As filed with the Securities and Exchange Commission on June 8, 2020.

Registration No. 333-

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

FORM S-1

REGISTRATION STATEMENT
UNDER
THE SECURITIES ACT OF 1933

VIVUS, Inc.

(Exact name of registrant as specified in its charter)

Delaware	**2834**	**94-3136179**
(State or other jurisdiction of incorporation or organization)	(Primary Standard Industrial Classification Code Number)	(I.R.S. Employer Identification Number)

900 E. Hamilton Avenue, Suite 550
Campbell, CA 95008
(650) 934-5200
(Address, including zip code, and telephone number, including area code, of registrant's principal executive offices)

Mark Oki
Senior Vice President, Chief Financial Officer and Chief Accounting Officer
VIVUS, Inc.
900 E. Hamilton Avenue, Suite 550
Campbell, CA 95008
(650) 934-5200
(Name, address, including zip code, and telephone number, including area code, of agent for service)

Copies to:

Jon Layman	**John L. Slebir**	**Robert F. Charron**
Hogan Lovells US LLP	**Senior Vice President, Business Development and General Counsel and Secretary**	**Ellenoff Grossman & Schole LLP**
3 Embarcadero Center	**VIVUS, Inc.**	**1345 Avenue of the Americas**
Suite 1500	**900 E. Hamilton Avenue, Suite 550**	**New York, NY 10105**
San Francisco, CA 94111	**Campbell, CA 95008**	**(212) 370-1300**
(415) 374-2300	**(650) 934-5200**	

Approximate date of commencement of proposed sale to the public:
As soon as practicable after the effective date of this registration statement.

If any of the securities being registered on this Form are to be offered on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933 check the following box. ☒

If this Form is filed to register additional securities for an offering pursuant to Rule 462(b) under the Securities Act, please check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. o

If this Form is a post-effective amendment filed pursuant to Rule 462(c) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. o

If this Form is a post-effective amendment filed pursuant to Rule 462(d) under the Securities Act, check the following box and list the Securities Act registration statement number of the earlier effective registration statement for the same offering. o

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

Large accelerated filer o	Accelerated filer o	Non-accelerated filer ☒	Smaller reporting company ☒
			Emerging growth company o

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 7(a)(2)(B) of the Securities Act. o

CALCULATION OF REGISTRATION FEE

Title of Each Class of Securities to Be Registered	Proposed Maximum Aggregate Offering Price(1)	Amount of Registration Fee(1)
Common Stock, par value $0.001 per share(2)(3)		
Pre-funded warrants to purchase shares of common stock and shares of common stock issuable upon the exercise of pre-funded warrants(2)(3)		
Warrants to purchase shares of common stock(2)		
Placement Agent's warrants to purchase shares of common stock(2)(4)		
Total	$185,500,000	$24,077.90

(1) Estimated solely for the purpose of calculating the registration fee in accordance with Rule 457(o) under the Securities Act of 1933, as amended (the "Securities Act").

(2) Pursuant to Rule 416 under the Securities Act, the securities being registered hereunder include such indeterminate number of additional securities as may be issuable to prevent dilution resulting from stock splits, dividends or similar transactions.

(3) The proposed maximum aggregate offering price of the common stock proposed to be sold in the offering will be reduced on a dollar-for-dollar basis based on the aggregate offering price of any pre-funded warrants offered and sold in the offering, and as such the proposed maximum aggregate offering price of the common stock and pre-funded warrants (and shares of common stock issuable upon the exercise of pre-funded warrants), if any, is $175,000,000.

(4) Represents warrants issuable to H.C. Wainwright & Co., LLC (the "Placement Agent's Warrants") to purchase a number of shares of common stock equal to 6.0% of the number of shares of common stock and pre-funded warrants being offered at an exercise price equal to 125% of the public offering price. Resales of the Placement Agent's Warrants on a delayed or continuous basis pursuant to Rule 415 under the Securities Act of 1933 are registered hereby.

The registrant hereby amends this registration statement on such date or dates as may be necessary to delay its effective date until the registrant shall file a further amendment which specifically states that this registration statement shall thereafter become effective in accordance with Section 8(a) of the Securities Act of 1933, as amended, or until this registration statement shall become effective on such date as the Securities and Exchange Commission, acting pursuant to said Section 8(a), may determine.

Table of Contents

The information in this preliminary prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This preliminary prospectus is not an offer to sell these securities and we are not soliciting an offer to buy these securities in any jurisdiction where the offer or sale is not permitted.

Subject to Completion, dated June 8, 2020

Preliminary Prospectus

Shares of Common Stock
Pre-Funded Warrants to Purchase up to Shares of Common Stock
Warrants to Purchase up to Shares of Common Stock

We are offering up to shares of our common stock, par value $0.001 per share, or the common stock, and warrants to purchase up to shares of common stock, or the common warrants. Each share of common stock and accompanying common warrant are being sold together at a combined price of $. Each common warrant will have an exercise price of $ per share, will not be exercisable until we receive stockholder approval of an amendment to our amended and restated certificate of incorporation to increase the number of shares of our authorized common stock so as to permit the exercise in full of the common warrants and such amendment has become effective, and will expire five years from the date on which the common warrants become exercisable. We are also offering to certain purchasers whose purchase of shares of common stock in this offering would otherwise result in the purchaser, together with its affiliates and certain related parties, beneficially owning more than 4.99% (or, at the election of the purchaser, 9.99%) of our outstanding common stock immediately following the consummation of this offering the opportunity to purchase, if any such purchaser so chooses, pre-funded warrants, in lieu of shares of common stock that would otherwise result in such purchaser's beneficial ownership exceeding 4.99% (or, at the election of the purchaser, 9.99%) of our outstanding common stock. Each pre-funded warrant will be exercisable for one share of common stock and will be accompanied by a common warrant to purchase one share of common stock. The purchase price of each pre-funded warrant and the accompanying common warrant will be equal to the price at which a share of common stock and accompanying common warrant are sold to the public in this offering, minus $0.001, and the exercise price of each pre-funded warrant will be $0.001 per share. The pre-funded warrants will be immediately exercisable and may be exercised at any time until all of the pre-funded warrants are exercised in full. The shares of common stock and pre-funded warrants, on the one hand, and the accompanying common warrants, on the other hand, are immediately separable and will be issued separately, but can only be purchased together in this offering. This offering also relates to the shares of common stock issuable upon exercise of any pre-funded warrants sold in this offering.

Our common stock is listed on The Nasdaq Global Select Market, or Nasdaq, under the symbol "VVUS." On June 5, 2020, the last reported sale price of our common stock on Nasdaq was $1.11 per share. There is no established trading market for the pre-funded warrants or common warrants, and we do not expect an active trading market to develop. We do not intend to apply to list the pre-funded warrants or common warrants on any securities exchange or other nationally recognized trading system. Without an active trading market, the liquidity of these warrants will be limited.

You should read this prospectus, together with the additional information described under the headings "Incorporation of Certain Information by Reference" and "Where You Can Find Additional Information" carefully before you decide to invest in any of our securities.

Investing in our securities involves a high degree of risk. See "Risk Factors" beginning on page 8 of this prospectus and in the documents incorporated by reference in this prospectus for a discussion of certain information that you should carefully consider in connection with an investment in our securities.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or passed upon the adequacy or accuracy of this prospectus. Any representation to the contrary is a criminal offense.

	Per Share and Common Warrant	Per Pre-Funded Warrant and Common Warrant	Total
Public offering price	$	$	$
Placement Agent's fees(1)	$	$	$
Proceeds to us, before expenses(2)	$	$	$

(1) We have agreed to reimburse H.C. Wainwright & Co., LLC, or the Placement Agent, for certain of its offering-related expenses, including a management fee of 1.0% of the gross proceeds raised in this offering. In addition, we have agreed to issue to designees of the Placement Agent or its affiliates warrants to purchase up to a number of shares of common stock equal to 6.0% of the number of the shares of common stock and pre-funded warrants sold in this offering at an exercise price equal to 125% of the public offering price of the common stock and related warrant. See "Plan of Distribution" for additional information and a description of the compensation payable to the Placement Agent.

(2) We estimate the total expenses of this offering payable by us, excluding the Placement Agent's fees, will be approximately $.

We have engaged H.C. Wainwright & Co., LLC as our exclusive Placement Agent to use its reasonable best efforts to solicit offers to purchase the securities in this offering. The Placement Agent has no obligation to buy any of the securities from us or to arrange for the purchase or sale of any specific number or dollar amount of the securities. The actual public offering amount, placement agent fees, and proceeds to us, if any, are not presently determinable and may be substantially less than the total maximum offering amounts set forth above. The securities are expected to be delivered to purchasers on or about , 2020.

H.C. Wainwright & Co.

The date of this prospectus is , 2020

TABLE OF CONTENTS

ABOUT THIS PROSPECTUS

You should rely only on the information contained or incorporated by reference in this prospectus and any free writing prospectus we authorize for use in connection with this offering. We have not, and the Placement Agent has not, authorized anyone to provide you with different information, and we and the Placement Agent take no responsibility for any other information others may give you. If anyone provides you with different or inconsistent information, you should not rely on it. We are not, and the Placement Agent is not, making an offer to sell these securities in any jurisdiction where the offer or sale is not permitted. The information appearing in this prospectus and any related free writing prospectus is accurate only as of the date on the front of the document and any information we have incorporated by reference is accurate only as of the date of the document incorporated by reference, regardless of the time of delivery of this prospectus or any related free writing prospectus or any sale of our common stock. Our business, financial condition, results of operations and prospects may have changed since those dates.

We are offering to sell, and seeking offers to buy, our securities only in jurisdictions where offers and sales are permitted. The distribution of this prospectus and the offering of the securities in certain jurisdictions may be restricted by law. Persons outside the United States who come into possession of this prospectus must inform themselves about, and observe any restrictions relating to, the offering of the common stock and warrants and the distribution of this prospectus outside the United States. This prospectus does not constitute, and may not be used in connection with, an offer to sell, or a solicitation of an offer to buy, any securities offered by this prospectus by any person in any jurisdiction in which it is unlawful for the person to make the offer or solicitation.

This prospectus does not contain all of the information that is important to you. Before buying any of the securities that we are offering, you should carefully read this prospectus, all information incorporated by reference in this prospectus, any free writing prospectus we have authorized for use in connection with this offering and the additional information described under "Where You Can Find Additional Information" and "Incorporation of Certain Information by Reference." These documents contain information you should consider when making your investment decision.

To the extent that any statement that we make in this prospectus is inconsistent with statements made in any documents incorporated by reference, the statements made in this prospectus will be deemed to modify or supersede those made in those documents incorporated by reference. However, if any statement in one of these documents is inconsistent with a statement in another document having a later date and that is incorporated by reference in this prospectus, the statement in the document having the later date modifies or supersedes the earlier statement.

Unless otherwise indicated, information contained in this prospectus or the documents incorporated by reference in this prospectus concerning our industry and the markets in which we operate, including our general expectations and market position, market opportunity and market share, is based on information from our own management estimates and research, as well as from industry and general publications and research, surveys and studies conducted by third parties. Management estimates are derived from publicly available information, our knowledge of our industry and assumptions based on that information and knowledge, which we believe to be reasonable. In addition, assumptions and estimates of our and our industry's future performance are necessarily subject to a high degree of uncertainty and risk due to a variety of factors, including those described under the heading "Risk Factors" in this prospectus and in our Annual Report on Form 10-K for the fiscal year ended December 31, 2019, filed with the Securities and Exchange Commission, or SEC, on March 3, 2020, as amended by Amendment No. 1 to Annual Report on Form 10-K/A, filed with the SEC on April 29, 2020, and our Quarterly Report on Form 10-Q for the quarter ended March 31, 2020, filed with the SEC on May 5, 2020, which are incorporated by reference into this prospectus. These and

other important factors could cause our future performance to differ materially from our assumptions and estimates. See also "Special Note Regarding Forward-Looking Statements."

