusts of the retiring Trustee and shall duly assign, transfer and deliver to such successor trustee all property and money held by such retiring Trustee hereunder. The trustee shall have no liability or responsibility for the action or inaction of any successor Trustee.

(b) In case of the appointment hereunder of a successor trustee with respect to some, but not all of the Notes, the Company, the retiring Trustee and each successor trustee with respect to such Notes shall execute and deliver an indenture supplemental hereto wherein each successor trustee shall accept such appointment and which (i) shall contain such provisions as shall be necessary or desirable to transfer and confirm to, and to vest in, each successor trustee all the rights, powers, trusts and duties of the retiring Trustee with respect to the Notes to which the appointment of such successor trustee relates, (ii) shall contain such provisions as shall be deemed necessary or desirable to confirm that all the rights, powers, trusts and duties of the retiring Trustee with respect to the Notes as to which the retiring Trustee is not retiring shall continue to be vested in the retiring Trustee, and (iii) shall add to or change any of the provisions of this Indenture as shall be necessary to provide for or facilitate the administration of the trusts hereunder by more than one Trustee, it being understood that nothing herein or in such supplemental indenture shall constitute such Trustees co-trustees of the same trust, that each such Trustee shall be trustee of a trust or trusts hereunder separate and apart from any trust or trusts hereunder administered by any other such Trustee and that no Trustee shall be responsible for any act or failure to act on the part of any other Trustee hereunder; and upon the execution and delivery of such supplemental indenture the resignation or removal of the retiring Trustee shall become effective to the extent provided therein, such retiring Trustee shall with respect to the Notes to which the appointment of such successor trustee relates have no further responsibility for the exercise of rights and powers or for the performance of the duties and obligations vested in the Trustee under this Indenture, and each such successor trustee, without any further act, deed or conveyance, shall become vested with all the rights, powers, trusts and duties of

the retiring Trustee with respect to the Notes to which the appointment of such successor trustee relates; but, on request of the Company or any successor trustee, such retiring Trustee shall duly assign, transfer and deliver to such successor trustee, to the extent contemplated by such supplemental indenture, the property and money held by such retiring Trustee hereunder with respect to the Notes to which the appointment of such successor trustee relates.

(c) Upon request of any such successor trustee, the Company shall execute any and all instruments for more fully and certainly vesting in and confirming to such successor trustee all such rights, powers and trusts referred to in paragraph (a) or (b) of this Section 7.11, as the case may be.

(d) No successor trustee shall accept its appointment unless at the time of such acceptance such successor trustee shall be qualified and eligible under this Article 7.

(e) Upon acceptance of appointment by a successor trustee as provided in this Section 7.11, the Company shall transmit notice of the succession of such trustee hereunder by mail, first class postage prepaid, to the Holders, as their names and addresses appear upon the Note Register. If the Company fails to transmit such notice within ten days after acceptance of appointment by the successor trustee, the successor trustee shall cause such notice to be transmitted at the expense of the Company.

Section 7.12. *Merger, Conversion, Consolidation or Succession to Business.* Any corporation into which the Trustee may be merged or converted or with which it may be consolidated, or any corporation resulting from any merger, conversion or consolidation to which the Trustee shall be a party, or any corporation succeeding to the corporate trust business of the Trustee, shall be the successor of the Trustee hereunder, provided that such corporation shall be qualified under the provisions of Section 7.08 and eligible under the provisions of Section 7.09, without the execution or filing of any paper or any further act on the part of any of the parties hereto, anything herein to the contrary notwithstanding. In case any Notes shall have been authenticated, but not delivered, by the Trustee then in office, any successor by merger, conversion or consolidation to such authenticating Trustee may adopt such authentication and deliver the Notes so authenticated with the same effect as if such successor Trustee had itself authenticated such Notes.

Section 7.13. *Preferential Collection of Claims Against the Company.* The Trustee shall comply with Section 311(a) of the Trust Indenture Act, excluding any creditor relationship described in Section 311(b) of the Trust Indenture Act. A Trustee who has resigned or been removed shall be subject to Section 311(a) of the Trust Indenture Act to the extent included therein.

ARTICLE 8  
CONCERNING THE HOLDERS

Section 8.01. *Evidence of Action by Holders.* Whenever in this Indenture it is provided that the Holders of a majority or specified percentage in aggregate principal amount of the Notes may take any action (including the making of any demand or request, the giving of any notice, consent or waiver or the taking of any other action), the fact that at the time of taking any such action the holders of such majority or specified percentage of such Notes have joined therein may be evidenced by any instrument or any number of instruments of similar tenor executed by such Holders of such Notes in person or by agent or proxy appointed in writing.

If the Company shall solicit from the Holders any request, demand, authorization, direction, notice, consent, waiver or other action, the Company may, at its option, as evidenced by an Officer's Certificate, fix in advance a record date for such Notes for the determination of Holders entitled to give such request, demand, authorization, direction, notice, consent, waiver or other action, but the Company shall have no obligation to do so. If such a record date is fixed, such request, demand, authorization, direction, notice, consent, waiver or other action may be given before or after the record date, but only the Holders of record at the close of business on the record date shall be deemed to be Holders for the purposes of determining whether Holders of the requisite proportion of Outstanding Notes have authorized or agreed or consented to such request, demand, authorization, direction, notice, consent, waiver or other action, and for that purpose the Outstanding Notes shall be computed as of the record date; provided, however, that no such authorization, agreement or consent by such Holders on the record date shall be deemed effective unless it shall become effective pursuant to the provisions of this Indenture not later than six months after the record date.

Section 8.02. *Proof of Execution by Holders.* Subject to the provisions of Section 7.01, proof of the execution of any instrument by a Holder (such proof will not require notarization) or his agent or proxy and proof of the holding by any Person of any of the Notes shall be sufficient if made in the following manner:

- (a) The fact and date of the execution by any such Person of any instrument may be proved in any reasonable manner acceptable to the Trustee.
- (b) The ownership of Notes shall be proved by the Note Register or by a certificate of the Note Registrar thereof.

The Trustee may require such additional proof of any matter referred to in this Section 8.02 as it shall deem necessary.

Section 8.03. *Who May be Deemed Owners.* Prior to the due presentment for registration of transfer of any Note, the Company, the Trustee, any paying agent and any Note Registrar may deem and treat the Person in whose name such Note shall be registered upon the books of the Company as the absolute owner of such Note (whether or not such Note shall be overdue and notwithstanding any notice of ownership or writing thereon made by anyone other than the Note Registrar) for the purpose of receiving payment of or on account of the principal of, premium, if any, and (subject to Section 2.03) interest on such Note and for all other purposes; and neither the Company nor the Trustee nor any paying agent nor any Note Registrar shall be affected by any notice to the contrary.

Section 8.04. *Certain Notes Owned by Company Disregarded.* In determining whether the Holders of the requisite aggregate principal amount of Notes have concurred in any direction, consent or waiver under this Indenture, the Notes that are owned by the Company or any other obligor on the Notes or by any Affiliate of the Company or any other obligor on the Notes shall be disregarded and deemed not to be Outstanding for the purpose of any such determination, except that for the purpose of determining whether the Trustee shall be protected in relying on any such direction, consent or waiver, only Notes that the Trustee actually knows are so owned shall be so disregarded. The Notes so owned that have been pledged in good faith may be regarded as Outstanding for the purposes of this Section 8.04, if the pledgee shall establish to the satisfaction of the Trustee the pledgee's right so to act with respect to such Notes and that the pledgee is not a Person directly or indirectly controlling or controlled by or under direct or indirect common control with the Company or any such other obligor. In case of a dispute as to such right, any decision by the Trustee taken upon the advice of counsel shall be full protection to the Trustee.

Section 8.05. *Actions Binding on Future Holders.* At any time prior to (but not after) the evidencing to the Trustee, as provided in Section 8.01, of the taking of any action by the Holders of the majority or percentage in aggregate principal amount of the Notes specified in this Indenture in connection with such action, any Holder of a Note that is shown by the evidence to be included in the Notes the Holders of which have consented to such action may, by filing written notice with the Trustee, and upon proof of holding as provided in Section 8.02, revoke such action so far as concerns such Note. Except as aforesaid any such action taken by the Holder of any Note shall be conclusive and binding upon such Holder and upon all future Holders and owners of such Note, and of any Note issued in exchange therefor, on registration of transfer thereof or in place thereof, irrespective of whether or not any notation in regard thereto is made upon such Note. Any action taken by the Holders of the majority or percentage in aggregate principal amount of the Notes specified in this Indenture in connection with such action shall be conclusively binding upon the Company, the Trustee and the Holders.

ARTICLE 9  
AMENDMENTS; SUPPLEMENTS AND WAIVERS

Section 9.01. *Without Consent of Holders.* The Company and the Trustee may amend or supplement this Indenture or the Notes without notice to or consent of any Holder of a Note for any of the following purposes:

- (a) to add to the covenants of the Company for the benefit of the Holders of Notes;
- (b) to surrender any right or power herein conferred upon the Company;
- (c) to make provision with respect to the conversion rights of Holders of Notes pursuant to Section 13.10 hereof;
- (d) to provide for the assumption of the Company's obligations to the Holders of Notes in the case of a merger, consolidation, conveyance, transfer or lease pursuant to Article 10 hereof;
- (e) to increase the Conversion Rate; *provided, however,* that such increase in the Conversion Rate shall not adversely affect the interests of the Holders of Notes in any material respect;
- (f) to comply with the requirements of the Commission in order to effect or maintain the qualification of this Indenture under the Trust Indenture Act;
- (g) to cure any ambiguity, correct or supplement any provision herein which may be inconsistent with any other provision herein or which is otherwise defective; *provided,* that such action pursuant to this clause (g) does not adversely affect the interests of the Holders of Notes in any material respect;
- (h) to add or modify any other provisions which the Company and the Trustee may deem necessary or desirable and which shall not adversely affect the interests of the Holders of Notes in any material respect; or
- (i) conform as necessary the Indenture and the form or terms of the Notes to the "Description of Notes" as set forth in the Offering Memorandum.

After an amendment, supplement or waiver under this Section 9.01 becomes effective, the Company, or, at the written request of the Company, the Trustee, shall mail to the Holders affected thereby a notice briefly describing the amendment, supplement or waiver. Any failure of the Company to mail such notice, or any defect therein, shall not, however, in any way impair or affect the validity of any such amendment, supplement or waiver.

Section 9.02. *With Consent of Holders.* Except as provided below in this Section 9.02, this Indenture or the Notes may be amended or supplemented, and noncompliance by the Company in any particular instance with any provision of this Indenture or the Notes may be waived, in each case (i) with the written consent of the Holders of at least a majority in aggregate principal amount of the Notes then Outstanding or (ii) by the adoption of a resolution, at a meeting of Holders of the Notes then Outstanding at which a quorum is present, by the Holders of a majority in aggregate principal amount of the Outstanding Notes represented at such meeting.

Without the written consent or the affirmative vote of each Holder of an affected Note, an amendment, supplement or waiver to this Indenture or the Notes may not:

- (a) change the stated maturity of the principal of, or the time of payment of any installment of interest on, any Note;
- (b) reduce the principal amount of any Note;
- (c) reduce the interest rate or interest on any Note;
- (d) change the currency of payment of principal of, premium, if any, or interest on any Note;
- (e) impair the right to institute suit for the enforcement of any payment with respect to, or the conversion of, any Note;
- (f) except as otherwise permitted by Section 13.10 hereof, adversely affect the right to convert any Note as provided in Article 13 hereof;
- (g) adversely affect the right of Holders to require the Company to purchase the Notes in the event of a Fundamental Change;
- (h) modify any of the provisions of this Section 9.02, Section 6.04 or Section 6.12, except to increase any percentage contained herein or therein or to provide that certain other provisions of this Indenture cannot be modified or waived without the consent of the Holder of each Note affected thereby; or
- (i) reduce the percentage in aggregate principal amount of the Outstanding Notes required for the adoption of a resolution or the quorum required at any meeting of Holders of Notes at which a resolution is adopted.

It shall not be necessary for the consent of Holders of Notes under this Section 9.02 to approve the particular form of any proposed modification, amendment or waiver, but it shall be sufficient if such act shall approve the substance thereof.



After an amendment, supplement or waiver under this Section 9.02 becomes effective, the Company, or, at the written request of the Company, the Trustee, shall mail to the Holders affected thereby a notice briefly describing the amendment, supplement or waiver. Any failure of the Company to mail such notice, or any defect therein, shall not, however, in any way impair or affect the validity of any such amendment, supplement or waiver.

Section 9.03. *Effect of Supplemental Indentures.* Upon the execution of any supplemental indenture pursuant to the provisions of this Article 9 or Section 10.01 this Indenture shall be and be deemed to be modified and amended in accordance therewith and the respective rights, limitations of rights, obligations, duties and immunities under this Indenture of the Trustee, the Company and the Holders of Notes affected thereby shall thereafter be determined, exercised and enforced hereunder subject in all respects to such modifications and amendments, and all the terms and conditions of any such supplemental indenture shall be and be deemed to be part of the terms and conditions of this Indenture for any and all purposes.

Section 9.04. *Notes Affected by Supplemental Indentures.* Notes affected by a supplemental indenture, authenticated and delivered after the execution of such supplemental indenture pursuant to the provisions of this Article 9 or Section 10.01, may bear a notation in form approved by the Company, provided such form meets the requirements of any securities exchange upon which such Notes may be listed, as to any matter provided for in such supplemental indenture. If the Company shall so determine, new securities so modified as to conform, in the opinion of the Board of Directors, to any modification of this Indenture contained in any such supplemental indenture may be prepared by the Company, authenticated by the Trustee and delivered in exchange for the Notes then Outstanding.

Section 9.05. *Execution of Supplemental Indentures.* Upon the request of the Company, accompanied by its Board Resolutions authorizing the execution of any such supplemental indenture, and upon the filing with the Trustee of evidence of the consent of Holders required to consent thereto as aforesaid (if such consent is required pursuant to this Article), the Trustee shall join with the Company in the execution of such supplemental indenture unless such supplemental indenture affects the Trustee's own rights, duties or immunities under this Indenture or otherwise, in which case the Trustee may in its discretion but shall not be obligated to enter into such supplemental indenture. The Trustee, subject to the provisions of Section 7.01, will be entitled to receive and will be fully protected in relying upon an Officer's Certificate and an Opinion of Counsel stating that any supplemental indenture executed pursuant to this Article is authorized or permitted by, and conforms to, the terms of this Article 9, constitutes a valid, binding and legal obligation, enforceable against the Company (subject to

customary qualifications) and that it is proper for the Trustee under the provisions of this Article 9 to join in the execution thereof.

Promptly after the execution by the Company and the Trustee of any supplemental indenture pursuant to the provisions of this Section, the Company shall transmit by mail, first class postage prepaid, a notice, setting forth in general terms the substance of such supplemental indenture, to the Holders of all Notes affected thereby as their names and addresses appear upon the Note Register. Any failure of the Company to mail such notice, or any defect therein, shall not, however, in any way impair or affect the validity of any such supplemental indenture.

## ARTICLE 10

### CONSOLIDATION; MERGER; CONVEYANCE; TRANSFER OR LEASE

Section 10.01. *Company May Consolidate, Etc., Only on Certain Terms.* The Company may not, without the consent of the Holders, consolidate with, merge into or convey, transfer or lease all or substantially all of the property and assets of the Company and its Subsidiaries, taken as a whole, to another Person unless:

(a) either (1) the Company shall be the resulting or surviving corporation or (2) the Person (if other than the Company) formed by such consolidation or into which the Company is merged, or the Person which acquires by transfer or lease all or substantially all of the property and assets of the Company, shall (i) be a corporation incorporated and existing under the laws of the United States of America or any State thereof or the District of Columbia and (ii) expressly assume, by an indenture supplemental hereto, executed and delivered to the Trustee, in form reasonably satisfactory to the Trustee, the obligations of the Company under the Notes and this Indenture;

(b) after giving effect to such transaction, no Event of Default, and no event which, after notice or lapse of time or both, would become an Event of Default, shall have occurred and be continuing; and

(c) if the Company will not be the resulting or surviving corporation, the Company shall have, at or prior to the effective date of such consolidation, merger, conveyance, transfer or lease, delivered to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that such consolidation, merger, conveyance, transfer or lease complies with this Article 10 and, if a supplemental indenture is required in connection with such transaction, such supplemental indenture complies with this Article 10, and that all conditions precedent herein provided for relating to such transaction have been complied with.

Section 10.02. *Successor Substituted.* Upon any consolidation of the Company with, or merger of the Company into, any other Person or any conveyance, transfer or lease of all or substantially all of the properties and assets of the Company and its Subsidiaries, taken as a whole, in accordance with Section 10.01, the successor Person formed by such consolidation or into which the Company is merged or to which such conveyance, transfer or lease is made shall succeed to, and be substituted for, and may exercise every right and power of, the Company under this Indenture with the same effect as if such successor Person had been named as the Company herein, and thereafter, except in the case of a lease, and except for obligations the predecessor Person may have under a supplemental indenture, the predecessor Person shall be relieved of all obligations and covenants under the Indenture and the Notes.

#### ARTICLE 11

##### IMMUNITY OF INCORPORATORS, STOCKHOLDERS, OFFICERS AND DIRECTORS

Section 11.01. *No Recourse.* No recourse under or upon any obligation, covenant or agreement of this Indenture, or of the Notes, or for any claim based thereon or otherwise in respect thereof, shall be had against any incorporator, stockholder, officer or director, past, present or future as such, of the Company or of any predecessor or successor corporation, either directly or through the Company or any such predecessor or successor corporation, whether by virtue of any constitution, statute or rule of law, or by the enforcement of any assessment or penalty or otherwise; it being expressly understood that this Indenture and the obligations issued hereunder are solely corporate obligations, and that no such personal liability whatever shall attach to, or is or shall be incurred by, the incorporators, stockholders, officers or directors as such, of the Company or of any predecessor or successor corporation, or any of them, because of the creation of the indebtedness hereby authorized, or under or by reason of the obligations, covenants or agreements contained in this Indenture or in any of the Notes or implied therefrom; and that any and all such personal liability of every name and nature, either at common law or in equity or by constitution or statute, of, and any and all such rights and claims against, every such incorporator, stockholder, officer or director as such, because of the creation of the indebtedness hereby authorized, or under or by reason of the obligations, covenants or agreements contained in this Indenture or in any of the Notes or implied therefrom, are hereby expressly waived and released as a condition of, and as a consideration for, the execution of this Indenture and the issuance of the Notes.

ARTICLE 12  
ADDITIONAL INTEREST

Section 12.01. *Additional Interest.* (a) If, at any time during the six-month period beginning on, and including, the date that is six months after the last date of original issuance of the Notes and ending on the date that is one year after the last date of the original issuance of the Notes, the Company either (i) fails to timely file any periodic report that the Company is required to file with the Commission under Article 13 or 15(d) of the Exchange Act, as applicable (other than reports on Form 8-K), and such failure continues for 14 days in the aggregate, or (ii) the Notes are not otherwise freely tradable pursuant to Rule 144 by Holders of the Notes other than the Company's Affiliates, or under the terms of this Indenture or the Notes, then in either case (an "**Additional Interest Event**"), the Company shall pay additional interest on the Notes (the "**Additional Interest**"). Such Additional Interest will accrue on the Notes at the rate of 0.25% per annum of the principal amount of Notes Outstanding for each day during the first 90-day period (or portion thereof) for which an Additional Interest Event has occurred and is continuing, which rate will increase by an additional 0.25% per annum of the principal amount of the Notes for each subsequent 90-day period (or portion thereof), up to a maximum of 0.50% of the principal amount of the Notes. Additional Interest shall be payable in arrears on each Interest Payment Date following accrual in the same manner as regular interest on the Notes.

(b) Unless

(i) the restrictive legend on the Notes has not been removed, or

(ii) the Notes are not freely tradable pursuant to Rule 144 by Holders other than the Company's Affiliates (without restrictions pursuant to U.S. securities law or the terms of this Indenture or the Notes),

on or after the 365th day after the last date of original issuance of the Notes offered hereby, an Additional Interest Event would be deemed to have occurred and the Company shall pay Additional Interest on the Notes at an annual rate equal to 0.25% of the aggregate principal amount of the Notes for each day during the first 90-day period (or portion thereof) for which such Additional Interest Event is continuing, which rate will increase by an additional 0.25% per annum of the principal amount of the Notes for each subsequent 90-day period (or portion thereof), up to a maximum of 0.50% of the principal amount of the Notes; *provided* that the Company shall not be required to pay Additional Interest on the Notes for failure to remove the restrictive legend on the Notes unless the Company has received a request to do so by a Holder, any Initial Purchaser or the Trustee on or after the 335th day after the last Issue Date of the original issuance of the Notes, except that if the Company receives such a request on or after the

5th Business Day immediately preceding such 365th day and the restrictive legend on the Notes has not been removed by the close of business on the 5th Business Day thereafter, Additional Interest on the Notes will accrue from such 365th day.

(c) Notwithstanding the foregoing, the Company shall not be required to pay Additional Interest on any date if (i) the Company has filed a shelf registration statement for the resale of the Notes and any shares of Common Stock issued upon conversion of the Notes, (ii) such shelf registration statement is effective and usable by Holders of the Notes identified therein as selling securityholders for the resale of the Notes and any shares of Common Stock issued upon conversion of the Notes, and (iii) the Holders may register the resale of their Notes under such shelf registration statement on terms customary for the resale of convertible securities offered in reliance on Rule 144A.

(d) Under no circumstances will the combined rate of Additional Interest or Special Interest exceed 1.00% per annum.

(e) The Company shall provide written notice to the Trustee prior to paying any Additional Interest.

ARTICLE 13  
CONVERSION OF NOTES

Section 13.01. *Conversion Privilege and Conversion Rate.* (a) The conversion rights pursuant to this Article 13 shall commence on the Issue Date of the Notes and expire at the close of business on the Business Day immediately preceding the Maturity Date unless previously redeemed or repurchased, subject to the provisions of this Indenture and, in the case of conversion of any Global Note, to any Applicable Procedures; provided, however, that if the Company has elected to redeem the Notes pursuant to Article 14 hereof, Holders may convert their Notes only until the close of business on the Business Day prior to the Redemption Date unless the Company fails to pay the Redemption Price in which case the conversion right shall terminate at the close of business on the Business Day prior to the date such failure is cured and such Note is redeemed. If a Note is submitted or presented for purchase pursuant to Article 15, subject to the last paragraph of Section 13.02(b), such conversion right shall terminate at the close of business on the Business Day prior to the Fundamental Change Purchase Date for such Note (unless the Company shall fail to make the Fundamental Change Purchase Price payment when due in accordance with Article 15, in which case the conversion right shall terminate at the close of business on the Business Day prior to the date such failure is cured and such Note is repurchased).

(b) Provisions of this Indenture that apply to conversion of all of a Note also apply to conversion of a portion of a Note.

(c) A Holder of Notes is not entitled to any rights of a holder of Common Stock until such Holder has converted its Notes into Common Stock, and only to the extent such Notes are deemed to have been converted into Common Stock pursuant to this Article 13.

(d) The Conversion Rate shall be adjusted in certain instances as provided in Section 13.01(e) and Section 13.06.

(e) If a Make-Whole Fundamental Change shall have occurred, the Company shall calculate and pay a **“Fundamental Change Make-Whole Premium”** to the Holders of the Notes who convert their Notes during the period beginning the date of the Make-Whole Fundamental Change Notice until the close of business on the tenth Business Day immediately following the Make-Whole Fundamental Change Effective Date by increasing the Conversion Rate for such Notes. The Fundamental Make-Whole Change Premium will be in addition to, and not in substitution for, any cash, securities or other assets otherwise due to Holders of Notes upon conversion. The number of additional shares of Common Stock per \$1,000 principal amount of Notes constituting the Fundamental Change Make-Whole Premium shall be determined by reference to the table set forth on Schedule A hereto, based on the Make-Whole Fundamental Change Effective Date and the Stock Price; provided that if the Stock Price or Make-Whole Fundamental Change Effective Date are not set forth on the table: (i) if the actual Stock Price on the Make-Whole Fundamental Change Effective Date is between two Stock Prices on the table or the actual Fundamental Change Effective Date is between two Make-Whole Fundamental Change Effective Dates on the table, the Fundamental Change Make-Whole Premium will be determined by a straight-line interpolation between the Fundamental Change Make-Whole Premiums set forth for the two Stock Prices and the two Make-Whole Fundamental Change Effective Dates on the table based on a 365-day year, as applicable, (ii) if the Stock Price on the Fundamental Change Effective Date exceeds \$50.00 per share, subject to adjustment as set forth herein, no Fundamental Change Make-Whole Premium will be paid, and (iii) if the Stock Price on the Make-Whole Fundamental Change Effective Date is less than \$5.97 per share, subject to adjustment as set forth herein, no Fundamental Change Make-Whole Premium will be paid. If holders of Common Stock receive only cash in the Make-Whole Fundamental Change, the Stock Price shall be the cash amount paid per share of Common Stock in connection with such Make-Whole Fundamental Change. Otherwise, the Stock Price shall be equal to the average Last Reported Sale Price of the Common Stock over the 10 Trading Day period ending on the Trading Day immediately preceding, and excluding, the applicable Fundamental Change Effective Date. The Company, or, at the request of the Company, the Trustee, shall mail written notice of the anticipated effective date of any Make-Whole Fundamental Change

to the Holders (with a copy to the Trustee if applicable) as practicable following the date the Company publicly announces such Make-Whole Fundamental Change, but in no event less than 20 days prior to the anticipated Make-Whole Fundamental Change Effective Date (the “**Make-Whole Fundamental Change Notice**”). At the Company’s request, the Trustee shall give such Make-Whole Fundamental Change Notice in the Company’s name and at the Company’s request; provided that, unless otherwise agreed by the Trustee, the Company makes such request at least three (3) Business Days prior to the date of such notice.

The Stock Prices set forth in the first column of the table on Schedule A will be adjusted as of any date on which the Conversion Rate of the Notes is adjusted other than an adjustment pursuant to the Fundamental Change Make-Whole Premium described above. The adjusted Stock Prices will equal the Stock Prices applicable immediately prior to such adjustment multiplied by a fraction, the numerator of which is the Conversion Rate immediately prior to the adjustment giving rise to the Stock Price adjustment and the denominator of which is the Conversion Rate as so adjusted. The number of additional shares set forth in the table above will be adjusted in the same manner as the Conversion Rate as set forth in Section 13.06 hereof, other than as a result of an adjustment to the Conversion Rate by adding the Fundamental Change Make-Whole Premium as described above.

Notwithstanding the foregoing, in no event will the Conversion Rate exceed 167.5041 per \$1,000 principal amount as a result of this Section 13.01, subject to proportional adjustment in the same manner as the Conversion Rate as set forth in Section 13.06 hereof.

The Fundamental Change Make-Whole Premium shall be delivered upon the later of the settlement date for the conversion and promptly following the Fundamental Change Effective Date.

If a Holder converts its Notes prior to the Fundamental Change Effective Date, and the Make-Whole Fundamental Change does not occur, such Holder shall not be entitled to the Fundamental Change Make-Whole Premium in connection with such conversion.

(f) By delivering the number of shares of Common Stock issuable on conversion to the Trustee, plus a cash payment for any fractional share, the Company will be deemed to have satisfied its obligation to pay the principal amount of the Notes so converted and its obligation to pay accrued and unpaid interest attributable to the period from the most recent Interest Payment Date through the Conversion Date (which amount will be deemed satisfied and extinguished).

Section 13.02. *Conversion Procedure.* (a) To convert a Note in certificated form, a Holder must (1) complete and manually sign the Notice of Conversion on the back of the Note, or facsimile of such Notice of Conversion, and deliver such Notice of Conversion to the Conversion Agent, which shall become irrevocable upon receipt by the Conversion Agent, (2) surrender the Note to the Conversion Agent, (3) furnish appropriate endorsements and transfer documents if required by the Note Registrar or the Conversion Agent, (4) pay an amount equal to the interest payable on the next Interest Payment Date to which the Holder is not entitled as required by Section 13.02(c) and (5) pay all transfer or similar taxes, if required pursuant to Section 13.04. Anything herein to the contrary notwithstanding, in the case of Global Notes, Notices of Conversion may be delivered and such Notes may be surrendered for conversion in accordance with clauses (3), (4) and (5) of this Section 13.02(a) and the Applicable Procedures as in effect from time to time. The date on which the Holder satisfies all the requirements set forth in this Section 13.02(a) is the “**Conversion Date.**”

(b) Each conversion shall be deemed to have been effected as to any Notes surrendered for conversion on the Conversion Date and the person in whose name the shares of Common Stock shall be issuable upon conversion shall be deemed to be the holder of record of such Common Stock as of the close of business on such Conversion Date, and the Company shall deliver the consideration due in respect of any conversion on the third Business Day immediately following the relevant Conversion Date; *provided*, however, that no surrender of a Note on any Conversion Date when the stock transfer books of the Company shall be closed shall be effective to constitute the person or persons entitled to receive the shares of Common Stock upon conversion as the record holder or holders of such shares of Common Stock on such date, but such surrender shall be effective to constitute the person or persons entitled to receive such shares of Common Stock as the record holder or holders thereof for all purposes at the close of business on the next succeeding day on which such stock transfer books are open. Upon conversion of a Note, such person shall no longer be the Holder of such Note. Except as set forth in this Indenture, no payment or adjustment will be made for dividends or distributions declared or made on shares of Common Stock issued upon conversion of a Note prior to the issuance of such shares.

A Holder that has delivered a Fundamental Change Purchase Notice pursuant to Section 15.01 with respect to a Note may not surrender such Note for conversion until such Holder has withdrawn the Fundamental Change Purchase Notice in accordance with Section 15.01(c).

(c) Holders of Notes surrendered for conversion (in whole or in part) during the period from the close of business on any Regular Record Date to the open of business on the next succeeding Interest Payment Date will receive the semiannual interest payable on the principal amount of such Notes being



surrendered for conversion on the corresponding Interest Payment Date notwithstanding the conversion. Upon surrender of any such Notes for conversion, such Notes shall also be accompanied by payment in funds to the Conversion Agent acceptable to the Company of an amount equal to the interest payable on such corresponding Interest Payment Date (but excluding any overdue interest on the principal amount of such Note so converted if any overdue interest exists at the time such Holder surrenders such Note for conversion); *provided, however*, that no such payment need be made (i) if the Company has specified a Redemption Date that is after such Regular Record Date and on or prior to the next succeeding Interest Payment Date, (ii) if the Company has specified a Fundamental Change Purchase Date that is after such Regular Record Date and on or prior to the next succeeding Interest Payment Date, or (iii) if conversion occurs after the last Regular Record Date prior to the Maturity Date,. Except as otherwise provided in this Section 13.02(c) and Section 14.01(c), no payment or adjustment will be made for accrued interest on a converted Note and any such accrued interest shall be deemed satisfied and extinguished.

(d) Subject to Section 13.02(c), nothing in this Section 13.02 shall affect the right of a Holder in whose name any Note is registered at the close of business on a Regular Record Date to receive the interest payable on such Note on the related Interest Payment Date in accordance with the terms of this Indenture and the Notes. If a Holder converts more than one Note at the same time, the number of shares of Common Stock issuable upon the conversion (and the amount of any cash in lieu of fractional shares pursuant to Section 13.03) shall be based on the aggregate principal amount of all Notes so converted.

(e) In the case of any Note which is converted in part only, upon such conversion the Company shall execute and the Trustee shall authenticate and deliver to the Holder thereof, without service charge, a new Note or Notes of authorized denominations in an aggregate principal amount equal to, and in exchange for, the unconverted portion of the principal amount of such Note. A Note may be converted in part, but only if the principal amount of such part is an integral multiple of \$1,000 and the principal amount of such Note to remain Outstanding after such conversion is equal to \$1,000 or any integral multiple of \$1,000 in excess thereof.

Section 13.03. *Fractional Shares*. No fractional shares of Common Stock shall be issued upon conversion of any Note or Notes. If more than one Note shall be surrendered for conversion at one time by the same Holder, the number of full shares which shall be issued upon conversion thereof shall be computed on the basis of the aggregate principal amount of the Notes (or specified portions thereof) so surrendered. Instead of any fractional share of Common Stock which would otherwise be issued upon conversion of any Note or Notes (or specified portions thereof), the Company shall pay a cash adjustment in respect of such fraction (calculated to the nearest one-100th of a share) in an amount equal to the same

fraction of the Last Reported Sale Price of the Common Stock as of the Trading Day preceding the Conversion Date.

Section 13.04. *Taxes on Conversion.* Except as provided in the next sentence, the Company will pay any and all documentary, stamp or similar issue or transfer tax due and duties on the issuance of shares of Common Stock upon conversion of Notes pursuant hereto. A Holder delivering a Note for conversion shall be liable for and will be required to pay any tax or duty which may be payable in respect of any transfer involved in the issue and delivery of shares of Common Stock in a name other than that of the Holder of the Note or Notes to be converted, and no such issue or delivery shall be made unless the Person requesting such issue has paid to the Company the amount of any such tax or duty, or has established to the satisfaction of the Company that such tax or duty has been paid.

Section 13.05. *Company to Provide Common Stock.* (a) The Company shall, prior to issuance of any Notes hereunder, and from time to time as may be necessary, reserve, out of its authorized but unissued Common Stock, a sufficient number of shares of Common Stock to permit the conversion of all Outstanding Notes into shares of Common Stock.

(b) All shares of Common Stock delivered upon conversion of the Notes shall be newly issued shares, shall be duly authorized, validly issued, fully paid and nonassessable and shall be free from preemptive or similar rights and free of any lien or adverse claim as the result of any action by the Company.

Section 13.06. *Adjustment of Conversion Rate.* The Conversion Rate shall be adjusted from time to time by the Company as follows:

(a) If the Company issues shares of Common Stock as a dividend or distribution on shares of Common Stock, or effects a share split or share combination, the Conversion Rate will be adjusted based on the following formula:

$$CR = CR_0 \times \frac{OS}{OS_0}$$

where,

CR<sub>0</sub> = the applicable Conversion Rate in effect immediately prior to the open of business on the Ex-Dividend Date for such dividend or distribution, or immediately prior to the open of business on the effective date of such share split or share combination, as the case may be;

- CR = the applicable Conversion Rate in effect immediately after the open of business on the Ex-Dividend Date for such dividend or distribution, or immediately after the open of business on the effective date of such share split or share combination, as the case may be;
- OS<sub>0</sub> = the number of shares of Common Stock outstanding immediately prior to such dividend, distribution, share split or share combination, as the case may be; and
- OS = the number of shares of Common Stock outstanding immediately after giving effect to such dividend, distribution, share split or share combination, as the case may be.

Any adjustments made pursuant to this Section 13.06(a) shall become effective immediately on or after (x) the open of business on the Ex-Dividend Date for such dividend or distribution or (y) the effective date of such split or combination, as applicable. If any dividend or distribution described in this Section 13.06(a) is declared but not so paid or made, the new Conversion Rate shall again be adjusted to the Conversion Rate that would then be in effect if such dividend or distribution had not been declared.

(b) If the Company distributes to all holders of Common Stock any rights or warrants entitling them to purchase, for a period of not more than 45 days after the Ex-Dividend Date for the distribution, shares of Common Stock at a price per share less than the average of the Last Reported Sale Prices of the Common Stock for the 10 consecutive Trading-Day period ending on the Trading Day immediately preceding the declaration date for such distribution, the Conversion Rate will be adjusted based on the following formula:

$$CR = CR_0 \times \frac{OS_0 + X}{OS_0 + Y}$$

where,

- CR<sub>0</sub> = the Conversion Rate in effect immediately prior to the open of business on the Ex-Dividend Date for such distribution;
- CR = the new Conversion Rate in effect immediately after the open of business on the Ex-Dividend Date for such distribution;
- OS<sub>0</sub> = the number of shares of Common Stock outstanding immediately prior to the open of business on the Ex-Dividend Date for such distribution;

X = the total number of shares of Common Stock issuable pursuant to such rights or warrants; and

Y = the number of shares of Common Stock equal to the aggregate price payable to exercise such rights or warrants divided by the average of the Last Reported Sale Prices of the Common Stock over the 10 consecutive Trading-Day period ending on the Trading Day immediately preceding the declaration date for such distribution.

For purposes of this Section 13.06(b), in determining whether any rights or warrants entitle the Holders to subscribe for or purchase shares of Common Stock at less than the average of the Last Reported Sale Prices of the Common Stock for the applicable 10 consecutive Trading-Day period, there shall be taken into account any consideration received by the Company for such rights or warrants and any amount payable on exercise thereof, with the value of such consideration if other than cash, to be determined by the Board of Directors. If any right or warrant described in this Section 13.06(b) is not exercised prior to the expiration of the exercisability thereof, the new Conversion Rate shall be readjusted to the Conversion Rate that would then be in effect if such right or warrant had not been so issued. Any adjustment made pursuant to this Section 13.06(b) shall become effective immediately after the Ex-Dividend Date for the applicable distribution.

(c) If the Company distributes shares of its Capital Stock, evidences of its indebtedness or other assets or property of the Company to all holders of the Common Stock, excluding

(i) dividends or distributions (including share splits) as to which an adjustment is effected in Section 13.06(a) or Section 13.06(b);

(ii) dividends or distributions covered by Section 13.06(d);

(iii) dividends or distributions that constitute Reference Property following an event pursuant to Section 13.10; and

(iv) Spin-Offs to which the provisions set forth below in this Section 13.06(c) shall apply,

then the applicable Conversion Rate will be adjusted based on the following formula:

$$CR = CR_0 \times \frac{SP_0}{SP_0 - FMV}$$

where,

CR<sub>0</sub> = the applicable Conversion Rate in effect immediately prior to the open of business on the Ex-Dividend Date for such distribution;

CR = the applicable Conversion Rate in effect immediately after the open of business on the Ex-Dividend Date for such distribution;

SP<sub>0</sub> = the average of the Last Reported Sale Prices of the Common Stock over the 10 consecutive Trading-Day period ending on, and including, the Trading Day immediately preceding the Ex-Dividend Date for such distribution; and

FMV = the fair market value (as determined in good faith by the Board of Directors) of the shares of Capital Stock, evidences of indebtedness, assets or property distributed with respect to each outstanding share of Common Stock as of the open of business on the Ex-Dividend Date for such distribution.

If the then fair market value of the portion of the shares of Capital Stock, evidences of indebtedness or other assets or property so distributed applicable to one share of Common Stock is equal to or greater than the average of the Last Reported Sales Prices of the Common Stock over the 10 consecutive Trading-Day period ending on the Trading Day immediately preceding the Ex-Dividend Date for such distribution, in lieu of the foregoing adjustment, adequate provisions shall be made so that each Holder of a Note shall have the right to receive on conversion in respect of each Note held by such Holder, in addition to any amounts to which such Holder is entitled to receive, the amount and kind of securities and assets such Holder would have received had such Holder already owned a number of shares of Common Stock equal to the applicable Conversion Rate immediately prior to the open of business on the Ex-Dividend Date for the distribution of the securities or assets.

With respect to an adjustment pursuant to this Section 13.06(c) where there has been a payment of a dividend or other distribution on the Common Stock of shares of the Capital Stock of any class or series, or similar equity interest, of or relating to a Subsidiary or other business unit that are, or, when issued, will be, traded or quoted on any national or regional securities exchange or other market (a “**Spin-Off**”), the applicable Conversion Rate will instead be adjusted based on the following formula:

$$CR = CR_0 \times \frac{FMV + MP_0}{MP_0}$$

where,

- CR<sub>0</sub> = the applicable Conversion Rate in effect immediately prior to the tenth Trading Day immediately following the effective date for such Spin-Off;
- CR = the applicable Conversion Rate in effect immediately after the open of business on the tenth Trading Day immediately following the effective date for such Spin-Off;
- FMV = the average of the Last Reported Sale Prices of the Capital Stock or similar equity interest distributed to holders of Common Stock applicable to one share of Common Stock over the first 10 consecutive Trading-Day period immediately following the effective date for such Spin-Off (such period, the “**Valuation Period**”); and
- MP<sub>0</sub> = the average of the Last Reported Sale Prices of Common Stock over the Valuation Period.