To the extent this prospectus or the documents incorporated by reference in this prospectus contain summaries of the documents referred to, you are directed to the actual documents for complete information. All of the summaries contained in this prospectus and the documents incorporated by reference in this prospectus are qualified in their entirety by the full text of the corresponding documents. Copies of the material agreements referred to in this prospectus have been filed, will be filed or will be incorporated by reference as exhibits to the registration statement of which this prospectus is a part. You may review or obtain copies of those documents as described below under the section entitled "Where You Can Find Additional Information."

This prospectus contains references to a number of our trademarks that are registered or are subject to pending applications or to which we have common law rights. These include, but are not limited to, the following: VIVUS, Qsymia, Qsiva, PANCREASE, PANCREAZE, STENDRA and SPEDRA. Each trademark, trade name or service mark of any other company appearing in this prospectus or any related free writing prospectus belongs to its holder.

PROSPECTUS SUMMARY

This summary highlights certain information about us, this offering and other information contained elsewhere in or incorporated by reference into this prospectus. This summary is not complete, does not contain all of the information that you should consider before deciding whether to invest in our common stock and warrants, and is qualified in its entirety by the more detailed information in this prospectus and the information incorporated by reference in this prospectus. Before investing in our common stock and warrants, you should carefully read this entire prospectus, including our financial statements and the related notes and other documents incorporated by reference into this prospectus, and the risks and uncertainties described under "Risk Factors" in this prospectus beginning on page 8.

Except as otherwise indicated in this prospectus or as the context otherwise requires, references in this prospectus to "VIVUS," the "Company," "we," "us" and "our" refer to VIVUS, Inc., a Delaware corporation, and its wholly-owned subsidiaries.

Company Overview

We are a specialty pharmaceutical company with three approved therapies and one product candidate in clinical development:

- Qsymia® (phentermine and topiramate extended release) is approved by the U.S. Food and Drug Administration, or FDA, for chronic weight management. We commercialize Qsymia in the United States through a specialty sales force supported by an internal commercial team and license the commercial rights to Qsymia in South Korea.

- PANCREAZE®/PANCREASE® MT (pancrelipase) is approved by the FDA and by Health Canada for the treatment of exocrine pancreatic insufficiency due to cystic fibrosis or other conditions. We commercialize PANCREAZE in the United States through a specialty sales force supported by an internal commercial team.

- STENDRA® (avanafil) is approved by the FDA for erectile dysfunction, or ED, and by the European Commission under the trade name SPEDRA, for the treatment of ED in the European Union. We license the commercial rights to STENDRA/SPEDRA in the United States, European Union and other jurisdictions.

- VI-0106 (tacrolimus) is in clinical development and is being studied in patients with pulmonary arterial hypertension.

In April 2018, we added John Amos as our Chief Executive Officer and a member of the VIVUS Board of Directors. With the addition of Mr. Amos, we announced a turnaround plan of building a portfolio of cash flow generating assets to leverage our expertise in commercializing specialty pharmaceutical assets. In June 2018, we completed the first acquisition under this strategy as we acquired all product rights for PANCREAZE (pancrelipase) in the United States and PANCREASE MT in Canada for $135.0 million in cash from Janssen Pharmaceuticals, Inc. PANCREAZE is a prescription medicine used to treat people who cannot digest food normally because their pancreas does not make enough enzymes due to cystic fibrosis or other conditions. We are supporting PANCREAZE in the U.S. market by leveraging our existing commercial infrastructure and 10 sales representatives in the United States focused on gastro-intestinal and cystic fibrosis physicians.

Restructuring Support Agreement and Refinancing our Debt

In addition to this offering, we are currently in negotiations regarding a potential debt financing. We intend to use the proceeds from this offering and any proceeds received from any potential debt financing to refinance existing indebtedness, including our Convertible Notes (as well as the reasonable fees and expenses of the sole holder of our Convertible Notes), as described below. We do not intend

to complete this offering if we are not able to raise an amount from this offering and from any debt financing sufficient to pay all amounts due under the Convertible Notes (as well as the note holder's reasonable fees and expenses) and, if required, the 2024 Notes (as defined below).

As of May 1, 2020, our outstanding debt consisted of $170.2 million principal amount of our 4.50% convertible senior notes due May 1, 2020, or the Convertible Notes, and $61.4 million principal amount of our 10.375% senior secured notes due June 30, 2024 (without giving effect to unamortized premium and debt issuance costs), or 2024 Notes. We do not currently have sufficient cash and/or credit facilities in place to pay the full outstanding principal amount of debt that became due May 1, 2020.

On April 29, 2020, we entered into an agreement with Icahn Enterprises Holdings L.P. (dba IEH Biopharma LLC), or IEH Biopharma, which held a principal amount of approximately $170.2 million of the Convertible Notes as of that date. In accordance with the terms of the agreement, we paid IEH Biopharma $3.8 million in accrued and unpaid interest on the Convertible Notes and IEH Biopharma granted us a grace period until June 1, 2020 for the repayment of the principal amount of the Convertible Notes during which the two parties were to work exclusively to attempt to restructure the outstanding principal amount of the Convertible Notes, subject to the terms and conditions contained therein. In addition, under the agreement, on May 1, 2020 we settled approximately $11.4 million of outstanding principal amount of the Convertible Notes representing payment owed to all holders other than IEH Biopharma and approximately $4 million representing all accrued and unpaid interest payable and due on that date to all holders including IEH Biopharma.

On May 31, 2020 we entered into a restructuring support agreement with IEH Biopharma as the sole holder of the Convertible Notes which, among other things, grants an extension of the grace period described above through July 13, 2020, subject to certain termination events.

Under the restructuring support agreement, we have until June 30, 2020 to complete a refinancing to pay in full all amounts due and owing under the Convertible Notes as well as IEH Biopharma's reasonable fees and expenses. If we are unable to complete the refinancing of the Convertible Notes by June 30, 2020, then pursuant to the terms of the restructuring support agreement, we will pursue a restructuring pursuant to a plan of reorganization and file petitions for voluntary relief under chapter 11 of the United States Bankruptcy Code on or before July 13, 2020. The terms of any such plan of reorganization will be consistent with the term sheet attached to the restructuring support agreement and remains subject to our filing of petitions for voluntary relief under the United States Bankruptcy Code, solicitation of votes, confirmation of the plan by the applicable bankruptcy court and other closing conditions. In connection with our entry into the restructuring support agreement, we paid $1.0 million aggregate principal amount of the outstanding Convertible Notes, reducing the principal amount to $169.2 million.

In addition to this offering, we are currently in negotiations regarding potential debt financing to refinance our existing indebtedness, including the Convertible Notes. If we incur additional indebtedness to refinance the Convertible Notes, we intend to repay the 2024 Notes, the terms of which restrict us from otherwise incurring such additional indebtedness. We do not intend to complete this offering if we are not able to raise an amount from this offering and any source of debt financing sufficient to pay all amounts due under the Convertible Notes, as well as IEH Biopharma's reasonable fees and expenses, and, if required, the 2024 Notes. However, we will not know until the completion of this offering the amount of proceeds we will receive through the issuance of securities in this offering and how much, if any, we will receive through the incurrence of debt. The issuance of common stock and warrants to purchase common stock in this offering will result in dilution to our existing stockholders and investors purchasing securities in this offering. The more common stock and warrants we issue, the greater the dilution will be to our existing stockholders and investors purchasing securities in this offering. The incurrence of indebtedness may subject our existing stockholders and investors purchasing securities in this offering to risks arising in connection with the debt that may then be

outstanding. Among other risks, lenders may be able to accelerate the debt obligations upon certain events of default. If repayment is accelerated, it would be unlikely that we would be able to repay the amounts then due under the indebtedness or our other outstanding indebtedness, including any interest.

Our independent registered public accounting firm's audit report on our consolidated financial statements set forth in our Annual Report on Form 10-K for the fiscal year ended December 31, 2019, as amended by Amendment No. 1 to Annual Report on Form 10-K/A, includes an explanatory paragraph stating that there is substantial doubt about our ability to continue as a going concern. Our audited consolidated financial statements for the year ended December 31, 2019 and unaudited condensed consolidated financial statements for the quarter ended March 31, 2020 have been prepared assuming the Company will continue as a going concern. Our significant indebtedness that is currently due and matured as well as our negative cash flow from operations and accumulated deficit raise substantial doubt about our ability to continue as a going concern. The audited financial statements and unaudited condensed consolidated financial statements do not include any adjustments that might result from the outcome of this uncertainty. Even if adequate funds become available, including through this offering, we may need to raise additional funds in the future to finance operations and pursue development and commercial opportunities.

Risks Associated with This Offering and Our Business

The securities offered in this offering, our business and our ability to execute our business strategy are subject to a number of risks of which you should be aware before you decide to purchase any of our common stock and warrants. In particular, you should consider the following risks, which are discussed more fully under the heading "Risk Factors" in this prospectus and in our Annual Report on Form 10-K for the fiscal year ended December 31, 2019, as amended, and our Quarterly Report on Form 10-Q for the quarter ended March 31, 2020, as well as the additional risks described under "Risk Factors."

- In addition to this offering, we also may need to complete a debt financing in connection with or following this offering to pay in full our Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses) by June 30, 2020 in accordance with the terms of the restructuring support agreement with IEH Biopharma and, if required, our 2024 Notes. This debt might be on terms that are onerous to us and our stockholders.

- Even if we successfully pay all amounts due and owing under the Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses) by June 30, 2020 and, if required, all amounts due and owing under the 2024 Notes, we might need to raise additional capital to fund the working capital requirements of our business and achieve our stated financial, strategic and other goals. This capital might not be available on acceptable terms or at all. We have a large accumulated deficit and a history of losses and our independent registered public accounting firm has expressed substantial doubt about our ability to continue as a going concern.

- If we are unable to maintain compliance with the requirements of the Nasdaq Global Select Market ("Nasdaq"), our common stock might be delisted from Nasdaq and there might be other adverse consequences under our material agreements with lenders and other counterparties.

- The widespread domestic and global impact of the novel coronavirus (COVID-19) pandemic, including on our supply chain, distribution networks, sales force, customers, employees, and financial markets, could have a materially adverse effect on our business, financial condition and results of operations.

- We depend on sole-source suppliers, third parties and collaborative partners to successfully produce and distribute our products.

- We depend on licensed rights to Qsymia, PANCREAZE and STENDRA/SPEDRA. If we default on material obligations under those licenses, we could lose rights to these drugs.
- We are required to maintain ongoing compliance with regulatory obligations and restrictions, which may result in significant expense or limit our ability to commercialize our drugs.
- We are subject to the risk of litigation and related liabilities, including as a result of product liability claims or securities-related class action and shareholder litigation.
- Our stock price has been volatile and will continue to be volatile.
- Our success and sales depend on our ability and that of our current or future collaborators to effectively and profitably commercialize Qsymia, PANCREAZE and STENDRA/SPEDRA.
- The pursuit of the restructuring of our capital structure has consumed a substantial portion of the time and attention of our management, which may have a material adverse effect on our business and results of operations.

Corporate Information

Our principal executive offices are located at 900 E. Hamilton Avenue, Suite 550, Campbell, California 95008, and our telephone number is (650) 934-5200. Our corporate website is located at www.vivus.com. The information on our website is for informational purposes only and should not be relied upon in connection with making any decision with respect to an investment in our securities. We have included our website address in this prospectus solely as an inactive textual reference. Any information contained on, or that can be accessed through, our website is not incorporated by reference into, nor is it a part of, this prospectus or any document filed with the SEC. We are required to file annual, quarterly and current reports, proxy statements and other information with the SEC. You may obtain any of the documents filed by us with the SEC at no cost from the SEC's website at www.sec.gov.