Such adjustment shall occur immediately after the tenth Trading Day immediately following, and including, the effective date of such Spin-Off; *provided* that, for purposes of determining the Conversion Rate in respect of any conversion during the 10 Trading Days following the effective date of any Spin-Off, references within this Section 13.06(c) related to “Spin-Offs” to 10 Trading Days shall be deemed replaced with such lesser number of Trading Days as have elapsed between the effective date of such Spin-Off and the relevant Conversion Date.

If any such dividend or distribution described in this Section 13.06(c) is declared but not paid or made, the new Conversion Rate shall be readjusted to be the Conversion Rate that would then be in effect if such dividend or distribution had not been declared.

(d) If any cash dividend or distribution is made to all holders of Common Stock, the Conversion Rate will be adjusted based on the following formula:

$$CR = CR_0 \times \frac{SP_0}{SP_0 - C}$$

where,

CR<sub>0</sub> = the applicable Conversion Rate in effect immediately prior to the open of business on the Ex-Dividend Date for such distribution;

- CR = the applicable Conversion Rate in effect immediately after the open of business on the Ex-Dividend Date for such distribution;
- SP<sub>0</sub> = the average of the Last Reported Sale Prices of the Common Stock over the 10 consecutive Trading-Day period ending on, and including, the Trading Day immediately preceding the Ex-Dividend Date for such distribution; and
- C = the amount in cash per share of Common Stock the Company distributes to holders of Common Stock.

An adjustment to the Conversion Rate made pursuant to this Section 13.06(d) shall become effective immediately after the open of business on the Ex-Dividend Date for the applicable dividend or distribution. If any dividend or distribution described in this Section 13.06(d) is declared but not so paid or made, the new Conversion Rate shall be readjusted to the Conversion Rate that would then be in effect if such dividend or distribution had not been declared.

If the amount in cash per share of Common Stock so paid or distributed is equal to or greater than the average of the Last Reported Sales Prices of the Common Stock over the 10 consecutive Trading-Day period ending on the Trading Day immediately preceding the Ex-Dividend Date for such cash dividend or distribution, in lieu of the foregoing adjustment, adequate provisions shall be made so that each Holder of a Note shall have the right to receive on conversion in respect of each Note held by such Holder, in addition to any amounts to which such Holder is entitled to receive, the amount in cash such Holder would have received had such Holder already owned a number of shares of Common Stock equal to the applicable Conversion Rate immediately prior to the record date for such cash dividend or distribution.

(e) If the Company or any of its Subsidiaries makes a payment in respect of a tender or exchange offer for Common Stock (other than tender offers or exchange offers not subject to Rule 13e-4 of the Exchange Act or odd lot tender offers), to the extent that the cash and value of any other consideration included in the payment per share of Common Stock exceeds the Last Reported Sale Price of the Common Stock on the Trading Day next succeeding the last date on which tenders or exchanges may be made pursuant to such tender or exchange offer (the “**Expiration Date**”), the Conversion Rate shall be increased based on the following formula:

$$CR = CR_0 \times \frac{AC + (SP \times OS)}{OS_0 \times SP}$$

where,

- CR<sub>0</sub> = the applicable Conversion Rate in effect immediately prior to the open of business on the Trading Day next succeeding the Expiration Date;
- CR = the applicable Conversion Rate in effect immediately after the open of business on the Trading Day next succeeding the Expiration Date;
- AC = the aggregate value of all cash and any other consideration (as determined by the Board of Directors) paid or payable for shares purchased in such tender offer or exchange offer;
- OS<sub>0</sub> = the number of shares of Common Stock outstanding immediately prior to time (the “**Expiration Time**”) such tender or exchange offer expires (prior to giving effect to such tender offer or exchange offer);
- OS = the number of shares of Common Stock outstanding immediately after the expiration time (after giving effect to such tender offer or exchange offer); and
- SP = the average of the Last Reported Sale Prices of Common Stock over the 10 consecutive Trading-Day period commencing on, and including, the Trading Day next succeeding the Expiration Date.

The adjustment to the Conversion Rate under this Section 13.06(e) shall become effective immediately following the tenth Trading Day next succeeding the date such tender offer or exchange offer expires; *provided* that, for purposes of determining the Conversion Rate, in respect of any conversion during the 10 Trading Days following the date that any tender or exchange offer expires, references within this Section 13.06(e) to 10 Trading Days shall be deemed replaced with such lesser number of Trading Days as have elapsed between the date such tender or exchange offer expires and the relevant Conversion Date. If the Company or one of its Subsidiaries is obligated to purchase Common Stock pursuant to any such tender or exchange offer but are permanently prevented by applicable law from effecting any such purchase or all such purchases are rescinded, the new Conversion Rate shall be readjusted to be the Conversion Rate that would be in effect if such tender or exchange offer had not been made.

(f) Notwithstanding the foregoing, if a Conversion Rate adjustment becomes effective on any Ex-Dividend Date pursuant to Section 13.06(a) through Section 13.06(e), and a Holder that has converted its Notes on or after such Ex-Dividend Date and on or prior to the related record date would be treated as the record holder of the Common Stock as of the related Conversion Date based on an adjusted Conversion Rate for such Ex-Dividend Date, then, notwithstanding



Section 13.06(a) through Section 13.06(e), the Conversion Rate adjustment relating to such Ex-Dividend Date will not be made for such converting Holder. Instead, such Holder shall be treated as if such Holder were the record owner of the Common Stock on an unadjusted basis and participate in the related dividend, distribution or other event giving rise to such adjustment.

Section 13.07. *When No Adjustment is Required.* (a) No adjustment in the Conversion Rate shall be required unless such adjustment would require an increase or decrease of at least 1% in the Conversion Rate as last adjusted; provided, however, that any adjustments which would be required to be made but for this Section 13.07(a) shall be carried forward and taken into account in any subsequent adjustment and any carry forward amount shall be paid to the Holder upon conversion regardless of the 1% threshold. All calculations under this Article 13 shall be made to the nearest cent or to the nearest one-hundredth of a share.

(b) Without limiting the foregoing provisions of Section 13.06, no adjustment will be made thereunder, nor shall an adjustment be made to the ability of a Holder to convert, for any distribution described therein if the Holder will otherwise participate in the distribution without conversion of such Holder's Notes as if such Holder held a number of shares of Common Stock equal to the applicable Conversion Rate, multiplied by the principal amount (expressed in thousands) of Notes held by such Holder, without having to convert its Notes. Further, if the application of the foregoing formulas in Section 13.06 would result in a decrease in the Conversion Rate, no adjustment to the Conversion Rate will be made (except on account of share combinations).

(c) No adjustment to the Conversion Rate will be made unless as specifically set forth in Section 13.06 and Section 13.01(e). Without limiting the foregoing, no adjustment to the Conversion Rate need be made:

- (i) upon the issuance of any shares of Common Stock pursuant to any present or future plan providing for the reinvestment of dividends or interest payable on securities of the Company and the investment of additional optional amounts in shares of Common Stock under any plan;
- (ii) upon the issuance of any shares of Common Stock or options or rights to purchase shares of Common Stock pursuant to any present or future employee, director or consultant benefit plan or program or employee stock purchase plan of, or assumed by, the Company or any of its Subsidiaries;
- (iii) upon the issuance of any shares of Common Stock pursuant to any option, warrant, right, or exercisable, exchangeable or convertible

security not described in clause (ii) above and outstanding as of the Issue Date;

(iv) for a change in the par value of the Common Stock; or

(v) for accrued and unpaid interest (including any Special Interest and Additional Interest, if applicable).

Section 13.08. *Notice of Adjustment.* Whenever the Conversion Rate or conversion privilege is required to be adjusted pursuant to this Indenture, the Company shall promptly mail to Holders a notice of the adjustment and file with the Trustee an Officer's Certificate briefly stating the facts requiring the adjustment, the adjusted Conversion Rate and the manner of computing it. Failure to mail such notice or any defect therein shall not affect the validity of any such adjustment. Unless and until the Trustee shall receive an Officer's Certificate setting forth an adjustment of the Conversion Rate, the Trustee may assume without inquiry that the Conversion Rate has not been adjusted and that the last Conversion Rate of which it has knowledge remains in effect.

Section 13.09. *Notice of Certain Transactions.* In the event that there is a dissolution or liquidation of the Company, the Company shall mail to Holders and file with the Trustee a notice stating the proposed effective date. The Company shall mail such notice at least 20 days before such proposed effective date. Failure to mail such notice or any defect therein shall not affect the validity of any transaction referred to in this Section 13.09.

Section 13.10. *Effect of Reclassification, Consolidation, Merger or Sale On Conversion Privilege.* If any of the following events occur:

(a) any recapitalization, reclassification or change of the outstanding shares of Common Stock (other than a changes resulting from a subdivision or combination),

(b) any consolidation, merger, or combination involving the Company with another corporation, or

(c) any sale, conveyance or lease to any other corporation of all or substantially all of the property and assets of the Company,

(d) any statutory share exchange,

in each case as a result of which holders of Common Stock shall be entitled to receive stock, other securities or other property or assets (including cash or any combination thereof) (the "**Reference Property**") with respect to or in exchange for such Common Stock, the Holders of the Notes then Outstanding will be entitled thereafter to convert those Notes into the kind and amount of shares of

stock, other securities or other property or assets (including cash or any combination thereof) which they would have owned or been entitled to receive upon such transaction had such notes been converted into Common Stock immediately prior to such transaction. In the event holders of Common Stock have the opportunity to elect the form of consideration to be received in such transaction, the reference property will be deemed to be the weighted average of the types and amounts of consideration received by the holders of Common Stock that affirmatively make such election. The Company shall notify the Holders of the weighted average as soon as practicable after such determination is made. The Company may not become a party to any such transaction unless its terms are consistent with the preceding. None of the foregoing provisions shall affect the right of a Holder of Notes to convert its Notes into shares of Common Stock prior to the effective date of such transaction.

The above provisions of this Section 13.10 shall similarly apply to successive recapitalizations, reclassifications, mergers, consolidations, statutory share exchanges, combinations, sales and conveyances.

If this Section 13.10 applies to any event or occurrence, Section 13.06 hereof shall not apply.

The Company shall not become a party to any such transaction unless its terms are consistent with the foregoing. None of the foregoing provisions shall affect the right of a Holder to convert the Notes as set forth in Section 13.01 prior to the effective time of such transaction.

Section 13.11. *Trustee's Disclaimer.* (a) The Trustee shall have no duty to determine, or liability in connection therewith, when an adjustment under this Article 13 should be made, how it should be made or what such adjustment should be, but may accept as conclusive evidence of that fact or the correctness of any such adjustment, and shall be protected in relying upon, an Officer's Certificate, including the Officer's Certificate with respect thereto which the Company is obligated to file with the Trustee pursuant to Section 13.08. Unless and until the Trustee receives such Officer's Certificate delivered pursuant to Section 13.08, the Trustee may assume without inquiry that no such adjustment has been made and the last Conversion Rate of which the Trustee has knowledge remains in effect. The Trustee makes no representation as to the validity or value of any securities or assets issued upon conversion of Notes, and the Trustee shall not be responsible for the Company's failure to comply with any provisions of this Article 13.

(b) The Trustee shall not be under any responsibility to determine the correctness of any provisions contained in any supplemental indenture executed pursuant to Section 13.10, but may accept as conclusive evidence of the correctness thereof, and shall be fully protected in relying upon, the Officer's

Certificate and Opinion of Counsel, with respect thereto which the Company are obligated to file with the Trustee pursuant to Section 13.10 and Section 10.01, respectively.

Section 13.12. *Voluntary Increase; Nasdaq Compliance.* Subject to Section 9.01(e), the Company from time to time may increase the Conversion Rate, to the extent permitted by law and subject to any applicable stockholder approval requirements pursuant to the listing standards of the Nasdaq Stock Market or such other United States securities exchange on which the Common Stock is traded, by any amount for any period of at least 20 days. The Company may make such increase in the Conversion Rate (in addition to others provided in this Indenture) as the Board of Directors deems advisable to avoid or diminish any income tax to holders of Common Stock resulting from a dividend or distribution of stock, or rights to acquire stock, or similar event, and the Company provides 15 days' prior written notice of any increase in the Conversion Rate to the Trustee and the Holders: *provided, however*, that in no event may the Company increase the Conversion Rate such that it causes the Conversion Price to be less than the par value of a share of Common Stock.

The Company may not take any voluntary actions that would result in an adjustment to the Conversion Rate pursuant to Section 13.06 without complying, if applicable, with the stockholder approval rules of the NASDAQ Global Market and any similar rule of any stock exchange on which the Common Stock is listed at the relevant time. In accordance with such listing standards, this restriction shall apply at any time when the Notes are Outstanding, regardless of whether the Company then has a class of securities listed on the NASDAQ Global Market.

Section 13.13. *Rights Plan.* To the extent that the Company has a Rights Plan in effect upon conversion of the Notes into Common Stock, the Holder will receive upon conversion of the Notes in respect of which the Company has elected to deliver Common Stock, if applicable, the Rights under the Rights Plan, unless prior to any conversion, the Rights have separated from the Common Stock, in which case, and only in such case, the Conversion Rate will be adjusted at the time of separation as if the Company distributed to all holders of Common Stock shares of the Company's Capital Stock, evidences of indebtedness or assets as described in Section 13.06(c) above, subject to readjustment in the event of the expiration, termination or redemption of such Rights. In lieu of any such adjustment, the Company may amend such applicable Rights Plan to provide that upon conversion of the Notes the Holders will receive, in addition to the Common Stock issuable upon such conversion, the Rights which would have attached to such Common Stock if the Rights had not become separated from the Common Stock under such applicable Rights Plan.

Section 13.14. *Exchange in Lieu of Conversion.* (a) Notwithstanding anything in this Indenture to the contrary, when a Holder surrenders Notes for

conversion, the Company may, at its election, direct the Conversion Agent to surrender, on or prior to the second Business Day immediately following the Conversion Date (assuming for purposes of this Section 13.14 that the date such Holder surrenders such Notes for conversion is the Conversion Date for such Notes), such Notes to a financial institution designated by the Company (a “**Financial Institution**”) for exchange in lieu of conversion.

(b) In order to accept any such Notes surrendered for conversion, the Financial Institution must agree to deliver, in exchange for such Notes, shares of Common Stock (and cash in lieu of fractional shares) equal to the consideration due upon conversion under Section 13.01(a), together with any cash payments (or common stock in lieu thereof) representing the Make-Whole Payment pursuant to Section 14.01 or any additional shares of Common Stock representing the Fundamental Change Make-Whole Premium pursuant to Section 13.01(e) (the “**Exchange Settlement Property**”).

(c) By the close of business on the second Business Day immediately following the Conversion Date, the Company must notify the Holder surrendering Notes for conversion that it has directed the Financial Institution to make an exchange in lieu of conversion and the Financial Institution shall be required to notify the Conversion Agent whether it will deliver the Exchange Settlement Property upon exchange.

(d) If the Financial Institution accepts any such Notes, it shall deliver the Exchange Settlement Property to the Conversion Agent and the Conversion Agent shall deliver such Exchange Settlement Property to the applicable Holder no later than the third Business Day following the Conversion Date. Any Notes exchanged by the Financial Institution shall remain Outstanding.

(e) If the Financial Institution agrees to accept any Notes for exchange but does not timely deliver the related consideration, or if the Financial Institution does not accept the Notes for exchange, the Company shall deliver such conversion consideration as if the Company had not made an exchange election.

The Company’s designation of the Financial Institution to which the Notes may be submitted for exchange does not require the Financial Institution to accept any Notes. The Company shall not pay any consideration to, or otherwise enter into any agreement with, the financial institution designated as the Financial Institution for or with respect to such designation.

ARTICLE 14  
REDEMPTION OF NOTES

Section 14.01. *Right to Redeem.* (a) No sinking fund is provided for the Notes. On or after the original Issue Date of the Notes, the Notes may be redeemed for cash in whole or in part at the option of the Company if the Last Reported Sale Price of the Common Stock is greater than or equal to 150% of the Conversion Price on at least 20 Trading Days during any 30 consecutive Trading Day period ending on the date on which the Company mailed the Notice of Redemption.

(b) The price at which the Notes are redeemable (the “**Redemption Price**”) shall be equal to (i) 100% of the principal amount of Notes to be redeemed, *plus* (ii) accrued and unpaid interest (including any Special Interest and Additional Interest), if any, to, but excluding, the Redemption Date, *plus* (iii) the Make-Whole Payment. The Trustee shall have no duty to determine or calculate the Make-Whole Payment, which shall be determined by the Company in accordance with the provisions of this Indenture, and the Trustee shall not be under any responsibility to determine the correctness of any such determination and/or calculation and may conclusively rely on the correctness thereof.

(c) Upon any redemption in accordance with this Article 14, the Company will pay to converting Holders, in addition to the shares of Common Stock due upon conversion (and cash in lieu of fractional shares), the Make-Whole Payment on all Notes called for redemption and converted during the period from the date the Company mailed the Notice of Redemption to the date of redemption (the “**Redemption Date**”); *provided, however*, that such Make-Whole Payment shall not exclude interest accrued to, but excluding, the Redemption Date. In the case of a Make-Whole Payment to converting Holders only in accordance with this Section 14.01(c), the Company may elect to pay such Make-Whole Payment in cash or shares of Common Stock, or any combination thereof. If the Company elects to pay any portion of such Make-Whole Payment in shares of Common Stock, the Company shall specify a percentage of such Make-Whole Payment in the Notice of Redemption to be paid in Common Stock. The number of shares of Common Stock to be delivered in respect of such portion of such Make-Whole Payment shall be determined by dividing such portion by 97.5% of the 5-day Volume-Weighted Average Price per share for the five Trading Days immediately succeeding the Trading Day on which the Company provides such Notice of Redemption. The Company shall not issue fractional shares for any additional payment upon conversion but shall instead make a cash adjustment for any fractional share payment. Notwithstanding the foregoing, the Company shall not pay any portion of any Make-Whole Payment in shares of Common Stock if (i) the resale of any such shares of Common Stock by any Person that is not an Affiliate of the Company shall require registration under the Securities Act or (ii)

the issuance of such shares of Common Stock shall require a shareholder approval pursuant to listing standards of the Nasdaq Stock Market.

(d) The Company may not redeem any Notes unless all accrued and unpaid interest (including Special Interest and Additional Interest, if applicable) thereon has been or is simultaneously paid for all interest periods ending prior to the Redemption Date.

(e) If the Redemption Date is after a Regular Record Date but on or prior to the corresponding Interest Payment Date then notwithstanding the foregoing the Company shall (i) pay accrued and unpaid interest on such Interest Payment Date to the Holder of record on such Regular Record Date, the Make-Whole Payment will equal the present value of all remaining interest payments starting with the next Interest Payment Date for which interest has not been provided for, calculated as set forth in the definition of Make-Whole Payment, and (x) in respect of any Notes redeemed on such Redemption Date, the Redemption Price payable on such Notes shall not include such payment, or (y) in respect of any Notes converted after such Regular Record Date and prior to the open of business on such Interest Payment Date, the converting Holder shall not be required to pay funds equal to the interest payable to the Holder of record on such Regular Record Date, as set forth under Section 13.02; and (ii) pay any Make-Whole Payment on the Redemption Date to the Holders of the Notes to be redeemed or Holders who convert their Notes called for redemption pursuant to Section 14.01(c), in each case regardless of whether such Holders are the Holders of record on such Regular Record Date. However, such Make-Whole Payment shall not include interest to be paid to the Holders of record on such Interest Payment Date.

Section 14.02. *Selection of Notes to be Redeemed.* If less than all the Notes are to be redeemed, the Trustee shall select the Notes to be redeemed by lot, or on a pro rata basis or by any other method the Trustee considers fair and appropriate (so long as such method is not prohibited by the rules of the Nasdaq Global Select Market or any other stock exchange on which the Common Stock is then listed, as applicable). The Trustee shall make the selection within seven Business Days from its receipt of the notice from the Company delivered pursuant to Section 14.03 from Outstanding Notes not previously called for redemption.

Notes and portions of Notes the Trustee selects shall be in principal amounts of \$1,000 or in integral multiples of \$1,000 in excess thereof. Provisions of this Indenture that apply to Notes called for redemption in whole also apply to Notes called for redemption in part. The Trustee shall notify the Company promptly of the Notes or portions of Notes to be redeemed.

If any portion of a Holder's Notes are selected for partial redemption and such Holder converts a portion of its Notes, the converted portion of such Notes

shall be deemed (so far as may be) to be from the portion selected for redemption. Notes which have been converted during a selection of Notes to be redeemed may be treated by the Trustee as Outstanding for the purpose of such selection.

Section 14.03. *Notice of Redemption.* At least 30 days but not more than 60 days before a Redemption Date, the Company, or at the Company's request, the Trustee, shall mail a notice of redemption by first-class mail, postage prepaid, to the Trustee, the Paying Agent and each Holder of Notes to be redeemed (the "**Notice of Redemption**"); *provided, however*, that the Company may not deliver any such notice to any Holder of Notes at any time when there exists any accrued and unpaid Defaulted Interest.

The Notice of Redemption shall specify the Notes (including CUSIP numbers) to be redeemed and shall state:

(i) the Redemption Date;

(ii) the Redemption Price;

(iii) the applicable Conversion Rate and any adjustments thereto;

(iv) the name and address of the Paying Agent and Conversion Agent;

(v) the amount of the Make-Whole Payment;

(vi) the percentage, if any, of such Make-Whole Payment to be paid in Common Stock for Notes called for redemption and converted during the period from the date the Company mailed the Notice of Redemption to and including the Redemption Date, pursuant to Section 14.01(c); and

(vii) the procedures a Holder must follow to exercise rights under Article 15.

At the Company's written request delivered at least 45 days prior to the Redemption Date (unless a shorter period is agreed to by the Trustee), the Trustee shall give the Notice of Redemption to each Holder of Notes to be redeemed in the Company's name and at the Company's expense.

Section 14.04. *Effect of Notice of Redemption.* Once Notice of Redemption is given, Notes called for redemption become due and payable on the Redemption Date and at the Redemption Price stated in the notice except for Notes that are converted in accordance with the terms of this Indenture. Upon surrender to the Paying Agent, such Notes shall be paid at the Redemption Price stated in the notice.



Section 14.05. *Deposit of Redemption Price.* Prior to 10:00 a.m. (New York City time) on or prior to the Redemption Date, the Company shall deposit with the Trustee or with the Paying Agent (or, if the Company or a Subsidiary of the Company or an Affiliate of either of them is acting as the Paying Agent, shall segregate and hold in trust as provided in Section 7.06) an amount of money (in immediately available funds if deposited on such Redemption Date) and shares of Common Stock, if any, sufficient to pay the aggregate Redemption Price of all the Notes or portions thereof which are to be redeemed as of the Redemption Date.

If the Paying Agent holds money and shares of Common Stock, if any, sufficient to pay the Redemption Price with respect to the Notes to be redeemed on the Redemption Date in accordance with the terms of this Indenture, then, immediately on and after the Redemption Date, interest on such Notes shall cease to accrue, whether or not the Notes are delivered to the Paying Agent, and all other rights of the Holders of such Notes shall terminate, other than the right to receive the Redemption Price upon delivery of such Notes.

Section 14.06. *Notes Redeemed in Part.* (a) Any Note which is to be redeemed only in part shall be surrendered at the office of the Paying Agent (with, if the Company or the Trustee so requires, due endorsement by, or a written instrument of transfer in form satisfactory to the Company and the Trustee duly executed by, the Holder thereof or such Holder's attorney duly authorized in writing) and the Company shall execute and, upon Company Order, the Trustee shall authenticate and deliver to the Holder of such Note, without service charge, a new Note or Notes, of any authorized denomination as requested by such Holder in aggregate principal amount equal to, and in exchange for, the portion of the principal amount of the Note so surrendered that is not redeemed.

(b) In the event of any redemption of any Note in part, the Company shall not be required to (i) issue, register the transfer of or exchange, pursuant to Section 2.05 or Section 2.06, any Notes during a period beginning at the open of business 15 days before the mailing of a Notice of Redemption and ending at the close of business on the day of such mailing or (ii) register the transfer of or exchange, pursuant to Section 2.05, any Notes so selected for redemption, in whole or in part, except the portion of such Notes not being redeemed.

#### ARTICLE 15 REPURCHASE OF NOTES

Section 15.01. *Repurchase of Notes at Option of the Holder Upon a Fundamental Change.* (a) If a Fundamental Change occurs prior to the Maturity Date, each Holder of a Note shall have the right, at the option of the Holder, to require the Company to repurchase all or any portion of the Notes of such Holder equal to \$1,000 principal amount (or an integral multiple thereof) at the

Fundamental Change Purchase Price, on the date specified by the Company that is not less than 20 days and not more than 35 days after the date of the Fundamental Change Company Notice pursuant to Section 15.01(b) (the “**Fundamental Change Purchase Date**”). If the Fundamental Change Purchase Date is after a Regular Record Date and on or prior to the corresponding Interest Payment Date, the Company shall pay accrued and unpaid interest to the Holder of a Note of record at the close of business on such Regular Record Date.

(b) On or before the tenth day after the Fundamental Change Effective Date, the Company, or, at the request of the Company, the Trustee, shall mail a written notice of the occurrence of the Fundamental Change, and of the repurchase right arising therefrom, to the Trustee, Paying Agent and to each Holder (and to beneficial owners as required by applicable law) (the “**Fundamental Change Company Notice**”). Simultaneously with providing such Fundamental Change Company Notice, the Company shall publish a notice containing the information that is required in the Fundamental Change Company Notice in a newspaper of general circulation in The City of New York or publish information on a website of the Company or through such other public medium the Company may use at that time. The Fundamental Change Company Notice shall set forth the Holder’s right to require the Company to purchase the Notes and specify:

(i) the events causing such Fundamental Change;

(ii) the date of such Fundamental Change;

(iii) the last date by which the Fundamental Repurchase Notice must be delivered to elect the repurchase option pursuant to this Section 15.01;

(iv) the Fundamental Change Purchase Price;

(v) the Fundamental Change Purchase Date;

(vi) the name and address of each Paying Agent and Conversion Agent, if applicable;

(vii) that the Notes with respect to which a Fundamental Change Notice has been delivered by a Holder may be converted only if the Holder withdraws the Fundamental Change Purchase Notice in accordance with the terms of this Indenture; and

(viii) the procedures that the Holder must follow to require the Company to repurchase its Notes under this Section 15.01.

At the Company's request, the Trustee shall give such Fundamental Change Company Notice in the Company's name and at the Company's expense; *provided* that, unless otherwise agreed by the Trustee, the Company makes such request at least five (5) Business Days prior to the date by which such Fundamental Change Company Notice must be given to the Holders in accordance with this Section 15.01; *provided, further*, that the text of such Fundamental Change Company Notice shall be prepared by the Company. If any of the Notes is in the form of a Global Note, then the Company shall modify such notice to the extent necessary to accord with the Applicable Procedures relating to the purchase of Global Notes.

No failure of the Company to give the foregoing notices or defect therein shall limit any Holder's right to exercise its right to cause the Company to repurchase such Holder's Notes pursuant to this Section 15.01.

(c) A Holder may exercise its rights specified in this Section 15.01 upon delivery of (1) the Note to be repurchased, duly endorsed for transfer, together with (2) a written purchase notice and the form entitled "Fundamental Change Purchase Notice" on the reverse of the Note duly completed and which may be delivered by letter, overnight courier, hand delivery, facsimile transmission or in any other written form onto the Paying Agent (in the case of Notes held in book-entry form, in accordance with DTC's Applicable Procedures) of the exercise of such rights (a "**Fundamental Change Purchase Notice**") to the Paying Agent at any time on or before the close of business on the Fundamental Change Purchase Date, subject to extension to comply with applicable law.

(i) The Fundamental Change Purchase Notice shall state: (A) the certificate number (if such Note is held in certificated form) of the Note which the Holder will deliver to be repurchased (or, if the Note is held in global form, any other items required to comply with the Applicable Procedures), (B) the portion of the principal amount of the Note which the Holder will deliver to be repurchased and (C) that such Note shall be repurchased as of the Fundamental Change Purchase Date pursuant to the terms and conditions specified in the Notes and in this Indenture.

(ii) The delivery of a Note for which a Fundamental Change Purchase Notice has been timely delivered to any Paying Agent, on or before the Business Day immediately preceding the Fundamental Change Purchase Date (together with all necessary endorsements) at the office of such Paying Agent shall be a condition to the receipt by the Holder of the Fundamental Change Purchase Price therefor (or, if the Note is held in global form, any items required to comply with the Applicable Procedures).

(iii) The Company shall only be obliged to purchase, pursuant to this Section 15.01, a portion of a Note if the principal amount of such portion is \$1,000 or an integral multiple of \$1,000 (provisions of this Indenture that apply to the purchase of all of a Note also apply to the purchase of such portion of such Note).

(iv) A Paying Agent shall promptly notify the Company of the receipt by it of any Fundamental Change Purchase Notice.

(v) Anything herein to the contrary notwithstanding, in the case of Global Notes, any Fundamental Change Purchase Notice may be delivered and such Notes may be surrendered or delivered for purchase in accordance with the Applicable Procedures as in effect from time to time.

(vi) A Holder may withdraw any Fundamental Change Purchase Notice in whole or in part by written notice of withdrawal delivered to the Paying Agent or in accordance with DTC's Applicable Procedures prior to the close of business on the Business Day prior to the Fundamental Change Purchase Date. Such notice of withdrawal shall state: (A) the principal amount of the withdrawn Note, (B) the certificate number (if such Note is held in certificated form) of the withdrawn Note (or, if the Note is held in global form, any other items required to comply with the Applicable Procedures), and (C) the principal amount, if any, which remains subject to the Fundamental Change Purchase Notice.

(d) The Company shall deposit cash at the time and in the manner as provided in Section 15.03, sufficient to pay the aggregate Fundamental Change Purchase Price of all Notes to be purchased pursuant to this Section 15.01.

Section 15.02. *Effect of Fundamental Change Purchase Notice.* Upon receipt by any Paying Agent of a properly completed Fundamental Change Purchase Notice from a Holder, the Holder of the Note in respect of which such Fundamental Change Purchase Notice was given shall thereafter be entitled to receive the Fundamental Change Purchase Price with respect to such Note. Such Fundamental Change Purchase Price shall be paid to such Holder promptly following the later of (1) the Fundamental Change Purchase Date (provided that the conditions in Section 15.01 have been satisfied) and (2) the time of book-entry transfer or delivery of such Note to a Paying Agent by the Holder thereof in the manner required by Section 15.01(c), subject to extension to comply with applicable law.

Section 15.03. *Deposit of Fundamental Change Purchase Price.* (a) On or before the applicable Fundamental Change Purchase Date, the Company shall deposit with the Paying Agent (or if the Company or an Affiliate of the Company is acting as the Paying Agent, shall segregate and hold in trust as provided in

Section 7.06) an amount of money (in immediately available funds if deposited on or after such Fundamental Change Purchase Date), sufficient to pay the aggregate Fundamental Change Purchase Price of all the Notes or portions thereof that are to be purchased as of the Fundamental Change Purchase Date. Payment by the Paying Agent of the Fundamental Change Purchase Price following receipt of the Fundamental Change Purchase Price from the Company shall be made promptly following the later of the Fundamental Change Purchase Date or the time of book-entry transfer or delivery of such Notes.

(b) If the Paying Agent holds, on the Fundamental Change Purchase Date, in accordance with the terms hereof, money or securities sufficient to pay the Fundamental Change Purchase Price of any Note for which a Fundamental Change Purchase Notice has been tendered then, immediately following the applicable Fundamental Change Purchase Date, whether or not book-entry transfer of the Note is made or whether or not the Note is delivered to the Paying Agent, each such Note shall cease to be Outstanding, interest, including any additional interest, if any, shall cease to accrue, and all other rights of the Holder in respect of the Note shall terminate (other than the right to receive the Fundamental Change Purchase Price upon delivery or transfer of the Note as aforesaid).

(c) If a Fundamental Change Purchase Date falls after a Regular Record Date and on or before the related Interest Payment Date, then interest on the Notes payable on such Interest Payment Date will be payable to the Holders in whose names the Notes are registered at the close of business on such Regular Record Date.

Section 15.04. *Repayment to the Company.* To the extent that the aggregate amount of cash deposited by the Company pursuant to Section 15.03 exceeds the aggregate Fundamental Change Purchase Price of the Notes or portions thereof that the Company is obligated to purchase, then promptly after the Fundamental Change Purchase Date the Paying Agent shall return any such excess cash to the Company.

Section 15.05. *Notes Purchased In Part.* Any Note that is to be purchased only in part shall be surrendered at the office of a Paying Agent, and promptly after the Fundamental Change Purchase Date, the Company shall execute and the Trustee shall authenticate and deliver to the Holder of such Note, without service charge, a new Note or Notes, of such authorized denomination or denominations as may be requested by such Holder (which must be equal to \$1,000 principal amount or any integral thereof), in aggregate principal amount equal to, and in exchange for, the portion of the principal amount of the Note so surrendered that is not purchased.

Section 15.06. *Compliance With Securities Laws Upon Purchase of Notes.* In connection with any offer to purchase of Notes under Section 15.01, the Company shall (a) comply with Rule 13e-4 and Rule 14e-1 (or any successor to either such Rule), and any other tender offer rules, if applicable, under the Exchange Act, (b) file the related Schedule TO (or any successor or similar schedule, form or report) if required under the Exchange Act, and (c) otherwise comply with all applicable federal and state securities laws in connection with such offer to purchase or purchase of Notes, all so as to permit the rights of the Holders and obligations of the Company under Section 15.01 through Section 15.05 to be exercised in the time and in the manner specified therein. To the extent that compliance with any such laws, rules and regulations would result in a conflict with any of the terms hereof, this Indenture is hereby modified to the extent required for the Company to comply with such laws, rules and regulations.

ARTICLE 16  
MEETING OF HOLDERS OF NOTES

Section 16.01. *Purposes For Which Meetings May Be Called.* A meeting of Holders of Notes may be called at any time and from time to time pursuant to this Article 16 to make, give or take any request, demand, authorization, direction, notice, consent, waiver or other action provided by this Indenture to be made, given or taken by Holders of Notes.

Notwithstanding anything contained in this Article 16, the Trustee may, during the pendency of a Default or an Event of Default, call a meeting of Holders of Notes in accordance with its standard practices.

Section 16.02. *Call Notice and Place of Meetings.* (a) The Trustee may at any time call a meeting of Holders of Notes for any purpose specified in Section 16.01 hereof, to be held at such time and at such place in The City of New York. Notice of every meeting of Holders of Notes, setting forth the time and the place of such meeting, in general terms the action proposed to be taken at such meeting and the percentage of the principal amount of the then-Outstanding Notes which shall constitute a quorum at such meeting, shall be given, in the manner provided in the Indenture, not less than 21 nor more than 180 days prior to the date fixed for the meeting.

(b) In case at any time the Company, pursuant to a resolution of the Board of Directors, or the Holders of at least 10% in principal amount of the Notes then Outstanding shall have requested the Trustee to call a meeting of the Holders of Notes for any purpose specified in Section 16.01 hereof, by written request setting forth in reasonable detail the action proposed to be taken at the meeting, and the Trustee shall not have made the first publication of the notice of such meeting within 21 days after receipt of such request or shall not thereafter

proceed to cause the meeting to be held as provided herein, then the Company or the Holders of Notes in the amount specified, as the case may be, may determine the time and the place in The City of New York for such meeting and may call such meeting for such purposes by giving notice thereof as provided in Section 16.02(a).

Section 16.03. *Persons Entitled to Vote at Meetings.* To be entitled to vote at any meeting of Holders of Notes, a Person shall be (a) a Holder of one or more Outstanding Notes or (b) a Person appointed by an instrument in writing as proxy for a Holder or Holders of one or more Outstanding Notes by such Holder or Holders. The only Persons who shall be entitled to be present or to speak at any meeting of Holders shall be the Persons entitled to vote at such meeting and their counsel, any representatives of the Trustee and its counsel and any representatives of the Company and its counsel.

Section 16.04. *Quorum; Action.* The Persons entitled to vote a majority in principal amount of the then-Outstanding Notes shall constitute a quorum. In the absence of a quorum within 30 minutes of the time appointed for any such meeting, the meeting shall, if convened at the request of Holders of Notes, be dissolved. In any other case, the meeting may be adjourned for a period of not less than 10 days as determined by the chairman of the meeting prior to the adjournment of such meeting. In the absence of a quorum at any such adjourned meeting, such adjourned meeting may be further adjourned for a period of not less than 10 days as determined by the chairman of the meeting prior to the adjournment of such adjourned meeting. Notice of the reconvening of any adjourned meeting shall be given as provided in Section 16.02(a) hereof, except that such notice need be given only once and not less than five days prior to the date on which the meeting is scheduled to be reconvened.

At a meeting or an adjourned meeting duly reconvened and at which a quorum is present as aforesaid, any resolution and all matters (except as limited by the third paragraph of Section 9.02 hereof) shall be effectively passed and decided if passed or decided by the Persons entitled to vote not less than a majority in principal amount of Notes then Outstanding represented and voting at such meeting.

Any resolution passed or decisions taken at any meeting of Holders of Notes duly held in accordance with this Section 16.04 shall be binding on all the Holders of Notes, whether or not present or represented at the meeting.

Section 16.05. *Determination of Voting Rights; Conduct and Adjournment of Meetings.* (a) Notwithstanding any other provisions of this Indenture, the Trustee may make such reasonable regulations as it may deem advisable for any meeting of Holders of Notes in regard to proof of the holding of Notes and of the appointment of proxies and in regard to the appointment and

duties of inspectors of votes, the submission and examination of proxies, certificates and other evidence of the right to vote, and such other matters concerning the conduct of the meeting as it shall deem appropriate.

(b) The Trustee shall, by an instrument in writing, appoint a temporary chairman (which may be the Trustee) of the meeting, unless the meeting shall have been called by the Company or by Holders of Notes as provided in Section 16.02 hereof, in which case the Company or the Holders of Notes calling the meeting, as the case may be, shall in like manner appoint a temporary chairman. A permanent chairman and a permanent secretary of the meeting shall be elected by vote of the Persons entitled to vote a majority in principal amount of the Outstanding Notes represented at the meeting.

(c) At any meeting, each Holder of a Note or proxy shall be entitled to one vote for each \$1,000 principal amount of Notes held or represented by him; *provided, however*, that no vote shall be cast or counted at any meeting in respect of any Note challenged as not Outstanding and ruled by the chairman of the meeting to be not Outstanding. The chairman of the meeting shall have no right to vote, except as a Holder of a Note or proxy.

(d) Any meeting of Holders of Notes duly called pursuant to Section 16.02 hereof at which a quorum is present may be adjourned from time to time by Persons entitled to vote a majority in principal amount of the then-Outstanding Notes represented at the meeting, and the meeting may be held as so adjourned without further notice.

Section 16.06. *Counting Votes and Recording Action of Meetings.* The vote upon any resolution submitted to any meeting of Holders of Notes shall be by written ballots on which shall be subscribed the signatures of the Holders of Notes or of their representatives by proxy and the principal amounts and serial numbers of the Outstanding Notes held or represented by them. The permanent chairman of the meeting shall appoint two inspectors of votes who shall count all votes cast at the meeting for or against any resolution and who shall make and file with the secretary of the meeting their verified written reports in duplicate of all votes cast at the meeting. A record, at least in duplicate, of the proceedings of each meeting of Holders of Notes shall be prepared by the secretary of the meeting and there shall be attached to said record the original reports of the inspectors of votes on any vote by ballot taken thereat and affidavits by one or more Persons having knowledge of the facts setting forth a copy of the notice of the meeting and showing that said notice was given as provided in Section 16.02 hereof and, if applicable, Section 16.04 hereof. Each copy shall be signed and verified by the affidavits of the permanent chairman and secretary of the meeting and one such copy shall be delivered to the Company and another to the Trustee to be preserved by the Trustee, the latter to have attached thereto the ballots voted



at the meeting. Any record so signed and verified shall be conclusive evidence of the matters therein stated.

ARTICLE 17  
MISCELLANEOUS PROVISIONS

Section 17.01. *Provisions Binding on Company's Successors.* All the covenants, stipulations, promises and agreements of the Company contained in this Indenture shall bind its successors and assigns whether so expressed or not.

Section 17.02. *Official Acts by Successor.* Any act or proceeding by any provision of this Indenture authorized or required to be done or performed by any board, committee or officer of the Company shall and may be done and performed with like force and effect by the like board, committee or officer of any corporation or other entity that shall at the time be the lawful sole successor of the Company.

Section 17.03. *Notices.* Except as otherwise expressly provided herein, any notice, request or demand that by any provision of this Indenture is required or permitted to be given, made or served by the Trustee or by the Holders or by any other Person pursuant to this Indenture to or on the Company may be given or served by being deposited in first class mail, postage prepaid, addressed (until another address is filed in writing by the Company with the Trustee), as follows: 28903 North Avenue Paine, Valencia, CA 91355. Any notice, election, request or demand by the Company or any Holder or by any other Person pursuant to this Indenture to or upon the Trustee shall be deemed to have been sufficiently given or made, for all purposes, if given or made in writing at the Corporate Trust Office of the Trustee. Except as otherwise expressly provided herein, any notice or communication to a Holder of a Note may be given or served by being deposited in first class mail, postage prepaid, addressed at the Holder's address as it appears in the Note Register.

Section 17.04. *Governing Law.* THIS INDENTURE AND EACH NOTE SHALL BE DEEMED TO BE A CONTRACT MADE UNDER THE LAWS OF NEW YORK, AND FOR ALL PURPOSES SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAWS OF NEW YORK, WITHOUT REGARD TO CONFLICTS OF LAWS PRINCIPLES THEREOF.

Section 17.05. *Evidence of Compliance with Conditions Precedent; Certificates and Opinions of Counsel to Trustee.* Upon any application or demand by the Company to the Trustee to take any action under any of the provisions of this Indenture, the Company shall furnish to the Trustee an Officer's Certificate and an Opinion of Counsel stating that such action is permitted by the

terms of this Indenture; *provided* that no such Opinion of Counsel shall be required in connection with the issuance of Notes on the Issue Date.

Each Officer's Certificate and Opinion of Counsel provided for by or on behalf of the Company in this Indenture and delivered to the Trustee with respect to compliance with this Indenture (other than the Officer's Certificates provided for in Section 4.04) shall include (a) a statement that the Person making such certification is familiar with the requested action and this Indenture; (b) a brief statement as to the nature and scope of the examination or investigation upon which the statement contained in such certificate is based; (c) a statement that, in the judgment of such person, he or she has made such examination or investigation as is necessary to enable him or her to express an informed judgment as to whether or not such action is permitted by this Indenture; and (d) a statement as to whether or not, in the judgment of such Person, such action is permitted by this Indenture.

Notwithstanding anything to the contrary in this Section 17.05, if any provision in this Indenture specifically provides that the Trustee shall or may receive an Opinion of Counsel in connection with any action to be taken by the Trustee or the Company hereunder, the Trustee shall be entitled to, or entitled to request, such Opinion of Counsel.

Section 17.06. *Legal Holidays*. In any case where any Interest Payment Date, Redemption Date, Fundamental Change Purchase Date, Conversion Date or Maturity Date is not a Business Day, then any action to be taken on such date need not be taken on such date, but may be taken on the next succeeding Business Day with the same force and effect as if taken on such date, and no interest shall accrue for the period from and after such date.

Section 17.07. *No Security Interest Created*. Nothing in this Indenture or in the Notes, expressed or implied, shall be construed to constitute a security interest under the Uniform Commercial Code or similar legislation, as now or hereafter enacted and in effect, in any jurisdiction.

Section 17.08. *Benefits of Indenture*. Nothing in this Indenture or in the Notes, expressed or implied, shall give to any Person, other than the parties hereto, any Paying Agent, any Conversion Agent, any authenticating agent, any Note Registrar and their successors hereunder or the Holders of the Notes, any benefit or any legal or equitable right, remedy or claim under this Indenture.

Section 17.09. *Table of Contents, Headings, Etc*. The table of contents and the titles and headings of the articles and sections of this Indenture have been inserted for convenience of reference only, are not to be considered a part hereof, and shall in no way modify or restrict any of the terms or provisions hereof.

Section 17.10. *Execution in Counterparts.* This Indenture may be executed in any number of counterparts, each of which shall be an original, but such counterparts shall together constitute but one and the same instrument.

Section 17.11. *Severability.* In the event any provision of this Indenture or in the Notes shall be invalid, illegal or unenforceable, then (to the extent permitted by law) the validity, legality or enforceability of the remaining provisions shall not in any way be affected or impaired.

Section 17.12. *Waiver of Jury Trial.* EACH OF THE COMPANY AND THE TRUSTEE HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS INDENTURE, THE NOTES OR THE TRANSACTION CONTEMPLATED HEREBY.

Section 17.13. *Consent to Jurisdiction.* (a) The Company hereby irrevocably and unconditionally submits, for itself and its property, to the nonexclusive jurisdiction of any New York State court or federal court of the United States sitting in the State and City of New York, County and Borough of Manhattan, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Indenture or the Notes, or for recognition or enforcement of any judgment, and each of the parties hereto hereby irrevocably and unconditionally agrees that all claims in respect of any such action or proceeding may be heard and determined in such state court sitting in the State and City of New York, County and Borough of Manhattan or, to the extent permitted by law, in such federal court sitting in the State and City of New York, County and Borough of Manhattan. Each of the parties hereto agrees that a final judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

(b) The Company hereby irrevocably and unconditionally waives, to the fullest extent it may legally and effectively do so, any objection which it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Indenture or the Notes in any New York State or federal court. Each of the parties hereto hereby irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the maintenance of such action or proceeding in any such court.

Section 17.14. *Force Majeure.* In no event shall the Trustee be responsible or liable for any failure or delay in the performance of its obligations hereunder arising out of or caused by, directly or indirectly, forces beyond its control, including, without limitation, strikes, work stoppages, accidents, acts of war or terrorism, civil or military disturbances, nuclear or natural catastrophes or

acts of God, and interruptions, loss or malfunctions of utilities, communications or computer (software and hardware) services; it being understood that the Trustee shall use reasonable efforts that are consistent with accepted practices in the banking industry to resume performance as soon as practicable under the circumstances.

Section 17.15. *Calculations.* Except as explicitly stated herein, the Company shall be responsible for making all calculations required pursuant to this Indenture and the Notes, including, without limitation, calculations with respect to determinations of the Conversion Price and Conversion Rate applicable to the Notes. The Company shall make all such calculations in good faith and, absent manifest error, the Company's calculations shall be binding on the Holders. The Company shall provide a written schedule of such calculations to the Trustee, and the Trustee shall be entitled to conclusively rely upon the accuracy of the Company's calculations without responsibility for independent verification thereof. The Trustee shall forward a copy of such calculations to any Holder upon such Holder's written request.

Section 17.16. *U.S.A. Patriot Act.* The parties hereto acknowledge that in accordance with Section 326 of the U.S.A. Patriot Act, the Trustee, like all financial institutions and in order to help fight the funding of terrorism and money laundering, is required to obtain, verify, and record information that identifies each person or legal entity that establishes a relationship or opens an account with the Trustee. The parties to this Indenture agree that they will provide the Trustee with such information as it may request in order for the Trustee to satisfy the requirements of the U.S.A. Patriot Act.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have caused this Indenture to be duly executed as of the date first written above.

MANKIND CORPORATION, as Issuer

By: /s/ Matthew J. Pfeffer

Name: Matthew J. Pfeffer

Title: Corporate Vice President and  
Chief Financial Officer

WELLS FARGO BANK, NATIONAL ASSOCIATION, as  
Trustee

By: /s/ Maddy Hall

Name: Maddy Hall

Title: Vice President

**Schedule A**  
**Make Whole Premium Upon a Fundamental Change**  
**(Number of Additional Shares)**

	<b>Stock Price</b>									
	<b>\$5.97</b>	<b>\$6.50</b>	<b>\$7.00</b>	<b>\$8.00</b>	<b>\$10.00</b>	<b>\$15.00</b>	<b>\$20.00</b>	<b>\$25.00</b>	<b>\$30.00</b>	<b>\$50.00</b>
August 24, 2010	20.4182	20.4182	20.4182	20.4182	18.3976	12.2848	9.2714	7.3218	6.1493	3.7299
August 15, 2011	20.4182	20.4182	20.4182	19.8839	15.8641	10.6240	7.9606	6.4456	5.2813	3.1875
August 15, 2012	20.4182	19.7954	18.4232	16.1445	12.9562	8.6237	6.4758	5.1902	4.3654	2.6155
August 15, 2013	20.4182	14.3658	13.3212	11.6771	9.3477	6.2018	4.6676	3.7430	3.1215	1.8779
August 15, 2014	20.4182	7.7914	7.2466	6.2954	5.0676	3.3901	2.5466	2.0406	1.7032	1.0287
August 15, 2015	20.4182	6.7603	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000

**[FORM OF FACE OF NOTE]**

[INCLUDE IF A GLOBAL NOTE]

[UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY, A NEW YORK CORPORATION (“DTC”), TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE, OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC (AND ANY PAYMENT IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC), ANY TRANSFER, PLEDGE, OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL INASMUCH AS THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.]

[INCLUDE IF A RESTRICTED SECURITY]

THE SALE OF THIS NOTE HAS NOT BEEN REGISTERED UNDER THE U.S. SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), AND ACCORDINGLY, THIS NOTE MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT AS SET FORTH IN THE FOLLOWING SENTENCE. BY ITS ACQUISITION HEREOF, OR OF A BENEFICIAL OWNERSHIP HEREIN, THE ACQUIRER: (I) REPRESENTS THAT IT, AND ANY ACCOUNT FOR WHICH IT IS ACTING, IS A “QUALIFIED INSTITUTIONAL BUYER” (WITHIN THE MEANING OF RULE 144A UNDER THE SECURITIES ACT) AND THAT IT EXERCISES SOLE INVESTMENT DISCRETION WITH RESPECT TO EACH SUCH ACCOUNT, AND (II) AGREES (1) THAT IT WILL NOT WITHIN THE LATER OF (X) ONE YEAR AFTER THE LAST DATE OF ORIGINAL ISSUANCE OF NOTES (INCLUDING THROUGH THE EXERCISE OF THE OPTION TO PURCHASE ADDITIONAL NOTES) AND (Y) 90 DAYS AFTER IT CEASES TO BE AN AFFILIATE (WITHIN THE MEANING OF RULE 144 UNDER THE SECURITIES ACT) OF MANNKIND CORPORATION (THE “COMPANY”), OFFER, RESELL, PLEDGE OR OTHERWISE TRANSFER THE NOTES EVIDENCED HEREBY, THE COMMON STOCK ISSUABLE UPON CONVERSION OF SUCH NOTES OR ANY BENEFICIAL OWNERSHIP HEREIN, EXCEPT: (A) TO THE COMPANY OR ANY SUBSIDIARY THEREOF; (B) UNDER A REGISTRATION STATEMENT THAT HAS BECOME EFFECTIVE UNDER THE SECURITIES ACT; (C) TO A PERSON THE SELLER REASONABLY BELIEVES IS A QUALIFIED

INSTITUTIONAL BUYER (AS DEFINED IN RULE 144A UNDER THE SECURITIES ACT) THAT IS PURCHASING FOR ITS OWN ACCOUNT OR FOR THE ACCOUNT OF ANOTHER QUALIFIED INSTITUTIONAL BUYER AND TO WHOM NOTICE IS GIVEN THAT THE TRANSFER IS BEING MADE IN RELIANCE ON RULE 144A, ALL IN COMPLIANCE WITH RULE 144A (IF AVAILABLE); OR (D) UNDER ANY OTHER AVAILABLE EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT, INCLUDING RULE 144, IF AVAILABLE; AND (2) THAT IT WILL, PRIOR TO ANY TRANSFER OF THIS NOTE WITHIN THE LATER OF (X) SIX MONTHS (OR, IF THE COMPANY HAS NOT SATISFIED THE CURRENT PUBLIC INFORMATION REQUIREMENTS OF RULE 144, ONE YEAR) AFTER THE LAST DATE OF ORIGINAL ISSUANCE OF NOTES (INCLUDING THROUGH THE EXERCISE OF THE OPTION TO PURCHASE ADDITIONAL NOTES) AND (Y) 90 DAYS AFTER IT CEASES TO BE AN AFFILIATE (WITHIN THE MEANING OF RULE 144) OF THE COMPANY, FURNISH TO THE TRUSTEE AND THE COMPANY SUCH CERTIFICATIONS, LEGAL OPINIONS OR OTHER INFORMATION AS THEY MAY REQUIRE AND MAY RELY UPON TO CONFIRM THAT SUCH TRANSFER IS BEING MADE PURSUANT TO AN EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT AND APPLICABLE STATE SECURITIES LAWS. IN ANY EVENT, NO AFFILIATE OF THE COMPANY MAY RESELL THIS NOTE OTHER THAN UNDER A REGISTRATION STATEMENT THAT HAS BECOME EFFECTIVE UNDER THE SECURITIES ACT OR PURSUANT TO AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT IN A TRANSACTION THAT RESULTS IN SUCH NOTE NO LONGER BEING "RESTRICTED SECURITIES" (AS DEFINED UNDER RULE 144). NO REPRESENTATION IS MADE AS TO THE AVAILABILITY OF ANY EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT. EACH PURCHASER AND TRANSFEREE OF A NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF A NOTE WILL BE DEEMED TO HAVE REPRESENTED BY ITS PURCHASE AND HOLDING OF THE NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF THE NOTE THAT (A) ITS PURCHASE AND HOLDING OF THE NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF THE NOTE IS NOT MADE ON BEHALF OF OR WITH "PLAN ASSETS" OF ANY PLAN SUBJECT TO TITLE I OF ERISA, SECTION 4975 OF THE CODE OR ANY SIMILAR LAW OR (B) ITS PURCHASE AND HOLDING OF THE NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF THE NOTE WILL NOT RESULT IN A NON-EXEMPT PROHIBITED TRANSACTION UNDER SECTION 406 OF ERISA, SECTION 4975 OF THE CODE OR ANY SIMILAR LAW.



MANNKIND CORPORATION  
5.75% Convertible Senior Note due 2015

No. \_\_\_\_\_

\$

CUSIP No.

ISIN No.

MannKind Corporation, a corporation duly organized and validly existing under the laws of the state of Delaware (herein called the “**Company**,” which term includes any successor corporation or other entity under the Indenture referred to on the reverse hereof), for value received hereby promises to pay to CEDE & CO., or registered assigns, the principal sum of [ ] (which amount may from time to time be increased or decreased to such other principal amounts as permitted by the Indenture by adjustments made on the records of the Trustee or the Custodian of the Depository as set forth in Schedule A hereto, in accordance with the rules and procedures of the Depository) on August 15, 2015, and interest thereon as set forth below.

This Note shall bear interest at the rate of 5.75% per year from August 24, 2010, or from the most recent date to which interest had been paid or provided for to, but excluding, the next scheduled Interest Payment Date until August 15, 2015. Interest is payable semi-annually in arrears on each February 15 and August 15 (or if any such day is not a Business Day, the immediately following Business Day), commencing February 15, 2011, to Holders of record at the close of business on the preceding February 1 and August 1 (whether or not such day is a Business Day), respectively.

Interest not paid when due and any interest on principal or interest not paid when due will be paid to Holders on a special record date, which will be the 15th day preceding the day fixed by the Company for the payment of such interest, whether or not such day is a Business Day. At least 15 days before a special record date, the Company will send to each Holder and to the Trustee a notice that sets forth the special record date, the payment date and the amount of interest to be paid.

Payment of the principal of, and accrued and unpaid interest on, this Note shall be made at the office or agency of the Company maintained for that purpose in such lawful money of the United States of America as at the time of payment shall be legal tender for the payment of public and private debts; *provided, however*, that interest on any Notes in certificated form (i) to the Person entitled thereto having an aggregate principal amount of \$2,000,000 or less, by check mailed to such Person at the address set forth in the Note Register and (ii) to the

Person entitled thereto having an aggregate principal amount of more than \$2,000,000, either by check mailed to such Person or, upon application by such Person to the Note Registrar not later than the relevant Regular Record Date, by wire transfer in immediately available funds to such Person's account within the United States, which application and wire transfer instructions shall remain in effect until such Person notifies, in writing, the Note Registrar to the contrary.

Reference is made to the further provisions of this Note set forth on the reverse hereof, including, without limitation, provisions giving the Holder of this Note the right to convert this Note into shares of Common Stock (together with cash in lieu of fractional shares) on the terms and subject to the limitations set forth in the Indenture. Such further provisions shall for all purposes have the same effect as though fully set forth at this place.

THIS NOTE SHALL BE DEEMED TO BE A CONTRACT MADE UNDER THE LAWS OF NEW YORK, AND FOR ALL PURPOSES SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAWS OF NEW YORK, WITHOUT REGARD TO CONFLICTS OF LAWS PRINCIPLES THEREOF.

This Note shall not be valid or become obligatory for any purpose until the certificate of authentication hereon shall have been manually signed by the Trustee or a duly authorized authenticating agent under the Indenture.

[Remainder of page intentionally left blank]

IN WITNESS WHEREOF, the Company has caused this Note to be duly executed.

MANNKIND CORPORATION

By: \_\_\_\_\_  
Name:  
Title:

Dated:

TRUSTEE'S CERTIFICATE OF AUTHENTICATION  
WELLS FARGO BANK, NATIONAL ASSOCIATION  
as Trustee, certifies that this is one of the Notes described  
in the within-named Indenture.

By: \_\_\_\_\_  
Authorized Signatory

[FORM OF REVERSE OF NOTE]

MANNKIND CORPORATION  
5.75% Convertible Senior Note due 2015

This Note is one of a duly authorized issue of the Notes of the Company, designated as its 5.75% Convertible Senior Notes due 2015 (herein called the “Notes”), all issued or to be issued under and pursuant to an Indenture dated as of August 24, 2010 (herein called the “Indenture”), between the Company and Wells Fargo Bank, National Association (herein called the “Trustee”), to which Indenture and all indentures supplemental thereto reference is hereby made for a description of the rights, limitations of rights, obligations, duties and immunities thereunder of the Trustee, the Company and the Holders of the Notes. Additional Notes may be issued in an unlimited aggregate principal amount, subject to certain conditions specified in the Indenture.

In case an Event of Default, as defined in the Indenture, shall have occurred and be continuing, the principal of and accrued and unpaid interest, if any, on all Notes may be declared, by either the Trustee or Holders of not less than 25% in aggregate principal amount of Notes then outstanding, and upon said declaration shall become, due and payable, in the manner, with the effect and subject to the conditions and certain exceptions set forth in the Indenture.

Subject to the terms and conditions of the Indenture, the Company will make all payments and deliveries in respect of the Redemption Price, the Fundamental Change Purchase Price and the principal amount on the Maturity Date, as the case may be, to the Holder who surrenders a Note to a Paying Agent to collect such payments in respect of the Note. The Company will pay cash amounts in money of the United States that at the time of payment is legal tender for payment of public and private debts.

The Indenture contains provisions permitting the Company and the Trustee in certain circumstances, without the consent of the Holders of the Notes, and in other circumstances, with the consent of the Holders of not less than a majority in aggregate principal amount of the Notes at the time outstanding, evidenced as in the Indenture provided, to execute supplemental indentures modifying the terms of the Indenture and the Notes as described therein. It is also provided in the Indenture that, subject to certain exceptions, the Holders of a majority in aggregate principal amount of the Notes at the time outstanding may on behalf of the Holders of all of the Notes waive any past Default or Event of Default under the Indenture and its consequences.

No reference herein to the Indenture and no provision of this Note or of the Indenture shall alter or impair the obligation of the Company, which is absolute and unconditional, to pay the principal of and accrued and unpaid

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interest, if any, on this Note at the place, at the respective times, at the rate and in the lawful money herein prescribed or to satisfy its obligation to convert the Notes.

The Notes are issuable in registered form without coupons in denominations of \$1,000 principal amount and multiples thereof. At the office or agency of the Company referred to on the face hereof, and in the manner and subject to the limitations provided in the Indenture, Notes may be exchanged for a like aggregate principal amount of Notes of other authorized denominations, without payment of any service charge but, if required by the Company or Trustee, with payment of a sum sufficient to cover any tax, assessments or other governmental charges that may be imposed in connection therewith as a result of the name of the Holders of the new Notes issued upon such exchange of Notes being different from the name of the Holder of the old Notes surrendered for such exchange.

The Notes are not subject to redemption through the operation of any sinking fund.

The Company may redeem the Notes in whole or in part for cash, subject to certain conditions described in the Indenture, at any time prior to the Maturity Date. The Redemption Price will equal 100% of the principal amount of the Notes to be redeemed, plus accrued and unpaid interest, if any, to, but excluding, the Redemption Date plus the Make-Whole Payment, as defined in the Indenture.

Upon the occurrence of a Fundamental Change, the Company will offer to purchase any and all of the Notes. The Holder has the right, at such Holder's option, to accept such offer and require the Company to purchase for cash all of such Holder's Notes or any portion thereof (in principal amounts of \$1,000 or multiples thereof) on the Fundamental Change Purchase Date at a price equal to the Fundamental Change Purchase Price.

Subject to the provisions of the Indenture, the Holder hereof has the right, at its option, prior to the close of business on the Business Day immediately preceding the Maturity Date, to convert any Notes or portion thereof that is \$1,000 or a multiple thereof, into shares of Common Stock (together with cash in lieu of fractional shares) at a Conversion Rate specified in the Indenture, as adjusted from time to time as provided in the Indenture.

Terms used in this Note and defined in the Indenture are used herein as therein defined.

## ABBREVIATIONS

The following abbreviations, when used in the inscription of the face of this Note, shall be construed as though they were written out in full according to applicable laws or regulations:

TEN COM = as tenants in common

UNIF GIFT MIN ACT = Uniform Gifts to Minors Act

CUST = Custodian

TEN ENT = as tenants by the entireties

JT TEN = joint tenants with right of survivorship and not as tenants in common

Additional abbreviations may also be used though not in the above list.



[FORM OF NOTICE OF CONVERSION]  
5.75% Convertible Senior Note due 2015

To: MannKind Corporation

The undersigned registered owner of this Note hereby exercises the option to convert this Note, or the portion hereof (that is \$1,000 principal amount or a multiple thereof) below designated, and the Company, at its election, may deliver shares of Common Stock (together with cash in lieu of fractional shares) in accordance with the terms of the Indenture referred to in this Note, and directs that any shares of Common Stock issuable and deliverable upon such conversion, and any Notes representing any unconverted principal amount hereof, be issued and delivered to the registered Holder hereof unless a different name has been indicated below. If any shares of Common Stock or any portion of this Note not converted are to be issued in the name of a Person other than the undersigned, the undersigned will pay all transfer taxes payable with respect thereto. Any amount required to be paid to the undersigned on account of interest accompanies this Note.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature(s)

\_\_\_\_\_  
Signature Guarantee

Signature(s) must be guaranteed by an eligible Guarantor Institution (banks, stock brokers, savings and loan associations and credit unions) with membership in an approved signature guarantee medallion program pursuant to Securities and Exchange Commission Rule 17Ad-15 if shares of Common Stock are to be issued, or Notes to be delivered, other than to and in the name of the registered Holder.

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Fill in for registration of shares if  
to be issued, and Notes if to  
be delivered, other than to and in the  
name of the registered Holder:

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Street Address)

\_\_\_\_\_  
(City, State and Zip Code)  
Please print name and address

Principal amount to be converted (if less than all):  
\$\_\_\_\_\_,000

NOTICE: The above signature(s) of the Holder(s)  
hereof must correspond with the name as written upon  
the face of the Note in every particular without  
alteration or enlargement or any change whatever.

\_\_\_\_\_  
Social Security or Other Taxpayer  
Identification Number

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[FORM OF FUNDAMENTAL CHANGE PURCHASE NOTICE]  
5.75% Convertible Senior Note due 2015

To: MannKind Company

The undersigned registered owner of this Note hereby acknowledges receipt of a notice from MannKind Corporation (the “**Company**”) as to the occurrence of a Fundamental Change with respect to the Company, offering to purchase the Notes and specifying the Fundamental Change Purchase Date. The undersigned registered owner of this Note hereby accepts the Company’s offer to purchase the Notes and instructs the Company to pay to the registered Holder hereof in accordance with the applicable provisions of the Indenture referred to in this Note (1) the entire principal amount of this Note, or the portion thereof (that is \$1,000 principal amount or a multiple thereof) below designated, and (2) if such Fundamental Change Purchase Date does not fall during the period after a Regular Record Date and on or prior to the corresponding Interest Payment Date, accrued and unpaid interest thereon to, but excluding, such Fundamental Change Purchase Date.

In the case of certificated Notes, the certificate numbers of the Notes to be purchased are as set forth below:

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature(s)

\_\_\_\_\_  
Social Security or Other Taxpayer  
Identification Number

Principal amount to be repaid (if less than all):  
\$\_\_\_\_\_,000

NOTICE: The above signature(s) of the Holder(s) hereof must correspond with the name as written upon the face of the Note in every particular without alteration or enlargement or any change whatever.

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[FORM OF ASSIGNMENT AND TRANSFER]

For value received \_\_\_\_\_ hereby sell(s), assign(s) and transfer(s) unto \_\_\_\_\_ (Please insert social security or Taxpayer Identification Number of assignee) the within Note, and hereby irrevocably constitutes and appoints \_\_\_\_\_ attorney to transfer the said Note on the books of the Company, with full power of substitution in the premises.

In connection with any transfer of the within Note occurring prior to the Resale Restriction Termination Date, as defined in the Indenture governing such Note, the undersigned confirms that such Note is being transferred:

- To MannKind Corporation or a subsidiary thereof; or
  - Pursuant to the registration statement that has become or been declared effective under the Securities Act of 1933, as amended; or
  - Pursuant to and in compliance with Rule 144A under the Securities Act of 1933, as amended; or
  - Pursuant to and in compliance with Rule 144 under the Securities Act of 1933, as amended; or
  - Pursuant to another available exemption from registration under the Securities Act of 1933, as amended.
-

Dated: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Signature(s)

\_\_\_\_\_  
Signature Guarantee

Signature(s) must be guaranteed by an eligible Guarantor Institution (banks, stock brokers, savings and loan associations and credit unions) with membership in an approved signature guarantee medallion program pursuant to Securities and Exchange Commission Rule 17Ad-15 if Notes are to be delivered, other than to and in the name of the registered Holder.

NOTICE: The signature on the assignment must correspond with the name as written upon the face of the Note in every particular without alteration or enlargement or any change whatever.

## [FORM OF FACE OF NOTE]

[INCLUDE IF A GLOBAL NOTE]

[UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITORY TRUST COMPANY, A NEW YORK CORPORATION (“DTC”), TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE, OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC (AND ANY PAYMENT IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC), ANY TRANSFER, PLEDGE, OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL INASMUCH AS THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.]

[INCLUDE IF A RESTRICTED SECURITY]

THE SALE OF THIS NOTE HAS NOT BEEN REGISTERED UNDER THE U.S. SECURITIES ACT OF 1933, AS AMENDED (THE “SECURITIES ACT”), AND ACCORDINGLY, THIS NOTE MAY NOT BE OFFERED, SOLD, PLEDGED OR OTHERWISE TRANSFERRED EXCEPT AS SET FORTH IN THE FOLLOWING SENTENCE. BY ITS ACQUISITION HEREOF, OR OF A BENEFICIAL OWNERSHIP HEREIN, THE ACQUIRER: (I) REPRESENTS THAT IT, AND ANY ACCOUNT FOR WHICH IT IS ACTING, IS A “QUALIFIED INSTITUTIONAL BUYER” (WITHIN THE MEANING OF RULE 144A UNDER THE SECURITIES ACT) AND THAT IT EXERCISES SOLE INVESTMENT DISCRETION WITH RESPECT TO EACH SUCH ACCOUNT, AND (II) AGREES (1) THAT IT WILL NOT WITHIN THE LATER OF (X) ONE YEAR AFTER THE LAST DATE OF ORIGINAL ISSUANCE OF NOTES (INCLUDING THROUGH THE EXERCISE OF THE OPTION TO PURCHASE ADDITIONAL NOTES) AND (Y) 90 DAYS AFTER IT CEASES TO BE AN AFFILIATE (WITHIN THE MEANING OF RULE 144 UNDER THE SECURITIES ACT) OF MANNKIND CORPORATION (THE “COMPANY”), OFFER, RESELL, PLEDGE OR OTHERWISE TRANSFER THE NOTES EVIDENCED HEREBY, THE COMMON STOCK ISSUABLE UPON CONVERSION OF SUCH NOTES OR ANY BENEFICIAL OWNERSHIP HEREIN, EXCEPT: (A) TO THE COMPANY OR ANY SUBSIDIARY THEREOF; (B) UNDER A REGISTRATION STATEMENT THAT HAS BECOME EFFECTIVE UNDER THE SECURITIES ACT; (C) TO A PERSON THE SELLER REASONABLY BELIEVES IS A QUALIFIED INSTITUTIONAL BUYER (AS DEFINED IN RULE 144A UNDER THE SECURITIES ACT) THAT IS PURCHASING FOR ITS OWN ACCOUNT OR FOR THE ACCOUNT OF ANOTHER QUALIFIED INSTITUTIONAL BUYER AND TO WHOM NOTICE IS GIVEN THAT THE TRANSFER IS BEING

MADE IN RELIANCE ON RULE 144A, ALL IN COMPLIANCE WITH RULE 144A (IF AVAILABLE); OR (D) UNDER ANY OTHER AVAILABLE EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT, INCLUDING RULE 144, IF AVAILABLE; AND (2) THAT IT WILL, PRIOR TO ANY TRANSFER OF THIS NOTE WITHIN THE LATER OF (X) SIX MONTHS (OR, IF THE COMPANY HAS NOT SATISFIED THE CURRENT PUBLIC INFORMATION REQUIREMENTS OF RULE 144, ONE YEAR) AFTER THE LAST DATE OF ORIGINAL ISSUANCE OF NOTES (INCLUDING THROUGH THE EXERCISE OF THE OPTION TO PURCHASE ADDITIONAL NOTES) AND (Y) 90 DAYS AFTER IT CEASES TO BE AN AFFILIATE (WITHIN THE MEANING OF RULE 144) OF THE COMPANY, FURNISH TO THE TRUSTEE AND THE COMPANY SUCH CERTIFICATIONS, LEGAL OPINIONS OR OTHER INFORMATION AS THEY MAY REQUIRE AND MAY RELY UPON TO CONFIRM THAT SUCH TRANSFER IS BEING MADE PURSUANT TO AN EXEMPTION FROM, OR IN A TRANSACTION NOT SUBJECT TO, THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT AND APPLICABLE STATE SECURITIES LAWS. IN ANY EVENT, NO AFFILIATE OF THE COMPANY MAY RESELL THIS NOTE OTHER THAN UNDER A REGISTRATION STATEMENT THAT HAS BECOME EFFECTIVE UNDER THE SECURITIES ACT OR PURSUANT TO AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT IN A TRANSACTION THAT RESULTS IN SUCH NOTE NO LONGER BEING "RESTRICTED SECURITIES" (AS DEFINED UNDER RULE 144). NO REPRESENTATION IS MADE AS TO THE AVAILABILITY OF ANY EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE SECURITIES ACT. EACH PURCHASER AND TRANSFEREE OF A NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF A NOTE WILL BE DEEMED TO HAVE REPRESENTED BY ITS PURCHASE AND HOLDING OF THE NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF THE NOTE THAT (A) ITS PURCHASE AND HOLDING OF THE NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF THE NOTE IS NOT MADE ON BEHALF OF OR WITH "PLAN ASSETS" OF ANY PLAN SUBJECT TO TITLE I OF ERISA, SECTION 4975 OF THE CODE OR ANY SIMILAR LAW OR (B) ITS PURCHASE AND HOLDING OF THE NOTE AND THE COMMON STOCK ISSUABLE UPON CONVERSION OF THE NOTE WILL NOT RESULT IN A NON-EXEMPT PROHIBITED TRANSACTION UNDER SECTION 406 OF ERISA, SECTION 4975 OF THE CODE OR ANY SIMILAR LAW.

MANNKIND CORPORATION

5.75% Convertible Senior Note due 2015

No. \_\_\_\_\_

\$

CUSIP No.

ISIN No.

MannKind Corporation, a corporation duly organized and validly existing under the laws of the state of Delaware (herein called the “**Company**,” which term includes any successor corporation or other entity under the Indenture referred to on the reverse hereof), for value received hereby promises to pay to CEDE & CO., or registered assigns, the principal sum of [ ] (which amount may from time to time be increased or decreased to such other principal amounts as permitted by the Indenture by adjustments made on the records of the Trustee or the Custodian of the Depository as set forth in Schedule A hereto, in accordance with the rules and procedures of the Depository) on August 15, 2015, and interest thereon as set forth below.

This Note shall bear interest at the rate of 5.75% per year from August 24, 2010, or from the most recent date to which interest had been paid or provided for to, but excluding, the next scheduled Interest Payment Date until August 15, 2015. Interest is payable semi-annually in arrears on each February 15 and August 15 (or if any such day is not a Business Day, the immediately following Business Day), commencing February 15, 2011, to Holders of record at the close of business on the preceding February 1 and August 1 (whether or not such day is a Business Day), respectively.

Interest not paid when due and any interest on principal or interest not paid when due will be paid to Holders on a special record date, which will be the 15th day preceding the day fixed by the Company for the payment of such interest, whether or not such day is a Business Day. At least 15 days before a special record date, the Company will send to each Holder and to the Trustee a notice that sets forth the special record date, the payment date and the amount of interest to be paid.

Payment of the principal of, and accrued and unpaid interest on, this Note shall be made at the office or agency of the Company maintained for that purpose in such lawful money of the United States of America as at the time of payment shall be legal tender for the payment of public and private debts; *provided, however*, that interest on any Notes in certificated form (i) to the Person entitled thereto having an aggregate principal amount of \$2,000,000 or less, by check mailed to such Person at the address set forth in the Note Register and (ii) to the Person entitled thereto having an aggregate principal amount of more than \$2,000,000, either by check mailed to such Person or, upon application by such

Person to the Note Registrar not later than the relevant Regular Record Date, by wire transfer in immediately available funds to such Person's account within the United States, which application and wire transfer instructions shall remain in effect until such Person notifies, in writing, the Note Registrar to the contrary.

Reference is made to the further provisions of this Note set forth on the reverse hereof, including, without limitation, provisions giving the Holder of this Note the right to convert this Note into shares of Common Stock (together with cash in lieu of fractional shares) on the terms and subject to the limitations set forth in the Indenture. Such further provisions shall for all purposes have the same effect as though fully set forth at this place.

**THIS NOTE SHALL BE DEEMED TO BE A CONTRACT MADE UNDER THE LAWS OF NEW YORK, AND FOR ALL PURPOSES SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAWS OF NEW YORK, WITHOUT REGARD TO CONFLICTS OF LAWS PRINCIPLES THEREOF.**

This Note shall not be valid or become obligatory for any purpose until the certificate of authentication hereon shall have been manually signed by the Trustee or a duly authorized authenticating agent under the Indenture.

[Remainder of page intentionally left blank]



IN WITNESS WHEREOF, the Company has caused this Note to be duly executed.

MANKIND CORPORATION

By: \_\_\_\_\_  
Name:  
Title:

Dated:

TRUSTEE'S CERTIFICATE OF AUTHENTICATION  
WELLS FARGO BANK, NATIONAL ASSOCIATION  
as Trustee, certifies that this is one of the Notes described  
in the within-named Indenture.

By: \_\_\_\_\_  
Authorized Signatory

[FORM OF REVERSE OF NOTE]

MANNKIND CORPORATION  
5.75% Convertible Senior Note due 2015

This Note is one of a duly authorized issue of the Notes of the Company, designated as its 5.75% Convertible Senior Notes due 2015 (herein called the “**Notes**”), all issued or to be issued under and pursuant to an Indenture dated as of August 24, 2010 (herein called the “**Indenture**”), between the Company and Wells Fargo Bank, National Association (herein called the “**Trustee**”), to which Indenture and all indentures supplemental thereto reference is hereby made for a description of the rights, limitations of rights, obligations, duties and immunities thereunder of the Trustee, the Company and the Holders of the Notes. Additional Notes may be issued in an unlimited aggregate principal amount, subject to certain conditions specified in the Indenture.

In case an Event of Default, as defined in the Indenture, shall have occurred and be continuing, the principal of and accrued and unpaid interest, if any, on all Notes may be declared, by either the Trustee or Holders of not less than 25% in aggregate principal amount of Notes then Outstanding, and upon said declaration shall become, due and payable, in the manner, with the effect and subject to the conditions and certain exceptions set forth in the Indenture.

Subject to the terms and conditions of the Indenture, the Company will make all payments and deliveries in respect of the Redemption Price, the Fundamental Change Purchase Price and the principal amount on the Maturity Date, as the case may be, to the Holder who surrenders a Note to a Paying Agent to collect such payments in respect of the Note. The Company will pay cash amounts in money of the United States that at the time of payment is legal tender for payment of public and private debts.

The Indenture contains provisions permitting the Company and the Trustee in certain circumstances, without the consent of the Holders of the Notes, and in other circumstances, with the consent of the Holders of not less than a majority in aggregate principal amount of the Notes at the time Outstanding, evidenced as in the Indenture provided, to execute supplemental indentures modifying the terms of the Indenture and the Notes as described therein. It is also provided in the Indenture that, subject to certain exceptions, the Holders of a majority in aggregate principal amount of the Notes at the time Outstanding may on behalf of the Holders of all of the Notes waive any past Default or Event of Default under the Indenture and its consequences.

No reference herein to the Indenture and no provision of this Note or of the Indenture shall alter or impair the obligation of the Company, which is absolute and unconditional, to pay the principal of and accrued and unpaid

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interest, if any, on this Note at the place, at the respective times, at the rate and in the lawful money herein prescribed or to satisfy its obligation to convert the Notes.

The Notes are issuable in registered form without coupons in denominations of \$1,000 principal amount and multiples thereof. At the office or agency of the Company referred to on the face hereof, and in the manner and subject to the limitations provided in the Indenture, Notes may be exchanged for a like aggregate principal amount of Notes of other authorized denominations, without payment of any service charge but, if required by the Company or Trustee, with payment of a sum sufficient to cover any tax, assessments or other governmental charges that may be imposed in connection therewith as a result of the name of the Holders of the new Notes issued upon such exchange of Notes being different from the name of the Holder of the old Notes surrendered for such exchange.

The Notes are not subject to redemption through the operation of any sinking fund.

The Company may redeem the Notes in whole or in part for cash, subject to certain conditions described in the Indenture, at any time prior to the Maturity Date. The Redemption Price will equal 100% of the principal amount of the Notes to be redeemed, plus accrued and unpaid interest, if any, to, but excluding, the Redemption Date plus the Make-Whole Payment, as defined in the Indenture.

Upon the occurrence of a Fundamental Change, the Company will offer to purchase any and all of the Notes. The Holder has the right, at such Holder's option, to accept such offer and require the Company to purchase for cash all of such Holder's Notes or any portion thereof (in principal amounts of \$1,000 or multiples thereof) on the Fundamental Change Purchase Date at a price equal to the Fundamental Change Purchase Price.

Subject to the provisions of the Indenture, the Holder hereof has the right, at its option, prior to the close of business on the Business Day immediately preceding the Maturity Date, to convert any Notes or portion thereof that is \$1,000 or a multiple thereof, into shares of Common Stock (together with cash in lieu of fractional shares) at a Conversion Rate specified in the Indenture, as adjusted from time to time as provided in the Indenture.