Implications of Being a Smaller Reporting Company

We are a "smaller reporting company" as defined in Rule 405 under the Securities Act of 1933, as amended, or the Securities Act, and Rule 12b-2 under the Securities Exchange Act of 1934, as amended, or the Exchange Act, and have elected to take advantage of some of the scaled disclosure provisions available to smaller reporting companies in, among other public filings, the periodic and current reports we file with the SEC under the Exchange Act. This means that the market value of our stock held by non-affiliates is less than $700 million and our annual revenue was less than $100 million during our most recently completed fiscal year. We may continue to be a smaller reporting company if either (i) the market value of our stock held by non-affiliates is less than $250 million or (ii) our annual revenue was less than $100 million during the most recently completed fiscal year and the market value of our stock held by non-affiliates is less than $700 million. For so long as we remain a smaller reporting company, we are permitted, and intend to rely on, exemptions from certain disclosure and other requirements that are applicable to other public companies that are not smaller reporting companies. As a result, the information that we provide may be different than you might receive from other public reporting companies in which you hold equity interests.

THE OFFERING

Common stock offered by us in this offering	shares of common stock. Each share of common stock and accompanying common warrant are being sold together at a combined public offering price of $.
Pre-funded warrants offered by us in this offering	We are also offering to certain purchasers whose purchase of shares of common stock in this offering would otherwise result in the purchaser, together with its affiliates and certain related parties, beneficially owning more than 4.99% (or, at the election of the purchaser, 9.99%) of our outstanding common stock immediately following the consummation of this offering, the opportunity to purchase, if such purchasers so choose, pre-funded warrants to purchase shares of common stock, in lieu of shares of common stock that would otherwise result in any such purchaser's beneficial ownership exceeding 4.99% (or, at the election of the purchaser, 9.99%) of our outstanding common stock. Each pre-funded warrant will be exercisable for one share of our common stock. The purchase price of each pre-funded warrant and accompanying common warrant will equal the price at which a share of common stock and accompanying common warrant are being sold to the public in this offering, minus $0.001, and the exercise price of each pre-funded warrant will be $0.001 per share. The pre-funded warrants will be immediately exercisable and may be exercised at any time until all of the pre-funded warrants are exercised in full. For each pre-funded warrant we sell, the number of shares of common we are offering will be decreased on a one-for-one basis. This prospectus also relates to shares of our common stock issuable upon the exercise of pre-funded warrants.
Common warrants offered by us in this offering	We are offering common warrants to purchase up to an aggregate of shares of common stock accompanying each share of common stock or pre-funded warrant sold in this offering. Each common warrant is exercisable for one share of our common stock. Each common warrant will have an exercise price per share of common stock of $, will be exercisable on or after the date of effectiveness of the Authorized Common Stock Increase and will expire on the fifth anniversary of the date on which the common warrants become exercisable. The common warrants will be immediately separable from each share of common stock or pre-funded warrant.

Common stock to be outstanding after this offering	179,904,734 shares, assuming the sale of the maximum number of shares of our common stock and no sales of pre-funded warrants, which, if sold, would reduce the number of shares of common stock that we are offering on a one-for-one basis and assuming none of the warrants issued in this offering are exercised. Assuming the exercise of all of the common warrants (which will not be exercisable until the date of effectiveness of the Authorized Common Stock Increase), there would be 341,941,771 shares of our common stock outstanding after this offering.
Use of proceeds	We estimate that the net proceeds from this offering will be approximately $ million, assuming the sale of the maximum number of shares of stock offered in this offering at the public offering price of $ per share of common stock and related warrant and assuming no sales of pre-funded warrants, after deducting estimated placement agent fees and estimated offering expenses payable by us, and assuming that none of the warrants issued in this offering are exercised in cash. However, because this is a best efforts offering, the actual offering amount, placement agent fees and net proceeds to us are not currently determinable and may be substantially less than the maximum amounts set forth on the cover page of this prospectus. We intend to use the proceeds from this offering and a potential debt financing to pay in full all amounts due and owing under the Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses) in accordance with the terms of the restructuring support agreement with IEH Biopharma and, if required, our 2024 Notes. We currently intend to use any remaining proceeds from this offering for general corporate purposes, the funding of clinical trials, commercial expenses and research and development, including VI-0106 development. See "Use of Proceeds" for more information.
Risk factors	An investment in our securities involves a high degree of risk. See "Risk Factors" beginning on page 8 of this prospectus and the other documents incorporated by reference into this prospectus for a discussion of certain information that you should carefully consider in connection with an investment in our securities.
Listing	Our common stock is listed on the Nasdaq Global Select Market under the symbol "VVUS." There is no established trading market for the pre-funded warrants or common warrants, and we do not expect an active trading market to develop. We do not intend to apply to list the pre-funded warrants or common warrants on any securities exchange or nationally recognized trading system. Without an active trading market, the liquidity of these warrants will be limited.

The number of shares of our common stock that will be outstanding after this offering is based on 17,867,697 shares of our common stock outstanding as of June 1, 2020 and excludes:

- 3,096,628 shares of common stock issuable upon the exercise of stock options outstanding as of June 1, 2020 at a weighted average exercise price of approximately $16.60 per share;
- 88 shares of common stock issuable upon vesting of restricted stock units outstanding as of June 1, 2020;
- 540,459 shares of common stock reserved for future issuance under our equity incentive plan as of June 1, 2020 (excluding shares of our common stock issuable upon the exercise of outstanding stock options and shares of our common stock subject to restricted stock awards shown above);
- 398,327 shares of common stock reserved for future issuance under our employee stock purchase plan as of June 1, 2020;
- 1,270,125 shares of common stock issuable upon exercise of outstanding warrants as of June 1, 2020 at a weighted-average exercise price of approximately $3.27 per share; and
- shares of our common stock issuable upon exercise of the common warrants offered in this offering and the warrants to be issued as compensation to the Placement Agent, or placement agent's warrants.

Unless otherwise stated, all information in this prospectus, including this section captioned "The Offering," assumes:

- no exercise of our outstanding stock options or warrants into shares of common stock;
- no vesting of the outstanding restricted stock units described above; and
- no exercise of the common warrants, the pre-funded warrants or the placement agent's warrants.

RISK FACTORS

Investing in our securities involves a high degree of risk. You should carefully consider the following risks and uncertainties as well as the risks and uncertainties described in the section entitled "Risk Factors" contained in our Annual Report on Form 10-K for the year ended December 31, 2019, as amended, and our Quarterly Report on Form 10-Q for the quarter ended March 31, 2020, as well as in our subsequent quarterly and annual reports filed with the SEC, which descriptions are incorporated in this prospectus by reference in their entirety. These risks and uncertainties are not the only risks and uncertainties we face. Additional risks and uncertainties not currently known to us, or that we currently view as immaterial, may also impair our business. If any of the risks or uncertainties described below or in our SEC filings or any additional risks and uncertainties actually occur, our business, financial condition, results of operations and cash flow could be materially and adversely affected. In that case, the trading price of our common stock could decline and you could lose all or part of your investment. You should carefully consider the following information about risks, together with the other information contained in this prospectus, before making an investment in our common stock.

RISKS RELATING TO OUR COMMON STOCK, OUR WARRANTS AND THIS OFFERING

Even if this offering and any potential debt financing are successful, we may require substantial additional capital in the future, which may not be available on acceptable terms or at all. If we are unable to raise additional capital when needed, we may be forced to delay, reduce and/or eliminate one or more of our commercialization initiatives, research and development programs, or other operations.

Even if this offering and any potential debt financing are successful and we refinance our existing indebtedness, we may require substantial additional capital in the future for working capital, debt service, research and development and other needs. Accordingly, we may need to obtain substantial additional funding to maintain our continuing operations. We may attempt to raise additional funds through various sources, including the offering of additional equity securities or the incurrence of debt. Our ability to raise additional capital may be adversely impacted by potential adverse domestic or global economic conditions or disruptions to and volatility in the credit and financial markets, including those resulting from the ongoing COVID-19 pandemic. If we are unable to raise capital when needed or on acceptable terms, we may be forced to delay, reduce or eliminate one or more of our commercialization initiatives, research and development programs, market expansion or commercial partnership opportunities, or other operations. In addition, we may be unable to execute our growth strategy, and operating results may be adversely affected and potentially curtail operations.

This is a best efforts offering. We may not raise the amount of capital we believe is required to pay all amounts due under the Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses) and, if required, our 2024 Notes, and we may need to incur substantial indebtedness in order to raise sufficient capital.

The Placement Agent has agreed to use its reasonable best efforts to solicit offers to purchase the securities in this offering. The Placement Agent has no obligation to buy any of the securities from us or to arrange for the purchase or sale of any specific number or dollar amount of the securities. Placement Agent fees and proceeds to us are not presently determinable and may be substantially less than the maximum amounts set forth above. We may sell fewer than all of the securities offered hereby, which may significantly reduce the amount of proceeds received by us. Accordingly, we may need to raise additional funds through debt financing, which may not be available or may not be available on terms acceptable to us. We do not intend to complete this offering if we are not able to raise an amount of funds from this offering and any other financing sources sufficient to pay all amounts due under the Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses) and, if required, our 2024 Notes.

If you purchase shares of common stock in this offering, you will experience immediate and substantial dilution in your investment.

Since the price per share of our common stock being offered is substantially higher than the net tangible book value per share of our common stock, you will suffer immediate and substantial dilution with respect to the net tangible book value of the common stock you purchase in this offering. Based on the combined assumed public offering price of $ per share of common stock and accompanying warrant being sold in this offering, which is the last reported sale price of our common stock on Nasdaq on June , 2020, assuming no sale of any pre-funded warrants and after deducting discounts and commissions and estimated offering expenses payable by us, if you purchase shares of common stock in this offering, you will suffer immediate and substantial dilution of $ per share with respect to the net tangible book value of the common stock. See the section entitled "Dilution" for a more detailed discussion of the dilution you will incur if you purchase common stock in this offering.

Our stock price has been and is expected to continue to be volatile.

The market price of our common stock has been volatile and is likely to continue to be volatile. In addition, our common stock can trade in small volumes which may make the price of our stock highly volatile. The last reported price of our common stock may not represent the price at which you would be able to buy or sell shares of our common stock. The market prices for the stock of companies comparable to us have been highly volatile. Often, the market prices for the stock of companies comparable to us have experienced significant price and volume fluctuations for reasons that may be related or unrelated to the operating performance of the individual companies. In addition, like our common stock, securities of publicly traded companies generally and in the biotechnology and life science sectors in particular have experienced significant volatility, including for reasons that may be unrelated to the operating performance of the individual companies. Factors giving rise to the past or current and expected future volatility of our common stock may include:

- our ability to refinance our Convertible Notes and other indebtedness and comply with the terms of the restructuring support agreement with IEH Biopharma;
- the widespread domestic and global impact of the COVID-19 pandemic, including on our customers, suppliers and other counterparties, employees, and financial markets;
- our ability and that of our collaboration partners to meet the expectations of investors related to the production and commercialization of Qsymia, PANCREAZE and STENDRA/SPEDRA;
- our ability to meet the expectations of investors related to the commercialization of the VIVUS Healthcare Platform;
- our ability to obtain marketing authorization for our products in foreign jurisdictions, including authorization from the European Commission for Qsymia in the European Union;
- the costs, timing and outcome of post-approval clinical studies which FDA has required us to perform as part of the approval for Qsymia;
- the cost required to maintain the Risk Evaluation and Mitigation Strategy program for Qsymia;
- results within the clinical trial programs for Qsymia or other results or decisions affecting the development of our investigational drug candidates;
- announcements of technological innovations or new products by us or our competitors;
- approval of, or announcements of, other anti-obesity compounds in development;
- publication of generic drug combination weight loss data by outside individuals or companies;
- actual or anticipated fluctuations in our financial results;

- our ability to obtain needed financing;
- sales by insiders or major stockholders;
- economic conditions in the United States and abroad;
- the volatility and liquidity of the financial markets;
- comments by or changes in assessments of us or financial estimates by security analysts;
- negative reports by the media or industry analysts on various aspects of our products, our performance and our future operations;
- the status of the cardiovascular outcomes trial (CVOT) with respect to Qsymia and our related discussions with FDA;
- adverse regulatory actions or decisions;
- any loss of key management;
- deviations in our operating results from the estimates of securities analysts or other analyst comments;
- discussions about us or our stock price by the financial and scientific press and in online investor communities;
- trading activity by highly technical investors utilizing sophisticated algorithms and high frequency trading;
- investment activities employed by short sellers of our common stock;
- developments or disputes concerning patents or other proprietary rights;
- reports of prescription data by us or from independent third parties for our products;
- licensing, product, patent or securities litigation; and
- public concern as to the safety or efficacy of our drugs or future investigational drug candidates developed by us.