Terms used in this Note and defined in the Indenture are used herein as therein defined.

## ABBREVIATIONS

The following abbreviations, when used in the inscription of the face of this Note, shall be construed as though they were written out in full according to applicable laws or regulations:

TEN COM = as tenants in common

UNIF GIFT MIN ACT = Uniform Gifts to Minors Act

CUST = Custodian

TEN ENT = as tenants by the entirety

JT TEN = joint tenants with right of survivorship and not as tenants in common

Additional abbreviations may also be used though not in the above list.



[FORM OF NOTICE OF CONVERSION]  
5.75% Convertible Senior Note due 2015

To: MannKind Corporation

The undersigned registered owner of this Note hereby exercises the option to convert this Note, or the portion hereof (that is \$1,000 principal amount or a multiple thereof) below designated, and the Company, at its election, may deliver shares of Common Stock (together with cash in lieu of fractional shares) in accordance with the terms of the Indenture referred to in this Note, and directs that any shares of Common Stock issuable and deliverable upon such conversion, and any Notes representing any unconverted principal amount hereof, be issued and delivered to the registered Holder hereof unless a different name has been indicated below. If any shares of Common Stock or any portion of this Note not converted are to be issued in the name of a Person other than the undersigned, the undersigned will pay all transfer taxes payable with respect thereto. Any amount required to be paid to the undersigned on account of interest accompanies this Note.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature(s)

\_\_\_\_\_  
Signature Guarantee

Signature(s) must be guaranteed  
by an eligible Guarantor Institution  
(banks, stock brokers, savings and  
loan associations and credit unions)  
with membership in an approved  
signature guarantee medallion program  
pursuant to Securities and Exchange  
Commission Rule 17Ad-15 if  
shares of Common Stock are to be issued, or  
Notes to be delivered, other than  
to and in the name of the registered Holder.

\_\_\_\_\_

Fill in for registration of shares if  
to be issued, and Notes if to  
be delivered, other than to and in the  
name of the registered Holder:

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Street Address)

\_\_\_\_\_  
(City, State and Zip Code)

Please print name and address

Principal amount to be converted (if less than all):  
\$\_\_\_\_\_,000

NOTICE: The above signature(s) of the Holder(s) hereof must correspond with the name as written upon the  
face of the Note in every particular without alteration or enlargement or any change whatever.

\_\_\_\_\_  
Social Security or Other Taxpayer  
Identification Number

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[FORM OF FUNDAMENTAL CHANGE PURCHASE NOTICE]  
5.75% Convertible Senior Note due 2015

To: MannKind Company

The undersigned registered owner of this Note hereby acknowledges receipt of a notice from MannKind Corporation (the “**Company**”) as to the occurrence of a Fundamental Change with respect to the Company, offering to purchase the Notes and specifying the Fundamental Change Purchase Date. The undersigned registered owner of this Note hereby accepts the Company’s offer to purchase the Notes and instructs the Company to pay to the registered Holder hereof in accordance with the applicable provisions of the Indenture referred to in this Note (1) the entire principal amount of this Note, or the portion thereof (that is \$1,000 principal amount or a multiple thereof) below designated, and (2) if such Fundamental Change Purchase Date does not fall during the period after a Regular Record Date and on or prior to the corresponding Interest Payment Date, accrued and unpaid interest thereon to, but excluding, such Fundamental Change Purchase Date.

In the case of certificated Notes, the certificate numbers of the Notes to be purchased are as set forth below:

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature(s)

\_\_\_\_\_  
Social Security or Other Taxpayer  
Identification Number

Principal amount to be repaid (if less than all):  
\$\_\_\_\_\_,000

NOTICE: The above signature(s) of the Holder(s) hereof must correspond with the name as written upon the face of the Note in every particular without alteration or enlargement or any change whatever.

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[FORM OF ASSIGNMENT AND TRANSFER]

For value received \_\_\_\_\_ hereby sell(s), assign(s) and transfer(s) unto \_\_\_\_\_ (Please insert social security or Taxpayer Identification Number of assignee) the within Note, and hereby irrevocably constitutes and appoints \_\_\_\_\_ attorney to transfer the said Note on the books of the Company, with full power of substitution in the premises.

In connection with any transfer of the within Note occurring prior to the Resale Restriction Termination Date, as defined in the Indenture governing such Note, the undersigned confirms that such Note is being transferred:

- To MannKind Corporation or a subsidiary thereof; or
  - Pursuant to the registration statement that has become or been declared effective under the Securities Act of 1933, as amended; or
  - Pursuant to and in compliance with Rule 144A under the Securities Act of 1933, as amended; or
  - Pursuant to and in compliance with Rule 144 under the Securities Act of 1933, as amended; or
  - Pursuant to another available exemption from registration under the Securities Act of 1933, as amended.
-

Dated: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_  
Signature(s)

\_\_\_\_\_  
Signature Guarantee

Signature(s) must be guaranteed by an eligible Guarantor Institution (banks, stock brokers, savings and loan associations and credit unions) with membership in an approved signature guarantee medallion program pursuant to Securities and Exchange Commission Rule 17Ad-15 if Notes are to be delivered, other than to and in the name of the registered Holder.

NOTICE: The signature on the assignment must correspond with the name as written upon the face of the Note in every particular without alteration or enlargement or any change whatever.

D. BRADLEY PECK  
(858) 550-6012  
bpeck@cooley.com

August 18, 2010

MannKind Corporation  
28903 North Avenue Paine  
Valencia, CA 91355

Ladies and Gentlemen:

You have requested our opinion with respect to certain matters in connection with the issuance by MannKind Corporation, a Delaware corporation (the "**Company**"), of up to 9,000,000 shares of the Company's common stock, par value \$0.01 (the "**Shares**"), pursuant to a Registration Statement on Form S-3 (No. 333-166404) (the "**Registration Statement**"), filed with the Securities and Exchange Commission (the "**Commission**") under the Securities Act of 1933, as amended (the "**Act**"), the prospectus included within the Registration Statement (the "**Base Prospectus**"), the preliminary prospectus supplement dated August 16, 2010 and the final prospectus supplement dated August 18, 2010, each filed with the Commission pursuant to Rule 424(b) of the Rules and Regulations of the Act (the "**Prospectus Supplements**"). The Base Prospectus and Prospectus Supplements are collectively referred to as the "**Prospectus**." The Shares are to be issued by the Company as described in the Registration Statement and the Prospectus.

In connection with this opinion, we have examined and relied upon the Registration Statement and Prospectus, the Company's Amended and Restated Certificate of Incorporation, as amended, its Amended and Restated Bylaws, and the originals or copies certified to our satisfaction of such records, documents, certificates, memoranda and other instruments as in our judgment are necessary or appropriate to enable us to render the opinion expressed below.

In rendering this opinion, we have assumed the genuineness and authenticity of all signatures on original documents; the conformity to originals of all documents submitted to us as copies; the accuracy, completeness and authenticity of certificates of public officials; and the due authorization, execution and delivery of all documents where authorization, execution and delivery are prerequisites to the effectiveness of such documents.

On the basis of the foregoing, and in reliance thereon, we are of the opinion that the Shares, when sold in accordance with the Registration Statement and Prospectus, will be validly issued, fully paid and nonassessable.

MannKind Corporation  
August 18, 2010  
Page Two

We consent to the reference to our firm under the caption "Legal Matters" in the Prospectus and to the filing of this opinion as an exhibit to the Registration Statement.

Sincerely,

Cooley LLP

By: /s/ D. Bradley Peck  
D. Bradley Peck

MANKIND CORPORATION

(A Delaware corporation)

\$100,000,000

Convertible Senior Notes

PURCHASE AGREEMENT

Dated: August 18, 2010

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MANNKIND CORPORATION

(A Delaware corporation)

\$100,000,000

Convertible Senior Notes

**PURCHASE AGREEMENT**

August 18, 2010

Merrill Lynch, Pierce, Fenner & Smith Incorporated

as Representative of the several Initial Purchasers

One Bryant Park

New York, New York 10036

Ladies and Gentlemen:

MannKind Corporation, a Delaware corporation (the “Company”), confirms its agreement with Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) and each of the other Initial Purchasers named in Schedule A hereto (collectively, the “Initial Purchasers,” which term shall also include any initial purchaser substituted as hereinafter provided in Section 11 hereof), for whom Merrill Lynch is acting as representative (in such capacity, the “Representative”), with respect to (i) the sale by the Company and the purchase by the Initial Purchasers, acting severally and not jointly, of the respective principal amounts set forth in said Schedule A of \$100,000,000 aggregate principal amount of the Company’s Convertible Senior Notes (the “Initial Securities”) and (ii) the grant by the Company to the Initial Purchasers, acting severally and not jointly, of the option to purchase all or any part of an additional \$10,000,000 aggregate principal amount of its Convertible Senior Notes (the “Option Securities” and, together with the Initial Securities, the “Securities”) to cover overallocments. The Securities are to be issued pursuant to an indenture dated as of August 24, 2010 (the “Indenture”) between the Company and Wells Fargo Bank, National Association, as trustee (the “Trustee”).

The Company understands that the Initial Purchasers propose to make an offering of the Securities on the terms and in the manner set forth herein and agrees that the Initial Purchasers may resell, subject to the conditions set forth herein, all or a portion of the Securities to purchasers (“Subsequent Purchasers”) at any time after this Agreement has been executed and delivered. The Securities are to be offered and sold through the Initial Purchasers without being registered under the Securities Act of 1933, as amended (the “1933 Act”), in reliance upon exemptions therefrom. Pursuant to the terms of the Securities and the Indenture, investors that acquire Securities may only resell or otherwise transfer such Securities if such Securities are hereafter registered under the 1933 Act or if an exemption from the registration requirements of the 1933 Act is available (including the exemption afforded by Rule 144A (“Rule 144A”) of the rules and regulations promulgated under the 1933 Act (the “1933 Act Regulations”) by the Securities and Exchange Commission (the “Commission”).

The Company has prepared and delivered to each Initial Purchaser copies of a preliminary offering memorandum dated August 16, 2010 (the “Preliminary Offering Memorandum”) and has prepared and will deliver to each Initial Purchaser, on the date hereof or the next succeeding day, copies

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of a final offering memorandum dated August 18, 2010 (the "Final Offering Memorandum"), each for use by such Initial Purchaser in connection with its solicitation of purchases of, or offering of, the Securities. "Offering Memorandum" means, with respect to any date or time referred to in this Agreement, the most recent offering memorandum (whether the Preliminary Offering Memorandum or the Final Offering Memorandum, or any amendment or supplement to either such document), including exhibits thereto and any documents incorporated therein by reference, which has been prepared and delivered by the Company to the Initial Purchasers in connection with their solicitation of purchases of, or offering of, the Securities. The Company will prepare a final term sheet reflecting the final terms of the Securities, in the form set forth in Schedule B hereto (the "Final Term Sheet"), and will deliver such Final Term Sheet to the Initial Purchasers in connection with their solicitation of purchases of, or offering of, the Securities. The Company agrees that, unless it obtains the prior written consent of the Representative, it will not make any offer relating to the Securities by any written materials other than the Offering Memorandum and the Issuer Written Information. "Issuer Written Information" means (i) any writing intended for general distribution to investors as evidenced by its being specified in Schedule C hereto, including the Final Term Sheet, and (ii) any "road show" that is a "written communication" within the meaning of the 1933 Act. "General Disclosure Package" means the Preliminary Offering Memorandum and any Issuer Written Information specified on Schedule C hereto and issued at or prior to 7:00 A.M., New York City time, on August 19, 2010 or such other time as agreed by the Company and Merrill Lynch (such date and time, the "Applicable Time").

All references in this Agreement to financial statements and schedules and other information which is "contained," "included" or "stated" in the Offering Memorandum (or other references of like import) shall be deemed to include all such financial statements and schedules and other information which are incorporated by reference in the Offering Memorandum; and all references in this Agreement to amendments or supplements to the Offering Memorandum shall be deemed to include the filing of any document under the Securities Exchange Act of 1934 (the "1934 Act") which is incorporated by reference in the Offering Memorandum.

Concurrently with the offering of the Initial Securities, the Company is offering 9,000,000 shares of the Company's common stock, par value \$0.01 per share (the "Common Stock") pursuant to a share lending agreement with an affiliate of the Representative, pursuant to which the Company will lend shares of its Common Stock to such affiliate (the "Share Lending Agreement") (the offering of such shares of Common Stock together with the lending of such shares pursuant to the Share Lending Agreements are referred to collectively as the "Transactions").

#### SECTION 1. Representations and Warranties.

(a) *Representations and Warranties by the Company.* The Company represents and warrants to each Initial Purchaser as of the date hereof, the Applicable Time, the Closing Time (as defined below) and any Date of Delivery (as defined below), and agrees with each Initial Purchaser, as follows:

(i) General Disclosure Package; Rule 144A Eligibility. The Company hereby confirms that it has authorized the use of the General Disclosure Package, including the Preliminary Offering Memorandum and the Final Term Sheet, and the Final Offering Memorandum in connection with the offer and sale of the Securities by the Initial Purchasers. The Securities are eligible for resale pursuant to Rule 144A and will not be, at the Closing Time, of the same class as securities listed on a national securities exchange registered under Section 6 of the 1934 Act, or quoted in a U.S. automated interdealer quotation system.

(ii) No Registration Required; No General Solicitation. Subject to compliance by the Initial Purchasers with the representations and warranties of the Initial Purchasers and the

procedures set forth in Section 6 hereof, it is not necessary in connection with the offer, sale and delivery of the offered Securities to the Initial Purchasers and to each Subsequent Purchaser in the manner contemplated by this Agreement and the Offering Memorandum to register the Securities under the 1933 Act or to qualify the Indenture under the Trust Indenture Act of 1939, as amended (the "1939 Act"). None of the Company, its Affiliates or any person acting on its or any of their behalf (other than the Initial Purchasers, as to whom the Company makes no representation) has engaged, in connection with the offering of the offered Securities, in any form of general solicitation or general advertising within the meaning of Rule 502(c) under the 1933 Act Regulations.

(iii) Accurate Disclosure. As of the Applicable Time, neither (A) the General Disclosure Package nor (B) any Issuer Written Information, when considered together with the General Disclosure Package, included an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. The Final Offering Memorandum, as of its date, at the Closing Time or at any Date of Delivery, did not, does not and will not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. The documents incorporated or deemed to be incorporated by reference in the General Disclosure Package and the Final Offering Memorandum, when such documents incorporated by reference were filed with the Commission, when read together with the other information in the General Disclosure Package or the Final Offering Memorandum, as the case may be, did not, does not and will not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading.

Each Issuer Written Information, if any, as of its issue date and at all subsequent times through the Closing Dates or until any earlier date that the Company notified or notifies the Representative as described in the next sentence, did not, does not and will not include any information that conflicted, conflicts or will conflict with the information contained in the General Disclosure Package or the Final Offering Memorandum, including any document incorporated by reference therein.

If at any time following issuance of an Issuer Written Information through the Closing Dates there occurred or occurs an event or development as a result of which such Issuer Written Information conflicted or would conflict with the information contained in the Offering Memorandum that has not been superseded or modified, or included in the General Disclosure Package or included or would include an untrue statement of a material fact or omitted or would omit to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances prevailing at the subsequent time, not misleading, the Company has promptly notified or will promptly notify the Representative and has promptly amended or supplemented or will promptly amend or supplement, at its own expense, such Issuer Written Information to eliminate or correct such conflict, untrue statement or omission.

The representations and warranties in this subsection shall not apply to statements in or omissions from the General Disclosure Package or the Final Offering Memorandum made in reliance upon and in conformity with written information furnished to the Company by any Initial Purchaser through Merrill Lynch expressly for use therein. For purposes of this Agreement, the only information so furnished shall be the information in the first paragraph under the heading



“Plan of Distribution–Price Stabilization, Short Positions” in the Offering Memorandum (collectively, the “Initial Purchaser Information”).

(iv) Incorporation of Documents by Reference. The documents incorporated by reference in the Offering Memorandum, at the time they became effective or were filed with the Commission, as the case may be, complied in all material respects with the requirements of the 1933 Act or the 1934 Act, as applicable, and the rules and regulations of the Commission thereunder (the “1934 Act Regulations”), and none of such documents contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, and any further documents so filed and incorporated by reference in the Offering Memorandum, when such documents become effective or are filed with the Commission, as the case may be, will conform in all material respects to the requirements of the 1933 Act, the 1933 Act Regulations, the 1934 Act, the 1934 Act Regulations, as applicable, and will not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they are made, not misleading.

(v) Independent Accountants. Deloitte & Touche LLP is and, during the periods covered by its reports, was an independent public accounting firm as required by the 1933 Act, the 1933 Act Regulations and the Public Accounting Oversight Board. Except as described in the General Disclosure Package and the Final Offering Memorandum and as pre-approved in accordance with the requirements set forth in Section 10A of the 1934 Act, Deloitte & Touche LLP has not been engaged by the Company to perform any “prohibited activities” (as defined in Section 10A of the 1934 Act).

(vi) Financial Statements. The financial statements of the Company (including all notes and schedules thereto) included or incorporated by reference in the General Disclosure Package and the Final Offering Memorandum present fairly, in all material respects, the financial position of the Company and its consolidated subsidiaries at the dates indicated and the statement of operations, stockholders’ equity and cash flows of the Company and its consolidated subsidiaries for the periods specified; and such financial statements and related schedules and notes thereto, and the unaudited financial information included or incorporated by reference in the Offering Memorandum, have been prepared in conformity with generally accepted accounting principles, consistently applied throughout the periods involved (provided that non-year-end financial statements are subject to normal recurring year-end audit adjustments that are not expected to be material in the aggregate and do not contain all footnotes required by generally accepted accounting principles). The summary and selected financial data included in the General Disclosure Package and the Final Offering Memorandum, if any, present fairly, in all material respects, the information shown therein as at the respective dates and for the respective periods specified and have been presented on a basis consistent with the consolidated financial statements set forth in the Offering Memorandum and other financial information.

(vii) Good Standing of the Company. The Company and each of its subsidiaries is duly organized, validly existing and in good standing under the laws of their respective jurisdictions of incorporation or organization and each such entity has all requisite power and authority to carry on its business as is currently being conducted as described in the General Disclosure Package and the Final Offering Memorandum, and to own, lease and operate its properties. The Company and each of its subsidiaries is duly qualified to do business and is in good standing as a foreign corporation in each jurisdiction in which the nature of the business conducted by it or location of the assets or properties owned, leased or licensed by it requires

such qualification, except for such jurisdictions where the failure to so qualify or be in good standing, individually or in the aggregate, would not reasonably be expected to have a material adverse effect on the assets, properties, condition, financial or otherwise, or in the results of operations, business affairs or business prospects of the Company and its subsidiaries considered as a whole (a “Material Adverse Effect”), and to the Company’s knowledge, no proceeding has been instituted in any such jurisdiction revoking, limiting or curtailing, or seeking to revoke, limit or curtail, such power and authority or qualification. The Company has no subsidiary other than its five wholly owned subsidiaries, MannKind LLC, MannKind Limited, Technosphere International C.V., MannKind Netherlands B.V. and MannKind Deutschland GmbH, and does not control, directly or indirectly, any other corporation, partnership, joint venture, association or other business organization. Such subsidiaries, when considered in the aggregate as a single subsidiary, do not constitute a “significant subsidiary” of the Company (as such term is defined in Rule 1-02(w) of Regulation S-X under the Securities Act) and are not otherwise material to the assets and operations of the Company. All outstanding shares of capital stock of each of the Company’s subsidiaries have been duly authorized and validly issued, and are fully paid and nonassessable and are owned directly by the Company or by another wholly owned subsidiary of the Company free and clear of any security interests, liens, encumbrances, equities or claims, other than those described in the General Disclosure Package and the Final Offering Memorandum.

(viii) Capitalization. The authorized, issued and outstanding shares of capital stock of the Company are as set forth in the General Disclosure Package and the Final Offering Memorandum in the column entitled “Actual” under the caption “Capitalization” (except for subsequent issuances, if any, pursuant to this Agreement, the Share Lending Agreement, the purchase agreement with The Mann Group LLC and the purchase agreement with Seaside 88, LP, pursuant to reservations, agreements or employee benefit plans referred to in the General Disclosure Package and the Final Offering Memorandum or pursuant to the vesting, conversion or exercise of convertible securities or options referred to in the General Disclosure Package and the Final Offering Memorandum). All of the issued and outstanding shares of Common Stock have been duly and validly issued and are fully paid and nonassessable. There are no statutory preemptive or other similar rights to subscribe for or to purchase or acquire any shares of Common Stock of the Company or any of its subsidiaries or any such rights pursuant to its Certificate of Incorporation or by-laws or any agreement or instrument to or by which the Company or any of its subsidiaries is a party or bound.

(ix) Authorization of Agreement. This Agreement has been duly authorized, executed and delivered by the Company.

(x) Authorization of the Indenture. The Indenture has been duly authorized by the Company and, when duly executed and delivered by the Company and the Trustee, will constitute a valid and binding agreement of the Company, enforceable against the Company in accordance with its terms, except as the enforcement thereof may be limited by bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium or similar laws affecting enforcement of creditors’ rights generally and except as enforcement thereof is subject to general principles of equity (regardless of whether enforcement is considered in a proceeding in equity or at law).

(xi) Authorization of the Securities and the Common Stock. The Securities have been duly authorized and, at the Closing Time, will have been duly executed by the Company and, when authenticated, issued and delivered in the manner provided for in the Indenture and delivered against payment of the purchase price therefor as provided in this Agreement, will

constitute valid and binding obligations of the Company, enforceable against the Company in accordance with their terms, except as the enforcement thereof may be limited by bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium or similar laws affecting enforcement of creditors' rights generally and except as enforcement thereof is subject to general principles of equity (regardless of whether enforcement is considered in a proceeding in equity or at law), and will be in the form contemplated by, and entitled to the benefits of, the Indenture. The shares of Common Stock issuable upon conversion of the Securities have been duly authorized and reserved for issuance upon such conversion by all necessary corporate action and such shares, when issued upon such conversion, will be validly issued and will be fully paid and non-assessable; no holder of such shares will be subject to personal liability solely by reason of being such a holder; and the issuance of such shares upon such conversion will not be subject to the preemptive or other similar rights of any securityholder of the Company.

(xii) Authorization of the Share Lending Agreement. The Share Lending Agreement has been duly authorized, executed and delivered by the Company and is a valid and binding agreement of the Company, enforceable against the Company in accordance with its terms, except as the enforcement thereof may be limited by bankruptcy, insolvency (including, without limitation, all laws relating to fraudulent transfers), reorganization, moratorium or similar laws affecting enforcement of creditors' rights generally and except as enforcement thereof is subject to general principles of equity (regardless of whether enforcement is considered in a proceeding in equity or at law).

(xiii) Description of the Securities, the Common Stock and the Indenture. The Securities and the Indenture will conform in all material respects to the respective statements relating thereto contained in the General Disclosure Package and the Final Offering Memorandum. The Common Stock conforms in all material respects to all statements in relation thereto contained or incorporated by reference in the General Disclosure Package and the Final Offering Memorandum and such description conforms to the rights set forth in the instruments defining the same.

(xiv) Lock-Up Agreements. Each director and executive officer of the Company listed on Schedule D hereto has delivered to the Representative his or her executed written lock-up agreement in the form attached to this Agreement as Exhibit C hereto or in such form as may be approved in writing by the Representative.

(xv) Stock Options. The exercise price of each option to acquire Common Stock (each, a "Company Stock Option") is no less than the fair market value of a share of Common Stock as determined on the date of grant of such Company Stock Option. All grants of Company Stock Options were validly issued and properly approved by the Board of Directors of the Company, a committee thereof or an individual with authority duly delegated by the Board of Directors of the Company or a committee thereof, in material compliance with (i) all applicable laws and (ii) the terms of the plans under which such Company Stock Options were issued and were recorded on the Company's financial statements in accordance with generally accepted accounting principles, and no such grants involved any "back dating", "forward dating," "spring loading" or similar practices with respect to the effective date of grant.

(xvi) Absence of Violations, Defaults and Conflicts. Neither the Company nor any subsidiary (i) is in violation of its certificate or articles of incorporation or organization, by-laws, certificate of formation, limited liability company agreement, partnership agreement or other organizational documents, (ii) is in default under, and no event has occurred which, with notice or

lapse of time, or both, would constitute a default under, or result in the creation or imposition of any lien, charge, mortgage, pledge, security interest, claim, limitation on voting rights, equity, trust or other encumbrance, preferential arrangement, defect or restriction of any kind whatsoever, upon, any property or assets of the Company or any subsidiary pursuant to, any bond, debenture, note, indenture, mortgage, deed of trust, loan agreement or other agreement or instrument to which it is a party or by which it is bound or to which any of its properties or assets is subject or (iii) is in violation of any statute, law, rule, regulation, ordinance, directive, judgment, decree or order of any judicial, regulatory or other legal or governmental agency or body, foreign or domestic having jurisdiction over the Company (each, a "Governmental Entity"), except (in the case of clauses (ii) and (iii) above) for violations or defaults that would not (individually or in the aggregate) reasonably be expected to have a Material Adverse Effect. Neither the execution, delivery and performance of this Agreement or the Share Lending Agreement by the Company nor the consummation of any of the transactions contemplated hereby or thereby and in the General Disclosure Package and the Final Offering Memorandum (including, without limitation, the issuance and sale by the Company of the Securities and the use of proceeds from the sale of the Securities as described therein under the caption "Use of Proceeds") will give rise to a right to terminate or accelerate the due date of any payment due under, or conflict with or result in the breach of any term or provision of, or constitute a default (or an event which with notice or lapse of time or both would constitute a default) under, or require any consent or waiver under, or result in the execution or imposition of any lien, charge or encumbrance upon any properties or assets of the Company or its subsidiaries pursuant to the terms of, any indenture, mortgage, deed of trust or other agreement or instrument to which the Company or any of its subsidiaries is a party or by which either the Company or its subsidiaries or any of their properties or businesses is bound, or any franchise, license, permit, judgment, decree, order, statute, rule or regulation applicable to the Company or any of its subsidiaries, except where it would not reasonably be expected to have a Material Adverse Effect, or violate any provision of the charter or by-laws of the Company or any of its subsidiaries, except for such consents or waivers which have already been obtained and are in full force and effect.

(xvii) Incorporated Documents. Each description of a contract, document or other agreement in the General Disclosure Package or the Final Offering Memorandum accurately reflects in all respects the material terms of the underlying contract, document or other agreement. Each contract, document or other agreement described in the General Disclosure Package or the Final Offering Memorandum or incorporated by reference is in full force and effect and is valid and enforceable by and against the Company or any of its subsidiaries, as the case may be, in accordance with its terms, except as the enforceability thereof may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general equitable principles. Neither the Company nor any of its subsidiaries, if a subsidiary is a party, nor to the Company's knowledge, any other party is in default in the observance or performance of any term or obligation to be performed by it under any such agreement, and no event has occurred which with notice or lapse of time or both would constitute such a default, in any such case which default or event, individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect. No default exists, and no event has occurred which with notice or lapse of time or both would constitute a default, in the due performance and observance of any term, covenant or condition, by the Company or its subsidiary, if a subsidiary is a party thereto, of any other agreement or instrument to which the Company or any of its subsidiaries is a party or by which the Company or its properties or business or a subsidiary or its properties or business may be bound or affected which default or event, individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect.

(xviii) Corporate Action. All necessary corporate action has been duly and validly taken by the Company to authorize the execution, delivery and performance of this Agreement and the Share Lending Agreement and the issuance and sale of the Securities by the Company.

(xix) Absence of Labor Dispute. Neither the Company nor any of its subsidiaries is involved in any labor dispute nor, to the knowledge of the Company, is any such dispute threatened, which dispute would reasonably be expected to have a Material Adverse Effect. The Company is not aware of any existing or imminent labor disturbance by the employees of any of its principal suppliers or contractors which would reasonably be expected to have a Material Adverse Effect. The Company is not aware of any threatened or pending litigation between the Company or its subsidiaries and any of its executive officers which, if adversely determined, would reasonably be expected to have a Material Adverse Effect.

(xx) Related Party Transactions. All material transactions occurring or that have occurred between or among the Company and any of its officers or directors, shareholders or any affiliate or affiliates of any such officer or director or shareholder are described in the General Disclosure Package and the Final Offering Memorandum.

(xxi) Absence of Proceedings. There are no legal or governmental proceedings pending to which the Company or any of its subsidiaries is a party or of which any property of the Company or any of its subsidiaries is the subject which, if determined adversely to the Company or any of its subsidiaries could individually or in the aggregate have a Material Adverse Effect; and, to the knowledge of the Company, no such proceedings are threatened or contemplated by governmental authorities or threatened by others.

(xxii) Absence of Further Requirements. Each approval, consent, order, authorization, designation, declaration or filing of, by or with any Governmental Entity necessary in connection with the execution and delivery by the Company of this Agreement and the Share Lending Agreement and the consummation of the transactions herein and therein contemplated required to be obtained or performed by the Company (except such additional steps as may be necessary to qualify the Securities by the Initial Purchasers under the state securities or Blue Sky laws) has been obtained or made and is in full force and effect.

(xxiii) Possession of Licenses and Permits. Except as set forth in the General Disclosure Package and the Final Offering Memorandum, the Company and each of its subsidiaries has all requisite corporate power and authority, and all necessary authorizations, approvals, consents, orders, licenses, certificates and permits of and from all governmental or regulatory bodies or any other person or entity (collectively, the "Permits"), to own, lease and license its assets and properties and conduct its business, all of which are valid and in full force and effect, except where the lack of such Permits, individually or in the aggregate, would not reasonably be expected to have a Material Adverse Effect. The Company and each of its subsidiaries has fulfilled and performed in all material respects all of its obligations with respect to such Permits and no event has occurred that allows, or after notice or lapse of time would allow, revocation or termination thereof or results in any other material impairment of the rights of the Company or such subsidiary thereunder. Except as may be required under the 1933 Act and state and foreign Blue Sky laws, no other Permits are required to enter into, deliver and perform this Agreement or the Share Lending Agreement and to issue and sell the Securities.

(xxiv) Title to Property. The Company and each of its subsidiaries has good and marketable title in fee simple to all real property owned by it, and good and marketable title to all other property owned by it, in each case free and clear of all liens, encumbrances, claims, security

interests and defects, except as are described in the General Disclosure Package and the Final Offering Memorandum or such as do not materially affect the value of such property and do not materially interfere with the use made of such property by the Company and its subsidiaries. All property held under lease by the Company and its subsidiaries is held by them under valid, existing and enforceable leases, free and clear of all liens, encumbrances, claims, security interests and defects, except such as are not material and do not materially interfere with the use made of such property by the Company and its subsidiaries. Subsequent to the respective dates as of which information is given in the Offering Memorandum, (i) there has not been any event which would reasonably be expected to have a Material Adverse Effect; (ii) neither the Company nor any of its subsidiaries has sustained any loss or interference with its assets, businesses or properties (whether owned or leased) from fire, explosion, earthquake, flood or other calamity, whether or not covered by insurance, or from any labor dispute or any court or legislative or other governmental action, order or decree which would reasonably be expected to have a Material Adverse Effect; and (iii) since the date of the latest balance sheet included or incorporated by reference in the Offering Memorandum, except as otherwise disclosed in the Offering Memorandum, neither the Company nor its subsidiaries has (A) issued any securities (other than securities pursuant to the Company's equity incentive plans) or incurred any liability or obligation, direct or contingent, for borrowed money, except such liabilities or obligations incurred in the ordinary course of business, (B) entered into any transaction not in the ordinary course of business or (C) declared or paid any dividend or made any distribution on any shares of its stock or redeemed, purchased or otherwise acquired or agreed to redeem, purchase or otherwise acquire any shares of its capital stock.

(xxv) Possession of Intellectual Property. Except as set forth in the General Disclosure Package and the Final Offering Memorandum, the Company and each of its subsidiaries owns or possesses legally-enforceable rights (including license rights) to use all patents, patent rights, inventions, trademarks, trademark applications, trade names, service marks, copyrights, copyright applications, licenses, know-how and other similar rights and proprietary knowledge (collectively, "Intellectual Property") necessary for the conduct of its business. Neither the Company nor any of its subsidiaries has received any written notice of, or is aware of, any infringement of or conflict with asserted rights of others with respect to any Intellectual Property, except as referenced in the General Disclosure Package and the Final Offering Memorandum or that would not reasonably be expected to have a Material Adverse Effect.

(xxvi) Environmental Laws. (A) Each of the Company and each of its subsidiaries is in compliance in all material respects with all rules, laws and regulation relating to the use, treatment, storage and disposal of toxic substances and protection of health or the environment ("Environmental Laws") which are applicable to its business; (B) neither the Company nor its subsidiaries has received any notice from any governmental authority or third party of an asserted claim under Environmental Laws; (C) each of the Company and each of its subsidiaries has received all permits, licenses or other approvals required of it under applicable Environmental Laws to conduct its business and is in compliance with all terms and conditions of any such permit, license or approval; (D) to the Company's knowledge, no facts currently exist that will require the Company or any of its subsidiaries to make future material capital expenditures to comply with Environmental Laws; and (E) no property which is or has been owned, leased or occupied by the Company or its subsidiaries has been designated as a Superfund site pursuant to the Comprehensive Environmental Response, Compensation of Liability Act of 1980, as amended (42 U.S.C. Section 9601, et. seq.) ("CERCLA"), or otherwise designated as a contaminated site under applicable state or local law. Neither the Company nor any of its subsidiaries has been named as a "potentially responsible party" under the CERCLA 1980.

In the ordinary course of its business, the Company periodically reviews the effect of Environmental Laws on the business, operations and properties of the Company and its subsidiaries, in the course of which the Company identifies and evaluates associated costs and liabilities (including, without limitation, any capital or operating expenditures required for clean-up, closure of properties or compliance with Environmental Laws, or any permit, license or approval, any related constraints on operating activities and any potential liabilities to third parties). On the basis of such review, the Company has reasonably concluded that such associated costs and liabilities would not, singly or in the aggregate, have a Material Adverse Effect.

(xxvii) Accounting Controls. The books, records and accounts of the Company and its subsidiaries accurately and fairly reflect, in all material respects, the transactions in, and dispositions of, the assets of, and the results of operations of, the Company and its subsidiaries. The Company and its subsidiaries maintain a system of internal accounting controls sufficient to provide reasonable assurances that (A) transactions are executed in accordance with management's general or specific authorizations, (B) transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles and to maintain asset accountability, (C) access to assets is permitted only in accordance with management's general or specific authorization and (D) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(xxviii) Disclosure Controls. The Company has established and maintains disclosure controls and procedures (as such term is defined in Rule 13a-15 under the 1934 Act), which: (A) are designed to ensure that material information relating to the Company is made known to the Company's principal executive officer and its principal financial officer by others within the Company, particularly during the periods in which the periodic reports required under the 1934 Act are required to be prepared; (B) provide for the periodic evaluation of the effectiveness of such disclosure controls and procedures at the end of the periods in which the periodic reports are required to be prepared; and (C) are effective in all material respects to perform the functions for which they were established. Based on the evaluation of its disclosure controls and procedures, the Company is not aware of (1) any significant deficiency in the design or operation of internal controls which could adversely affect the Company's ability to record, process, summarize and report financial data or any material weaknesses in internal controls; or (2) any fraud, whether or not material, that involves management or other employees who have a role in the Company's internal controls.

(xxix) Off-Balance Sheet Arrangements. Except as described in the General Disclosure Package and the Final Offering Memorandum, there are no material off-balance sheet arrangements (as defined in Item 303 of Regulation S-K) that have or are reasonably likely to have a material current or future effect on the Company's financial condition, revenues or expenses, changes in financial condition, results of operations, liquidity, capital expenditures or capital resources.

(xxx) Audit Committee. The Company's Board of Directors has validly appointed an audit committee whose composition satisfies the requirements of Rule 5605(c)(2) of the Listing Rules of NASDAQ (the "NASDAQ Rules") and the Company's Board of Directors and/or the audit committee has adopted a charter that satisfies the requirements of Rule 5605(c)(1) of the NASDAQ Rules. The audit committee has reviewed the adequacy of its charter within the past twelve months.

(xxxix) Compliance with the Sarbanes-Oxley Act. There is and has been no failure on the part of the Company or any of its directors or officers, in their capacities as such, to comply with any applicable provision of the Sarbanes-Oxley Act of 2002, including, without limitation, Section 402 related to loans and Sections 302 and 906 related to certifications.

(xxxii) Payment of Taxes. The Company and each of its subsidiaries has filed all Federal, state, local and foreign tax returns which are required to be filed through the date hereof, which returns are true and correct in all material respects or has received timely extensions thereof, and has paid all taxes shown on such returns and all assessments received by it to the extent that the same are material and have become due, except in each case where such failure to file or pay would not reasonably be expected to have a Material Adverse Effect. There are no tax audits or investigations pending which, if adversely determined, would reasonably be expected to have a Material Adverse Effect; nor to the Company's knowledge are there any material proposed additional tax assessments against the Company or any of its subsidiaries.

(xxxiii) Insurance. The Company and its subsidiaries are insured by insurers of recognized financial responsibility against such losses and risks and in such amounts as are customary in the businesses in which they are engaged or propose to engage after giving effect to the transactions described in the General Disclosure Package and the Final Offering Memorandum; all policies of insurance and fidelity or surety bonds insuring the Company or any of its subsidiaries or the Company's or its subsidiaries' respective businesses, assets, employees, officers and directors are in full force and effect; the Company and each of its subsidiaries are in compliance with the terms of such policies and instruments in all material respects; and neither the Company nor any subsidiary of the Company has any reason to believe that it will not be able to renew its existing insurance coverage as and when such coverage expires or to obtain similar coverage from similar insurers as may be necessary to continue its business at a cost that is not materially greater than the current cost of such coverage. Neither the Company nor any of its subsidiaries has been denied any insurance coverage which it has sought or for which it has applied.

(xxxiv) Investment Company Act. The Company is not and, after giving effect to the offering and sale of the Securities and the application of proceeds thereof as described in the General Disclosure Package and the Final Offering Memorandum and the transactions contemplated by the Share Lending Agreement, will not be an "investment company" within the meaning of the Investment Company Act of 1940, as amended.

(xxxv) Absence of Manipulation. The Company has not taken, nor will it take, directly or indirectly, any action designed to or which might reasonably be expected to cause or result in, or which has constituted or which might reasonably be expected to constitute, the stabilization or manipulation of the price of the Common Stock or any security of the Company to facilitate the sale or resale of any of the Securities.

(xxxvi) Continued Registration of Common Stock. The Company has taken no action designed to, or likely to have the effect of, terminating the registration of the Common Stock under the 1934 Act or the listing of the Common Stock on the Nasdaq Global Market, nor has the Company received any notification that the Commission or the Nasdaq Global Market is contemplating terminating such registration or listing.

(xxxvii) Foreign Corrupt Practices Act. Neither the Company nor any other person associated with or acting on behalf of the Company including, without limitation, any director, officer, agent or employee of the Company or its subsidiaries, has, directly or indirectly, while



acting on behalf of the Company or its subsidiaries (i) used any corporate funds for unlawful contributions, gifts, entertainment or other unlawful expenses relating to political activity; (ii) made any unlawful payment to foreign or domestic government officials or employees or to foreign or domestic political parties or campaigns from corporate funds; (iii) violated any provision of the Foreign Corrupt Practices Act of 1977, as amended; or (iv) made any other unlawful payment.

(xxxviii) Money Laundering Laws. The operations of the Company and its subsidiaries are in compliance in all material respects with applicable financial recordkeeping and reporting requirements of the Currency and Foreign Transactions Reporting Act of 1970, as amended, the money laundering statutes of all required jurisdictions, the rules and regulations thereunder and any related or similar rules, regulations or guidelines, issued, administered or enforced by any governmental agency having jurisdiction over the Company (collectively, the “Money Laundering Laws”) and no action, suit or proceeding by or before any court or governmental agency, authority or body or any arbitrator involving the Company or any of its subsidiaries with respect to the Money Laundering Laws is pending, or to the best knowledge of the Company, threatened.