The factors and fluctuations described above, as well as domestic and global macroeconomic, political and other market conditions, including those related to the COVID-19 pandemic, may adversely affect the market price of our common stock. Additionally, volatility or a lack of positive performance in our stock price may adversely affect our ability to retain or recruit key employees, all of whom have been or will be granted equity awards as an important part of their compensation packages.

Our warrants are expected to become exercisable for shares of our common stock, which would increase the number of shares eligible for future resale in the public market and result in substantial dilution to stockholders.

Each common warrant offered in this offering entitles the holder to purchase one share of our common stock, subject to adjustment, and is expected to become exercisable following our receipt of stockholder approval, if any, of an amendment to our amended and restated certificate of incorporation, or certificate of incorporation, to increase the number of shares of our authorized common stock so as to permit the exercise in full of the common warrants and placement agent's warrants and such amendment has become effective. To the extent such warrants are exercised, additional shares of common stock will be issued, which will result in dilution to the then existing holders of shares of our common stock and increase the number of shares eligible for resale in the public market. Sales of substantial numbers of shares in the public market could adversely affect the market price of our shares of common stock, among other effects.

If we issue additional shares of common stock in the future, you may experience immediate and substantial dilution and our stock price may decline.

We may from time to time issue additional shares of common stock, or securities convertible into, exchangeable or exercisable for shares of common stock, including at a discount from the current market price of our common stock. Any sales of additional shares, without regard to the price of the shares sold, will result in additional dilution to our stockholders, including investors who purchase shares of common stock (or pre-funded warrants) and accompanying warrants in this offering, and may result in a significant decline in the price of our common stock. We also cannot assure you that we will be able to sell shares or other securities in any other offering at a price per share that is equal to or greater than the price per share paid by investors in this offering, and investors purchasing shares or other securities in the future could have rights superior to existing stockholders. Investors would experience immediate dilution upon the purchase of any shares of our common stock sold at a discount. In addition, the exercise of outstanding stock options and warrants by the holders of those options and warrants and the vesting of outstanding restricted stock units may result in further dilution of your investment.

You will be unable to exercise the common warrants unless we receive stockholder approval and file an amendment to our certificate of incorporation.

The common warrants issued in this offering will not be exercisable unless we receive stockholder approval of an amendment to our certificate of incorporation to increase the number of shares of our authorized common stock so as to permit the exercise in full of the common warrants and placement agent's warrants and such amendment has become effective. The common warrants will expire five years from the date on which the common warrants become exercisable.

Following the completion of this offering, we expect to file a proxy statement for the solicitation of stockholder approval to amend our certificate of incorporation to increase the number of authorized shares of common stock to permit the exercise in full of the common warrants and placement agent's warrants. If we do not obtain stockholder approval for the increase in our number of authorized shares of common stock, the common warrants and placement agent's warrants will not be exercisable. In such a case, we intend, on a future date, to continue to solicit stockholder approval for the increase the number of authorized shares of common stock.

There is no public market for the warrants being offered in this offering.

There is no established public trading market for the pre-funded warrants or common warrants being offered in this offering, and we do not expect an active trading market to develop. In addition, we do not intend to apply to list the pre-funded warrants or common warrants on Nasdaq, any other securities exchange or any nationally recognized trading system. Without an active trading market, the liquidity of the pre-funded warrants and common warrants will be limited.

Future sales of our common stock, or the possibility that such sales could occur, could adversely affect the market price of our common stock.

Future sales in the public market of shares of our common stock, including shares we may offer in the future, as referred to in the foregoing risk factors, or shares issued upon exercise of stock options or warrants, or the perception by the market that these sales could occur, could lower the market price of our common stock or make it difficult for us to raise additional capital.

Fluctuations in our operating results could adversely affect the price of our common stock.

Our operating results may fluctuate significantly on a quarterly and annual basis and are difficult to predict. Our operating expenses are largely independent of sales in any particular period. We believe

that our quarterly and annual results of operations may be negatively affected by a variety of factors. Some of the factors include, but are not limited to, the level of patient demand for Qsymia and PANCREAZE, the ability of our distribution partners to process and ship product on a timely basis, the success of our third-party's manufacturing efforts to meet customer demand, fluctuations in foreign exchange rates, investments in sales and marketing efforts to support the sales of Qsymia and STENDRA/SPEDRA, investments in the research and development efforts, and expenditures we may incur to acquire additional products. Period-to-period comparisons of our historical and future financial results may not be meaningful, and investors should not rely on them as an indication of future performance. Our fluctuating results may fail to meet the expectations of securities analysts or investors. If one or more of the analysts who cover us downgrade our stock, or if our results of operations do not meet their expectations, the trading price of our stock could decline.

Holders of warrants purchased in this offering will have no rights as common stockholders until such holders exercise such warrants and acquire our common stock.

Until holders of pre-funded warrants or common warrants acquire shares of our common stock upon exercise of such warrants (in the case of the common warrants, after these warrants have become exercisable), holders of pre-funded warrants or common warrants will have no rights with respect to the shares of our common stock underlying such warrants. Upon exercise of the pre-funded warrants or common warrants, the holders will be entitled to exercise the rights of a common stockholder only as to matters for which the record date occurs after the exercise date.

Because we have not paid dividends on our common stock since our inception and may never pay dividends, you will benefit from an investment in our common stock only if our common stock appreciates in value.

We have not paid any dividends on our common stock since our inception. We do not intend to declare or pay any dividends on our common stock in the foreseeable future and may never pay dividends. In addition, certain of our financing arrangements place restrictions on, and any future financing arrangements may further limit or prohibit, our ability to pay dividends. Any return to stockholders will therefore be limited to the appreciation in value of any shares of our common stock they may own.

Significant holders or beneficial holders of our common stock may not be permitted to exercise pre-funded warrants or common warrants that they hold.

The pre-funded warrants and common warrants being offered hereby will prohibit a holder from exercising its pre-funded warrants or common warrants if doing so would result in such holder (together with such holder's affiliates and any other persons acting as a group together with such holder or any of such holder's affiliates) beneficially owning more than 4.99% of our common stock outstanding immediately after giving effect to the exercise, provided that, at the election of a holder and notice to us, such beneficial ownership limitation as to such holder shall be up to 9.99% of our common stock outstanding immediately after giving effect to the exercise. As a result, if you hold a significant amount of our securities, you may not be able to exercise your pre-funded warrants or common warrants for shares of our common stock, in whole or in part, at a time when it would be financially beneficial for you to do so.

The pre-funded warrants in this offering are speculative in nature.

The pre-funded warrants in this offering do not confer any rights of ownership of our common stock on their holders, but rather merely represent the right to acquire shares of our common stock at a fixed price. In addition, following this offering, the market value of the pre-funded warrants, if any, is uncertain and there can be no assurance that the market value of the pre-funded warrants will equal or

exceed their imputed offering price. The pre-funded warrants will be not listed or quoted for trading on any market or exchange.

RISKS RELATING TO OUR INDEBTEDNESS, RESTRUCTURING AND FINANCIAL CONDITION

We may incur substantial additional indebtedness in connection with or following the closing of this offering. Holders of our new and existing debt obligations will have priority over the holders of our common stock with respect to payment in the event of liquidation, dissolution or winding up and with respect to dividends. Such indebtedness could negatively affect the value of our common stock.

We are currently in negotiations to refinance our existing debt and we may incur substantial additional indebtedness in connection with or following the closing of this offering. We do not intend to complete this offering if we are not able to raise a sufficient amount from this offering and any potential debt financing to pay all amounts due under the Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses) and, if required, our 2024 Notes. However, we will not know until the completion of this offering how much we will raise through the issuance of common stock and warrants to purchase common stock and how much we will raise through the incurrence of indebtedness. We expect that, following the completion of this offering and any potential debt offering, we may have outstanding more than $125 million in aggregate indebtedness even after we pay our Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses) and our 2024 Notes. If we incur such additional indebtedness, our existing stockholders and investors purchasing securities in this offering will be subject to risks arising in connection with such a substantial amount of indebtedness that may then be outstanding (including those described below). Our incurrence of indebtedness could negatively affect the market price of our common stock.

Moreover, upon certain events of default under the terms of our existing and contemplated agreements and indentures governing our indebtedness, debt holders could exercise their rights under such agreements to accelerate the obligations thereunder. If repayment is accelerated, it would be unlikely that we would be able to repay the total then-outstanding amounts of indebtedness, including any interest.

If we are unable to pay our debt when due, we may be required to adopt one or more alternatives, such as selling assets, restructuring debt or obtaining additional debt or equity capital on terms that may be onerous or highly dilutive. Our ability to restructure or refinance our indebtedness will depend on the condition of the capital markets and our financial condition at such time. We may not be able to undertake any of these alternatives or engage in these activities on acceptable terms, which could result in a default on our debt obligations.

In addition, in the event of our insolvency or liquidation, holders of our common stock will not be entitled to receive any payment or other distribution of assets until after all of our obligations to our debt holders have been satisfied and holders of our debt have received any payments and other distributions due to them.

If we complete a debt financing that we might enter into in connection with or following this offering, we will have a substantial amount of debt, which could adversely affect our business and financial position and, among other things, our ability to raise additional capital our ability to satisfy our financial obligations.

If we complete a potential debt financing in connection with or following this offering, we will have a substantial amount of debt, which could adversely affect, among other things, our business and financial position, our ability to raise additional capital, and our ability to satisfy our financial

obligations. Accordingly, the impact of the indebtedness may include, but may not be limited to, the following:

- make it difficult for us to satisfy our financial obligations, including with respect to any such indebtedness;
- limit our ability to borrow additional funds for working capital, capital expenditures, acquisitions, or other general business purposes;
- require us to use a substantial portion of our cash flow from operations to make debt service payments instead of other purposes, thereby reducing the amount of cash flow available for future working capital, capital expenditures, acquisitions, or other general business purposes;
- limit our flexibility to plan for, or react to, changes in our business and industry;
- place us at a competitive disadvantage compared with our less-leveraged competitors;
- increase our vulnerability to the impact of adverse economic, competitive, and industry conditions; and
- increase our cost of borrowing.

In addition, we expect that the agreements governing our potential debt financing will contain restrictive covenants that may limit our ability to engage in activities that may be in our long-term best interest. Our failure to comply with those covenants could result in an event of default which, if not cured or waived, could result in the acceleration of all of our indebtedness outstanding after the completion of this offering and any debt financing. Furthermore, we may be able to incur substantial additional indebtedness in the future. If new indebtedness is added to our indebtedness outstanding after the completion of this offering and any debt financing, the risks relating to indebtedness that we will face could intensify.

We may not be able to successfully refinance our debt, and if we are not able to repay our debt in full by June 30, 2020, our restructuring support agreement provides that existing stockholders will receive a pro rata cash payment and lose their entire equity interest in the Company.

We do not intend to complete this offering if we are not able to raise an amount of funds from this offering and any other financing sources sufficient to pay all amounts due under the Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses) and, if required, the 2024 Notes. However, if we are not able to complete the refinancing of the Convertible Notes by June 30, 2020, then pursuant to the terms of the restructuring support agreement, we will pursue a restructuring pursuant to a plan of reorganization and file petitions for voluntary relief under chapter 11 of the United States Bankruptcy Code on or before July 13, 2020, as described below.

On April 29, 2020, we entered into an agreement with Icahn Enterprises Holdings L.P. (dba IEH Biopharma LLC), or IEH Biopharma, which held a principal amount of approximately $170.2 million of the Convertible Notes. In accordance with the terms of the agreement, we paid IEH Biopharma $3.8 million in accrued and unpaid interest on the Convertible Notes and IEH Biopharma granted us a 30-day grace period for the repayment of the principal amount of the Convertible Notes during which the two parties were to work exclusively to attempt to restructure the outstanding principal amount of the Convertible Notes. In addition, under the agreement, we settled approximately $11 million of outstanding principal amount of the Convertible Notes owed to all holders other than IEH Biopharma and approximately $4 million representing all accrued and unpaid interest payable and due on that date to all holders including IEH Biopharma.

On May 31, 2020 we entered into a restructuring support agreement with IEH Biopharma as the sole holder of the Convertible Notes which, among other things, grants an extension of the grace

period described above through July 13, 2020, subject to certain termination events. Under the agreement, we have until June 30, 2020 to complete a refinancing to pay in full in cash all amounts due and owing under the Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses). In addition, we will continue to work with IEH Biopharma on an exclusive basis in respect of any restructuring, financing or other material transaction concerning us or our assets, other than such refinancing.

In accordance with the terms of the restructuring support agreement, if we are unable to pay in full all amounts due under the Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses) on or before June 30, 2020, we and IEH Biopharma will exclusively pursue, on or before July 13, 2020, an in court plan of reorganization consistent with the restructuring term sheet agreed to as part of the restructuring support agreement. The plan of reorganization remains subject to our filing of petitions for voluntary relief under the United States Bankruptcy Code, solicitation of votes, confirmation of the plan by the applicable bankruptcy court and other closing conditions. In the event certain conditions are satisfied under the plan of reorganization, our existing stockholders will receive (1) a *pro rata* share of $5 million and (2) a non-transferable contractual contingent value right to earn another $2 per share if certain financial milestones are met in 2021 and 2022. Additionally, IEH Biopharma will take 100% ownership of VIVUS.

We have a history of losses and our independent registered public accounting firm has expressed substantial doubt about our ability to continue as a going concern.

As of March 31, 2020, our accumulated deficit was approximately $917.2 million and our cash and cash equivalents were $32.9 million, which does not include net proceeds from a registered direct offering of our common stock completed in April 2020 in the amount of approximately $10.5 million. Even if we successfully restructure or refinance our existing debt obligations, we expect to continue to incur operating and net losses for the foreseeable future. Our independent registered public accounting firm's audit report on our consolidated financial statements set forth in our Annual Report on Form 10-K for the fiscal year ended December 31, 2019, as amended, includes an explanatory paragraph stating that there is substantial doubt about our ability to continue as a going concern. Although our financial statements raise substantial doubt about our ability to continue as a going concern, they do not reflect any adjustments that might result if we are unable to continue our business. If we cannot continue as a viable entity, our stockholders may lose some or all of their investment in our company. Even if a financial restructuring or refinancing is consummated, whether by means of an out-of-court agreement or restructuring or an in-court restructuring, we will continue to face a number of risks, including our ability to repay our remaining debt, implement our strategic initiatives and bring our products to market. Accordingly, we cannot guarantee that the proposed financial restructuring will achieve our stated goals nor can we give any assurance of our ability to continue as a going concern. As a result of the substantial doubt about our ability to continue as a going concern, investors or other financing sources may be unwilling to provide additional funding to us on commercially reasonable terms or at all.

SPECIAL NOTE REGARDING FORWARD-LOOKING STATEMENTS

This prospectus and the documents incorporated by reference into this prospectus may contain forward-looking statements within the meaning of Section 27A of the Securities Act and Section 21E of the Exchange Act about VIVUS, Inc. These forward-looking statements are intended to be covered by the safe harbor for forward-looking statements provided by the Private Securities Litigation Reform Act of 1995. Forward-looking statements are not guarantees of future performance and are not statements of historical fact. Forward looking statements can generally be identified in this prospectus by the use of forward-looking words such as "believes", "expects", "may", "will", "could", "should", "projects", "plans", "goal", "targets", "potential", "estimates", "pro forma", "seeks", "intends" or "anticipates" or the negative of these words or comparable expressions. Forward-looking statements include discussions of strategy, financial projections, guidance and estimates (including their underlying assumptions), statements regarding plans, objectives, expectations or consequences of various transactions, and statements about the future performance, operations, products and services of VIVUS, Inc. We caution our stockholders and other readers not to place undue reliance on these statements. The risks and uncertainties that may affect the operations, performance, development, and results of our business include but are not limited to:

Risks and uncertainties related to our business, indebtedness, restructuring and financial condition:

- our ability to refinance our Convertible Notes and other indebtedness and comply with the terms of the restructuring support agreement with IEH Biopharma and to address our liquidity and capital resource needs;
- the widespread domestic and global impact of the COVID-19 pandemic on our business, results of operations, customers, suppliers and other counterparties, and employees;
- our history of losses and variable quarterly results;
- our ability to continue as a going concern;
- the volatility and liquidity of the financial markets;
- our expected future revenues, operations and expenditures;
- our ability to effectively manage expenses;
- risks related to our ability to protect our intellectual property and litigation in which we are involved or may become involved;
- uncertainties of government or third-party payor reimbursement;
- our reliance on sole-source suppliers, third parties and our collaborative partners;
- our ability to successfully develop or acquire a proprietary formulation of tacrolimus;
- risks related to the failure to obtain or retain federal or state-controlled substances registrations and noncompliance with Drug Enforcement Administration ("DEA") or state-controlled substances regulations;
- risks related to the failure to obtain FDA or foreign authority clearances or approvals and noncompliance with FDA or foreign authority regulations;
- our ability to demonstrate through clinical testing the quality, safety, and efficacy of our current and future investigational drug candidates or approved products;
- the timing of initiation and completion of clinical trials and submissions to U.S. and foreign authorities;

- compliance with post-marketing regulatory standards, post-marketing obligations or pharmacovigilance rules is not maintained;
- our ability to execute on our business strategy to enhance enterprise and long-term stockholder value;
- our ability to identify and acquire cash flow generating assets and opportunities;
- our ability to successfully navigate recent changes to our Board of Directors and the senior management team;
- other factors that are described from time to time in our periodic filings with the SEC including those set forth in Part II, Item 1A., "Risk Factors," of our Quarterly Report on Form 10-Q for the quarter ended March 31, 2020 and Part II, Item 1A., "Risk Factors," of our Form 10-K for the fiscal year ended December 31, 2019, as amended;

Risks and uncertainties related to Qsymia® (phentermine and topiramate extended release):

- our, or our current or potential partners', ability to successfully commercialize Qsymia including risks and uncertainties related to expansion to direct to patient distribution, the broadening of payor reimbursement, the expansion of Qsymia's primary care presence, and the outcomes of our discussions with pharmaceutical companies and our strategic and franchise-specific pathways for Qsymia;
- our ability to sell through the Qsymia retail pharmacy network and the Qsymia Advantage program;
- the impact of promotional programs for Qsymia on our net product revenue and operating results in future periods;
- our ability to ensure that the entire supply chain for Qsymia timely, efficiently and consistently delivers Qsymia to our customers and partners;
- our ability to accurately forecast Qsymia demand;
- our ability to maintain the relationship with the sole manufacture for Qsymia;
- our, or our current or potential partners', ability to successfully seek, gain and maintain approval for Qsymia in territories outside the United States;
- our dialogue with certain Concerned Member States (as defined below) in Europe relating to the pending decentralized Marketing Authorization Application, the timing and scope of the assessment by such Concerned Member State health authorities of our Marketing Authorization Application, and ultimately the decision of such Concerned Member State health authorities on whether to grant Marketing Authorization for Qsymia in such EU countries;
- the timing of and costs associated with the initiation and completion of the post-approval clinical studies required as part of the approval of Qsymia by the FDA;
- the response from FDA to any data and/or information relating to post-approval clinical studies required for Qsymia;
- our ability to work with FDA to significantly reduce or remove the requirements of the cardiovascular outcomes trial;
- the impact of the indicated uses and contraindications contained in the Qsymia label and the Risk Evaluation and Mitigation Strategy requirements;

- the impact of any possible future requirement to provide additional clinical data or further analysis of previously submitted clinical trial data;

Risks and uncertainties related to PANCREAZE (pancrelipase):

- risks and uncertainties related to the timing, strategy, tactics and success of the marketing and sales of PANCREAZE;
- our ability to successfully maintain and increase market share against current competing products and potential competitors that may develop alternative formulations of the drug;
- our ability to expand payor coverage for PANCREAZE;
- our ability to accurately forecast PANCREAZE demand;
- our ability to maintain the relationship with the sole manufacturer for PANCREAZE;
- our ability to maintain a satisfactory level of PANCREAZE inventory;
- the ability of our partners to maintain regulatory approvals to manufacture and adequately supply our products to meet demand;

Risks and uncertainties related to STENDRA® (avanafil) or SPEDRA™ (avanafil):

- our ability to manage the supply chain for STENDRA/SPEDRA for our current or potential commercial collaborators;
- our partner's ability to find a new distribution partner or model for STENDRA in the United States, Canada, South America and India;
- risks and uncertainties related to the timing, strategy, tactics and success of the launches and commercialization of STENDRA/SPEDRA by our current or potential collaborators;
- our ability to successfully complete, on acceptable terms and on a timely basis, avanafil partnering discussions for territories under our license with Mitsubishi Tanabe Pharma Corporation in which we do not have a commercial collaboration partner;
- Sanofi Chimie's ability to manufacture the avanafil active pharmaceutical ingredient and Sanofi Winthrop Industrie's ability to manufacture avanafil tablets; and
- the ability of our partners to maintain regulatory approvals to manufacture and adequately supply our products to meet demand or to comply with the terms of their agreements with us.

You should read this prospectus and the documents incorporated by reference completely and with the understanding that our actual future results may be materially different from what we currently expect. Our business and operations are and will be subject to a variety of risks, uncertainties and other factors. Consequently, actual results and experience may materially differ from those contained in any forward-looking statements. These risks, uncertainties and other factors that could cause actual results and experience to differ from those projected include, but are not limited to, the risk factors set forth under the caption "Risk Factors" in our Annual Report on Form 10-K for the year ended December 31, 2019, as filed with the SEC on March 3, 2020, as amended by Amendment No. 1 on Form 10-K/A as filed with the SEC on April 29, 2020, our Quarterly Report on Form 10-Q for the quarter ended March 31, 2020, as filed with the SEC on May 5, 2020 and elsewhere in the documents incorporated by reference into this prospectus.

You should assume that the information appearing in this prospectus, any related free writing prospectus and any document incorporated herein by reference is accurate as of its date only. Because the risk factors referred to above could cause actual results or outcomes to differ materially from those

expressed in any forward-looking statements made by us or on our behalf, you should not place undue reliance on any forward-looking statements. Further, any forward-looking statement speaks only as of the date on which it is made.