(xxxix) OFAC. Neither the Company nor any of its subsidiaries nor, to the knowledge of the Company, any director, officer, agent, employee or affiliate of the Company or any of its subsidiaries is currently subject to any U.S. sanctions administered by the Office of Foreign Assets Control of the U.S. Treasury Department (“OFAC”); and the Company will not directly or indirectly use the proceeds of the offering, or lend, contribute or otherwise make available such proceeds to any subsidiary, joint venture partner or other person or entity, for the purpose of financing the activities of any person known by the Company to be currently subject to any U.S. sanctions administered by OFAC.

(xl) ERISA. The Company has fulfilled its obligations, if any, under the minimum funding standards of Section 302 of the U.S. Employee Retirement Income Security Act of 1974 (“ERISA”) and the regulations and published interpretations thereunder with respect to each “plan” as defined in Section 3(3) of ERISA and such regulations and published interpretations in which its employees are eligible to participate and each such plan is in compliance in all material respects with the presently applicable provisions of ERISA and such regulations and published interpretations. No “Reportable Event” (as defined in Section 4043 of ERISA) has occurred with respect to any “Pension Plan” (as defined in ERISA) for which the Company could have any material liability.

(xli) Clinical and Pre-Clinical Studies. The clinical, pre-clinical and other studies and tests conducted by the Company or in which the Company or its products or product candidates have participated, or that are described in the General Disclosure Package and the Final Offering Memorandum or the results of which are referred to in the General Disclosure Package or the Final Offering Memorandum, and such studies and tests conducted on behalf of or sponsored by the Company or that the Company intends to rely on in support of regulatory approval by the U.S. Food and Drug Administration (the “FDA”) or foreign regulatory agencies, were and, if still pending, are, to the Company’s knowledge, being conducted in all material respects in accordance with standard accepted medical and scientific research procedures and, to the Company’s knowledge, the protocols established by the Company for such studies and tests. The descriptions in the General Disclosure Package and the Final Offering Memorandum of the results of such studies and tests are accurate and complete in all material respects and fairly present the data derived from such studies and tests, and except as set forth in the General Disclosure Package and the Final Offering Memorandum, the Company has no knowledge of any

other studies or tests, the results of which the Company believes reasonably call into question the results described or referred to in the General Disclosure Package and the Final Offering Memorandum when viewed in the context in which such results are described. Except to the extent disclosed in the General Disclosure Package and the Final Offering Memorandum, the Company has not received any written notices or other correspondence from the FDA or any other domestic or foreign governmental agency requiring the termination, suspension or modification (other than such modifications as are normal in the regulations, any such modification which are material have been disclosed to you) of any clinical or pre-clinical studies or tests that are described in the General Disclosure Package or the Final Offering Memorandum or the results of which are referred to in the General Disclosure Package or the Final Offering Memorandum.

(xlii) Lending Relationship. Except as disclosed in the General Disclosure Package and the Final Offering Memorandum, the Company (i) does not have any material lending or other relationship with any bank or lending affiliate of any Initial Purchaser and (ii) does not intend to use any of the proceeds from the sale of the Securities to repay any outstanding debt owed to any affiliate of any Initial Purchaser.

(xliii) Statistical and Market-Related Data. The statistical and market related data included in the General Disclosure Package or the Final Offering Memorandum are based on or derived from sources that the Company believes to be reliable and accurate.

(b) *Officer's Certificates*. Any certificate signed by any officer of the Company or any of its subsidiaries delivered to the Representative or to counsel for the Initial Purchasers shall be deemed a representation and warranty by the Company to each Initial Purchaser as to the matters covered thereby.

## SECTION 2. Sale and Delivery to Initial Purchasers; Closing.

(a) *Initial Securities*. On the basis of the representations and warranties herein contained and subject to the terms and conditions herein set forth, the Company agrees to sell to each Initial Purchaser, severally and not jointly, and each Initial Purchaser, severally and not jointly, agrees to purchase from the Company, at the price set forth in Schedule A, the aggregate principal amount of Initial Securities set forth in Schedule A, plus any additional principal amount of Initial Securities which such Initial Purchaser may become obligated to purchase pursuant to the provisions of Section 11 hereof, subject to such adjustments as Merrill Lynch in its discretion shall make to ensure that any sales or purchases are in authorized denominations.

(b) *Option Securities*. In addition, on the basis of the representations and warranties herein contained and subject to the terms and conditions herein set forth, the Company hereby grants an option to the Initial Purchasers, severally and not jointly, to purchase the Option Securities, at the price set forth in Schedule A. The option hereby granted will expire 13 days after the Closing Time and may be exercised in whole or in part from time to time only for the purpose of covering overallocments made in connection with the offering and distribution of the Initial Securities upon notice by the Representative to the Company setting forth the amount of Option Securities as to which the several Initial Purchasers are then exercising the option and the time and date of payment and delivery for such Option Securities. Any such time and date of delivery (a "Date of Delivery") shall be determined by the Representative, but shall not be later than seven full business days after the exercise of said option, nor in any event prior to the Closing Time. If the option is exercised as to all or any portion of the Option Securities, each of the Initial Purchasers, acting severally and not jointly, will purchase that proportion of the total principal amount of Option Securities then being purchased which the amount of Initial Securities set forth in Schedule A opposite the name of such Initial Purchaser bears to the total principal amount of Initial

Securities, subject in each case to such adjustments as Merrill Lynch in its discretion shall make to ensure that any sales or purchases are in authorized denominations.

(c) *Payment.* Payment of the purchase price for, and delivery of certificates for, the Initial Securities shall be made at the offices of Davis Polk & Wardwell LLP, or at such other place as shall be agreed upon by the Representative and the Company, at 9:00 A.M. (New York City time) on the third (fourth, if the pricing occurs after 4:30 P.M. (New York City time) on any given day) business day after the date hereof (unless postponed in accordance with the provisions of Section 11), or such other time not later than ten business days after such date as shall be agreed upon by the Representative and the Company (such time and date of payment and delivery being herein called "Closing Time").

In addition, in the event that any or all of the Option Securities are purchased by the Initial Purchasers, payment of the purchase price for, and delivery of certificates for, such Option Securities shall be made at the above-mentioned offices, or at such other place as shall be agreed upon by the Representative and the Company, on each Date of Delivery as specified in the notice from the Representative to the Company.

Payment shall be made to the Company by wire transfer of immediately available funds to a bank account designated by the Company, against delivery to the Representative for the respective accounts of the Initial Purchasers of certificates for the Securities to be purchased by them. It is understood that each Initial Purchaser has authorized the Representative, for its account, to accept delivery of, receipt for, and make payment of the purchase price for, the Initial Securities and the Option Securities, if any, which it has agreed to purchase. Merrill Lynch, individually and not as representative of the Initial Purchasers, may (but shall not be obligated to) make payment of the purchase price for the Initial Securities or the Option Securities, if any, to be purchased by any Initial Purchaser whose funds have not been received by the Closing Time or the relevant Date of Delivery, as the case may be, but such payment shall not relieve such Initial Purchaser from its obligations hereunder.

(d) *Denominations; Registration.* Certificates for the Initial Securities and the Option Securities, if any, shall be in such denominations (\$1,000 or integral multiples thereof) and registered in such names as the Representative may request in writing at least one full business day before the Closing Time or the relevant Date of Delivery, as the case may be. The Initial Securities and the Option Securities, if any, will be made available for examination and packaging by the Representative in The City of New York not later than 10:00 A.M. (New York City time) on the business day prior to the Closing Time or the relevant Date of Delivery, as the case may be.

SECTION 3. Covenants of the Company. The Company covenants with each Initial Purchaser as follows:

(a) *Delivery of Offering Memorandum.* The Company has delivered to each Initial Purchaser, without charge, as many copies of the Preliminary Offering Memorandum (as amended or supplemented) thereto and documents incorporated by reference therein as such Initial Purchaser reasonably requested, and the Company hereby consents to the use of such copies. The Company will furnish to each Initial Purchaser, without charge, such number of copies of the Final Offering Memorandum thereto and documents incorporated by reference therein as such Initial Purchaser may reasonably request.

(b) *Notice and Effect of Material Events.* If at any time prior to the completion of resales of the Securities by the Initial Purchasers, any event shall occur or condition shall exist as a result of which it is necessary, in the opinion of counsel for the Initial Purchasers or for the Company, to amend or supplement the General Disclosure Package or the Final Offering Memorandum in order that the General

Disclosure Package or the Final Offering Memorandum, as the case may be, will not include any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein not misleading in the light of the circumstances existing at the time it is delivered to a Subsequent Purchaser, the Company will promptly (A) give the Representative notice of such event and (B) prepare any amendment or supplement as may be necessary to correct such statement or omission and, a reasonable amount of time prior to any proposed use or distribution, furnish the Representative with copies of any such amendment or supplement; provided that the Company shall not use or distribute any such amendment or supplement to which the Representative or counsel for the Initial Purchasers shall object. The Company will furnish to the Initial Purchasers such number of copies of such amendment or supplement as the Initial Purchasers may reasonably request.

(c) *Reporting Requirements.* Until the completion of resales of the Securities by the Initial Purchasers, the Company will file all documents required to be filed with the Commission pursuant to the 1934 Act within the time periods required by the 1934 Act and the 1934 Act Regulations. The Company has given the Representative notice of any filings made pursuant to the 1934 Act or 1934 Act Regulations within 48 hours prior to the Applicable Time; the Company will give the Representative notice of its intention to make any such filing from the Applicable Time to the Closing Time and will furnish the Representative with copies of any such documents a reasonable amount of time prior to such proposed filing, as the case may be, and will not file or use any such document to which the Representative or counsel for the Initial Purchasers shall reasonably object.

(d) *Blue Sky Qualifications.* The Company will use its best efforts, in cooperation with the Initial Purchasers, to qualify the Securities for offering and sale under the applicable securities laws of such states and other jurisdictions (domestic or foreign) as the Representative may designate and to maintain such qualifications in effect so long as required to complete the distribution of the Securities; provided, however, that the Company shall not be obligated to file any general consent to service of process or to qualify as a foreign corporation or as a dealer in securities in any jurisdiction in which it is not so qualified or to subject itself to taxation in respect of doing business in any jurisdiction in which it is not otherwise so subject.

(e) *Use of Proceeds.* The Company will use the net proceeds received by it from the sale of the Securities in the manner specified in the General Disclosure Package and the Final Offering Memorandum under the caption "Use of Proceeds."

(f) *DTCC.* The Company will cooperate with the Initial Purchasers and use its best efforts to permit the offered Securities to be eligible for clearance and settlement through the facilities of The Depository Trust & Clearing Corporation ("DTCC").

(g) *Listing.* The Company will use its reasonable best efforts to effect and maintain the listing of the Common Stock issuable upon conversion of the Securities on the Nasdaq Global Market.

(h) *Restriction on Sale of Securities.* During a period of 90 days from the date of the Final Offering Memorandum (the "Lock-Up Period"), the Company will not, without the prior written consent of Merrill Lynch, (i) directly or indirectly, offer, pledge, sell, contract to sell, sell any option or contract to purchase, purchase any option or contract to sell, grant any option, right or warrant to purchase or otherwise transfer or dispose of any shares of Common Stock or any securities convertible into or exercisable or exchangeable for Common Stock or file any registration statement under the 1933 Act with respect to any of the foregoing or (ii) enter into any swap or any other agreement or any transaction that transfers, in whole or in part, directly or indirectly, the economic consequence of ownership of the Common Stock, whether any such swap or transaction described in clause (i) or (ii) above is to be settled by delivery of Common Stock or such other securities, in cash or otherwise. The foregoing sentence

shall not apply to (A) the Securities to be sold hereunder, (B) the shares of Common Stock to be lent pursuant to the Share Lending Agreement, (C) up to an aggregate of 8,400,000 shares of Common Stock to be sold and issued by the Company pursuant to the Common Stock Purchase Agreement by and between the Company and Seaside 88, LP and the Common Stock Purchase Agreement by and between the Company and The Mann Group LLC, each dated as of August 10, 2010, (D) any shares of Common Stock issued by the Company upon the exercise of an option or warrant or the conversion of a security outstanding on the date hereof and referred to in the General Disclosure Package and the Final Offering Memorandum, (E) any shares of Common Stock issued or options to purchase Common Stock granted pursuant to existing employee benefit plans of the Company referred to in the General Disclosure Package and the Final Offering Memorandum, (F) any shares of Common Stock issued pursuant to any non-employee director stock plan or dividend reinvestment plan referred to in the General Disclosure Package and the Final Offering Memorandum or (G) any shares of Common Stock issued to one or more counterparties in connection with the consummation of a strategic partnership, joint venture, collaboration, merger or the acquisition or license of any business products or technology complimentary to the Company's business; provided that, with respect to this subsection (G), (1) the sum of the aggregate number of Common Stock so issued shall not exceed 10% of the total number of shares of Common Stock outstanding as of the date hereof and (2) prior to the issuance of such Common Stock each recipient of such Common Stock shall have executed and delivered to Merrill Lynch an agreement substantially in the form of Exhibit D hereto.

#### SECTION 4. Payment of Expenses.

(a) *Expenses.* The Company will pay or cause to be paid all expenses incident to the performance of their obligations under this Agreement, including (i) preparation, issuance and delivery of the Securities to the Initial Purchasers and the Common Stock issuable upon conversion thereof and any charges of DTCC in connection therewith, (ii) the fees and disbursements of the Company's counsel, accountants and other advisors, (iii) the qualification of the Securities under securities laws in accordance with the provisions of Section 3(d) hereof, including filing fees and the reasonable fees and disbursements of counsel for the Initial Purchasers in connection therewith and in connection with the preparation of the Blue Sky Survey and any supplement thereto, provided such fees and disbursements do not exceed \$10,000 in the aggregate, (iv) the preparation, printing and delivery to the Initial Purchasers of copies of each Preliminary Offering Memorandum, any Issuer Written Information, the Final Term Sheet and the Final Offering Memorandum and any amendments or supplements thereto and any costs associated with electronic delivery of any of the foregoing by the Initial Purchasers to investors, (v) all fees and expenses of the Trustee and any expenses of any transfer agent or registrar for the Securities or the Common Stock issuable upon conversion of the Securities, (vi) the costs and expenses of the Company relating to investor presentations on any "road show" undertaken in connection with the marketing of the Securities, including without limitation, expenses associated with the production of road show slides and graphics, fees and expenses of any consultants engaged in connection with the road show presentations, travel and lodging expenses of the representatives and officers of the Company and any such consultants, and the cost of aircraft and other transportation chartered in connection with the road show, (vii) the fees and expenses incurred in connection with the listing of the Common Stock issuable upon conversion of the Securities on the Nasdaq Global Market and (viii) the costs and expenses (including, without limitation, any damages or other amounts payable in connection with legal or contractual liability) associated with the reforming of any contracts for sale of the Securities made by the Initial Purchasers caused by a breach of the representation contained in the first sentence of Section 1(a)(iii). Subject to the provisions of Section 4(b) below, the Initial Purchasers agree to pay, whether or not the transactions contemplated hereby are consummated or this Agreement is terminated, all costs and expenses incident to the performance of the obligations of the Initial Purchasers under this Agreement not payable by the Company pursuant to the preceding sentence, including, without limitation, the fees and disbursements of counsel for the Initial Purchasers.

(b) *Termination of Agreement.* If this Agreement is terminated by the Representative prior to the Closing Time in accordance with the provisions of Section 5(a)-(c), Section 5(e)-(k), Section 5(m), Section 10(a)(i) or (iii) or Section 11 hereof, the Company shall reimburse the Initial Purchasers (except, in the case of a termination in accordance with the provisions of Section 11 hereof, any defaulting Initial Purchaser) for all of their out-of-pocket expenses, including the reasonable fees and disbursements of counsel for the Initial Purchasers.

SECTION 5. Conditions of Initial Purchasers' Obligations. The obligations of the several Initial Purchasers hereunder are subject to the accuracy of the representations and warranties of the Company contained herein or in certificates of any officer of the Company or any of its subsidiaries, to the performance by the Company of its covenants and other obligations hereunder, and to the following further conditions:

(a) *Opinion and Negative Assurance Letter of Counsel for Company.* At the Closing Time, the Representative shall have received an opinion and negative assurance letter, each dated the Closing Time, of Cooley LLP, counsel for the Company, substantially in the forms attached as Exhibit A-1 and A-2 hereto, respectively.

(b) *Opinion of Intellectual Property Counsel for Company.* At the Closing Time, the Representative shall have received an opinion, dated the Closing Time, of K&L Gates LLP, intellectual property counsel for the Company, substantially in the form attached as Exhibit B hereto.

(c) *Certificate of the General Counsel of the Company.* At the Closing Time, the Representative shall have received a certificate, addressed to the Representative, of the General Counsel of the Company, dated the Closing Time, substantially in the form attached as Exhibit C hereto.

(d) *Opinion of Counsel for Initial Purchasers.* At the Closing Time, the Representative shall have received the favorable opinion, dated the Closing Time, of Davis Polk & Wardwell LLP, counsel for the Initial Purchasers, together with signed or reproduced copies of such letter for each of the other Initial Purchasers in form and substance satisfactory to the Representative. In giving such opinion such counsel may rely, as to all matters governed by the laws of jurisdictions other than the law of the State of New York, the General Corporation Law of the State of Delaware and the federal securities laws of the United States, upon the opinions of counsel satisfactory to the Representative. Such counsel may also state that, insofar as such opinion involves factual matters, they have relied, to the extent they deem proper, upon certificates of officers and other representatives of the Company and its subsidiaries and certificates of public officials.

(e) *Officers' Certificate.* At the Closing Time, there shall not have been, since the date hereof or since the respective dates as of which information is given in the General Disclosure Package or the Final Offering Memorandum, any material adverse change in the condition, financial or otherwise, or in the earnings, business affairs or business prospects of the Company and its subsidiaries considered as one enterprise, whether or not arising in the ordinary course of business, and the Representative shall have received a certificate of the Chief Executive Officer or the President of the Company and of the chief financial or chief accounting officer of the Company, dated the Closing Time, to the effect that (i) there has been no such material adverse change, (ii) the representations and warranties of the Company in this Agreement are true and correct with the same force and effect as though expressly made at and as of the Closing Time and (iii) the Company has complied with all agreements and satisfied all conditions on its part to be performed or satisfied at or prior to the Closing Time.

(f) *Accountant's Comfort Letter.* At the time of the execution of this Agreement, the Representative shall have received from Deloitte & Touche LLP a letter, dated such date, in form and

substance satisfactory to the Representative, together with signed or reproduced copies of such letter for each of the other Initial Purchasers containing statements and information of the type ordinarily included in accountants' "comfort letters" to underwriters with respect to the financial statements and certain financial information contained in the Offering Memorandum.

(g) *Bring-down Comfort Letter.* At the Closing Time, the Representative shall have received from Deloitte & Touche LLP a letter, dated as of the Closing Time, to the effect that they reaffirm the statements made in the letter furnished pursuant to subsection (f) of this Section, except that the specified date referred to shall be a date not more than three business days prior to the Closing Time.

(h) *Approval of Listing.* At the Closing Time, the Nasdaq Stock Market shall not have rejected the Company's Application for Listing of Additional Shares covering the Common Stock issuable upon conversion of the Securities.

(i) *Lock-up Agreements.* At the date of this Agreement, the Representative shall have received an agreement substantially in the form of Exhibit D hereto signed by the persons listed on Schedule D hereto.

(j) *Maintenance of Rating.* Since the execution of this Agreement, there shall not have been any decrease in or withdrawal of the rating of any securities of the Company or any of its subsidiaries by any "nationally recognized statistical rating organization" (as defined for purposes of Rule 436(g) under the 1933 Act) or any notice given of any intended or potential decrease in or withdrawal of any such rating or of a possible change in any such rating that does not indicate the direction of the possible change.

(k) *Transactions.* At the Closing Time, the Transactions shall have been consummated on the terms and conditions described in the General Disclosure Package and the Offering Memorandum.

(l) *Conditions to Purchase of Option Securities.* In the event that the Initial Purchasers exercise their option provided in Section 2(b) hereof to purchase all or any portion of the Option Securities, the representations and warranties of the Company contained herein and the statements in any certificates furnished by the Company and any of its subsidiaries hereunder shall be true and correct as of each Date of Delivery and, at the relevant Date of Delivery, the Representative shall have received:

(i) Officers' Certificate. A certificate, dated such Date of Delivery, of the President or a Vice President of the Company and of the chief financial or chief accounting officer of the Company confirming that the certificate delivered at the Closing Time pursuant to Section 5(e) hereof remains true and correct as of such Date of Delivery.

(ii) Opinion and Negative Assurance Letter of Counsel for Company. If requested by the Representative, an opinion and negative assurance letter of Cooley LLP, counsel for the Company, together with the favorable opinion of K&L Gates LLP, special intellectual property counsel for the Company, each dated such Date of Delivery and relating to the Option Securities to be purchased on such Date of Delivery, and otherwise to the same effect as the applicable opinion or negative assurance letter required by Section 5(a) or 5(b) hereof, as the case may be.

(iii) Opinion of Counsel for Initial Purchasers. If requested by the Representative, the favorable opinion of Davis Polk & Wardwell LLP, counsel for the Initial Purchasers, dated such Date of Delivery, relating to the Option Securities to be purchased on such Date of Delivery and otherwise to the same effect as the opinion required by Section 5(d) hereof.

(iv) Bring-down Comfort Letter. If requested by the Representative, a letter from Deloitte & Touche LLP, in form and substance satisfactory to the Representative and dated such Date of Delivery, substantially in the same form and substance as the letter furnished to the Representative pursuant to Section 5(f) hereof, except that the “specified date” in the letter furnished pursuant to this paragraph shall be a date not more than three business days prior to such Date of Delivery.

(m) Additional Documents. At the Closing Time and at each Date of Delivery (if any), counsel for the Initial Purchasers shall have been furnished with such documents and opinions as they may reasonably require for the purpose of enabling them to pass upon the issuance and sale of the Securities as herein contemplated, or in order to evidence the accuracy of any of the representations or warranties, or the fulfillment of any of the conditions, herein contained; and all proceedings taken by the Company in connection with the issuance and sale of the Securities as herein contemplated shall be satisfactory in form and substance to the Representative and counsel for the Initial Purchasers.

(n) Termination of Agreement. If any condition specified in this Section shall not have been fulfilled when and as required to be fulfilled, this Agreement, or, in the case of any condition to the purchase of Option Securities on a Date of Delivery which is after the Closing Time, the obligations of the several Initial Purchasers to purchase the relevant Option Securities, may be terminated by the Representative by notice to the Company at any time at or prior to Closing Time or such Date of Delivery, as the case may be, and such termination shall be without liability of any party to any other party except as provided in Section 4 and except that Sections 1, 7, 8, 9, 14, 15 and 16 shall survive any such termination and remain in full force and effect.

#### SECTION 6. Subsequent Offers and Resales of the Securities.

(a) Offer and Sale Procedures. Each of the Initial Purchasers and the Company hereby establish and agree to observe the following procedures in connection with the offer and sale of the Securities:

(i) Offers and Sales. Offers and sales of the Securities shall be made to such persons and in such manner as is contemplated by the Offering Memorandum. Each Initial Purchaser severally agrees that it will not offer, sell or deliver any of the Securities in any jurisdiction outside the United States except under circumstances that will result in compliance with the applicable laws thereof, and that it will take at its own expense whatever action is required to permit its purchase and resale of the Securities in such jurisdictions. The Company has not entered into any contractual arrangement, other than this Agreement, with respect to the distribution of the Securities or the Common Stock issuable upon conversion of the Securities and the Company will not enter into any such arrangement except as contemplated thereby.

(ii) No General Solicitation. No general solicitation or general advertising (within the meaning of Rule 502(c) under the 1933 Act Regulations) will be used in the United States in connection with the offering or sale of the Securities.

(iii) Legends. Each of the Securities will bear, to the extent applicable, the legend contained in “Notice to Investors” in the General Disclosure Package and the Final Offering Memorandum for the time period and upon the other terms stated therein.

(iv) Minimum Principal Amount. No sale of the Securities to any one Subsequent Purchaser will be for less than U.S. \$1,000 principal amount and no Security will be issued in a smaller principal amount. If the Subsequent Purchaser is a non-bank fiduciary acting on behalf of



others, each person for whom it is acting must purchase at least U.S. \$1,000 principal amount of the Securities.

(b) *Covenants of the Company.* The Company covenants with each Initial Purchaser as follows:

(i) Integration. The Company agrees that it will not and will cause its Affiliates not to, directly or indirectly, solicit any offer to buy, sell or make any offer or sale of, or otherwise negotiate in respect of, securities of the Company of any class if, as a result of the doctrine of “integration” referred to in Rule 502 under the 1933 Act Regulations, such offer or sale would render invalid (for the purpose of (i) the sale of the offered Securities by the Company to the Initial Purchasers, (ii) the resale of the offered Securities by the Initial Purchasers to Subsequent Purchasers or (iii) the resale of the offered Securities by such Subsequent Purchasers to others) the exemption from the registration requirements of the 1933 Act provided by Section 4(2) thereof or by Rule 144A thereunder or otherwise.

(ii) Rule 144A Information. The Company agrees that, in order to render the offered Securities eligible for resale pursuant to Rule 144A, while any of the offered Securities remain outstanding, it will make available, upon request, to any holder of offered Securities or prospective purchasers of Securities the information specified in Rule 144A(d)(4), unless the Company furnishes information to the Commission pursuant to Section 13 or 15(d) of the 1934 Act.

(iii) Restriction on Repurchases. Until the expiration of one year after the original issuance of the offered Securities, the Company will not, and will cause its Affiliates not to, resell any offered Securities which are “restricted securities” (as such term is defined under Rule 144(a)(3)), whether as beneficial owner or otherwise (except as agent acting as a securities broker on behalf of and for the account of customers in the ordinary course of business in unsolicited broker’s transactions).

(c) *Representations, Warranties and Agreements of the Initial Purchasers.* Each Initial Purchaser severally and not jointly represents and warrants to, and agrees with, the Company that it is a Qualified Institutional Buyer and an “accredited investor” within the meaning of Rule 501(a) under the 1933 Act Regulations. Each Initial Purchaser understands that the offered Securities have not been and will not be registered under the 1933 Act and may not be offered or sold within the United States except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the 1933 Act. Each Initial Purchaser severally represents and agrees that it has not offered or sold, and will not offer or sell, any offered Securities constituting part of its allotment within the United States except in accordance with Rule 144A or another applicable exemption from the registration requirements of the 1933 Act. Accordingly, neither it nor any person acting on its behalf has made or will make offers or sales of the Securities in the United States by means of any form of general solicitation or general advertising (within the meaning of Regulation D) in the United States. Each Initial Purchaser will take reasonable steps to inform, and cause each of its affiliates (as such term is defined in Rule 501(b) under the 1933 Act Regulations (each, an “Affiliate”)) to take reasonable steps to inform, persons acquiring Securities from such Initial Purchaser or Affiliate, as the case may be, in the United States that the Securities (A) have not been and will not be registered under the 1933 Act, (B) are being sold to them without registration under the 1933 Act in reliance on Rule 144A or in accordance with another exemption from registration under the 1933 Act, as the case may be, and (C) may not be offered, sold or otherwise transferred except (1) to the Company, (2) outside the United States in accordance with Regulation S or (3) inside the United States in accordance with (x) Rule 144A to a person whom the seller reasonably believes is a Qualified Institutional Buyer that is purchasing such Securities for its own account or for the account of a Qualified Institutional Buyer to whom notice is given that the offer, sale

or transfer is being made in reliance on Rule 144A or (y) pursuant to another available exemption from registration under the 1933 Act.

**SECTION 7. Indemnification.**

(a) *Indemnification of Initial Purchasers.* The Company agrees to indemnify and hold harmless each Initial Purchaser, its Affiliates, its selling agents and each person, if any, who controls any Initial Purchaser within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act as follows:

(i) against any and all loss, liability, claim, damage and expense whatsoever, as incurred, arising out of any untrue statement or alleged untrue statement of a material fact included in any Preliminary Offering Memorandum, the Final Offering Memorandum, the information contained in the Final Term Sheet, any Issuer Written Information or any other information used by or on behalf of the Company in connection with the offer or sale of the Securities (or any amendment or supplement to the foregoing) or the omission or alleged omission therefrom of a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading;

(ii) against any and all loss, liability, claim, damage and expense whatsoever, as incurred, to the extent of the aggregate amount paid in settlement of any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or of any claim whatsoever based upon any such untrue statement or omission, or any such alleged untrue statement or omission; provided that (subject to Section 7(d) below) any such settlement is effected with the written consent of the Company;

(iii) against any and all expense whatsoever, as incurred (including the fees and disbursements of counsel chosen by Merrill Lynch), reasonably incurred in investigating, preparing or defending against any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or any claim whatsoever based upon any such untrue statement or omission, or any such alleged untrue statement or omission, to the extent that any such expense is not paid under (i) or (ii) above;

provided, however, that this indemnity agreement shall not apply to any loss, liability, claim, damage or expense to the extent arising out of any untrue statement or omission or alleged untrue statement or omission made in any Preliminary Offering Memorandum, the Final Offering Memorandum (or any amendment or supplement to the foregoing) in reliance upon and in conformity with the Initial Purchaser Information.

(b) *Indemnification of Company, Directors and Officers.* Each Initial Purchaser severally agrees to indemnify and hold harmless the Company, its directors, its officers and each person, if any, who controls the Company within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act, against any and all loss, liability, claim, damage and expense described in the indemnity contained in subsection (a) of this Section, as incurred, but only with respect to untrue statements or omissions, or alleged untrue statements or omissions, made in any Preliminary Offering Memorandum, the Final Offering Memorandum (or any amendment or supplement to the foregoing) in reliance upon and in conformity with the Initial Purchaser Information.

(c) *Actions against Parties; Notification.* Each indemnified party shall give notice as promptly as reasonably practicable to each indemnifying party of any action commenced against it in respect of which indemnity may be sought hereunder, but failure to so notify an indemnifying party shall

not relieve such indemnifying party from any liability hereunder to the extent it is not materially prejudiced as a result thereof and in any event shall not relieve it from any liability which it may have otherwise than on account of this indemnity agreement. In the case of parties indemnified pursuant to Section 7(a) above, counsel to the indemnified parties shall be selected by Merrill Lynch, and, in the case of parties indemnified pursuant to Section 7(b) above, counsel to the indemnified parties shall be selected by the Company. An indemnifying party may participate at its own expense in the defense of any such action; provided, however, that counsel to the indemnifying party shall not (except with the consent of the indemnified party) also be counsel to the indemnified party. In no event shall the indemnifying parties be liable for fees and expenses of more than one counsel (in addition to any local counsel) separate from their own counsel for all indemnified parties in connection with any one action or separate but similar or related actions in the same jurisdiction arising out of the same general allegations or circumstances. No indemnifying party shall, without the prior written consent of the indemnified parties, settle or compromise or consent to the entry of any judgment with respect to any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or any claim whatsoever in respect of which indemnification or contribution could be sought under this Section 7 or Section 8 hereof (whether or not the indemnified parties are actual or potential parties thereto), unless such settlement, compromise or consent (i) includes an unconditional release of each indemnified party from all liability arising out of such litigation, investigation, proceeding or claim and (ii) does not include a statement as to or an admission of fault, culpability or a failure to act by or on behalf of any indemnified party.

(d) *Settlement without Consent if Failure to Reimburse.* If at any time an indemnified party shall have requested an indemnifying party to reimburse the indemnified party for fees and expenses of counsel, such indemnifying party agrees that it shall be liable for any settlement of the nature contemplated by Section 7(a)(ii) effected without its written consent if (i) such settlement is entered into more than 45 days after receipt by such indemnifying party of the aforesaid request, (ii) such indemnifying party shall have received notice of the terms of such settlement at least 30 days prior to such settlement being entered into and (iii) such indemnifying party shall not have reimbursed such indemnified party in accordance with such request prior to the date of such settlement.

SECTION 8. Contribution. If the indemnification provided for in Section 7 hereof is for any reason unavailable to or insufficient to hold harmless an indemnified party in respect of any losses, liabilities, claims, damages or expenses referred to therein, then each indemnifying party shall contribute to the aggregate amount of such losses, liabilities, claims, damages and expenses incurred by such indemnified party, as incurred, (i) in such proportion as is appropriate to reflect the relative benefits received by the Company, on the one hand, and the Initial Purchasers, on the other hand, from the offering of the Securities pursuant to this Agreement or (ii) if the allocation provided by clause (i) is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) above but also the relative fault of the Company, on the one hand, and of the Initial Purchasers, on the other hand, in connection with the statements or omissions which resulted in such losses, liabilities, claims, damages or expenses, as well as any other relevant equitable considerations.

The relative benefits received by the Company, on the one hand, and the Initial Purchasers, on the other hand, in connection with the offering of the Securities pursuant to this Agreement shall be deemed to be in the same respective proportions as the total net proceeds from the offering of the Securities pursuant to this Agreement (before deducting expenses) received by the Company, on the one hand, and the total discount received by the Initial Purchasers, on the other hand, bear to the aggregate initial offering price of the Securities as set forth on the cover of the Final Offering Memorandum.

The relative fault of the Company, on the one hand, and the Initial Purchasers, on the other hand, shall be determined by reference to, among other things, whether any such untrue or alleged untrue

statement of a material fact or omission or alleged omission to state a material fact relates to information supplied by the Company or by the Initial Purchasers and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission.

The Company and the Initial Purchasers agree that it would not be just and equitable if contribution pursuant to this Section 8 were determined by pro rata allocation (even if the Initial Purchasers were treated as one entity for such purpose) or by any other method of allocation which does not take account of the equitable considerations referred to above in this Section 8. The aggregate amount of losses, liabilities, claims, damages and expenses incurred by an indemnified party and referred to above in this Section 8 shall be deemed to include any legal or other expenses reasonably incurred by such indemnified party in investigating, preparing or defending against any litigation, or any investigation or proceeding by any governmental agency or body, commenced or threatened, or any claim whatsoever based upon any such untrue or alleged untrue statement or omission or alleged omission.

Notwithstanding the provisions of this Section 8, no Initial Purchaser shall be required to contribute any amount in excess of the purchase discount or commissions received by such Initial Purchasers in connection with the Securities purchased by it and distributed to the public.

No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the 1933 Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation.

For purposes of this Section 8, each person, if any, who controls an Initial Purchaser within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act and each Initial Purchaser's Affiliates and selling agents shall have the same rights to contribution as such Initial Purchaser, and each director of the Company, each officer of the Company, and each person, if any, who controls the Company within the meaning of Section 15 of the 1933 Act or Section 20 of the 1934 Act shall have the same rights to contribution as the Company. The Initial Purchasers' respective obligations to contribute pursuant to this Section 8 are several in proportion to the aggregate principal amount of Initial Securities set forth opposite their respective names in Schedule A hereto and not joint.

**SECTION 9. Representations, Warranties and Agreements to Survive.** All representations, warranties and agreements contained in this Agreement or in certificates of officers of the Company or any of its subsidiaries submitted pursuant hereto, shall remain operative and in full force and effect regardless of (i) any investigation made by or on behalf of any Initial Purchaser or its Affiliates or selling agents, any person controlling any Initial Purchaser, its officers or directors or any person controlling the Company and (ii) delivery of and payment for the Securities.

**SECTION 10. Termination of Agreement.**

(a) *Termination.* The Representative may terminate this Agreement, by notice to the Company, at any time at or prior to the Closing Time (i) if there has been, in the judgment of the Representative, since the time of execution of this Agreement or since the respective dates as of which information is given in the General Disclosure Package or the Final Offering Memorandum, any material adverse change in the condition, financial or otherwise, or in the earnings, business affairs or business prospects of the Company and its subsidiaries considered as one enterprise, whether or not arising in the ordinary course of business, or (ii) if there has occurred any material adverse change in the financial markets in the United States or the international financial markets, any outbreak of hostilities or escalation thereof or other calamity or crisis or any change or development involving a prospective change in national or international political, financial or economic conditions, in each case the effect of which is such as to make it, in the judgment of the Representative, impracticable or inadvisable to

proceed with the completion of the offering or to enforce contracts for the sale of the Securities, or (iii) if trading in any securities of the Company has been suspended or materially limited by the Commission or the Nasdaq Global Market, or (iv) if trading generally on the New York Stock Exchange or in the Nasdaq Global Market has been suspended or materially limited, or minimum or maximum prices for trading have been fixed, or maximum ranges for prices have been required, by any of said exchanges or by order of the Commission, FINRA or any other governmental authority, or (v) a material disruption has occurred in commercial banking or securities settlement or clearance services in the United States, or (vi) if a banking moratorium has been declared by either Federal or New York authorities.

(b) *Liabilities*. If this Agreement is terminated pursuant to this Section, such termination shall be without liability of any party to any other party except as provided in Section 4 hereof, and provided further that Sections 1, 7, 8, 9, 14, 15 and 16 shall survive such termination and remain in full force and effect.

SECTION 11. Default by One or More of the Initial Purchasers. If one or more of the Initial Purchasers shall fail at the Closing Time or a Date of Delivery to purchase the Securities which it or they are obligated to purchase under this Agreement (the "Defaulted Securities"), the Representative shall have the right, within 24 hours thereafter, to make arrangements for one or more of the non-defaulting Initial Purchasers, or any other initial purchasers, to purchase all, but not less than all, of the Defaulted Securities in such amounts as may be agreed upon and upon the terms herein set forth; if, however, the Representative shall not have completed such arrangements within such 24-hour period, then:

(i) if the amount of Defaulted Securities does not exceed 10% of the aggregate principal amount of the Securities to be purchased on such date, each of the non-defaulting Initial Purchasers shall be obligated, severally and not jointly, to purchase the full amount thereof in the proportions that their respective obligations hereunder bear to the obligations of all non-defaulting Initial Purchasers, or

(ii) if the amount of Defaulted Securities exceeds 10% of the aggregate principal amount of the Securities to be purchased on such date, this Agreement or, with respect to any Date of Delivery which occurs after the Closing Time, the obligation of the Initial Purchasers to purchase, and the Company to sell, the Option Securities to be purchased and sold on such Date of Delivery, shall terminate without liability on the part of any non-defaulting Initial Purchaser.

No action taken pursuant to this Section shall relieve any defaulting Initial Purchaser from liability in respect of its default.

In the event of any such default which does not result in a termination of this Agreement or, in the case of a Date of Delivery which is after the Closing Time, which does not result in a termination of the obligation of the Initial Purchasers to purchase and the Company to sell the relevant Option Securities, as the case may be, either the (i) Representative or (ii) the Company shall have the right to postpone Closing Time or the relevant Date of Delivery, as the case may be, for a period not exceeding seven days in order to effect any required changes in the General Disclosure Package or the Final Offering Memorandum or in any other documents or arrangements. As used herein, the term "Initial Purchaser" includes any person substituted for an Initial Purchaser under this Section 11.

SECTION 12. Notices. All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given if mailed or transmitted by any standard form of telecommunication. Notices to the Initial Purchasers shall be directed to Merrill Lynch at One Bryant Park, New York, New York 10036, attention of Syndicate Department, with a copy to ECM Legal; notices to the Company shall be directed to it at 28903 North Avenue Paine, Valencia, California 91355

(fax: (661) 755-2086), attention of David Thomson, with a copy to Cooley LLP, 4401 Eastgate Mall, San Diego, California 92121 (fax: (858) 550-6420), attention of D. Bradley Peck.