New factors emerge from time to time, and it is not possible for us to predict which factors will arise. In addition, we cannot assess the impact of each factor on our business or the extent to which any factor, or combination of factors, may cause actual results to differ materially from those contained in any forward-looking statements. All written or oral forward-looking statements attributable to us or any person acting on our behalf are expressly qualified in their entirety by the risk factors and cautionary statements contained in and incorporated by reference into this prospectus. Unless legally required, we do not undertake any obligation to release publicly any revisions to these forward-looking statements to reflect events or circumstances after the date of this prospectus or to reflect the occurrence of unanticipated events.

USE OF PROCEEDS

Assuming the maximum number of shares offered in this offering are sold, we estimate that our net proceeds from this offering will be approximately $ million based on an assumed public offering price of $ per share of our common stock and related warrant, the last reported sale price of our common stock on the Nasdaq Global Select Market on June , 2020, after deducting estimated placement agent fees and estimated offering expenses payable by us, and further assuming no sales of pre-funded warrants and that none of the warrants issued in this offering are exercised in cash. However, because this is a best efforts offering, Placement Agent's fees and net proceeds to us are not presently determinable and may be substantially less than the maximum amounts set forth on the cover page of this prospectus.

We intend to use the proceeds from this offering and any potential debt financing to pay in full all amounts due and owing under the Convertible Notes (as well as IEH Biopharma's reasonable fees and expenses) in accordance with the terms of the restructuring support agreement with IEH Biopharma and, if required, the 2024 Notes. We currently intend to use any remaining proceeds from this offering for general corporate purposes, the funding of clinical trials, commercial expenses and research and development, including VI-0106 development. As of June 1, 2020, we had outstanding (1) $170.2 million aggregate face amount of our Convertible Notes, which bear interest at a rate of 4.5% and matured on May 1, 2020, subject to a grace period which terminates on July 13, 2020 pursuant to the terms of the restructuring support agreement, and (2) $61.4 aggregate face amount of our 2024 Notes, which bear interest at a rate of 10.375% and mature on June 30, 2024.

Pending the use of proceeds from this offering as described above, we plan to invest the net proceeds we receive in this offering in short-term and intermediate-term interest-bearing obligations, investment-grade investments, certificates of deposit, or direct or guaranteed U.S. government obligations.

DIVIDEND POLICY

Common stockholders are entitled to receive dividends declared by the board of directors out of funds legally available for the payment of dividends, subject to the rights, if any, of preferred stockholders and applicable contractual restrictions. We have not paid any dividends since our inception, and we do not intend to declare or pay any dividends on our common stock in the foreseeable future. Declaration or payment of future dividends, if any, will be at the discretion of our Board of Directors after taking into account various factors, including, but not limited to, our financial condition, operating results and current and anticipated cash needs.

CAPITALIZATION

The following table sets forth our cash and cash equivalents capitalization as of March 31, 2020, derived from our unaudited condensed consolidated financial statements included in our Quarterly Report on Form 10-Q for the quarter ended March 31, 2020, which is incorporated by reference in this prospectus:

- on an actual basis;
- on a pro forma basis to reflect the sale of 7,218,750 shares of our common stock subsequent to March 31, 2020 as a result of our registered direct offering of our common stock that closed on April 3, 2020 in addition to the payment of $7.5 million to settle $11.3 million of convertible notes on April 30, 2020 and the payment of $1.0 million principal amount of our Convertible Notes to IEH Biopharma on June 2, 2020 in connection with our entry into the restructuring support agreement; and
- on a on a pro forma as adjusted basis to give effect to our issuance and sale of the maximum of shares of our common stock in this offering at the assumed public offering price of $ per share and accompanying common warrant, which is the last reported sale price of our common stock on the Nasdaq Global Select Market on June , 2020, assuming the sale of the maximum offering amount and no sales of pre-funded warrants, which, if sold, would reduce the number of shares of our common stock that we are offering on a one-for-one basis, and after deducting the estimated Placement Agent fees and estimated offering expenses payable by us, and the application of proceeds therefrom.

The pro forma as adjusted information below is illustrative only and our capitalization following the completion of this offering is subject to adjustment based on the actual public offering price of our common stock and related warrant and other terms of this offering determined at pricing. The pro forma as adjusted information below is unaudited and reflects estimates by our management.

The information in this table below should be read together with, and is qualified by reference to, the sections entitled "Summary Financial Data" and "Description of Capital Stock" in this prospectus and our financial statements and related notes included in our Annual Report on Form 10-K for the year ended December 31, 2019, as amended, and our Quarterly Report on Form 10-Q for the quarter ended March 31, 2020, which are incorporated by reference in this prospectus.

	As of March 31, 2020 (in thousands, except share and per share amounts)		
	Actual	Pro Forma	Pro Forma, As Adjusted(1)
Cash and cash equivalents	$ 32,854	$ 34,772	$
Total current liabilities	227,786	215,272	
Long-term debt	58,910	58,910(2)	
Convertible Notes	181,822	169,561	
Total liabilities	289,864	277,350(2)	
Stockholders' equity:			
Common stock, par value $0.001 per share, 200,000 shares authorized, 10,649 shares issued and outstanding	11	18	
Additional paid-in capital	843,146	853,606	
Accumulated deficit	(917,221)	(913,256)	
Total stockholders' deficit	(73,956)	(59,524)	
Total capitalization	$ 215,908	$ 217,826	$

(1) Each $0.10 increase (decrease) in the assumed public offering price of $ per share and accompanying common warrant, which is the last reported sale price of our common stock on the

Nasdaq Global Select Market on June , 2020, would increase (decrease) the as adjusted amount of each of cash and cash equivalents, additional paid-in capital, total stockholders' equity and total capitalization by approximately $ million, assuming that the maximum number of shares offered by us, as set forth on the cover page of this prospectus, remains the same, and no sale of any pre-funded warrants, and after deducting estimated Placement Agent fees and estimated offering expenses payable by us, and excluding the proceeds, if any, from the cash exercise of the common warrants issued in this offering.

(2) As disclosed in our Form 10-Q for the quarter ended March 31, 2020, on May 4, 2020, we received a $1.25 million loan through the Paycheck Protection Program under the Coronavirus Aid, Relief, and Economic Security Act. On June 1, 2020, we provided our authorization for the repayment of this loan. The withdrawal of these funds by the relevant lending institution is expected to occur within the near future, at which time the loan will be repaid in full.

The table above is based on 10,648,947 shares of common stock outstanding as of March 31, 2020, and excludes the following, all of which, if issued by us, would be dilutive to our stockholders:

- 3,220,158 shares of common stock issuable upon the exercise of stock options outstanding under our equity incentive plan as of March 31, 2020, at a weighted average exercise price of approximately 16.18 per share;
- 88 shares of our common stock subject to restricted stock unit awards outstanding as of March 31, 2020;
- 524,160 shares of our common stock reserved for issuance under our equity incentive plans as of March 31, 2020 (excluding shares of our common stock issuable upon the exercise of outstanding stock options and shares of our common stock subject to restricted stock awards shown above);
- 398,327 shares of common stock reserved for future issuance under our employee stock purchase plan as of March 31, 2020;
- 837,000 shares of our common stock issuable upon exercise of outstanding warrants as of March 31, 2020 at a weighted-average exercise price of approximately $3.92 per share; and
- shares of our common stock issuable upon exercise of the common warrants offered in this offering and the placement agent's warrants.

DILUTION

If you invest in our common stock in this offering, your ownership interest will be immediately diluted to the extent of the difference between the combined public offering price per share of our common stock and accompanying common warrant and the as adjusted net tangible book value per share of our common stock immediately after the closing of this offering.

Our historical net tangible book value as of March 31, 2020 was $(189.8) million, or $(17.83) per share of common stock. Our historical net tangible book value represents the amount of our total tangible assets less our total liabilities. Historical net tangible book value per common share is our historical net tangible book value divided by the total number of shares of common stock outstanding as of March 31, 2020. Pro forma net tangible book value as of March 31, 2020 was approximately $(175.4) million, or $(9.82) per share of common stock, after giving effect to the sale of 7,218,750 shares of common stock subsequent to March 31, 2020 in our registered direct offering that closed on April 3, 2020 in addition to the payment of $7.5 million to settle $11.3 million of convertible notes on April 30, 2020 and the payment of $1.0 million principal amount of our Convertible Notes to IEH Biopharma on June 2, 2020 in connection with our entry into the restructuring support agreement. Net tangible book value dilution per share to new investors represents the difference between the amount per share paid by purchasers of shares of common stock in this offering and the as adjusted net tangible book value per share of common stock immediately after completion of this offering.

After giving effect to the sale of shares of our common stock and accompanying common warrants in this offering at an assumed combined public offering price of $ per share, which was the last reported sale price of our common stock on The Nasdaq Global Select Market on June , 2020, assuming the sale of the maximum offering amount, and after deducting estimated Placement Agent fees and estimated offering expenses payable by us, and excluding the proceeds, if any, from the exercise of the common warrants issued in this offering, our pro forma as adjusted net tangible book value as of March 31, 2020 would have been $ million, or $ per share of common stock. This amount represents an immediate increase in pro forma as adjusted net tangible book value of $ per share to our existing stockholders and an immediate dilution in the pro forma as adjusted net tangible book value of $ per share to investors purchasing securities in this offering.

The following table illustrates this dilution on a per share basis to new investors:

Assumed combined public offering price per share and accompanying common warrant	$
Pro forma net tangible book value per share as of March 31, 2020, before giving effect to this offering	$ (9.82)
Increase in pro forma as adjusted net tangible book value per share of common stock attributable to existing investors in this offering	$
Pro forma as adjusted net tangible book value per share as of March 31, 2020, after giving effect to this offering	$
Dilution in net tangible book value per share to new investors in this offering	$

The pro forma as adjusted dilution information discussed above is illustrative only and will change based on the actual public offering price, the actual number of shares and common warrants that we offer in this offering, and other terms of this offering, in each case as determined at pricing. Each $0.10 increase (decrease) in the assumed combined public offering price of $ per share and accompanying common warrant, which was the last reported sale price of our common stock on The Nasdaq Global Select Market on June , 2020, would increase (decrease) the as-adjusted net tangible book value per share by $ per share and the dilution per share to new investors purchasing

securities in this offering by $ per share, assuming that the maximum number of shares and accompanying common warrants offered by us, as set forth on the cover page of this prospectus, remains the same and after deducting estimated Placement Agent fees and estimated offering expenses payable by us, and excluding the proceeds, if any, from the exercise of the common warrants issued in this offering.

We may also increase or decrease the number of shares we are offering. A 1 million share increase or decrease in the maximum number of shares and accompanying common warrants offered by us, as set forth on the cover page of this prospectus, would increase or decrease the net proceeds to us by $ million, increase or decrease the as adjusted net tangible book value per share after this offering by $ and increase or decrease the dilution per share to new investors purchasing securities in this offering by $, assuming the combined public offering price of $ per share and accompanying common warrant, which was the last reported sale price of our common stock on The Nasdaq Global Select Market on June , 2020, remains the same, and after deducting estimated Placement Agent fees and estimated offering expenses payable by us, and excluding the proceeds, if any, from the exercise of the common warrants issued in this offering.

The discussion and table above assume no sale of pre-funded warrants, which, if sold, would reduce the number of shares of common stock that we are offering on a one-for-one basis. The table and discussion above are based on 10,648,947 shares of common stock outstanding as of March 31, 2020, and exclude the following, all of which, if issued by us, would be dilutive to our stockholders:

- 3,220,158 shares of common stock issuable upon exercise of stock options outstanding as of March 31, 2020 under our equity incentive plan at a weighted average exercise price of approximately $16.18 per share;
- 88 shares of common stock issuable upon vesting of restricted stock units outstanding as of March 31, 2020;
- 524,160 shares of our common stock reserved for issuance under our equity incentive plan as of March 31, 2020 (excluding shares of our common stock issuable upon the exercise of outstanding stock options and shares of our common stock subject to restricted stock awards shown above);
- 398,327 shares of common stock reserved for future issuance under our employee stock purchase plan as of March 31, 2020;
- 837,000 shares of our common stock issuable upon exercise of outstanding warrants as of March 31, 2020 at a weighted-average exercise price of approximately $3.92 per share; and
- shares of our common stock issuable upon exercise of the common warrants offered in this offering and the placement agent's warrants.