SECTION 13. No Advisory or Fiduciary Relationship. The Company acknowledges and agrees that (a) the purchase and sale of the Securities pursuant to this Agreement, including the determination of the initial offering price of the Securities and any related discounts and commissions, is an arm's-length commercial transaction between the Company, on the one hand, and the several Initial Purchasers, on the other hand, (b) in connection with the offering of the Securities and the process leading thereto, each Initial Purchaser is and has been acting solely as a principal and is not the agent or fiduciary of the Company, any of its subsidiaries or their respective stockholders, creditors, employees or any other party, (c) no Initial Purchaser has assumed or will assume an advisory or fiduciary responsibility in favor of the Company with respect to the offering of the Securities or the process leading thereto (irrespective of whether such Initial Purchaser has advised or is currently advising the Company or any of its subsidiaries on other matters) and no Initial Purchaser has any obligation to the Company with respect to the offering of the Securities except the obligations expressly set forth in this Agreement, (d) the Initial Purchasers and their respective affiliates may be engaged in a broad range of transactions that involve interests that differ from those of the Company and (e) the Initial Purchasers have not provided any legal, accounting, regulatory or tax advice with respect to the offering of the Securities and the Company has consulted its own respective legal, accounting, regulatory and tax advisors to the extent it deemed appropriate.

SECTION 14. Parties. This Agreement shall each inure to the benefit of and be binding upon the Initial Purchasers and the Company and their respective successors. Nothing expressed or mentioned in this Agreement is intended or shall be construed to give any person, firm or corporation, other than the Initial Purchasers and the Company and their respective successors and the controlling persons and officers and directors referred to in Sections 7 and 8 and their heirs and legal representatives, any legal or equitable right, remedy or claim under or in respect of this Agreement or any provision herein contained. This Agreement and all conditions and provisions hereof are intended to be for the sole and exclusive benefit of the Initial Purchasers and the Company and their respective successors, and said controlling persons and officers and directors and their heirs and legal representatives, and for the benefit of no other person, firm or corporation. No purchaser of Securities from any Initial Purchaser shall be deemed to be a successor by reason merely of such purchase.

SECTION 15. Trial by Jury. The Company (on its behalf and, to the extent permitted by applicable law, on behalf of its stockholders and affiliates) and each of the Initial Purchasers hereby irrevocably waives, to the fullest extent permitted by applicable law, any and all right to trial by jury in any legal proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

SECTION 16. GOVERNING LAW. THIS AGREEMENT AND ANY CLAIM, CONTROVERSY OR DISPUTE ARISING UNDER OR RELATED TO THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF, THE STATE OF NEW YORK WITHOUT REGARD TO ITS CHOICE OF LAW PROVISIONS.

SECTION 17. TIME. TIME SHALL BE OF THE ESSENCE OF THIS AGREEMENT. EXCEPT AS OTHERWISE SET FORTH HEREIN, SPECIFIED TIMES OF DAY REFER TO NEW YORK CITY TIME.

SECTION 18. Partial Unenforceability. The invalidity or unenforceability of any Section, paragraph or provision of this Agreement shall not affect the validity or enforceability of any other Section, paragraph or provision hereof. If any Section, paragraph or provision of this Agreement is for any reason determined to be invalid or unenforceable, there shall be deemed to be made such minor changes (and only such minor changes) as are necessary to make it valid and enforceable.

SECTION 19. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all such counterparts shall together constitute one and the same Agreement.

SECTION 20. Effect of Headings. The Section headings herein are for convenience only and shall not affect the construction hereof.

SECTION 21. Entire Agreement. This Agreement, together with the schedules and exhibits hereto, contains the entire understanding of the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, oral or written, with regard to such matters.

[Signature page follows]

If the foregoing is in accordance with your understanding of our agreement, please sign and return to the Company a counterpart hereof, whereupon this instrument, along with all counterparts, will become a binding agreement among the Initial Purchasers and the Company in accordance with its terms.

Very truly yours,

MANKIND CORPORATION

By /s/ Matthew J. Pfeffer

Title: Chief Financial Officer

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CONFIRMED AND ACCEPTED,  
as of the date first above written:

MERRILL LYNCH, PIERCE, FENNER & SMITH  
INCORPORATED

By /s/ Benjamin Perkins  
Authorized Signatory

For itself and as Representative of the other Initial Purchasers named in Schedule A hereto.

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**SCHEDULE A**

The initial offering price of the Securities shall be 100% of the principal amount thereof, plus accrued interest, if any, from the date of issuance.

The purchase price to be paid by the Initial Purchasers for the Securities shall be 96.7% of the principal amount thereof.

The interest rate on the Securities shall be 5.75% per annum.

Name of Initial Purchaser	Principal Amount of Securities
Merrill Lynch, Pierce, Fenner & Smith Incorporated	\$ 64,000,000
Wells Fargo Securities, LLC	17,000,000
Rodman & Renshaw, LLC	12,500,000
Imperial Capital, LLC	6,500,000
<b>Total</b>	<b>\$ 100,000,000</b>

Final Term Sheet

Dated August 18, 2010

**MannKind Corporation**  
**5.75% Senior Convertible Notes due 2015**

*The information in this pricing term sheet supplements MannKind Corporation's preliminary offering memorandum, dated August 16, 2010 (the "Preliminary Offering Memorandum"), and supersedes the information in the Preliminary Offering Memorandum to the extent inconsistent with the information in the Preliminary Offering Memorandum. In all other respects, this term sheet is qualified in its entirety by reference to the Preliminary Offering Memorandum. Terms used herein but not defined herein shall have the respective meanings as set forth in the Preliminary Offering Memorandum. All references to dollar amounts are references to U.S. dollars. Unless the context otherwise requires, references to "MannKind" or the "company," "we," "us," and "our" in this pricing term sheet mean MannKind Corporation and not its subsidiaries.*

Issuer:	MannKind Corporation (Nasdaq: MNKD) (the "Issuer")
Title of securities:	5.75% Senior Convertible Notes due 2015 (the "notes")
Aggregate principal amount offered:	\$100,000,000 aggregate principal amount of notes
Over-allotment option:	\$10,000,000
Use of proceeds:	We estimate that the net proceeds to us from this offering will be approximately \$95.5 million (or approximately \$105.2 million if the initial purchasers exercise their over-allotment option in full), after deducting the discount to the initial purchasers and our estimated offering expenses payable by us. We intend to use the net proceeds from this offering to fund the costs of our clinical trials programs and other research and development activities, to expand our manufacturing operations, both on-going and planned, and for general corporate purposes, including working capital.
Maturity date:	August 15, 2015
Interest rate:	5.75% per annum, accruing from the settlement date
Issue price:	100%
Interest payment dates:	Each February 15 and August 15, beginning on February 15, 2011
Initial conversion rate:	147.0859 common shares per \$1,000 principal amount of notes
Nasdaq consolidated closing bid price on August 18, 2010:	\$5.97
Conversion premium:	22.5% above the concurrent offering price (as defined below)
Initial conversion price:	Approximately \$6.80 per common share of the Issuer
Initial purchasers:	Sole book-running manager: BofA Merrill Lynch Lead manager: Wells Fargo Securities, LLC

Co-managers: Rodman & Renshaw, LLC and Imperial Capital, LLC

Trade date: August 18, 2010

Settlement date: August 24, 2010

CUSIP/ISIN: Restricted CUSIP Number: 56400PAB8  
Restricted ISIN Number: US56400PAB85

Concurrent offering and share lending agreement Concurrently with this offering of the notes, we are offering, in a transaction registered under the Securities Act, and by means of a separate prospectus and prospectus supplement, 9,000,000 shares of our common stock at an offering price of \$5.55 (the “concurrent offering price”), all of which are being borrowed by Bank of America, N.A., or BANA, an affiliate of Merrill Lynch, Pierce, Fenner & Smith Incorporated, the underwriter in the common stock offering, pursuant to a share lending agreement between us and BANA. BANA, or its affiliate, will receive all of the proceeds from the common stock offering. We will not receive any proceeds of that offering, but will receive a nominal one-time lending fee for each share we loan.

The delivery of shares of our common stock under the share lending agreement is contingent upon the closing of this offering, and the closing of this offering is contingent upon the delivery of the shares to be lent to BANA pursuant to the share lending agreement. We expect that delivery of our common stock will be made on or about the closing date of the notes offered hereby.

Adjustment to conversion rate upon a make-whole fundamental change:

The following table shows what the fundamental change make-whole premium would be for each hypothetical stock price and effective date set forth below, expressed as additional shares of common stock per \$1,000 principal amount of notes:

	Stock Price									
	\$5.97	\$6.50	\$7.00	\$8.00	\$10.00	\$15.00	\$20.00	\$25.00	\$30.00	\$50.00
August 24, 2010	20.4182	20.4182	20.4182	20.4182	18.3976	12.2848	9.2714	7.3218	6.1493	3.7299
August 15, 2011	20.4182	20.4182	20.4182	19.8839	15.8641	10.6240	7.9606	6.4456	5.2813	3.1875
August 15, 2012	20.4182	19.7954	18.4232	16.1445	12.9562	8.6237	6.4758	5.1902	4.3654	2.6155
August 15, 2013	20.4182	14.3658	13.3212	11.6771	9.3477	6.2018	4.6676	3.7430	3.1215	1.8779
August 15, 2014	20.4182	7.7914	7.2466	6.2954	5.0676	3.3901	2.5466	2.0406	1.7032	1.0287
August 15, 2015	20.4182	6.7603	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000

The actual stock price and effective date may not be set forth on the table, in which case:

- if the actual stock price on the effective date is between two stock prices on the table or the actual effective date is between two effective dates on the table, the fundamental change make-whole premium will be determined by a straight-line interpolation between the fundamental change make-whole premiums set forth for the two stock prices and the two effective dates on the table based on a 365-day year, as applicable;

- if the stock price on the effective date exceeds \$50.00 per share, subject to adjustment as described below, no fundamental change make-whole premium will be paid; and
- if the stock price on the effective date is less than \$5.97 per share, subject to adjustment as described below, no fundamental change make-whole premium will be paid.

Notwithstanding the foregoing, in no event will the conversion rate exceed 167.5041 per \$1,000 principal amount of notes, subject to adjustments in the same manner as the conversion rate.

### **General**

This communication is intended for the sole use of the person to whom it is provided by the sender. This material is confidential and is for your information only and is not intended to be used by anyone other than you. This information does not purport to be a complete description of the notes or the offering.

This communication does not constitute an offer to sell or the solicitation of an offer to buy any notes in any jurisdiction to any person to whom it is unlawful to make such offer or solicitation in such jurisdiction.

**The offer and sale of the notes and the common stock issuable upon conversion thereof have not been registered, and will not be registered, under the Securities Act, and the notes may not be offered or sold within the United States or to, or for the account or benefit of, U.S. persons except pursuant to an exemption from, or in a transaction not subject to, the registration requirements of the Securities Act. Accordingly, the notes are being offered and sold only to “qualified institutional buyers” (as defined in Rule 144A under the Securities Act).**

ANY DISCLAIMERS OR OTHER NOTICES THAT MAY APPEAR BELOW ARE NOT APPLICABLE TO THIS COMMUNICATION AND SHOULD BE DISREGARDED. SUCH DISCLAIMERS OR OTHER NOTICES WERE AUTOMATICALLY GENERATED AS A RESULT OF THIS COMMUNICATION BEING SENT VIA BLOOMBERG OR ANOTHER EMAIL SYSTEM.

Issuer Written Information

Final Term Sheet in the form set forth on Schedule B

Sch C-1

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List of Persons Subject to Lock-up

Alfred E. Mann  
Hakan S. Edstrom  
Matthew J. Pfeffer  
Juergen A. Martens, Ph.D.  
Diane M. Palumbo  
Dr. Peter C. Richardson  
David Thomson, Ph.D., J.D.  
Abraham E. Cohen  
Ronald Consiglio  
Michael Friedman  
Kent Kresa  
David H. MacCallum  
Henry L. Nordhoff  
James S. Shannon

## SHARE LENDING AGREEMENT

Dated as of August 18, 2010

Among

MANKIND CORPORATION (“**Lender**”),

and

BANK OF AMERICA, N.A. (“**Borrower**”).

This Share Lending Agreement (this “**Agreement**”) sets forth the terms and conditions under which Borrower may borrow from Lender shares of Lender’s Common Stock.

The parties hereto agree as follows:

Section 1. *Certain Definitions.* The following capitalized terms shall have the following meanings:

“**Borrowing Notice**” means a written notice from Borrower to Lender specifying the number of Loaned Shares (not to exceed the Maximum Number of Shares) and the date and time for the commencement of the Loan, which time and date shall not be earlier than 9:00 a.m. New York City on the second Business Day following receipt by Lender of the Borrowing Notice, and shall not be later than 9:00 a.m. on the Closing Date.

“**Business Day**” means a day on which (i) regular trading occurs in the principal trading market for the Common Stock and (ii) the Clearing Organization is open.

“**Cash**” means any coin or currency of the United States as at the time shall be legal tender for payment of public and private debts.

“**Clearing Organization**” means The Depository Trust Company, or, if agreed to by Borrower and Lender, a Securities Intermediary at which Borrower and Lender both maintain accounts.

“**Closing Date**” means the closing date of the initial issuance of the Convertible Notes.

“**Common Stock**” means shares of Common Stock, par value \$0.01 per share, of Lender; *provided* that, if the Common Stock shall be exchanged or converted into any stock, other securities or other property or assets or any

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combination thereof (excluding cash) (the “**Reference Property**”) as the result of (a) any recapitalization, reclassification or change of the Common Stock (other than changes resulting from a subdivision or combination of the Common Stock), (b) any consolidation, merger or combination involving Lender, (c) any sale, conveyance or lease to another corporation of all or substantially all of Lender’s property and assets or (d) any statutory share exchange (any of clauses (a), (b), (c) or (d), a “**Merger Event**”), then, effective upon the effectiveness of such transaction, one share of Common Stock shall be deemed to be the amount and type of such Reference Property received in exchange for or upon conversion of one share of Common Stock (including any share as reclassified). For purposes of the foregoing, where a share of Common Stock may be converted or exchanged into more than a single type of Reference Property based upon any form of stockholder election, such consideration will be deemed to be the weighted average of the types and amounts of Reference Property received by the holders of the Common Stock that affirmatively make such an election.

“**Convertible Notes**” means the \$100,000,000 aggregate principal amount of 5.75% Senior Convertible Notes due 2015 issued by Lender, or up to \$115,000,000 aggregate principal amount to the extent the option to purchase additional Convertible Notes is exercised in full as set forth in the underwriting agreement relating to the Convertible Notes.

“**Disrupted Day**” means any Business Day on which any of the following occurs: (i) any suspension of or limitation imposed on trading relating to the Common Stock or futures or options contracts relating to the Common Stock by the principal U.S. exchange on which the Common Stock is traded, or any exchange or quotation system where trading has a material effect on the overall market for such futures or options contracts, (ii) any event that disrupts or impairs (as determined by Borrower in its commercially reasonable judgment) the ability of market participants in general to effect transactions in or obtain market values for the Common Stock or any such futures or options contracts, or (iii) the closure on any Business Day of any such exchange or quotation system prior to its scheduled closing time.

“**Exchange Act**” means the Securities Exchange Act of 1934, as amended.

“**Lender’s Designated Account**” means the securities account of Lender maintained on the books of Borrower, as Securities Intermediary (account number 6ZJ-10064), established simultaneously with the execution of this Agreement.

“**Loaned Shares**” means shares of Common Stock initially transferred to Borrower pursuant to Section 2; *provided* that upon the termination of any portion of the Loan, the number of Loaned Shares shall be reduced by the number of Loaned Shares transferred by Borrower to Lender; *provided further* that in respect of any such share of Common Stock initially transferred to Borrower by Lender and subsequently transferred by Borrower to another transferee, “Loaned Shares” means an equivalent number of shares of identical Common Stock. If, as a result

of a stock split (excluding, for the avoidance of doubt, any share dividend) or reverse stock split, the number of outstanding shares of Common Stock is increased or decreased, then the number of Loaned Shares shall be proportionately increased or decreased, as the case may be. If, pursuant to the definition of Common Stock, a share of Common Stock is deemed to be stock, other securities or other property or assets as specified therein, then each Loaned Share shall correspondingly change to include Reference Property. For purposes of return of Loaned Shares by Borrower pursuant to Section 4 or purchase or sale of securities pursuant to Section 10, such term shall mean securities of the same issuer, class and quantity as the Loaned Shares as adjusted pursuant to the two preceding sentences.

“**Maximum Number of Shares**” means 9,000,000 shares of Common Stock.

“**Relevant Price**” on any Business Day means, with respect to the Common Stock, the dollar volume weighted average price per share of Common Stock for such Business Day based on transactions executed during such Business Day, as reported on Bloomberg Screen “MNKD.UQ <Equity> VAP <Go>.” (or any successor thereto); or, in the event such price is not so reported on such Business Day for any reason, as reasonably determined by the Borrower.

“**Securities Act**” means the Securities Act of 1933, as amended.

“**Securities Intermediary**” means a “securities intermediary” as defined by Section 8-102(a)(14) of the UCC.

“**UCC**” means the Uniform Commercial Code, as in effect in the State of New York, as in effect from time to time. Any reference to particular sections of the UCC shall be deemed to embrace successor renumbered provisions thereof.

Section 2. *Loan of Shares; Transfers of Loaned Shares.*

(a) Subject to the terms and conditions of this Agreement, Lender hereby agrees to make available for borrowing by Borrower, on or prior to the closing date of the initial issuance of Convertible Notes (the “**Closing Date**”), a number of shares of Common Stock up to the Maximum Number of Shares.

(b) Subject to the terms and conditions of this Agreement, Borrower may by delivery of a Borrowing Notice to Lender on or prior to the Closing Date, seek to initiate a transaction in which Lender will lend shares of Common Stock to Borrower through the issuance by Lender of such Loaned Shares to Borrower upon the terms, and subject to the conditions, set forth in this Agreement (such issuance and loan, the “**Loan**”). The Loan shall be confirmed by a schedule and receipt listing the Loaned Shares provided by Lender to Borrower (the “**Confirmation**”). Such Confirmation shall constitute conclusive evidence with

respect to the Loan, including the number of shares of Common Stock that are the subject of the Loan.

(c) Notwithstanding anything to the contrary in this Agreement, Borrower shall not be permitted to borrow or have any right to take delivery of, or otherwise receive or be deemed to have received, any shares of Common Stock hereunder to the extent (but only to the extent) that after such receipt of such Common Stock (i) the “beneficial ownership” (within the meaning of Section 13(d) of the Exchange Act and the rules and regulations promulgated thereunder) of Common Stock by Borrower or any affiliate of Borrower or other person subject to aggregation with Borrower under such Section 13(d) and such rules (Borrower and any such affiliate or other person, collectively, “**Borrower Group**”) would exceed 4.5%, as determined by Borrower in its sole discretion, (ii) Borrower would be subject to Section 16(b) of the Exchange Act, (iii) Borrower or any “affiliate” or “associate” of Borrower would be an “interested stockholder” of Lender, as all such terms are defined in Section 203 of the Delaware General Corporation Law or (iv) Borrower, Borrower Group (as defined below) or any person whose ownership position would be aggregated with Borrower or Borrower Group (Borrower, Borrower Group or any such person, a “**Borrower Person**”) under any federal, state or local laws, regulations or regulatory orders applicable to ownership of Common Stock (“**Applicable Laws**”), owns, beneficially owns, constructively owns, holds the power to vote or otherwise meets a relevant definition of ownership in excess of a number of shares of Common Stock equal to (a) the number of shares of Common Stock that would give rise to a reporting or registration obligation or other requirement (including obtaining prior approval by a state or federal regulator) of a Borrower Person under Applicable Laws, and with respect to which such requirements have not been met or the relevant approval has not been received or that would give rise to any consequences under the constitutive documents of Lender or any contract or agreement to which Lender is a party, in each case *minus* (b) 1% of the number of shares of Common Stock outstanding on the date of determination, in each case as determined by Borrower in its sole discretion (each of clauses (i) to (iv) above, an “**Ownership Limitation**”), and if the Loan breaches any Ownership Limitation, the Loan shall be void and have no effect to the extent (but only to the extent) of such breach. If any delivery owed to Borrower hereunder is not made, in whole or in part, as a result of an Ownership Limitation, Lender’s obligation to make such delivery shall not be extinguished and Lender shall make such delivery as promptly as practicable after, but in no event later than one Business Day after, Borrower gives notice to Lender that such delivery would not result in any Ownership Limitation being breached. If, notwithstanding the foregoing, any delivery of Common Stock is erroneously made to Borrower or Borrower otherwise receives or is deemed to have received Common Stock in excess of the foregoing limitation contrary to the first sentence of this clause (c), such Common Stock shall remain the property of Lender and Borrower shall be deemed to hold the same as bailee of Lender and shall have no voting, dispositive control or pecuniary interest with respect thereto.

(d) Lender shall transfer to Borrower a number of shares of Common Stock equal to the number of Loaned Shares specified in the Borrowing Notice on or before the time and date specified in the Borrowing Notice for the commencement of the Loan in the manner set forth under Section 11 below.

Section 3. *Loan Fee*. Borrower agrees to pay Lender a single loan fee per Loan (a “**Loan Fee**”) equal to \$0.01 per Loaned Share. The Loan Fee shall be paid by Borrower on or before the time of transfer of the Loaned Shares pursuant to Section 2(d) on a delivery-versus-payment basis through the facilities of the Clearing Organization. In addition to all other consideration provided pursuant to this Agreement or otherwise, Lender agrees that the Loan Fee will constitute consideration for the issuance of the Loaned Shares to be issued by Lender.

Section 4. *Loan Terminations*.

(a) Borrower may terminate all or any portion of the Loan on any Business Day by giving written notice thereof to Lender and transferring the corresponding number of Loaned Shares to Lender (with an amount of cash determined by Borrower in its reasonable discretion in lieu of fractional Loaned Shares), without any consideration being payable in respect thereof by Lender to Borrower.

(b) Subject to Section 10, the Loan shall terminate on the date this Agreement terminates pursuant to Section 13 (the “**Facility Termination Date**”) and all outstanding Loaned Shares shall be delivered by Borrower to Lender (with an amount of cash determined by Borrower in its reasonable discretion in lieu of fractional Loaned Shares), without any consideration being payable in respect thereof by Lender to Borrower, no later than the fifth Business Day following the Facility Termination Date.

(c) Subject to Section 10, if the Loan or any portion thereof is terminated upon the occurrence of a Default as set forth in Section 9, the Loaned Shares shall be delivered by Borrower to Lender, without any consideration being payable in respect thereof by Lender to Borrower, no later than the third Business Day following the termination date of such Loan, as provided in Section 9.

(d) If, pursuant to a Merger Event, the Common Stock is changed, reclassified, exchanged for, or converted into, Reference Property, then:

(i) if such Reference Property consists entirely of cash, the Loan shall terminate on the date of effectiveness of any such change, reclassification, exchange or conversion and Borrower shall, on or prior to the fifth Business Day following such effective date, pay, in full satisfaction of any obligation to return Loaned Shares hereunder, cash in an amount equal to the product of (A) the number of Loaned Shares outstanding immediately prior to such effective date and (B) the amount of

cash per share of Common Stock received by holders of Common Stock in such event; and

(ii) if such Reference Property consists of both cash and securities or other property, (A) the Loan shall not terminate as a result of any such event, (B) the amount of Loaned Shares shall be adjusted as set forth in the definition thereof, and (C) Borrower shall, on the fifth Business Day following the effective date of any such exchange or conversion, pay cash in an amount equal to the product of (1) the number of Loaned Shares outstanding immediately prior to such effective date (without, for the avoidance of doubt, giving effect to any adjustment) and (2) the amount of cash per share of Common Stock received by holders of Common Stock in such event.

(e) For the avoidance of doubt, Borrower may deliver shares of Common Stock that are subject to restrictions under the Securities Act to Lender in respect of any part of its obligation to return Loaned Shares hereunder.

Section 5. *Distributions.*

(a) If (i) Lender pays a cash dividend or makes a cash distribution in respect of all of its outstanding Common Stock, and (ii) as of the record date for such cash dividend or distribution the Loan or any portion thereof remains outstanding, Borrower shall pay to Lender, within three Business Days after the payment of such dividend or distribution, an amount in cash equal to the product of (x) the amount per share of such dividend or distribution and (y) the number of Loaned Shares outstanding as of the record date of such dividend or distribution.

(b) If at any time when the Loan or any portion thereof is outstanding under this Agreement, Lender makes a distribution in respect of all of its outstanding Common Stock (other than a distribution upon liquidation or a reorganization in bankruptcy) in property or securities, including any options, warrants, rights or privileges in respect of securities and including any distribution of Common Stock (a "**Non—Cash Distribution**"), then as of the date such Non-Cash Distribution is paid, such Non-Cash Distribution shall be deemed to be included in the Loan and each "Loaned Share" shall be deemed to include the per share of Common Stock kind and amount of such Non-Cash Distribution; *provided* that in lieu of the Non-Cash Distribution being included in the Loan and the Loaned Shares, Borrower may deliver to Lender, within three business days after the payment of such Non-Cash Distribution, the market value of the product of (x) the amount per share of Common Stock of such Non-Cash Distribution and (y) the number of Loaned Shares outstanding as of the record date of such Non-Cash Distribution, as determined by the Borrower in accordance with market practice for the property or securities constituting the Non-Cash Distribution; *provided further* that if Borrower returns any Loaned Shares to Lender following a record date for such a Non-Cash Distribution but prior to the payment of such Non-Cash Distribution, Borrower shall deliver to Lender, at Borrower's election,

either (A) an amount of such Non-Cash Distribution equal to the product of (x) the amount per share of Common Stock of such Non-Cash Distribution and (y) the number of Loaned Shares so returned or (B) the market value of the property and securities described in clause (A) as determined by Borrower in accordance with market practice for the property or securities constituting the Non-Cash Distribution, in either case within three Business Days after the payment of such Non-Cash Distribution.

Section 6. *Rights in Respect of Loaned Shares.* Subject to the terms of this Agreement, and except as otherwise agreed by Borrower and Lender, Borrower, insofar as it is the record owner of Loaned Shares, shall have all of the incidents of ownership in respect of any such Loaned Shares until such Loaned Shares are required to be delivered to Lender in accordance with the terms of this Agreement, including the right to transfer the Loaned Shares to others with all such incidents of ownership. Borrower agrees that it or any of its affiliates that are the record or beneficial owner of any Loaned Shares (x) held by Borrower or any of its affiliates prior to any sale thereof under a registration statement by Borrower or its affiliate or (y) held by Borrower or its affiliate specifically for the purpose of hedging this Agreement and facilitating the hedging of an investment in Convertible Notes by holders thereof as determined by Borrower in its sole discretion (other than, for the avoidance of doubt, any Common Stock that is held in the account of, and beneficially owned by, any unaffiliated third party, where such third party has the power to direct the vote of such Common Stock), will not vote or provide any consent or take any similar action with respect to such Loaned Shares on any matter submitted to a vote of Lender's stockholders during the term of the Loan.

Section 7. *Representations and Warranties.*

(a) Each of Borrower and Lender represents and warrants to the other that as of the date hereof:

(i) it has full power to execute and deliver this Agreement, to enter into the Loan contemplated hereby and to perform its obligations hereunder;

(ii) it has taken all necessary action to authorize such execution, delivery and performance;

(iii) this Agreement constitutes its legal, valid and binding obligation enforceable against it in accordance with its terms, subject to applicable bankruptcy, insolvency, fraudulent conveyance, reorganization, moratorium and similar laws affecting creditors' rights and remedies generally, and subject, as to enforceability, to general principles of equity, including principles of commercial reasonableness, good faith and fair dealing (regardless of whether enforcement is sought in a proceeding at law or in equity) and except that rights to indemnification and contribution

hereunder may be limited by federal or state securities laws or public policy relating thereto;

(iv) the execution, delivery and performance of this Agreement does not and will not violate, contravene, or constitute a default under, (A) its certificate of incorporation, bylaws or other governing documents, (B) any laws, rules or regulations of any governmental authority to which it is subject, (C) any contracts, agreements or instrument to which it is a party or (D) any judgment, injunction, order or decree by which it is bound, except, in the case of each of clauses (B), (C) and (D), for any such violation, contravention or default that would not reasonably be expected to (I) have a material adverse effect on the financial condition, business, properties or results of operations of Lender and its subsidiaries, or Borrower and its affiliates, as applicable, taken as a whole or (II) materially impair Borrower's or Lender's, as applicable, ability to perform its obligations under this Agreement; and

(v) this Agreement is not unsuitable for it in the light of such party's financial situation, investment objectives and needs and it is entering into this Agreement in reliance upon such tax, accounting, regulatory, legal and financial advice as it deems necessary and not upon any view expressed by the other.

(b) Lender represents and warrants to Borrower, as of the date hereof, and as of the date the Loaned Shares are transferred to Borrower pursuant to Section 2(d) hereof, and agrees with Borrower, that:

(i) The Loaned Shares and all other outstanding shares of Common Stock of Lender have been duly authorized and, upon the issuance and delivery of the Loaned Shares to Borrower in accordance with the terms and conditions hereof, and subject to the contemporaneous or prior receipt of the applicable Loan Fee by Lender, the Loaned Shares will be duly authorized, validly issued, fully paid non-assessable shares of Common Stock; and the stockholders of Lender have no preemptive rights with respect to the Loaned Shares.

(ii) Lender acknowledges that Borrower is not making any representations or warranties or taking any position or expressing any view with respect to the treatment of the Agreement or transactions contemplated hereby under any accounting standards including ASC Topic 260, *Earnings Per Share*, ASC Topic 815, *Derivatives and Hedging*, ASC Topic 480, *Distinguishing Liabilities from Equity* and ASC 815-40, *Derivatives and Hedging — Contracts in Entity's Own Equity* (or any successor issue statements) or under FASB's Liabilities & Equity Project.

(iii) To Lender's knowledge, no state or local (including non-U.S. jurisdictions) law, rule, regulation or regulatory order applicable to

the Common Stock (excluding banking laws, rules, regulations or regulatory orders and any other law, rule, regulation or regulatory order that is applicable to Borrower due to the nature of Borrower's business) in any jurisdiction in which Lender or any subsidiary thereof is organized, conducts business, operates or is licensed on the date hereof would give rise to any reporting, consent, registration or other requirement (including without limitation a requirement to obtain prior approval from any person or entity) solely as a result of Borrower or its affiliates owning or holding (however defined) shares of Common Stock.

(iv) It is entering into the Agreement in good faith and not as part of a plan or scheme to evade compliance with federal securities laws including, without limitation, Rule 10b-5 under the Exchange Act or any other antifraud or anti-manipulation provisions of the federal or applicable state securities laws.

(c) Lender represents and warrants to Borrower, as of the date hereof and as of the date the Loaned Shares are transferred to Borrower pursuant to Section 2(d) hereof, that the outstanding shares of Common Stock are listed on The NASDAQ Global Market (the "NASDAQ") and, as of the date any Loaned Shares are transferred to Borrower pursuant to Section 2(d) hereof, (1) a listing application for the Loaned Shares shall have been submitted to NASDAQ and (2) NASDAQ shall not have rejected such application.

(d) Borrower and Lender agree that the Loan shall be accounted for, as of the date of this Agreement (and, for the avoidance of doubt, without giving effect to any change in generally accepted accounting principles, or the application thereof, that is made after the date of this Agreement and that applies to Lender retroactively), as a single transaction under EITF 09-01, not representing the repurchase of shares of Common Stock or another equivalent transaction but rather, consistent with the intent of the parties, representing a loan of shares of Common Stock by Lender to Borrower.

(e) The representations and warranties of Borrower and Lender under this Section 7 shall remain in full force and effect at all times during the term of this Agreement and shall survive the termination of this Agreement for any reason.

#### Section 8. *Covenants.*

(a) Borrower covenants and agrees with Lender that it will not transfer or dispose of any Loaned Shares transferred to Borrower by Lender hereunder of which it is the record owner except pursuant to a registration statement that is effective under the Securities Act; *provided* that Borrower may transfer any such Loaned Shares to any of its affiliates without a registration statement so long as such affiliate transferee does not transfer or dispose of such Loaned Shares to any non-affiliated transferee except pursuant to a registration statement that is effective under the Securities Act.



(b) Lender agrees and acknowledges that Borrower has represented to Lender that Borrower is a “financial institution” within the meaning of Section 101(22) of the Bankruptcy Code. The parties hereto further agree and acknowledge (A) that this Agreement is intended to be a “securities contract,” as such term is defined in Section 741(7) of the Bankruptcy Code, with respect to which each payment and delivery hereunder is a “settlement payment,” or “margin payment,” as such terms are defined in Section 741(8) and Section 741(5) of the Bankruptcy Code, and a “transfer,” as such term is defined in Section 101(54) of the Bankruptcy Code, and (B) that Borrower is intended to be entitled to the protections afforded by, among other sections, Sections 362(b)(6), 546(e) and 555 of the Bankruptcy Code.

(c) Lender covenants and agrees that, at least ten days prior to effecting any repurchase of shares of Common Stock, Lender shall give Borrower a written notice of the estimated number of its outstanding shares of Common Stock after giving effect to such repurchase (a “**Repurchase Notice**”) if, following such repurchase, the Outstanding Borrow Percentage, as determined on the day of such repurchase after giving effect thereto, shall have increased by more than 0.5% since the immediately preceding Repurchase Notice (or, in the case of the first such Repurchase Notice, the number of outstanding shares of Common Stock as of the date hereof). The “**Outstanding Borrow Percentage**” as of any day is the fraction (A) the numerator of which is the number of Loaned Shares outstanding on such day and (B) the denominator of which is the number of shares of Common Stock outstanding on such day, including such Loaned Shares.

(d) Lender covenants and agrees that, unless otherwise agreed to by Borrower in writing, Lender shall not, and shall not permit any of its direct or indirect subsidiaries, or any entity or person controlled by Lender, to, directly or indirectly, purchase shares of Common Stock if, after giving effect to such purchase, the number of outstanding Loaned Shares shall be in excess of 9.0% of the number of outstanding shares of Common Stock at such time.

(e) Borrower covenants and agrees that it shall not, and shall not permit any of its direct or indirect subsidiaries to, directly or indirectly acquire record or beneficial ownership of shares of Common Stock (other than the Loaned Shares) if, as a result of such acquisition, it or any of its affiliates would become a beneficial owner of 9.0% or more of the number of outstanding shares of Common Stock at such time.

(f) Lender covenants and agrees that, on the date hereof, Lender shall provide to Borrower a properly executed Internal Revenue Service Form W-9.

(g) Borrower covenants and agrees with Lender that, insofar as Borrower or any of its affiliates is the record owner of any Loaned Shares, such Loaned Shares shall be used for the purpose of (x) directly or indirectly facilitating the sale of the Convertible Notes and hedging activities (including short sales of Loaned Shares or entry into cash-settled swap agreements with

regard to the Common Stock) (all such facilitation and hedging activities, the “**Hedging Activities**”) relating to the Convertible Notes by the holders thereof or (y) performing Borrower’s obligations under this Agreement during any Scheduled Unwind Period.

(h) Lender covenants and agrees with Borrower that it shall have no interest whatsoever in any of the proceeds that Borrower or its affiliates may receive in connection with the Hedging Activities and that Borrower or its affiliates shall be entitled to all such proceeds, if any.

(i) Lender covenants and agrees that upon the occurrence of any event described in clause (a) — (d) in the definition of “Common Stock” that results in right of holders of Common Stock to receive more than one type of consideration based upon any form of stockholder election, Lender shall notify Borrower promptly (but in any case prior to the effective date of such event) of the weighted average of the types and amounts of Reference Property received by the holders of the Common Stock that affirmatively make such an election.

Section 9. *Events of Default.*

(a) The Loan may, at the option of Lender by a written notice to Borrower, be terminated (i) immediately upon the occurrence of any of the events set forth in Section 9(a)(iii) or Section 9(a)(iv) below and (ii) two Business Days following such notice upon the occurrence of any of the other events set forth below (each, a “**Borrower Default**”):

(i) Borrower fails to deliver Loaned Shares to Lender as required by Section 4, subject to Section 10;

(ii) Borrower fails to deliver or pay to Lender when due any cash, securities or other property as required by Section 5;

(iii) the filing by or on behalf of Borrower of a voluntary petition or an answer seeking reorganization, arrangement, readjustment of its debts or for any other relief under any bankruptcy, reorganization, receivership, compromise, arrangement, insolvency, readjustment of debt, dissolution, moratorium, delinquency, winding-up or liquidation or similar act or law, of any state, federal or other applicable foreign jurisdictions, now or hereafter existing (“**Bankruptcy Law**”), or any action by Borrower for, or consent or acquiescence to, the appointment of a receiver trustee, conservator, custodian or similar official of Borrower, or of all or a substantial part of its property; or the making by Borrower of a general assignment for the benefit of creditors; or the admission by Borrower in writing of its inability to pay its debts as they become due;

(iv) the filing of any involuntary petition against Borrower in bankruptcy or seeking reorganization, arrangement, readjustment of its

debts or for any other relief under any Bankruptcy Law and an order for relief by a court having jurisdiction in the premises shall have been issued or entered therein; or any other similar relief shall be granted under any applicable federal or state law or law of any other applicable foreign jurisdictions; or a decree or order of a court having jurisdiction in the premises for the appointment of a receiver, liquidator, sequestrator, trustee or other officer having similar powers over Borrower or over all or a part of its property shall have been entered; or the involuntary appointment of an interim receiver, trustee or other custodian of Borrower or of all or a substantial part of its property; or the issuance of a warrant of attachment, execution or similar process against any substantial part of the property of Borrower; and continuance of any such event for 15 consecutive calendar days unless dismissed, bonded to the satisfaction of the court having jurisdiction in the premises or discharged;

(v) Borrower fails to provide any indemnity as required by Section 12;

(vi) Borrower notifies Lender of its inability to or intention not to perform Borrower's obligations hereunder or otherwise disaffirms, rejects or repudiates any of its obligations hereunder; or

(vii) any representation made by Borrower under this Agreement in connection with the Loan hereunder shall be incorrect or untrue in any material respect during the term of the Loan or Borrower fails to comply in any material respect with any of its covenants under this Agreement.

(b) The Loan may, at the option of Borrower by a written notice to Lender, be terminated two Business Days following such notice by Borrower upon the occurrence of any of the events set forth below (each, a "**Lender Default**");

(i) the filing by or on behalf of Lender of a voluntary petition or an answer seeking reorganization, arrangement, readjustment of its debts or for any other relief under any Bankruptcy Law, or any action by Lender for, or consent or acquiescence to, the appointment of a receiver, trustee, custodian or similar official of Lender, or of all or a substantial part of its property; or the making by Lender of a general assignment for the benefit of creditors; or the admission by Lender in writing of its inability to pay its debts as they become due; or

(ii) the filing of any involuntary petition against Lender in bankruptcy or seeking reorganization, arrangement, readjustment of its debts or for any other relief under any Bankruptcy Law and an order for relief by a court having jurisdiction in the premises shall have been issued or entered therein; or any other similar relief shall be granted under any

applicable federal or state law or law of any other applicable foreign jurisdictions; or a decree or order of a court having jurisdiction in the premises for the appointment of a receiver, liquidator, sequestrator, trustee or other officer having similar powers over Lender or over all or a part of its property shall have been entered; or the involuntary appointment of an interim receiver, trustee or other custodian of Lender or of all or a substantial part of its property; or the issuance of a warrant of attachment, execution or similar process against any substantial part of the property of Lender; and continuance of any such event for 45 consecutive calendar days unless dismissed, bonded to the satisfaction of the court having jurisdiction in the premises or discharged.

Section 10. *Borrower's Right to Extend; Lender's Remedies.*

(a) Except to the extent a Loan is terminated pursuant to Section 9 as a result of a Borrower Default, Borrower may, following the termination of any portion of the Loan pursuant to Section 4, delay the date on which the related Loaned Shares are due to Lender (the "**Settlement Due Date**" as so delayed to the extent applicable), with respect to some or all of such Loaned Shares, if Borrower determines in good faith upon the advice of counsel that such extension is necessary or appropriate to enable Borrower or any of its affiliates to effect purchases of Common Stock to deliver to Lender pursuant to this Agreement in a manner that (x) is, or would be, in compliance with legal and regulatory requirements (i) applicable to Borrower or such affiliates in purchasing such shares of Common Stock or (ii) if Borrower were deemed to be Lender or an affiliated purchaser of Lender, that would be applicable to Lender in purchasing such shares of Common Stock and (y) shall not be commercially impracticable, in the reasonable judgment of Borrower, in the time period required by Section 4.

(b) If, upon the termination of any Loan pursuant to Section 4 and the purchase of Common Stock in an amount equal to all or any portion of the Loaned Shares to be delivered to Lender by Borrower in accordance with Section 4 of this Agreement (i) shall be prohibited by any law, rules or regulation of any governmental authority to which it is or would be subject, (ii) shall violate, or would upon such purchase likely violate, any order or prohibition of any court, tribunal or other governmental authority, (iii) shall require the prior consent of any court, tribunal or governmental authority prior to any such repurchase or (iv) would subject Borrower, in the commercially reasonable judgment of Borrower, to any liability or potential liability under any applicable federal securities laws (including, without limitation, Section 16 of the Exchange Act or applicable banking regulations) (each of (i), (ii), (iii) and (iv), a "**Legal Obstacle**"), then, in each case, Borrower shall immediately notify Lender of the Legal Obstacle and the basis therefor, whereupon such Borrower's obligations under Section 4 shall be suspended until such time as no Legal Obstacle with respect to such obligations shall exist (a "**Repayment Suspension**"). Following the occurrence of and during the continuation of any Repayment Suspension, Borrower shall use its reasonable best efforts to remove or cure the Legal

Obstacle as soon as practicable and to deliver to Lender any Loaned Shares it actually acquires; *provided* that Lender shall promptly reimburse all costs and expenses (including legal counsel to Borrower) incurred or, at Borrower's election, provide reasonably adequate surety or guarantee for any such costs and expenses that may be incurred by Borrower, in each case in removing or curing such Legal Obstacle.

(c) If Borrower is unable to remove or cure any Legal Obstacle within 10 Business Days, Lender may elect to require Borrower, upon five Business Days' advance written notice, to pay to Lender in lieu of the delivery of Loaned Shares otherwise required to be delivered, an amount in immediately available funds (the "**Replacement Cash**") equal to the product of (A) the average of the Relevant Prices over the 40 consecutive Business Day period immediately preceding the termination date of the Loan and (B) the number of Loaned Shares otherwise required to be delivered that Borrower failed to deliver; provided that if any Business Day in the 40 consecutive Business Day averaging period described in clause (A) above is a Disrupted Day in full or in part, (x) such averaging period shall be extended by one Business Day for each such Disrupted Day, and (y) the Borrower shall calculate the amount of Replacement Cash according to an appropriately weighted average of the Relevant Prices over such averaging period (as extended).

(d) If Borrower shall fail to deliver to Lender on the Settlement Due Date the applicable Loaned Shares relating to any portion of the Loan that has been terminated under Section 4 and Borrower is unable to remove or cure any Legal Obstacle within 10 Business Days or Borrower shall fail to pay the Replacement Cash to Lender in accordance with Section 10(c) above (to the extent Borrower is required to pay Replacement Cash), then, in either case, Lender shall have the right (upon prior written notice to Borrower) to purchase a like number of shares of Common Stock (and, Non-Cash Distributions, if applicable pursuant to Section 5(b)) ("**Replacement Shares**") in the principal market for such securities in a commercially reasonable manner (and Lender shall promptly notify Borrower of the aggregate purchase price of the Replacement Shares upon the exercise of such right). To the extent Lender shall exercise such right, Borrower's obligation to return a like amount of Loaned Shares or to pay the Replacement Cash, as applicable, shall terminate and Borrower shall be liable to Lender for the purchase price of such Replacement Shares (plus all other amounts, if any, due to Lender hereunder), all of which shall be due and payable within three Business Days of notice to Borrower by Lender of the aggregate purchase price of the Replacement Shares. The purchase price of Replacement Shares purchased under this Section 10 shall include broker's fees and commissions and all other reasonable costs, fees and expenses related to such purchase and sale.

Section 11. *Transfers of Common Stock.*

(a) The transfer of Loaned Shares to Borrower hereunder shall be made by the crediting by a Clearing Organization of such Loaned Shares to Borrower's "securities account" (within the meaning of Section 8-501 of the UCC) maintained with such Clearing Organization. All transfers of Loaned Shares to Lender hereunder shall be made by the crediting of such Loaned Shares to Lender's Designated Account (whereupon, for the avoidance of doubt, such Loaned Shares credited to Lender's Designated Account shall become the property of Lender, and Borrower shall have no voting, dispositive control or pecuniary interest with respect thereto). In every transfer of "financial assets" (within the meaning of Section 8-102(a)(9) of the UCC) hereunder, the transferor shall take all steps necessary (i) to effect a delivery of such financial assets to the transferee under Section 8-301 of the UCC, or to cause the creation of a security entitlement in favor of the transferee in such financial assets under Section 8-501 of the UCC, (ii) to enable the transferee to obtain "control" (within the meaning of Section 8-106 of the UCC), and (iii) to provide the transferee with comparable rights under any similar law or regulation of any other jurisdiction that is applicable to such transfer.

(b) Except as otherwise provided herein, all transfers of cash hereunder to Borrower or Lender shall be by wire transfer in immediately available, freely transferable funds.

(c) A transfer of securities or cash may be effected under this Section 11 on any Business Day except (i) a Business Day on which the transferee is closed for business at its address set forth in Section 17 or (ii) a Business Day on which a Clearing Organization or wire transfer system is closed, if the facilities of such Clearing Organization or wire transfer system are required to effect such transfer. Any transfer not effected because of this clause (c) shall be made on the next following Business Day on which such transfer may be made.

Section 12. *Indemnities.*

(a) Lender hereby agrees to indemnify and hold harmless Borrower and its affiliates and its former, present and future directors, officers, employees and other agents and representatives from and against any and all liabilities, judgments, claims, settlements, losses, damages, fees, liens, taxes, penalties, obligations and expenses (including, without limitation, any losses relating to Borrower's market activities as a consequence of becoming, or of the risk of becoming, subject to Section 16(b) of the Exchange Act, including, without limitation, any forbearance from market activities or cessation of market activities and any losses in connection therewith) incurred or suffered by any such person or entity directly or indirectly arising from, by reason of, or in connection with, (i) any breach by Lender of any of its representations or warranties contained in Section 7 or (ii) any breach by Lender of any of its covenants or agreements in this Agreement (including, without limitation, Section 8(c)).

(b) Borrower hereby agrees to indemnify and hold harmless Lender and its affiliates and its former, present and future directors, officers, employees and other agents and representatives from and against any and all liabilities, judgments, claims, settlements, losses, damages, fees, liens, taxes, penalties, obligations and expenses incurred or suffered by any such person or entity directly or indirectly arising from, by reason of, or in connection with (i) any breach by Borrower of any of its representations or warranties contained in Section 7 or (ii) any breach by Borrower of any of its covenants or agreements in this Agreement.

(c) In case any claim or litigation which might give rise to any obligation of a party under this Section 12 (each an “**Indemnifying Party**”) shall come to the attention of the party seeking indemnification hereunder (the “**Indemnified Party**”), the Indemnified Party shall promptly notify the Indemnifying Party in writing of the existence and amount thereof; *provided* that the failure of the Indemnified Party to give such notice shall not adversely affect the right of the Indemnified Party to indemnification under this Agreement, except to the extent the Indemnifying Party is materially prejudiced thereby. The Indemnifying Party shall promptly notify the Indemnified Party in writing if it accepts such claim or litigation as being within its indemnification obligations under this Section 12. Such response shall be delivered no later than 30 days after the initial notification from the Indemnified Party; *provided* that, if the Indemnifying Party reasonably cannot respond to such notice within 30 days, the Indemnifying Party shall respond to the Indemnified Party as soon thereafter as reasonably possible.

(d) An Indemnifying Party shall be entitled to participate in and, if (i) in the good faith judgment of the Indemnified Party such claim can properly be resolved by money damages alone and the Indemnifying Party has the financial resources to pay such damages and (ii) the Indemnifying Party admits that this indemnity fully covers the claim or litigation, the Indemnifying Party shall be entitled to direct the defense of any claim at its expense, but such defense shall be conducted by legal counsel reasonably satisfactory to the Indemnified Party. An Indemnified Party shall not make any settlement of any claim or litigation under this Section 12 without the written consent of the Indemnifying Party.

#### Section 13. *Termination of Agreement.*

(a) This Agreement shall terminate upon the earliest of (i) the 45th Business Day following the date as of which the entire principal amount of Convertible Notes ceases to be outstanding and Lender has settled all payments or deliveries in respect of such Convertible Notes, whether as a result of conversion, redemption, repurchase, cancellation, at maturity or otherwise, subject to Section 10, (ii) the written agreement of Lender and Borrower to so terminate, (iii) August 24, 2010 (or such later date as Borrower and Lender shall have agreed which in no event shall be later than September 7, 2010) (August 24, 2010 or such later date being the “**Early Unwind Date**”) if the initial offering of the Convertible

Notes has not closed prior to such Early Unwind Date pursuant to the terms of the underwriting agreement relating to the Convertible Notes, (iv) the occurrence of a Borrower Default, at the option of Lender, as set forth in Section 9(a) and (v) the occurrence of a Lender Default, at the option of Borrower, as set forth in Section 9(b).

(b) Unless otherwise agreed in writing by Borrower and Lender, the provisions of Section 12 shall survive the termination of this Agreement.

Section 14. *Delegation.* Neither party shall delegate its obligations under this Agreement without the prior written consent of the other party, and any attempt to delegate obligations arising under this Agreement without such consent shall be void; *provided* that notwithstanding the foregoing and anything to the contrary herein, Borrower may designate any person to deliver or receive Loaned Shares or cash to or from Lender when deliverable in accordance with this Agreement and to otherwise perform Borrower's obligations in respect of this Agreement and any such designee may assume such obligations. Borrower shall only be discharged of its obligations to Lender to the extent of any such delivery or performance.

Section 15. *Transfer and Assignment of the Agreement.* Neither party shall transfer or assign its rights or obligations under this Agreement without the prior written consent of the other party, and any attempt to transfer or assign any rights or obligations arising under this Agreement without such consent shall be void; *provided* that notwithstanding the foregoing and anything to the contrary herein, Borrower shall have the right to assign its rights and obligations under this Agreement to any of Borrower's affiliates or any other person of equal or better credit rating as Borrower, or guaranteed by Borrower or an entity with equal or better credit rating as Borrower.

Section 16. *Communications; Hedging.* Lender acknowledges and agrees that (A) any purchases or sales made by Borrower in respect of the Agreement shall be made in Borrower's sole judgment and for Borrower's own account and (B) Lender does not have, and shall not attempt to exercise, any influence over how, when or whether to effect such purchases or sales, including, without limitation, the price paid or received per share pursuant to such transactions whether such transactions are made on any securities exchange or privately. In addition, Lender shall not communicate any material non-public information relating either to Lender or the Common Stock to any employee of Borrower or its affiliates if Lender knows, or Borrower has notified Lender, that such employee is involved in hedging Borrower's market and price risk with respect to the Agreement until the fifth Business Day following the termination of the Agreement.



Section 17. *Notices.*

(a) All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given when received.

(b) All such notices and other communications shall be directed to the following address:

(i) If to Borrower to:

Bank of America, N.A.  
9 West 57<sup>th</sup> Street  
New York, NY 10019  
Attention: John Servidio

(ii) If to Lender to:

MannKind Corporation  
28903 North Avenue Paine  
Valencia, California 91355  
Attn: David Thomson  
Telephone: (661) 775-5350  
Facsimile: (661) 755-2086

(c) In the case of any party, at such other address as may be designated by written notice to the other parties.

Section 18. *Governing Law; Submission To Jurisdiction; Severability.*

(a) This Agreement, and each claim, controversy or dispute arising hereunder or relating hereto, shall be governed by and construed in accordance with the laws of the State of New York, but excluding any choice of law provisions that would require the application of the laws of a jurisdiction other than New York.

**(b) EACH PARTY HERETO IRREVOCABLY AND UNCONDITIONALLY (A) SUBMITS TO THE NON-EXCLUSIVE JURISDICTION OF ANY UNITED STATES FEDERAL OR NEW YORK STATE COURT SITTING IN NEW YORK CITY, AND ANY APPELLATE COURT FROM ANY SUCH COURT, SOLELY FOR THE PURPOSE OF ANY SUIT, ACTION OR PROCEEDING BROUGHT TO ENFORCE ITS OBLIGATIONS HEREUNDER OR RELATING IN ANY WAY TO THIS AGREEMENT OR THE LOAN HEREUNDER AND (B) WAIVES, TO THE FULLEST EXTENT IT MAY EFFECTIVELY DO SO, ANY DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF SUCH ACTION OR PROCEEDING IN ANY SUCH COURT AND ANY**

**RIGHT OF JURISDICTION ON ACCOUNT OF ITS PLACE OF RESIDENCE OR DOMICILE.**

**(c) EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES ANY RIGHT THAT IT MAY HAVE TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.**

(d) To the extent permitted by law, the unenforceability or invalidity of any provision or provisions of this Agreement shall not render any other provision or provisions herein contained unenforceable or invalid.

Section 19. *Counterparts*. This Agreement may be executed in any number of counterparts, and all such counterparts taken together shall be deemed to constitute one and the same agreement.

Section 20. *Amendments*. No amendment or modification in respect of this Agreement shall be effective unless it shall be in writing and signed by the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Share Lending Agreement as of the date and year first above written.

MANKIND CORPORATION  
as Lender

BANK OF AMERICA, N.A.  
as Borrower

By: /s/ Matthew J. Pfeffer  
Name: Matthew J. Pfeffer  
Title: Chief Financial Officer

By: /s/ Charles J. Neslen  
Name: Charles J. Nelsen  
Title: Director

August 17, 2010

MannKind Corporation  
28903 North Avenue Paine  
Valencia, CA 91355

Re: The Mann Group LLC Revolving Loan Arrangement

Ladies and Gentlemen:

Reference is made to that certain Amended and Restated Promissory Note made by MannKind Corporation (the "**Company**") in favor of The Mann Group LLC, dated August 10, 2010 (the "**Loan**"). I hereby confirm by this letter that The Mann Group LLC shall not require the Company to prepay amounts outstanding under the Loan prior to the maturity date of the Loan if such prepayment would require the use by the Company of its working capital resources, including any proceeds from the current offering by the Company of convertible promissory notes due 2015.

Very truly yours,

THE MANN GROUP LLC

/s/ Alfred E. Mann

\_\_\_\_\_  
Alfred E. Mann, Managing Member

Acknowledged and Agreed:

MANNKIND CORPORATION

By: /s/ David Thomson

\_\_\_\_\_  
David Thomson  
General Counsel

Dated: August 18, 2010

## Risk Factors

### RISKS RELATED TO OUR BUSINESS

***We depend heavily on the successful development and commercialization of our lead product candidate, AFREZZA, which is not yet approved, and our other product candidates, which are in early clinical or preclinical development.***

To date, we have not commercialized any product candidates. In March 2009, we submitted an NDA to the FDA requesting approval of AFREZZA for the treatment of adults with type 1 or type 2 diabetes for the control of hyperglycemia. In March 2010, we received a Complete Response letter regarding this NDA from the FDA. A Complete Response letter is issued by the FDA's Center for Drug Evaluation and Research when the review of a submitted file is completed and questions remain that preclude the approval of the NDA in its current form. In July 2010, the FDA accepted our reply to the Complete Response letter and set a target action date of December 29, 2010. There can be no assurance that the FDA will find our proposed approach for addressing its questions acceptable. The FDA could also request that we conduct additional clinical trials to provide sufficient data for approval of the NDA. There can be no assurance that we will obtain approval of the NDA in a timely manner or at all.

Our other product candidates are generally in early clinical or preclinical development. We anticipate that in the near term, our ability to generate revenues will depend solely on the successful development and commercialization of AFREZZA.

We have expended significant time, money and effort in the development of our lead product candidate, AFREZZA, which has not yet received regulatory approval and which may not be approved by the FDA in a timely manner, or at all. We must receive the necessary approvals from the FDA and similar foreign regulatory agencies before AFREZZA can be marketed and sold in the United States or elsewhere. Even if we were to receive regulatory approval, we ultimately may be unable to gain market acceptance of AFREZZA for a variety of reasons, including the treatment and dosage regimen, potential adverse effects, the availability of alternative treatments and cost effectiveness. If we fail to commercialize AFREZZA, our business, financial condition and results of operations will be materially and adversely affected.

We are seeking to develop and expand our portfolio of product candidates through our internal research programs and through licensing or otherwise acquiring the rights to therapeutics in the areas of cancer and other indications. All of these product candidates will require additional research and development and significant preclinical, clinical and other testing prior to seeking regulatory approval to market them. Accordingly, these product candidates will not be commercially available for a number of years, if at all.

A significant portion of the research that we are conducting involves new and unproven compounds and technologies, including AFREZZA, Technosphere platform technology and immunotherapy product candidates. Research programs to identify new product candidates require substantial technical, financial and human resources. Even if our research programs identify candidates that initially show promise, these candidates may fail to progress to clinical development for any number of reasons, including discovery upon further research that these candidates have adverse effects or other characteristics that indicate they are unlikely to be effective. In addition, the clinical results we obtain at one stage are not necessarily indicative of future testing results. If we fail to successfully complete the development and commercialization of AFREZZA or develop or expand our other product candidates, or are significantly delayed in doing so, our business and results of operations will be harmed and the value of our stock could decline.

***We have a history of operating losses, we expect to continue to incur losses and we may never become profitable.***

We are a development stage company with no commercial products. All of our product candidates are still being developed, and all but AFREZZA are still in the early stages of development. Our product candidates will require significant additional development, clinical trials, regulatory clearances and additional investment before they can be commercialized. We cannot be certain when AFREZZA may be approved, or if it will be approved.

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We have never been profitable and, as of June 30, 2010, we had incurred a cumulative net loss of \$1.7 billion. The cumulative net loss has resulted principally from costs incurred in our research and development programs, the write-off of goodwill and general operating expenses. We expect to make substantial expenditures and to incur increasing operating losses in the future in order to further develop and commercialize our product candidates, including costs and expenses to complete clinical trials, seek regulatory approvals and market our product candidates, including AFREZZA. This cumulative net loss may increase significantly as we continue development and clinical trial efforts.

Our losses have had, and are expected to continue to have, an adverse impact on our working capital, total assets and stockholders' equity. As of June 30, 2010, we had a stockholders' deficit of \$137.7 million. Our ability to achieve and sustain profitability depends upon obtaining regulatory approvals for and successfully commercializing AFREZZA, either alone or with third parties. We do not currently have the required approvals to market any of our product candidates, and we may not receive them. We may not be profitable even if we succeed in commercializing any of our product candidates. As a result, we cannot be sure when we will become profitable, if at all.

***If we fail to raise additional capital our financial condition and business would suffer.***

It is costly to develop therapeutic product candidates and conduct clinical trials for these product candidates. Although we are currently focusing on AFREZZA as our lead product candidate, we have begun to conduct clinical trials for additional product candidates. Our existing capital resources will not be sufficient to support the expense of fully commercializing AFREZZA or developing any of our product candidates.

Based upon our current expectations, we believe that our existing capital resources, including the loan arrangement with The Mann Group LLC (an entity controlled by our principal stockholder) but excluding the net proceeds from our recently-completed sale of our 5.75% convertible notes due 2015 and any proceeds to us from our share purchase arrangement with Seaside, will enable us to continue planned operations through the first quarter of 2011. However, we cannot assure you that our plans will not change or that changed circumstances will not result in the depletion of our capital resources more rapidly than we currently anticipate. Accordingly, we may raise additional funds through the sale of equity or debt securities, the entry into strategic business collaborations, the establishment of other funding facilities, licensing arrangements and/or assets sales, in order to continue the development and commercialization of AFREZZA and other product candidates and to support our other ongoing activities. However, it may be difficult for us to raise additional funds through the sale of equity or debt securities. As of June 30, 2010, we had a stockholders' deficit of \$137.7 million which may raise concerns about our solvency and affect our ability to raise additional funds. The amount of additional funds we need will depend on a number of factors, including:

- the rate of progress and costs of our clinical trials and research and development activities, including costs of procuring clinical materials and expanding our own manufacturing facilities;
  - our success in establishing strategic business collaborations and the timing and amount of any payments we might receive from any collaboration we are able to establish;
  - actions taken by the FDA and other regulatory authorities affecting our products and competitive products;
  - our degree of success in commercializing AFREZZA;
  - the emergence of competing technologies and products and other adverse market developments;
  - the timing and amount of payments we might receive from potential licensees;
  - the costs of preparing, filing, prosecuting, maintaining and enforcing patent claims and other intellectual property rights or defending against claims of infringement by others;
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- the costs of discontinuing projects and technologies or decommissioning existing facilities, if we undertake those activities; and
- the costs of performing additional clinical trials to demonstrate safety and efficacy if our current trials do not deliver results sufficient for FDA approval and commercialization.

We have raised capital in the past primarily through the sale of equity and debt securities. We may in the future pursue the sale of additional equity and/or debt securities, or the establishment of other funding facilities. For example, on August 10, 2010, we entered into the Seaside purchase agreement and the Mann purchase agreement for the sale and issuance by us of up to 36,400,000 shares of our common stock over a period of approximately 50 weeks. Issuances of additional debt or equity securities or the conversion of any of our currently outstanding convertible debt securities into shares of our common stock could impact the rights of the holders of our common stock and may dilute their ownership percentage. Moreover, the establishment of other funding facilities may impose restrictions on our operations. These restrictions could include limitations on additional borrowing and specific restrictions on the use of our assets, as well as prohibitions on our ability to create liens, pay dividends, redeem our stock or make investments.

We also may seek to raise additional capital by pursuing opportunities for the licensing or sale of certain intellectual property and other assets, including our Technosphere technology platform. We cannot offer assurances, however, that any strategic collaborations, sales of securities or sales or licenses of assets will be available to us on a timely basis or on acceptable terms, if at all. We may be required to enter into relationships with third parties to develop or commercialize products or technologies that we otherwise would have sought to develop independently, and any such relationships may not be on terms as commercially favorable to us as might otherwise be the case.

In the event that sufficient additional funds are not obtained through strategic collaboration opportunities, sales of securities, credit facilities, licensing arrangements and/or asset sales on a timely basis, we may be required to reduce expenses through the delay, reduction or curtailment of our projects, including AFREZZA commercialization, or further reduction of costs for facilities and administration. Moreover, if we do not obtain such additional funds, there will be substantial doubt about our ability to continue as a going concern and increased risk of insolvency and loss of investment to the holders of our securities. As of the date hereof, we have not obtained a solvency opinion or otherwise conducted a valuation of our properties to determine whether our debts exceed the fair value of our property within the meaning of applicable solvency laws. If we are or become insolvent, investors in our stock may lose the entire value of their investment.

***Deteriorating global economic conditions may have an adverse impact on the loan facility with an entity controlled by our principal stockholder, which we currently cannot predict.***

As widely reported, financial markets in the United States, Europe and Asia have been experiencing a period of unprecedented turmoil and upheaval characterized by extreme volatility and declines in security prices, severely diminished liquidity and credit availability, inability to access capital markets, the bankruptcy, failure, collapse or sale of various financial institutions and an unprecedented level of intervention from the United States federal government and other governments. We cannot predict the impact of these events on the loan facility with an entity controlled by our principal stockholder. If we are unable to draw on this financial resource, our business and financial condition will be adversely affected.

***If we do not achieve our projected development and commercialization goals in the timeframes we announce and expect, our business would be harmed and the market price of our common stock could decline.***

For planning purposes, we estimate the timing of the accomplishment of various scientific, clinical, regulatory and other product development goals, which we sometimes refer to as milestones. These milestones may include the commencement or completion of scientific studies and clinical trials and the submission of regulatory filings. From time to time, we publicly announce the expected timing of some of these milestones. All of these milestones are based on a variety of assumptions. The actual timing of the achievement of these milestones can vary dramatically from our estimates, in many cases for reasons beyond our control, depending on numerous factors, including:

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- the rate of progress, costs and results of our clinical trial and research and development activities, which will be impacted by the level of proficiency and experience of our clinical staff;
- our ability to identify and enroll patients who meet clinical trial eligibility criteria;
- our ability to access sufficient, reliable and affordable supplies of components used in the manufacture of our product candidates, including insulin and other materials for AFREZZA;
- the costs of expanding and maintaining manufacturing operations, as necessary;
- the extent of scheduling conflicts with participating clinicians and clinical institutions;
- the receipt of approvals by our competitors and by us from the FDA and other regulatory agencies;
- our ability to enter into sales and marketing collaborations for AFREZZA; and
- other actions by regulators.

In addition, if we do not obtain sufficient additional funds through sales of securities, strategic collaborations or the license or sale of certain of our assets on a timely basis, we may be required to reduce expenses by delaying, reducing or curtailing our development of AFREZZA or other product development activities, which would impact our ability to meet milestones. If we fail to commence or complete, or experience delays in or are forced to curtail, our proposed clinical programs or otherwise fail to adhere to our projected development goals in the timeframes we announce and expect (or within the timeframes expected by analysts or investors), our business and results of operations will be harmed and the market price of our common stock may decline.

***We face substantial competition in the development of our product candidates and may not be able to compete successfully, and our product candidates may be rendered obsolete by rapid technological change.***

A number of established pharmaceutical companies have or are developing technologies for the treatment of diabetes. We also face substantial competition for the development of our other product candidates.

Many of our existing or potential competitors have, or have access to, substantially greater financial, research and development, production, and sales and marketing resources than we do and have a greater depth and number of experienced managers. As a result, our competitors may be better equipped than we are to develop, manufacture, market and sell competing products. In addition, gaining favorable reimbursement is critical to the success of AFREZZA. Many of our competitors have existing infrastructure and relationships with managed care organizations and reimbursement authorities which can be used to their advantage.

The rapid rate of scientific discoveries and technological changes could result in one or more of our product candidates becoming obsolete or noncompetitive. Our competitors may develop or introduce new products that render our technology and AFREZZA less competitive, uneconomical or obsolete. Our future success will depend not only on our ability to develop our product candidates but to improve them and keep pace with emerging industry developments. We cannot assure you that we will be able to do so.

We also expect to face increasing competition from universities and other non-profit research organizations. These institutions carry out a significant amount of research and development in the areas of diabetes and cancer. These institutions are becoming increasingly aware of the commercial value of their findings and are more active in seeking patent and other proprietary rights as well as licensing revenues.

***If we fail to enter into a strategic collaboration with respect to AFREZZA, we may not be able to execute on our business model.***

We have held extensive discussions with a number of pharmaceutical companies concerning a potential strategic business collaboration for AFREZZA. To date we have not reached an agreement with any of these

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companies on a collaboration. We cannot predict when, if ever, we could conclude an agreement with a partner. There can be no assurance that any such collaboration will be available to us on a timely basis or on acceptable terms. If we are not able to enter into a collaboration on terms that are favorable to us, we may be unable to undertake and fund product development, clinical trials, manufacturing and marketing activities at our own expense. Accordingly, we may have to substantially reduce our development efforts, which would delay or otherwise impede the commercialization of AFREZZA.

We will face similar challenges as we seek to develop our other product candidates. Our current strategy for developing, manufacturing and commercializing our other product candidates includes evaluating the potential for collaborating with pharmaceutical and biotechnology companies at some point in the drug development process and for these collaborators to undertake the advanced clinical development and commercialization of our product candidates. It may be difficult for us to find third parties that are willing to enter into collaborations on economic terms that are favorable to us, or at all. Failure to enter into a collaboration with respect to any other product candidate could substantially increase our requirements for capital and force us to substantially reduce our development effort.

***If we enter into collaborative agreements with respect to AFREZZA and if our third-party collaborators do not perform satisfactorily or if our collaborations fail, development or commercialization of AFREZZA may be delayed and our business could be harmed.***

We may enter into license agreements, partnerships or other collaborative arrangements to support the financing, development and marketing of AFREZZA. We may also license technology from others to enhance or supplement our technologies. These various collaborators may enter into arrangements that would make them potential competitors. These various collaborators also may breach their agreements with us and delay our progress or fail to perform under their agreements, which could harm our business.

If we enter into collaborative arrangements, we will have less control over the timing, planning and other aspects of our clinical trials, and the sale and marketing of AFREZZA and our other product candidates. We cannot offer assurances that we will be able to enter into satisfactory arrangements with third parties as contemplated or that any of our existing or future collaborations will be successful.

***Continued testing of AFREZZA or our other product may not yield successful results, and even if it does, we may still be unable to commercialize our product.***

Our research and development programs are designed to test the safety and efficacy of AFREZZA and our other product candidates through extensive nonclinical and clinical testing. We may experience numerous unforeseen events during, or as a result of, the testing process that could delay or prevent commercialization of AFREZZA or any of our other product candidates, including the following:

- safety and efficacy results obtained in our nonclinical and initial clinical testing may be inconclusive or may not be predictive of results obtained in later-stage clinical trials or following long-term use, and we may as a result be forced to stop developing product candidates that we currently believe are important to our future;
- the data collected from clinical trials of our product candidates may not be sufficient to support FDA or other regulatory approval;
- after reviewing test results, we or any potential collaborators may abandon projects that we previously believed were promising; and
- our product candidates may not produce the desired effects or may result in adverse health effects or other characteristics that preclude regulatory approval or limit their commercial use if approved.

Forecasts about the effects of the use of drugs, including AFREZZA, over terms longer than the clinical trials or in much larger populations may not be consistent with the clinical results. If use of AFREZZA results in

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adverse health effects or reduced efficacy or both, the FDA or other regulatory agencies may terminate our ability to market and sell AFREZZA, may narrow the approved indications for use or otherwise require restrictive product labeling or marketing, or may require further clinical trials, which may be time-consuming and expensive and may not produce favorable results.

As a result of any of these events, we, any collaborator, the FDA, or any other regulatory authorities, may suspend or terminate clinical trials or marketing of AFREZZA at any time. Any suspension or termination of our clinical trials or marketing activities may harm our business and results of operations and the market price of our common stock may decline.

***If we are unable to transition successfully from a development company to a company that commercializes therapeutics, our business would suffer.***

We require a well-structured plan to make the transition from the development stage to being a company with commercial operations. In order to implement our commercialization strategy, we will need to:

- align our management structure to accommodate the increasing complexity of our operations;
- develop comprehensive and detailed commercialization, clinical development and regulatory plans; and
- implement standard operating procedures.

If we are unable to accomplish these measures in a timely manner, we would be at considerable risk of failing to develop the capabilities necessary for commercial operations.

***If our suppliers fail to deliver materials and services needed for the production of AFREZZA in a timely and sufficient manner, or they fail to comply with applicable regulations, our business and results of operations would be harmed and the market price of our common stock could decline.***

For AFREZZA to be commercially viable, we need access to sufficient, reliable and affordable supplies of insulin, our AFREZZA inhaler, the related cartridges and other materials. We have a long-term agreement with N.V. Organon for the supply of insulin. In June 2009, we purchased from Pfizer, a portion of its inventory of bulk insulin and acquired an option to purchase the remainder of Pfizer's insulin inventory, in whole or in part, at a specified price to the extent that Pfizer has not otherwise disposed of or used the retained insulin.

We obtain FDKP, the precursor raw material for AFREZZA, from a major multinational chemical manufacturer. We have completed a successful validation campaign of FDKP at commercial scale. We can also utilize our in-house chemical manufacturing plant for supplemental capacity. We believe our contract manufacturer has the capacity to supply our current and future commercial requirements. We obtain our intended commercial AFREZZA inhaler and cartridges from a plastic molding company located in the United States.

We must rely on our suppliers to comply with relevant regulatory and other legal requirements, including the production of insulin in accordance with the FDA's current good manufacturing practices, or cGMP for drug products, and the production of the AFREZZA inhaler and related cartridges in accordance with Quality System Regulations, or QSR. The supply of any of these materials may be limited or any of the manufacturers may not meet relevant regulatory requirements, and if we are unable to obtain any of these materials in sufficient amounts, in a timely manner and at reasonable prices, or if we should encounter delays or difficulties in our relationships with manufacturers or suppliers, the development or manufacturing of AFREZZA may be delayed. Any such events could delay market introduction and subsequent sales of AFREZZA and, if so, our business and results of operations will be harmed and the market price of our common stock may decline.

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***We have never manufactured AFREZZA or any other product candidates in commercial quantities, and if we fail to develop an effective manufacturing capability for our product candidates or to engage third-party manufacturers with this capability, we may be unable to commercialize these products.***

We use our Danbury facility to formulate AFREZZA, fill plastic cartridges with AFREZZA and blister package the cartridges for use in our clinical trials. This facility has been fully qualified and undergone inspection by the FDA. The manufacture of pharmaceutical products requires significant expertise and capital investment, including the development of advanced manufacturing techniques and process controls. Manufacturers of pharmaceutical products often encounter difficulties in production, especially in scaling up initial production. These problems include difficulties with production costs and yields, quality control and assurance and shortages of qualified personnel, as well as compliance with strictly enforced federal, state and foreign regulations. If we engage a third-party manufacturer, we would need to transfer our technology to that third-party manufacturer and gain FDA approval, potentially causing delays in product delivery. In addition, our third-party manufacturer may not perform as agreed or may terminate its agreement with us.

Additionally, when we manufacture commercial material on a significantly larger production scale than the production scale for clinical trial materials, we are required by the FDA to establish that the results obtained from the clinical trials may reasonably be extrapolated to such commercial material. We have submitted documentation to the FDA to show correlation to the clinical-scale production materials but can provide no assurance that approval will be obtained.

Any of these factors could cause us to delay or suspend clinical trials, regulatory submissions, required approvals or commercialization of our product candidates, entail higher costs and result in our being unable to effectively commercialize our products. Furthermore, if we or a third-party manufacturer fail to deliver the required commercial quantities of any product on a timely basis, and at commercially reasonable prices and acceptable quality, and we were unable to promptly find one or more replacement manufacturers capable of production at a substantially equivalent cost, in substantially equivalent volume and quality on a timely basis, we would likely be unable to meet demand for such products and we would lose potential revenues.

***We deal with hazardous materials and must comply with environmental laws and regulations, which can be expensive and restrict how we do business.***

Our research and development work involves the controlled storage and use of hazardous materials, including chemical, radioactive and biological materials. In addition, our manufacturing operations involve the use of a chemical that is stable and non-hazardous under normal storage conditions, but may form an explosive mixture under certain conditions. Our operations also produce hazardous waste products. We are subject to federal, state and local laws and regulations governing how we use, manufacture, store, handle and dispose of these materials. Moreover, the risk of accidental contamination or injury from hazardous materials cannot be completely eliminated, and in the event of an accident, we could be held liable for any damages that may result, and any liability could fall outside the coverage or exceed the limits of our insurance. Currently, our general liability policy provides coverage up to \$1 million per occurrence and \$2 million in the aggregate and is supplemented by an umbrella policy that provides a further \$4 million of coverage; however, our insurance policy excludes pollution coverage and we do not carry a separate hazardous materials policy. In addition, we could be required to incur significant costs to comply with environmental laws and regulations in the future. Finally, current or future environmental laws and regulations may impair our research, development or production efforts.

When we purchased the facilities located in Danbury, Connecticut in 2001, there was a soil cleanup plan in process. As part of the purchase, we obtained an indemnification from the seller related to the remediation of the soil for all known environmental conditions that existed at the time the seller acquired the property. The seller is, in turn, indemnified for these known environmental conditions by the previous owner. We also received an indemnification from the seller for environmental conditions created during its ownership of the property and for environmental problems unknown at the time that the seller acquired the property. These additional indemnities are limited to the purchase price that we paid for the Danbury facilities.

During the construction of our expanded manufacturing facility, we completed the final stages of the soil cleanup plan in the third quarter of 2008, at a cost of approximately \$2.25 million. We have reached an agreement

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with the party responsible for their contribution to past clean-up costs and were reimbursed \$1.625 million in July 2010. The responsible party has agreed to pay for or indemnify us for any future costs and expenses directly related to the final closure of the environmental remediation. If we are unable to collect these future costs and expenses, if any, from the responsible party, our business and results of operations may be harmed.

***If we fail to enter into collaborations with third parties, we would be required to establish our own sales, marketing and distribution capabilities, which could impact the commercialization of our products and harm our business.***

Our products are intended to be used by a large number of healthcare professionals who will require substantial education and support. For example, a broad base of physicians, including primary care physicians and endocrinologists, treat patients with diabetes. A large sales force will be required in order to educate these physicians about the benefits and advantages of AFREZZA and to provide adequate support for them. Therefore, we plan to enter into collaborations with one or more pharmaceutical companies to market, distribute and sell AFREZZA, if it is approved. If we fail to enter into collaborations, we would be required to establish our own direct sales, marketing and distribution capabilities. Establishing these capabilities can be time-consuming and expensive and would delay our ability to commercialize AFREZZA. Because we lack experience in selling pharmaceutical products to the diabetes market, we would be at a disadvantage compared to our potential competitors, all of whom have substantially more resources and experience than we do. For example, several other companies selling products to treat diabetes have existing sales forces in excess of 1,500 sales representatives. We, acting alone, would not initially be able to field a sales force as large as our competitors or provide the same degree of marketing support. Also, we would not be able to match our competitor's spending levels for pre-launch marketing preparation, including medical education. We cannot assure you that we will succeed in entering into acceptable collaborations, that any such collaboration will be successful or, if not, that we will successfully develop our own sales, marketing and distribution capabilities.

***If any product that we may develop does not become widely accepted by physicians, patients, third-party payers and the healthcare community, we may be unable to generate significant revenue, if any.***

AFREZZA and our other product candidates are new and unproven. Even if any of our product candidates obtain regulatory approval, they may not gain market acceptance among physicians, patients, third-party payers and the healthcare community. Failure to achieve market acceptance would limit our ability to generate revenue and would adversely affect our results of operations.

The degree of market acceptance of AFREZZA and our other product candidates will depend on many factors, including the:

- claims for which FDA approval can be obtained, including superiority claims;
  - perceived advantages and disadvantages of competitive products;
  - willingness of the healthcare community and patients to adopt new technologies;
  - ability to manufacture the product in sufficient quantities with acceptable quality and cost;
  - perception of patients and the healthcare community, including third-party payers, regarding the safety, efficacy and benefits compared to competing products or therapies;
  - convenience and ease of administration relative to existing treatment methods;
  - pricing and reimbursement relative to other treatment therapeutics and methods; and
  - marketing and distribution support.
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Because of these and other factors, any product that we may develop may not gain market acceptance, which would materially harm our business, financial condition and results of operations.

***If third-party payers do not reimburse consumers for our products, our products might not be used or purchased, which would adversely affect our revenues.***

Our future revenues and potential for profitability may be affected by the continuing efforts of governments and third-party payers to contain or reduce the costs of healthcare through various means. For example, in certain foreign markets the pricing of prescription pharmaceuticals is subject to governmental control. In the United States, there has been, and we expect that there will continue to be, a number of federal and state proposals to implement similar governmental controls. We cannot be certain what legislative proposals will be adopted or what actions federal, state or private payers for healthcare goods and services may take in response to any drug pricing reform proposals or legislation. Such reforms may make it difficult to complete the development and testing of AFREZZA and our other product candidates, and therefore may limit our ability to generate revenues from sales of our product candidates and achieve profitability. Further, to the extent that such reforms have a material adverse effect on the business, financial condition and profitability of other companies that are prospective collaborators for some of our product candidates, our ability to commercialize our product candidates under development may be adversely affected.

In the United States and elsewhere, sales of prescription pharmaceuticals still depend in large part on the availability of reimbursement to the consumer from third-party payers, such as governmental and private insurance plans. Third-party payers are increasingly challenging the prices charged for medical products and services. In addition, because each third-party payer individually approves reimbursement, obtaining these approvals is a time-consuming and costly process. We would be required to provide scientific and clinical support for the use of any product to each third-party payer separately with no assurance that approval would be obtained. This process could delay the market acceptance of any product and could have a negative effect on our future revenues and operating results. Even if we succeed in bringing one or more products to market, we cannot be certain that any such products would be considered cost-effective or that reimbursement to the consumer would be available, in which case our business and results of operations would be harmed and the market price of our common stock could decline.