To the extent that outstanding options or warrants are exercised, you will experience further dilution. In addition, we may choose to raise additional capital due to market conditions or strategic considerations even if we believe we have sufficient funds for our current or future operating plans. To the extent that additional capital is raised through the sale of equity or convertible debt securities, the issuance of these securities could result in further dilution to our stockholders.

SUMMARY FINANCIAL DATA

The summary statement of operations data for the years ended December 31, 2019 and 2018 and the summary balance sheet data as of December 31, 2019 and 2018 are derived from our audited financial statements appearing in our Annual Report on Form 10-K for the year ended December 31, 2019, as amended, which is incorporated by reference in this prospectus. The summary statement of operations data for the three months ended March 31, 2020 and 2019 and the summary balance sheet data as of March 31, 2020 and 2019 are derived from our unaudited financial statements appearing in our Quarterly Report on Form 10-Q for the quarterly periods ended March 31, 2020 and 2019, which are incorporated by reference in this prospectus. Our historical results are not necessarily indicative of our results in any future period and results from our interim period may not necessarily be indicative of the results of the entire year.

You should read the following summary financial data together with "Management's Discussion and Analysis of Financial Condition and Results of Operations" section and our financial statements and the related notes in our Annual Report on Form 10-K for the year ended December 31, 2019, as amended, and our Quarterly Reports on Form 10-Q for the quarterly periods ended March 31, 2019 and 2020, which are incorporated by reference in this prospectus. The summary financial data in this section is not intended to replace our financial statements and the related notes and are qualified in their entirety by the financial statements and related notes described in the preceding sentence.

	Year ended December 31,		Three Months Ended March 31	
	2019	2018	2020	2019
Total revenue	$ 69,760	$ 65,062	$ 19,631	$ 16,146
Operating expenses				
Cost of Goods Sold	$ 15,671	$ 14,613	$ 4,627	$ 4,308
Research and development	$ 10,467	$ 7,347	$ 2,445	$ 2,469
General and administrative	$ 22,071	$ 23,971	$ 6,727	$ 5,284
Impairment of property and equipment	—	—	—	—
Total operating expenses	$ 80,729	$ 68,541	$ 21,670	$ 20,233
Interest income (expense)	$ 20,728	$ 33,876	*	*
Other income (expense)	$ (215)	$ 970	*	*
Provision for income taxes	$ 21	$ 52	(45)	(8)
Net loss	$ (31,503)	$ (36,950)	$ (5,258)	$ (7,949)
Net loss per share				
Basic and diluted	$ (2.96)	$ (3.48)	$ (0.49)	$ (0.75)

	Year ended December 31,		Three Months Ended March 31	
	2019	2018	2020	2019
Balance Sheet Data:				
Cash and cash equivalents	$ 32,659	$ 30,411	$ 32,854	$ 23,021
Working capital	$ (128,346)	$ 124,327	$ (129,932)	$ 118,755
Total assets	$ 218,308	$ 302,147	$ 215,908	$ 290,183
Convertible note	—	—	—	—
Long-term debt	$ 58,721	$ 294,446	$ 58,910	$ 293,396
Total liabilities	$ 287,532	$ 342,170	$ 289,264	$ 337,428
Convertible preferred stock	—	—	—	—
Accumulated deficit	$ (912,008)	$ (880,515)	$ (917,221)	$ (888,454)
Total stockholders' (deficit) equity	$ (69,224)	$ (40,023)	$ (73,956)	$ (47,245)

* Not presented in our unaudited condensed consolidated financial statement.

PRINCIPAL STOCKHOLDERS

The following table sets forth certain information known to us with respect to beneficial ownership of our common stock as of June 1, 2020 by (i) each person or entity who is known by us to own beneficially more than 5% of our common stock; (ii) each of our directors; (iii) each of our named executive officers; and (iv) all directors and executive officers as a group.

The percentage ownership information shown in the column titled "Percent Before Offering" in the table is based on 17,867,697 shares of common stock outstanding as of June 1, 2020. The percentage ownership information shown in the column titled "Percent After Offering" in the table is based on a total of shares of our common stock outstanding, assuming the sale of the maximum of shares of our common stock and accompanying common warrants by us and no sale of any pre-funded warrants in this offering.

The calculation of beneficial ownership is determined in accordance with SEC rules. Under such rules, a person is deemed to be a "beneficial owner" of a security if that person has or shares the power to vote or direct the voting of the security or the power to dispose or direct the disposition of the security. Beneficial ownership as of any date includes any shares as to which a person has the right to acquire voting or investment power as of such date or within 60 days thereafter through the exercise of any stock options, restricted stock units or warrants held by that person, without regard to whether such right expires before the end of such 60-day period or continues thereafter. Those shares, however, are not deemed outstanding for the purpose of computing the percentage ownership of any other person. Consequently, the denominator used for calculating such percentage may be different for each beneficial owner.

The following table is based upon information supplied by officers, directors and principal stockholders and Schedules 13D and 13G, if any, filed with the SEC. Unless otherwise noted, the business address of the persons or entities shown in the table is 900 E. Hamilton Avenue, Suite 550, Campbell, California 95008.

Name of Beneficial Owner	Common Stock(1) Number	Percent Before Offering	Percent After Offering
5% Holders			
Sabby Management, LLC(2)	1,781,250	9.97%	
Steven Chlavin(3)	1,025,000	5.7%	
Non-Employee Directors			
Karen Ferrell(4)	26,875	*	
Edward A. Kangas(5)	26,875	*	
Thomas B. King(6)	110,834	*	
David Y. Norton(7)	52,500	*	
Jorge Plutzky, M.D.(8)	57,839	*	
Herman Rosenman(9)	60,357	*	
Named Executive Officers			
John P. Amos(10)	456,808	2.6%	
Mark K. Oki(11)	105,016	*	
John L. Slebir(12)	205,993	1.2%	
Santosh T. Varghese, M.D.(13)	164,554	*	
Kenneth Suh(14)	384,475	2.2%	
M. Scott Oehrlein(15)	92,026	*	
All directors and executive officers as a group (12 persons)(16)	1,744,153	9.8%	

* Less than 1%

(1) Based on information furnished by the beneficial owners in SEC filings or otherwise, the persons named in this table have sole voting and investment power with respect to all shares of Common Stock shown as beneficially owned by them, subject to community property laws, where applicable, and except as indicated in the other footnotes to this table.

(2) Beneficial ownership information is based on a Schedule 13G filed with the SEC on April 1, 2020. Sabby Management, LLC and its affiliates (the "Sabby Management Entities") report that Sabby Management, LLC, Sabby Volatility Warrant Master Fund, Ltd. (the "Master Fund") and Hal Mintz beneficially own, and have shared voting and dispositive power over, an aggregate of 1,781,250 shares of Common Stock. The Sabby Management Entities further report that (a) Sabby Management, LLC, a Delaware limited liability company, and Mr. Mintz do not directly own any shares of Common Stock, but each indirectly owns 1,781,250 shares of Common Stock, (b) Sabby Management, LLC indirectly owns 1,781,250 shares of Common Stock because it serves as the investment manager of the Master Fund, a Cayman Islands company, and (c) Mr. Mintz indirectly owns 1,781,250 shares of Common Stock in his capacity as manager of Sabby Management, LLC. The address of the Master Fund is 89 Nexus Way, Camana Bay, Grand Cayman KY1-9007, Cayman Islands, the address of Sabby Management, LLC is 10 Mountainview Road, Suite 205, Upper Saddle River, New Jersey 07458 and the address of Mr. Mintz is c/o Sabby Management, LLC, 10 Mountainview Road, Suite 205, Upper Saddle River, New Jersey 07458.

(3) Beneficial ownership information is based on a Schedule 13G filed with the SEC on February 4, 2020. Mr. Chlavin reports that he beneficially owns, and has sole voting and dispositive power over, 1,025,000 shares of Common Stock. The address of Steven Chlavin is 9663 Santa Monica Blvd., Suite 214, Beverly Hills, California, 90210.

(4) Consists of 26,875 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(5) Consists of 26,875 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(6) Consists of 110,834 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(7) Consists of 52,500 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(8) Consists of (i) 5,339 shares of Common Stock and (ii) 52,500 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(9) Consists of (i) 12,357 shares of Common Stock, (ii) 500 shares of Common Stock Mr. Rosenman is deemed to beneficially own that are held in an Individual Retirement Account for the benefit of Mr. Rosenman, (iii) 5,000 shares of Common Stock Mr. Rosenman is deemed to beneficially own that are held by his spouse, and (iv) 42,500 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(10) Consists of (i) 170,850 shares of Common Stock, (ii) 186,458 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020, and (iii) 99,500 warrants to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(11) Consists of (i) 12,100 shares of Common Stock and (ii) 95,016 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(12) Consists of (i) 13,209 shares of Common Stock and (ii) 192,784 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(13) Consists of (i) 8,869 shares of Common Stock and (ii) 155,685 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(14) Consists of (i) 169,375 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020, and (ii) 215,100 warrants to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(15) Consists of (i) 68,126 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020, and (ii) 23,900 warrants to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

(16) Includes (i) 1,179,528 options to purchase shares of Common Stock exercisable within 60 days of April 15, 2020 and (ii) 338,500 warrants to purchase shares of Common Stock exercisable within 60 days of April 15, 2020.

DESCRIPTION OF CAPITAL STOCK

The following descriptions of our capital stock (including the common stock, $0.001 par value per share (the "common stock"), of VIVUS, Inc.), the rights (the "Rights") to purchase specified units of the Series A Participating Preferred Stock, $0.001 par value per share, of VIVUS, Inc. (the "Series A Participating Preferred Stock") and the Rights Agreement (as defined below) are summaries and are subject to, and are qualified in their entirety by reference to, the provisions of (1) our Amended and Restated Certificate of Incorporation (the "Certificate of Incorporation"), (2) our Amended and Restated Bylaws, as further amended (the "Bylaws"), (3) our Amended and Restated Certificate of Designation of Rights, Preferences and Privileges of Series A Participating Preferred Stock of the Company and (4) the Preferred Stock Rights Agreement, dated as of December 30, 2019, between the Company and Computershare Trust Company, N.A. (the "Rights Agreement"), copies of which are incorporated by reference as Exhibits 3.1, 3.2, 3.3 and 4.3, respectively, to our Annual Report on Form 10-K for the year ended December 31, 2019, as amended.

Capital Stock

Our Certificate of Incorporation authorizes us to issue a total of 205,000,000 shares of capital stock, consisting of (1) 200,000,000 shares of common stock, and (2) 5,000,000 shares of preferred stock, $0.001 par value per share (the "preferred stock").

Common Stock

Voting Rights

The holders of shares of our common stock are entitled to one vote per share on all matters to be voted on by stockholders. Directors are elected by a plurality of the votes cast by stockholders present in person or represented by proxy at a meeting of the stockholders of the Company and entitled to vote on the election of directors. Except as otherwise provided by applicable law, our Certificate of Incorporation or our Bylaws, every matter other than the election of directors will be decided by the affirmative vote of a majority of the votes cast by stockholders present in person or represented by proxy at the meeting and entitled to vote on such matter. Except as otherwise provided in our Certificate of Incorporation or as required by applicable law, holders of shares of our common stock are not entitled to cumulate their votes in the election of directors or with respect to any matter submitted to a vote of the stockholders.