***If product liability claims are brought against us, we may incur significant liabilities and suffer damage to our reputation.***

The testing, manufacturing, marketing and sale of AFREZZA and our other product candidates expose us to potential product liability claims. A product liability claim may result in substantial judgments as well as consume significant financial and management resources and result in adverse publicity, decreased demand for a product, injury to our reputation, withdrawal of clinical trial volunteers and loss of revenues. We currently carry worldwide liability insurance in the amount of \$10 million. We believe these limits are reasonable to cover us from potential damages arising from current and previous clinical trials of AFREZZA. In addition, we carry local policies per trial in each country in which we conduct clinical trials that require us to carry coverage based on local statutory requirements. We intend to obtain product liability coverage for commercial sales in the future if AFREZZA is approved. However, we may not be able to obtain insurance coverage that will be adequate to satisfy any liability that may arise, and because insurance coverage in our industry can be very expensive and difficult to obtain, we cannot assure you that we will be able to obtain sufficient coverage at an acceptable cost, if at all. If losses from such claims exceed our liability insurance coverage, we may ourselves incur substantial liabilities. If we are required to pay a product liability claim our business and results of operations would be harmed and the market price of our common stock may decline.

***If we lose any key employees or scientific advisors, our operations and our ability to execute our business strategy could be materially harmed.***

In order to commercialize our product candidates successfully, we will be required to expand our work force, particularly in the areas of manufacturing, clinical trials management, regulatory affairs, business development, and sales and marketing. These activities will require the addition of new personnel, including management, and the development of additional expertise by existing personnel. We face intense competition for qualified employees among companies in the biotechnology and biopharmaceutical industries. Our success depends

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upon our ability to attract, retain and motivate highly skilled employees. We may be unable to attract and retain these individuals on acceptable terms, if at all.

The loss of the services of any principal member of our management and scientific staff could significantly delay or prevent the achievement of our scientific and business objectives. All of our employees are “at will” and we currently do not have employment agreements with any of the principal members of our management or scientific staff, and we do not have key person life insurance to cover the loss of any of these individuals. Replacing key employees may be difficult and time-consuming because of the limited number of individuals in our industry with the skills and experience required to develop, gain regulatory approval of and commercialize our product candidates successfully.

We have relationships with scientific advisors at academic and other institutions to conduct research or assist us in formulating our research, development or clinical strategy. These scientific advisors are not our employees and may have commitments to, and other obligations with, other entities that may limit their availability to us. We have limited control over the activities of these scientific advisors and can generally expect these individuals to devote only limited time to our activities. Failure of any of these persons to devote sufficient time and resources to our programs could harm our business. In addition, these advisors are not prohibited from, and may have arrangements with, other companies to assist those companies in developing technologies that may compete with our product candidates.

***If our Chairman and Chief Executive Officer is unable to devote sufficient time and attention to our business, our operations and our ability to execute our business strategy could be materially harmed.***

Alfred Mann, our Chairman and Chief Executive Officer, is involved in many other business and charitable activities. As a result, the time and attention Mr. Mann devotes to the operation of our business varies, and he may not expend the same time or focus on our activities as other, similarly situated chief executive officers. If Mr. Mann is unable to devote the time and attention necessary to running our business, we may not be able to execute our business strategy and our business could be materially harmed.

***If our internal controls over financial reporting are not considered effective, our business and stock price could be adversely affected.***

Section 404 of the Sarbanes-Oxley Act of 2002 requires us to evaluate the effectiveness of our internal controls over financial reporting as of the end of each fiscal year, and to include a management report assessing the effectiveness of our internal controls over financial reporting in our annual report on Form 10-K for that fiscal year. Section 404 also requires our independent registered public accounting firm to attest to, and report on, our internal controls over financial reporting.

Our management, including our Chief Executive Officer and Chief Financial Officer, does not expect that our internal controls over financial reporting will prevent all errors and all fraud. A control system, no matter how well designed and operated, can provide only reasonable, not absolute, assurance that the control system’s objectives will be met. Further, the design of a control system must reflect the fact that there are resource constraints, and the benefits of controls must be considered relative to their costs. Because of the inherent limitations in all control systems, no evaluation of controls can provide absolute assurance that all control issues and instances of fraud involving a company have been, or will be, detected. The design of any system of controls is based in part on certain assumptions about the likelihood of future events, and we cannot assure you that any design will succeed in achieving its stated goals under all potential future conditions. Over time, controls may become inadequate because of changes in conditions or deterioration in the degree of compliance with policies or procedures. Because of the inherent limitations in a cost-effective control system, misstatements due to error or fraud may occur and not be detected. We cannot assure you that we or our independent registered public accounting firm will not identify a material weakness in our internal controls in the future. A material weakness in our internal controls over financial reporting would require management and our independent registered public accounting firm to evaluate our internal controls as ineffective. If our internal controls over financial reporting are not considered effective, we may experience a loss of public confidence, which could have an adverse effect on our business and on the market price of our common stock.

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## RISKS RELATED TO REGULATORY APPROVALS

*Our product candidates must undergo rigorous nonclinical and clinical testing and we must obtain regulatory approvals, which could be costly and time-consuming and subject us to unanticipated delays or prevent us from marketing any products.*

Our research and development activities, as well as the manufacturing and marketing of our product candidates, including AFREZZA, are subject to regulation, including regulation for safety, efficacy and quality, by the FDA in the United States and comparable authorities in other countries. FDA regulations and the regulations of comparable foreign regulatory authorities are wide-ranging and govern, among other things:

- product design, development, manufacture and testing;
- product labeling;
- product storage and shipping;
- pre-market clearance or approval;
- advertising and promotion; and
- product sales and distribution.

Clinical testing can be costly and take many years, and the outcome is uncertain and susceptible to varying interpretations. We cannot be certain if or when the FDA might request additional studies, under what conditions such studies might be requested, or what the size or length of any such studies might be. The clinical trials of our product candidates may not be completed on schedule, the FDA or foreign regulatory agencies may order us to stop or modify our research, or these agencies may not ultimately approve any of our product candidates for commercial sale. The data collected from our clinical trials may not be sufficient to support regulatory approval of our various product candidates, including AFREZZA. Even if we believe the data collected from our clinical trials are sufficient, the FDA has substantial discretion in the approval process and may disagree with our interpretation of the data. Our failure to adequately demonstrate the safety and efficacy of any of our product candidates would delay or prevent regulatory approval of our product candidates, which could prevent us from achieving profitability.

The requirements governing the conduct of clinical trials and manufacturing and marketing of our product candidates, including AFREZZA, outside the United States vary widely from country to country. Foreign approvals may take longer to obtain than FDA approvals and can require, among other things, additional testing and different clinical trial designs. Foreign regulatory approval processes include essentially all of the risks associated with the FDA approval processes. Some of those agencies also must approve prices of the products. Approval of a product by the FDA does not ensure approval of the same product by the health authorities of other countries. In addition, changes in regulatory policy in the United States or in foreign countries for product approval during the period of product development and regulatory agency review of each submitted new application may cause delays or rejections.

The process of obtaining FDA and other required regulatory approvals, including foreign approvals, is expensive, often takes many years and can vary substantially based upon the type, complexity and novelty of the products involved. We are not aware of any precedent for the successful commercialization of products based on our technology. In January 2006, the FDA approved the first pulmonary insulin product, Exubera. This approval has had an impact on and, notwithstanding the voluntary withdrawal of the product from the market by its manufacturer, could still impact the development and registration of AFREZZA in different ways. For example, Exubera may be used as a reference for safety and efficacy evaluations of AFREZZA, and the approval standards set for Exubera may be applied to other products that follow, including AFREZZA.

In March 2009, we submitted an NDA for AFREZZA. The FDA has advised us that it will regulate AFREZZA as a “combination product” because of the complex nature of the system that includes the combination

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of a new drug (AFREZZA) and a new medical device (the AFREZZA inhaler used to administer the insulin). The FDA's review of our NDA for AFREZZA involves several separate review groups of the FDA including: (1) the Metabolic and Endocrine Drug Products Division; (2) the Pulmonary Drug Products Division; and (3) the Center for Devices and Radiological Health, which reviews medical devices. The Metabolic and Endocrine Drug Products Division is the lead group and obtains consulting reviews from the other two FDA groups. We can make no assurances at this time about what impact FDA review by multiple groups will have on the approvability of our product.

In March 2010, we received a Complete Response letter regarding this NDA from the FDA. A Complete Response letter is issued by the FDA's Center for Drug Evaluation and Research when the review of a submitted file is completed and questions remain that preclude the approval of the NDA in its current form. In July 2010, the FDA accepted our reply to the Complete Response letter and set a target action date of December 29, 2010. There can be no assurance that the FDA will find our proposed approach for addressing its questions acceptable. The FDA could also request that we conduct additional clinical trials to provide sufficient data for approval of the NDA. There can be no assurance that we will obtain approval of the NDA in a timely manner or at all.

Also, questions that have been raised about the safety of marketed drugs generally, including pertaining to the lack of adequate labeling, may result in increased cautiousness by the FDA in reviewing new drugs based on safety, efficacy, or other regulatory considerations and may result in significant delays in obtaining regulatory approvals. Such regulatory considerations may also result in the imposition of more restrictive drug labeling or marketing requirements as conditions of approval, which may significantly affect the marketability of our drug products. FDA review of AFREZZA as a combination product may lengthen the product development and regulatory approval process, increase our development costs and delay or prevent the commercialization of AFREZZA.

We are developing AFREZZA as a new treatment for diabetes utilizing unique, proprietary components. As a combination product, any changes to either the AFREZZA inhaler, or AFREZZA, including new suppliers, could possibly result in FDA requirements to repeat certain clinical studies. For example, we plan to launch AFREZZA with our next-generation inhaler rather than the device that was used in pivotal clinical studies, and in our July 2010 reply to the FDA's Complete Response letter, we submitted information on the comparability of our next-generation inhaler to the device that was used in pivotal clinical studies. As a result of our change to our next-generation inhaler, the FDA could yet require us to undertake additional clinical trials and other studies, which could significantly delay the development and commercialization of AFREZZA. Our product candidates that are currently in development for the treatment of cancer also face similar obstacles and costs.

We also must obtain final approval from the FDA for the trade name of our product. In September 2009, we proposed AFREZZA as a trade name, which the FDA found conditionally acceptable in December 2009.

***We have only limited experience in filing and pursuing applications necessary to gain regulatory approvals, which may impede our ability to obtain timely approvals from the FDA or foreign regulatory agencies, if at all.***

We will not be able to commercialize AFREZZA or any other product candidates until we have obtained regulatory approval. Until we prepared and submitted our NDA for AFREZZA, we had no experience as a company in late-stage regulatory filings, such as preparing and submitting NDAs, which may place us at risk of delays, overspending and human resources inefficiencies. Any delay in obtaining, or inability to obtain, regulatory approval could harm our business.

***If we do not comply with regulatory requirements at any stage, whether before or after marketing approval is obtained, we may be subject to criminal prosecution, fined or forced to remove a product from the market or experience other adverse consequences, including restrictions or delays in obtaining regulatory marketing approval.***

Even if we comply with regulatory requirements, we may not be able to obtain the labeling claims necessary or desirable for product promotion. We may also be required to undertake post-marketing trials. In addition, if we or other parties identify adverse effects after any of our products are on the market, or if manufacturing problems occur, regulatory approval may be withdrawn and a reformulation of our products,

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additional clinical trials, changes in labeling of, or indications of use for, our products and/or additional marketing applications may be required. If we encounter any of the foregoing problems, our business and results of operations will be harmed and the market price of our common stock may decline.

***Even if we obtain regulatory approval for our product candidates, such approval may be limited and we will be subject to stringent, ongoing government regulation.***

Even if regulatory authorities approve any of our product candidates, they could approve less than the full scope of uses or labeling that we seek or otherwise require special warnings or other restrictions on use or marketing or could require potentially costly post-marketing follow-up clinical trials. Regulatory authorities may limit the segments of the diabetes population to which we or others may market AFREZZA or limit the target population for our other product candidates. Based on currently available clinical studies, we believe that AFREZZA may have certain advantages over currently approved insulin products including its approximation of the natural early insulin secretion normally seen in healthy individuals following the beginning of a meal. Nonetheless, there are no assurances that these or any other advantages of AFREZZA will be agreed to by the FDA or otherwise included in product labeling or advertising and, as a result, AFREZZA may not have our expected competitive advantages when compared to other insulin products.

The manufacture, marketing and sale of any of our product candidates will be subject to stringent and ongoing government regulation. The FDA may also withdraw product approvals if problems concerning safety or efficacy of a product occurs following approval. We cannot be sure that FDA and United States Congressional initiatives pertaining to ensuring the safety of marketed drugs or other developments pertaining to the pharmaceutical industry will not adversely affect our operations.

We also are required to register our establishments and list our products with the FDA and certain state agencies. We and any third-party manufacturers or suppliers must continually adhere to federal regulations setting forth requirements, known as cGMP (for drugs) and QSR (for medical devices), and their foreign equivalents, which are enforced by the FDA and other national regulatory bodies through their facilities inspection programs. If our facilities, or the facilities of our manufacturers or suppliers, cannot pass a preapproval plant inspection, the FDA will not approve the marketing of our product candidates. In complying with cGMP and foreign regulatory requirements, we and any of our potential third-party manufacturers or suppliers will be obligated to expend time, money and effort in production, record-keeping and quality control to ensure that our products meet applicable specifications and other requirements. QSR requirements also impose extensive testing, control and documentation requirements. State regulatory agencies and the regulatory agencies of other countries have similar requirements. In addition, we will be required to comply with regulatory requirements of the FDA, state regulatory agencies and the regulatory agencies of other countries concerning the reporting of adverse events and device malfunctions, corrections and removals (e.g., recalls), promotion and advertising and general prohibitions against the manufacture and distribution of adulterated and misbranded devices. Failure to comply with these regulatory requirements could result in civil fines, product seizures, injunctions and/or criminal prosecution of responsible individuals and us. Any such actions would have a material adverse effect on our business and results of operations.

***Our insulin supplier does not yet supply human recombinant insulin for an FDA-approved product.***

Our insulin supplier for purposes of the AFREZZA NDA sells its product outside of the United States. The FDA has inspected this supplier and found it to be acceptable. If we were required to find a new or additional supplier of insulin, we would be required to evaluate the new supplier's ability to provide insulin that meets our specifications and quality requirements, which would require significant time and expense and could delay the manufacturing and future commercialization of AFREZZA. We also depend on suppliers for other materials that comprise AFREZZA, including our AFREZZA inhaler and cartridges. Each device supplier must comply with relevant regulatory requirements including QSR and is subject to inspection by the FDA. There can be no assurance, in the conduct of an inspection of any of our suppliers, that the agency would find that the supplier substantially complies with the QSR or cGMP requirements, where applicable. If we or any potential third-party manufacturer or supplier fails to comply with these requirements or comparable requirements in foreign countries, regulatory authorities may subject us to regulatory action, including criminal prosecutions, fines and suspension of the manufacture of our products.

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***Reports of side effects or safety concerns in related technology fields or in other companies' clinical trials could delay or prevent us from obtaining regulatory approval or negatively impact public perception of our product candidates.***

At present, there are a number of clinical trials being conducted by us and other pharmaceutical companies involving insulin delivery systems. If we discover that AFREZZA is associated with a significantly increased frequency of adverse events, or if other pharmaceutical companies announce that they observed frequent adverse events in their trials involving the pulmonary delivery of insulin, we could encounter delays in the timing of our clinical trials or difficulties in obtaining approval of AFREZZA. As well, the public perception of AFREZZA might be adversely affected, which could harm our business and results of operations and cause the market price of our common stock to decline, even if the concern relates to another company's products or product candidates.

There are also a number of clinical trials being conducted by other pharmaceutical companies involving compounds similar to, or competitive with, our other product candidates. Adverse results reported by these other companies in their clinical trials could delay or prevent us from obtaining regulatory approval or negatively impact public perception of our product candidates, which could harm our business and results of operations and cause the market price of our common stock to decline.

## **RISKS RELATED TO INTELLECTUAL PROPERTY**

***If we are unable to protect our proprietary rights, we may not be able to compete effectively, or operate profitably.***

Our commercial success depends, in large part, on our ability to obtain and maintain intellectual property protection for our technology. Our ability to do so will depend on, among other things, complex legal and factual questions, and it should be noted that the standards regarding intellectual property rights in our fields are still evolving. We attempt to protect our proprietary technology through a combination of patents, trade secrets and confidentiality agreements. We own a number of domestic and international patents, have a number of domestic and international patent applications pending and have licenses to additional patents. We cannot assure you that our patents and licenses will successfully preclude others from using our technologies, and we could incur substantial costs in seeking enforcement of our proprietary rights against infringement. Even if issued, the patents may not give us an advantage over competitors with similar alternative technologies.

Moreover, the issuance of a patent is not conclusive as to its validity or enforceability and it is uncertain how much protection, if any, will be afforded by our patents. A third party may challenge the validity or enforceability of a patent after its issuance by various proceedings such as oppositions in foreign jurisdictions or re-examinations in the United States. If we attempt to enforce our patents, they may be challenged in court where they could be held invalid, unenforceable, or have their breadth narrowed to an extent that would destroy their value.

We also rely on unpatented technology, trade secrets, know-how and confidentiality agreements. We require our officers, employees, consultants and advisors to execute proprietary information and invention and assignment agreements upon commencement of their relationships with us. We also execute confidentiality agreements with outside collaborators. There can be no assurance, however, that these agreements will provide meaningful protection for our inventions, trade secrets, know-how or other proprietary information in the event of unauthorized use or disclosure of such information. If any trade secret, know-how or other technology not protected by a patent were to be disclosed to or independently developed by a competitor, our business, results of operations and financial condition could be adversely affected.

***If we become involved in lawsuits to protect or enforce our patents or the patents of our collaborators or licensors, we would be required to devote substantial time and resources to prosecute or defend such proceedings.***

Competitors may infringe our patents or the patents of our collaborators or licensors. To counter infringement or unauthorized use, we may be required to file infringement claims, which can be expensive and time-consuming. In addition, in an infringement proceeding, a court may decide that a patent of ours is not valid or is unenforceable, or may refuse to stop the other party from using the technology at issue on the grounds that our patents do not cover its technology. A court may also decide to award us a royalty from an infringing party instead of issuing an injunction against the infringing activity. An adverse determination of any litigation or defense

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proceedings could put one or more of our patents at risk of being invalidated or interpreted narrowly and could put our patent applications at risk of not issuing.

Interference proceedings brought by the U.S. Patent and Trademark Office may be necessary to determine the priority of inventions with respect to our patent applications or those of our collaborators or licensors. Litigation or interference proceedings may fail and, even if successful, may result in substantial costs and be a distraction to our management. We may not be able, alone or with our collaborators and licensors, to prevent misappropriation of our proprietary rights, particularly in countries where the laws may not protect such rights as fully as in the United States. We may not prevail in any litigation or interference proceeding in which we are involved. Even if we do prevail, these proceedings can be very expensive and distract our management.

Furthermore, because of the substantial amount of 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, the market price of our common stock may decline.

***If our technologies conflict with the proprietary rights of others, we may incur substantial costs as a result of litigation or other proceedings and we could face substantial monetary damages and be precluded from commercializing our products, which would materially harm our business.***

Over the past three decades the number of patents issued to biotechnology companies has expanded dramatically. As a result it is not always clear to industry participants, including us, which patents cover the multitude of biotechnology product types. Ultimately, the courts must determine the scope of coverage afforded by a patent and the courts do not always arrive at uniform conclusions.

A patent owner may claim that we are making, using, selling or offering for sale an invention covered by the owner's patents and may go to court to stop us from engaging in such activities. Such litigation is not uncommon in our industry.

Patent lawsuits can be expensive and would consume time and other resources. There is a risk that a court would decide that we are infringing a third party's patents and would order us to stop the activities covered by the patents, including the commercialization of our products. In addition, there is a risk that we would have to pay the other party damages for having violated the other party's patents (which damages may be increased, as well as attorneys' fees ordered paid, if infringement is found to be willful), or that we will be required to obtain a license from the other party in order to continue to commercialize the affected products, or to design our products in a manner that does not infringe a valid patent. We may not prevail in any legal action, and a required license under the patent may not be available on acceptable terms or at all, requiring cessation of activities that were found to infringe a valid patent. We also may not be able to develop a non-infringing product design on commercially reasonable terms, or at all.

Moreover, certain components of AFREZZA and/or our cancer vaccines may be manufactured outside the United States and imported into the United States. As such, third parties could file complaints under 19 U.S.C. Section 337(a)(1)(B), or a 337 action, with the International Trade Commission, or the ITC. A 337 action can be expensive and would consume time and other resources. There is a risk that the ITC would decide that we are infringing a third party's patents and either enjoin us from importing the infringing products or parts thereof into the United States or set a bond in an amount that the ITC considers would offset our competitive advantage from the continued importation during the statutory review period. The bond could be up to 100% of the value of the patented products. We may not prevail in any legal action, and a required license under the patent may not be available on acceptable terms, or at all, resulting in a permanent injunction preventing any further importation of the infringing products or parts thereof into the United States. We also may not be able to develop a non-infringing product design on commercially reasonable terms, or at all.

Although we own a number of domestic and foreign patents and patent applications relating to AFREZZA and cancer vaccine products under development, we have identified certain third-party patents having claims relating to pulmonary insulin delivery that may trigger an allegation of infringement upon the commercial

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manufacture and sale of AFREZZA as well as third-party patents disclosing methods of use and compositions of matter related to cancer vaccines that also may trigger an allegation of infringement upon the commercial manufacture and sale of our cancer immunotherapy. If a court were to determine that our insulin products or cancer therapies were infringing any of these patent rights, we would have to establish with the court that these patents were invalid or unenforceable in order to avoid legal liability for infringement of these patents. However, proving patent invalidity or unenforceability can be difficult because issued patents are presumed valid. Therefore, in the event that we are unable to prevail in an infringement or invalidity action we will have to either acquire the third-party patents outright or seek a royalty-bearing license. Royalty-bearing licenses effectively increase production costs and therefore may materially affect product profitability. Furthermore, should the patent holder refuse to either assign or license us the infringed patents, it may be necessary to cease manufacturing the product entirely and/or design around the patents, if possible. In either event, our business would be harmed and our profitability could be materially adversely impacted.

Furthermore, because of the substantial amount of 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, the market price of our common stock may decline.

In addition, patent litigation may divert the attention of key personnel and we may not have sufficient resources to bring these actions to a successful conclusion. At the same time, some of our competitors may be able to sustain the costs of complex patent litigation more effectively than we can because they have substantially greater resources. An adverse determination in a judicial or administrative proceeding or failure to obtain necessary licenses could prevent us from manufacturing and selling our products or result in substantial monetary damages, which would adversely affect our business and results of operations and cause the market price of our common stock to decline.

***We may not obtain trademark registrations for our potential trade names.***

We have not selected trade names for some of our product candidates; therefore, we have not filed trademark registrations for our potential trade names for our product candidates in all jurisdictions, nor can we assure that we will be granted registration of those potential trade names for which we have filed. Although we intend to defend any opposition to our trademark registrations, no assurance can be given that any of our trademarks will be registered in the United States or elsewhere or that the use of any of our trademarks will confer a competitive advantage in the marketplace. Furthermore, even if we are successful in our trademark registrations, the FDA has its own process for drug nomenclature and its own views concerning appropriate proprietary names. It also has the power, even after granting market approval, to request a company to reconsider the name for a product because of evidence of confusion in the marketplace. We cannot assure you that the FDA or any other regulatory authority will approve of any of our trademarks or will not request reconsideration of one of our trademarks at some time in the future.

**RISKS RELATED TO OUR COMMON STOCK**

***Our stock price is volatile.***

The stock market, particularly in recent years, has experienced significant volatility particularly with respect to pharmaceutical and biotechnology stocks, and this trend may continue. The volatility of pharmaceutical and biotechnology stocks often does not relate to the operating performance of the companies represented by the stock. Our business and the market price of our common stock may be influenced by a large variety of factors, including:

- the progress and results of our clinical trials;
  - general economic, political or stock market conditions;
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- legislative developments;
- announcements by us or our competitors concerning clinical trial results, acquisitions, strategic alliances, technological innovations, newly approved commercial products, product discontinuations, or other developments;
- the availability of critical materials used in developing and manufacturing AFREZZA or other product candidates;
- developments or disputes concerning our patents or proprietary rights;
- the expense and time associated with, and the extent of our ultimate success in, securing regulatory approvals;
- announcements by us concerning our financial condition or operating performance;
- changes in securities analysts' estimates of our financial condition or operating performance;
- general market conditions and fluctuations for emerging growth and pharmaceutical market sectors;
- the issuance and sale of our common stock pursuant to the Seaside purchase agreement and the Mann purchase agreement over the terms of these agreements;
- sales of large blocks of our common stock, including sales by our executive officers, directors and significant stockholders;
- the existence of, and the issuance of shares of our common stock pursuant to, the share lending agreement and the short sales of our common stock effected in connection with the recently-completed sale of our 5.75% convertible notes due 2015; and
- discussion of AFREZZA, our other product candidates, competitors' products, or our stock price by the financial and scientific press, the healthcare community and online investor communities such as chat rooms. In particular, statements about us and our investigational products that appear on interactive websites that permit users to generate content anonymously or under a pseudonym may be difficult to verify and statements attributed to company officials may, in fact, have originated elsewhere.

Any of these risks, as well as other factors, could cause the market price of our common stock to decline.

***If other biotechnology and biopharmaceutical companies or the securities markets in general encounter problems, the market price of our common stock could be adversely affected.***

Public companies in general and companies included on the Nasdaq Global Market in particular have experienced extreme price and volume fluctuations that have often been unrelated or disproportionate to the operating performance of those companies. There has been particular volatility in the market prices of securities of biotechnology and other life sciences companies, and the market prices of these companies have often fluctuated because of problems or successes in a given market segment or because investor interest has shifted to other segments. These broad market and industry factors may cause the market price of our common stock to decline, regardless of our operating performance. We have no control over this volatility and can only focus our efforts on our own operations, and even these may be affected due to the state of the capital markets.

In the past, following periods of large price declines in the public market price of a company's securities, securities class action litigation has often been initiated against that company. Litigation of this type could result in substantial costs and diversion of management's attention and resources, which would hurt our business. Any adverse determination in litigation could also subject us to significant liabilities.

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***Our Chairman and Chief Executive Officer and principal stockholder can individually control our direction and policies, and his interests may be adverse to the interests of our other stockholders. After his death, his stock will be left to his funding foundations for distribution to various charities, and we cannot assure you of the manner in which those entities will manage their holdings.***

At July 23, 2010, Mr. Mann beneficially owned approximately 42.1% of our outstanding shares of capital stock. After giving effect to our recently-completed issuance of 9,000,000 shares of our common stock, at July 23, 2010 Mr. Mann would have beneficially owned approximately 39.0% of our outstanding shares of capital stock. We believe members of Mr. Mann's family beneficially owned approximately an additional 1% of our outstanding shares of common stock, although Mr. Mann does not have voting or investment power with respect to these shares. By virtue of his holdings, Mr. Mann can and will continue to be able to effectively control the election of the members of our board of directors, our management and our affairs and prevent corporate transactions such as mergers, consolidations or the sale of all or substantially all of our assets that may be favorable from our standpoint or that of our other stockholders or cause a transaction that we or our other stockholders may view as unfavorable.

Subject to compliance with United States federal and state securities laws, and lockup restrictions in connection with the recently-completed sale of our 5.75% convertible notes due 2015, Mr. Mann is free to sell the shares of our stock he holds at any time. Upon his death, we have been advised by Mr. Mann that his shares of our capital stock will be left to the Alfred E. Mann Medical Research Organization, or AEMMRO, and AEM Foundation for Biomedical Engineering, or AEMFBE, not-for-profit medical research foundations that serve as funding organizations for Mr. Mann's various charities, including the Alfred Mann Foundation, or AMF, and the Alfred Mann Institutes at the University of Southern California, the Technion-Israel Institute of Technology, and Purdue University, and that may serve as funding organizations for any other charities that he may establish. The AEMMRO is a membership foundation consisting of six members, including Mr. Mann, his wife, three of his children and Dr. Joseph Schulman, the chief scientist of the AEMFBE. The AEMFBE is a membership foundation consisting of five members, including Mr. Mann, his wife, and the same three of his children. Although we understand that the members of AEMMRO and AEMFBE have been advised of Mr. Mann's objectives for these foundations, once Mr. Mann's shares of our capital stock become the property of the foundations, we cannot assure you as to how those shares will be distributed or how they will be voted.

***The future sale of our common stock or the conversion of our senior convertible notes into common stock could negatively affect our stock price.***

As of July 23, 2010, we had approximately 113,760,415 shares of common stock outstanding. Substantially all of these shares are available for public sale, subject in some cases to volume and other limitations or delivery of a prospectus. If our common stockholders sell substantial amounts of common stock in the public market, or the market perceives that such sales may occur, the market price of our common stock may decline. Likewise the issuance of additional shares of our common stock upon the conversion of some or all of our senior convertible notes could adversely affect the trading price of our common stock. In addition, the existence of these notes may encourage short selling of our common stock by market participants. Furthermore, if we were to include in a company-initiated registration statement shares held by our stockholders pursuant to the exercise of their registration rights, the sale of those shares could impair our ability to raise needed capital by depressing the price at which we could sell our common stock.

On August 10, 2010, we entered into the Seaside purchase agreement and the Mann purchase agreement, which together provide for the sale and issuance by us of up to 36,400,000 shares of our common stock over a period of approximately 50 weeks. The future issuance of shares of our common stock pursuant to these two agreements, or the expectation that these issuances will occur, may further depress the price of our common stock.

In addition, we will need to raise substantial additional capital in the future to fund our operations. If we raise additional funds by issuing equity securities or additional convertible debt, the market price of our common stock may decline and our existing stockholders may experience significant dilution.

***We have reserved for future issuance substantially all of our authorized but unissued shares of common stock, which may impair our ability to conduct future financing and other transactions.***

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Our certificate of incorporation currently authorizes us to issue up to 200,000,000 shares of common stock and 10,000,000 shares of preferred stock. As of June 30, 2010, we had a total of 86,325,779 shares of common stock that were authorized but unissued. In August 2010, we issued 9,000,000 shares pursuant to a share lending agreement with Bank of America, N.A. and we have reserved substantially all of our remaining authorized but unissued shares for future issuance pursuant to outstanding equity awards, our equity plans, our 3.75% senior convertible notes due 2013, our 5.75% senior convertible notes due 2015 and our common stock purchase agreements with Seaside 88 and The Mann Group. As a result, our ability to issue shares of common stock other than pursuant to existing arrangements will be limited until such time, if ever, that we are able to amend our certificate of incorporation to further increase our authorized shares of common stock or shares currently reserved for issuance otherwise become available (for example, due to the termination of the underlying agreement to issue the shares).

If we are unable to enter into new arrangements to issue shares of our common stock or securities convertible or exercisable into shares of our common stock, our ability to complete equity-based financings or other transactions that involve the potential issuance of our common stock or securities convertible or exercisable into our common stock, will be limited. In lieu of issuing common stock or securities convertible into our common stock in any future equity financing transactions, we may need to issue some or all of our authorized but unissued shares of preferred stock, which would likely have superior rights, preferences and privileges to those of our common stock, or we may need to issue debt that is not convertible into shares of our common stock, which may require us to grant security interests in our assets and property and/or impose covenants upon us that restrict our business. If we are unable to issue additional shares of common stock or securities convertible or exercisable into our common stock, our ability to enter into strategic transactions such as acquisitions of companies or technologies, may also be limited. If we propose to amend our certificate of incorporation to increase our authorized shares of common stock, such a proposal would require the approval by the holders of a majority of our outstanding shares of common stock, and we cannot assure you that such a proposal would be adopted. If we are unable to complete financing, strategic or other transactions due to our inability to issue additional shares of common stock or securities convertible or exercisable into our common stock, our financial condition and business prospects may be materially harmed.

***Anti-takeover provisions in our charter documents and under Delaware law could make an acquisition of us, which may be beneficial to our stockholders, more difficult and may prevent attempts by our stockholders to replace or remove our current management.***

We are incorporated in Delaware. Certain anti-takeover provisions under Delaware law and in our certificate of incorporation and amended and restated bylaws, as currently in effect, may make a change of control of our company more difficult, even if a change in control would be beneficial to our stockholders. Our anti-takeover provisions include provisions such as a prohibition on stockholder actions by written consent, the authority of our board of directors to issue preferred stock without stockholder approval, and supermajority voting requirements for specified actions. In addition, we are governed by the provisions of Section 203 of the Delaware General Corporation Law, which generally prohibits stockholders owning 15% or more of our outstanding voting stock from merging or combining with us in certain circumstances. These provisions may delay or prevent an acquisition of us, even if the acquisition may be considered beneficial by some of our stockholders. In addition, they may frustrate or prevent any attempts by our stockholders to replace or remove our current management by making it more difficult for stockholders to replace members of our board of directors, which is responsible for appointing the members of our management.

***Because we do not expect to pay dividends in the foreseeable future, you must rely on stock appreciation for any return on your investment.***

We have paid no cash dividends on any of our capital stock to date, and we currently intend to retain our future earnings, if any, to fund the development and growth of our business. As a result, we do not expect to pay any cash dividends in the foreseeable future, and payment of cash dividends, if any, will also depend on our financial condition, results of operations, capital requirements and other factors and will be at the discretion of our board of directors. Furthermore, we may in the future become subject to contractual restrictions on, or prohibitions against, the payment of dividends. Accordingly, the success of your investment in our common stock will likely depend entirely upon any future appreciation. There is no guarantee that our common stock will appreciate or maintain its current price. You could lose the entire value of your investment in our common stock.

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## **Description of Capital Stock**

Our authorized capital stock consists of 200,000,000 shares of common stock, \$0.01 par value, and 10,000,000 shares of preferred stock, \$0.01 par value. As of June 30, 2010, there were 113,674,221 shares of common stock outstanding and no shares of preferred stock outstanding.

### **Voting Rights**

Each holder of our common stock is entitled to one vote for each share on all matters submitted to a vote of our stockholders, including the election of our directors. Under our certificate of incorporation and bylaws, our stockholders will not have cumulative voting rights. Accordingly, the holders of a majority of our outstanding shares of common stock entitled to vote in any election of directors can elect all of the directors standing for election, if they should so choose.

### **Dividends**

Subject to preferences that may be applicable to any outstanding shares of our preferred stock, holders of our common stock are entitled to receive ratably any dividends our board of directors declares out of funds legally available for that purpose.

### **Liquidation, Dissolution or Winding Up**

If we liquidate, dissolve or wind up, the holders of our common stock are entitled to share ratably in all assets legally available for distribution to our stockholders after the payment of all of our debts and other liabilities and the satisfaction of any liquidation preference granted to the holders of any outstanding shares of our preferred stock.

### **Rights and Preferences**

Our common stock has no preemptive, conversion or subscription rights. There are no redemption or sinking fund provisions applicable to our common stock. The rights, preferences and privileges of the holders of our common stock are subject to, and may be adversely affected by, the rights of the holders of any outstanding shares of our preferred stock, which we may designate and issue in the future.

### **Anti-Takeover Effects of Provisions of Delaware Law and Our Certificate of Incorporation and Bylaws**

#### *Delaware takeover statute*

We are subject to Section 203 of the Delaware General Corporation Law, or DGCL, which regulates acquisitions of some Delaware corporations. In general, Section 203 prohibits, with some exceptions, a publicly held Delaware corporation from engaging in a “business combination” with an “interested stockholder” for a period of three years following the date of the transaction in which the person became an interested stockholder, unless:

- the board of directors of the corporation approved the business combination or the other transaction in which the person became an interested stockholder prior to the date of the business combination or other transaction;
  - upon consummation of the transaction that resulted in the person becoming an interested stockholder, the person owned at least 85% of the voting stock of the corporation outstanding at the time the transaction commenced, excluding shares owned by persons who are directors and also officers of the corporation and shares issued under employee stock plans under which employee participants do not have the right to determine confidentially whether shares held subject to the plan will be tendered in a tender or exchange offer; or
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- on or subsequent to the date the person became an interested stockholder, the board of directors of the corporation approved the business combination and the stockholders of the corporation authorized the business combination at an annual or special meeting of stockholders by the affirmative vote of at least 66<sup>2</sup>/<sub>3</sub>% of the outstanding stock of the corporation not owned by the interested stockholder.

Section 203 of the DGCL generally defines a “business combination” to include any of the following:

- any merger or consolidation involving the corporation and the interested stockholder;
- any sale, transfer, pledge or other disposition of 10% or more of the corporation’s assets or outstanding stock involving the interested stockholder;
- in general, any transaction that results in the issuance or transfer by the corporation of any of its stock to the interested stockholder;
- any transaction involving the corporation that has the effect of increasing the proportionate share of its stock owned by the interested stockholder; or
- the receipt by the interested stockholder of the benefit of any loans, advances, guarantees, pledges or other financial benefits provided by or through the corporation.

In general, Section 203 defines an “interested stockholder” as any person who, together with the person’s affiliates and associates, owns, or within three years prior to the determination of interested stockholder status did own, 15% or more of a corporation’s voting stock.

Section 203 of the DGCL could depress our stock price and delay, discourage or prohibit transactions not approved in advance by our board of directors, such as takeover attempts that might otherwise involve the payment to our stockholders of a premium over the market price of our common stock.

#### *Certificate of incorporation and bylaw provisions*

Our certificate of incorporation and bylaws include a number of provisions that may have the effect of deterring hostile takeovers or delaying or preventing changes in our control or our management, including, but not limited to the following:

- Our board of directors can issue up to 10,000,000 shares of preferred stock with any rights or preferences, including the right to approve or not approve an acquisition or other change in our control.
  - Our certificate of incorporation and bylaws provide that all stockholder actions must be effected at a duly called meeting of holders and not by written consent.
  - Our bylaws provide that special meetings of the stockholders may be called only by the Chairman of our board of directors, by our Chief Executive Officer, by our board of directors upon a resolution adopted by a majority of the total number of authorized directors or, under certain limited circumstances, by the holders of at least 5% of our outstanding voting stock.
  - Our bylaws provide that stockholders seeking to present proposals before a meeting of stockholders or to nominate candidates for election as directors at a meeting of stockholders must provide timely
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notice in writing and also specify requirements as to the form and content of a stockholder's notice. These provisions may delay or preclude stockholders from bringing matters before a meeting of our stockholders or from making nominations for directors at a meeting of stockholders, which could delay or deter takeover attempts or changes in our management.

- Our certificate of incorporation provides that, subject to the rights of the holders of any outstanding series of preferred stock, all vacancies, including newly created directorships, may, except as otherwise required by law, be filled by the affirmative vote of a majority of directors then in office, even if less than a quorum. In addition, our certificate of incorporation provides that our board of directors may fix the number of directors by resolution.
- Our certificate of incorporation does not provide for cumulative voting for directors. The absence of cumulative voting may make it more difficult for stockholders who own an aggregate of less than a majority of our voting stock to elect any directors to our board of directors.

These and other provisions contained in our certificate of incorporation and bylaws are expected to discourage coercive takeover practices and inadequate takeover bids. These provisions are also designed to encourage persons seeking to acquire control of us to first negotiate with our board of directors. However, these provisions could delay or discourage transactions involving an actual or potential change in control of us or our management, including transactions in which our stockholders might otherwise receive a premium for their shares over market price of our stock and may limit the ability of stockholders to remove our current management or approve transactions that our stockholders may deem to be in their best interests and, therefore, could adversely affect the price of our common stock.

#### **Transfer Agent and Registrar**

The transfer agent and registrar for our common stock is BNY Mellon Shareowner Services, LLC. Its address is 400 South Hope Street, Suite 400, Los Angeles, California 90071.