Dividends

The holders of our common stock are entitled to receive dividends declared by our Board of Directors (the "Board") out of funds legally available for the payment of dividends under Delaware law, subject to the rights, if any, of the holders of our preferred stock. In addition, our debt financing arrangements currently impose limitations, and debt financing or other contractual arrangements may in the future impose limitations, on our ability to pay dividends.

Liquidation

Upon any liquidation, dissolution or winding up of our business, the holders of common stock are entitled to share equally in all assets available for distribution after payment of all liabilities and provision for liquidation preference of shares of preferred stock then outstanding.

Rights and Preferences

The holders of our common stock have no preemptive rights and no rights to convert their common stock into any other securities. There are also no redemption or sinking fund provisions

applicable to our common stock. All outstanding shares of common stock are fully paid and nonassessable. In addition, see "Anti-Takeover Effects of Provisions of Our Certificate of Incorporation, Bylaws, Other Agreements and Delaware Law" below.

Listing

Our common stock is traded on The Nasdaq Global Select Market under the trading symbol "VVUS."

Preferred Stock

Our Board has the authority, without further action by our stockholders, to issue up to 5,000,000 shares of our preferred stock, each with a par value of $0.001 per share, in one or more series and to fix the rights, preferences, privileges and restrictions thereof. These rights, preferences and privileges could include dividend rights, conversion rights, voting rights, terms of redemption, liquidation preferences, sinking fund terms and the number of shares constituting, or the designation of, such series, any or all of which may be greater than the rights of common stock. The issuance of our preferred stock could adversely affect the voting power of holders of common stock and the likelihood that such holders will receive dividend payments and payments upon our liquidation. In addition, the issuance of preferred stock could have the effect of delaying, deferring or preventing a change in control of our Company or other corporate action.

Our Board has adopted the Amended and Restated Certificate of Designation of Rights, Preferences and Privileges of Series A Participating Preferred Stock of VIVUS, Inc. setting forth the rights, powers and preferences of our Series A Participating Preferred Stock, as described below. In addition, we have issued Rights to purchase specified units of Series A Participating Preferred Stock. For more information about the Rights, see "Rights to Purchase Series A Participating Preferred Stock."

In addition, see "Anti-Takeover Effects of Provisions of Our Certificate of Incorporation, Bylaws, Other Agreements and Delaware Law" below.

Series A Participating Preferred Stock

Amount

Under the Amended and Restated Certificate of Designation of Rights, Preferences and Privileges of Series A Participating Preferred Stock, we may issue 700,000 shares of Series A Participating Preferred Stock.

Ranking

The Series A Participating Preferred Stock will rank junior to all other series of the Company's preferred stock as to the payment of dividends and the distribution of assets, unless the terms of any such series provide otherwise.

Proportional Adjustment

In the event that the Company shall at any time after the issuance of any share or shares of Series A Participating Preferred Stock (i) declare any dividend on common stock payable in shares of common stock, (ii) subdivide the outstanding common stock or (iii) combine the outstanding common stock into a smaller number of shares, then in each such case the Company shall simultaneously effect a proportional adjustment to the number of outstanding shares of Series A Participating Preferred Stock.

Dividend Rights

Subject to the prior and superior right of the holders of any shares of any series of preferred stock ranking prior and superior to the shares of Series A Participating Preferred Stock with respect to dividends, the holders of shares of Series A Participating Preferred Stock will be entitled to receive when, as and if declared by the Board out of funds legally available for the purpose, quarterly dividends payable in cash on the last day of March, June, September and December in each year (referred to as a "Quarterly Dividend Payment Date"), commencing on the first Quarterly Dividend Payment Date after the first issuance of a share or fraction of a share of Series A Participating Preferred Stock, in an amount per share (rounded to the nearest cent) equal to 1,000 times the aggregate per share amount of all cash dividends, and 1,000 times the aggregate per share amount (payable in kind) of all non-cash dividends or other distributions other than a dividend payable in shares of common stock or a subdivision of the outstanding shares of common stock (by reclassification or otherwise), declared on the common stock since the immediately preceding Quarterly Dividend Payment Date, or, with respect to the first Quarterly Dividend Payment Date, since the first issuance of any share or fraction of a share of Series A Participating Preferred Stock.

We will be required to declare a dividend or distribution on the Series A Participating Preferred Stock as provided in the preceding paragraph immediately after we declare a dividend or distribution on the common stock (other than a dividend payable in shares of common stock).

Dividends will begin to accrue on outstanding shares of Series A Participating Preferred Stock from the Quarterly Dividend Payment Date first following the date of issue of such shares of Series A Participating Preferred Stock, unless the date of issue of such shares is prior to the record date for the first Quarterly Dividend Payment Date, in which case dividends on such shares will begin to accrue from the date of issue of such shares, or unless the date of issue is a Quarterly Dividend Payment Date or is a date after the record date for the determination of holders of shares of Series A Participating Preferred Stock entitled to receive a quarterly dividend and before such Quarterly Dividend Payment Date, in either of which events such dividends will begin to accrue from such Quarterly Dividend Payment Date. Accrued but unpaid dividends will not bear interest. Dividends paid on the shares of Series A Participating Preferred Stock in an amount less than the total amount of such dividends at the time accrued and payable on such shares will be allocated pro rata on a share-by-share basis among all such shares at the time outstanding.

Voting Rights

Each share of Series A Participating Preferred Stock will entitle the holder thereof to 1,000 votes on all matters submitted to a vote of the stockholders of the Company. Except as otherwise provided herein or by law, the holders of shares of Series A Participating Preferred Stock and the holders of shares of common stock will vote together as one class on all matters submitted to a vote of stockholders of the Company.

Certain Restrictions on Dividends

Whenever quarterly dividends or other dividends or distributions payable on the Series A Participating Preferred Stock as described above are in arrears, the Company will be restricted in its ability to declare or pay dividends on, redeem or purchase or otherwise acquire for consideration, or make other distributions of shares of stock ranking junior to, or on parity with, the Series A Participating Preferred Stock (subject to specified exceptions for stock ranking on a parity with the Series A Participating Preferred Stock). In such event, the Company will also be restricted in its ability to purchase shares of Series A Participating Preferred Stock.

Distribution Upon Liquidation of Dissolution

Upon any liquidation, dissolution or winding up of the Company, the holders of shares of Series A Participating Preferred Stock will be entitled to receive an aggregate amount per share equal to 1,000 times the aggregate amount to be distributed per share to holders of shares of common stock plus an amount equal to any accrued and unpaid dividends on such shares of Series A Participating Preferred Stock.

Exchange Upon Consolidation or Merger

In the event the Company enters into any consolidation, merger, combination or other transaction in which the shares of our common stock are exchanged for or changed into other stock or securities, cash and/or any other property, then the shares of Series A Participating Preferred Stock must at the same time be similarly exchanged or changed in an amount per share equal to 1,000 times the aggregate amount of stock, securities, cash and/or any other property (payable in kind), as the case may be, into which or for which each share of common stock is changed or exchanged.

Rights and Redemption

The shares of Series A Participating Preferred Stock will not be redeemable. There is also no sinking fund provision applicable to our Series A Participating Preferred Stock.

Amendments

Our Certificate of Incorporation may not be amended in any manner which would materially alter or change the powers, preference or special rights of the Series A Participating Preferred Stock so as to affect them adversely without the affirmative vote of the holders of a majority of the outstanding shares of Series A Participating Preferred Stock, voting separately as a series.

Rights to Purchase Series A Participating Preferred Stock

We are a party to the Rights Agreement, dated as of December 30, 2019, with Computershare Trust Company, N.A. On December 30, 2019, our Board authorized and declared a dividend distribution of one Right, initially representing the right to purchase one one-thousandth (0.001) of a share of our Series A Participating Preferred Stock, for each share of our common stock outstanding on January 13, 2020 to the stockholders of record at the close of business on that date. As of December 31, 2019, there were no Rights outstanding, and as of January 13, 2020, there were 10,648,947 Rights outstanding.

We expect to submit the Rights Agreement to a vote at our 2020 annual meeting of stockholders. If our stockholders do not approve the Rights Agreement at the 2020 annual meeting, it will expire at the close of business on the following day.

Exercise of Rights

Prior to the Distribution Date (as defined below), the Rights are not exercisable. On or after the Distribution Date, each Right would initially entitle the holder to purchase one one-thousandth (0.001) of a share of the Series A Participating Preferred Stock for a purchase price of $12.68 (subject to adjustment) (the "Purchase Price"). Under certain circumstances set forth in the Rights Agreement, the Company may suspend the exercisability of the Rights.

The "Distribution Date" means the earlier of (1) the close of business on the tenth business day after the Stock Acquisition Date (as defined below), or (2) the close of business on the tenth business day (or such later date as the Board determines prior to the time at which any person becomes an Acquiring Person) after the date that a tender or exchange offer by any person (other than any

"Exempt Person" (as defined below)) is first published, sent or given within the meaning of applicable Securities and Exchange Commission rules, if on the completion of the tender or exchange offer, that person, or any affiliate or associate of that person, would become an Acquiring Person.

Definition of "Acquiring Person"

An "Acquiring Person" is a person (including a legal entity) or group that, together with affiliates and associates of such person or group, acquires beneficial ownership of 4.9% or more of the shares of common stock then outstanding, other than, generally: (A) the Company, its subsidiaries and their respective employee benefit plans or any person or entity organized, appointed or established by the Company for or pursuant to the terms of any such plan; (B) any stockholder that, as of the time of the first public announcement of approval of the Rights Agreement, beneficially owns 4.9% or more of the shares of common stock then outstanding, unless such person thereafter acquires an additional 1% of the outstanding shares of common stock, subject to certain exceptions (including pursuant to a dividend or distribution paid or made by the Company on the outstanding common stock or pursuant to a split or subdivision of the outstanding common stock); (C) a person who becomes an Acquiring Person solely as a result of the Company repurchasing shares of common stock or a stock dividend, stock split, reverse stock split or similar transaction effected by the Company (unless and until such person acquires additional shares, other than in certain specified exempt transactions); (D) certain stockholders who inadvertently or without knowledge of the terms of the Rights, becomes Acquiring Persons and who thereafter reduce the percentage of shares owned below 4.9%; (E) investment advisors to mutual funds, to the extent that such advisor does not hold and no single fund advised by such advisor holds 4.9% or more of the Company's outstanding common stock, and (F) any person whose beneficial ownership of common stock is determined by the Board not to be inconsistent with the purpose of the Rights Agreement.

For purposes of the Rights Agreement, "Exempt Person" generally means a person (including a legal entity) identified in clauses (A), (E) or (F) in the definition of "Acquiring Person" above.

Flip-In

In the event that any person or group becomes an Acquiring Person, each holder of a Right will thereafter have the right to receive, upon exercise, common stock (or, in certain circumstances, cash, property or other securities of the Company), having a value equal to two times the exercise price of the Right. The exercise price is the Purchase Price times the number of units associated with each Right (initially, one). Notwithstanding any of the foregoing, following the occurrence of an Acquiring Person becoming such, all Rights that are, or (under certain circumstances specified in the Rights Agreement) were, beneficially owned by any Acquiring Person or its affiliates and associates and certain transferees thereof will be null and void.

Exchange

At any time following the (1) first date on which there is a public announcement by the Company or an Acquiring Person that an Acquiring Person has become an Acquiring Person or (2) any earlier date on which at least a majority of our Board becomes aware of the existence of an Acquiring Person (the "Stock Acquisition Date") but before the time the Acquiring Person becomes the beneficial owner of 50% or more of the outstanding shares of common stock, the Board may, at its option, exchange the Rights (other than Rights owned by such person or group which have become void), in whole or in part, for common stock at an exchange ratio of one share of common stock per Right (subject to adjustment); provided, that no holder is entitled to receive pursuant to such exchange common stock that would result in a beneficial ownership of more than 4.9% of the common stock then outstanding.

Term and Expiration

The Rights and the Rights Agreement will expire on the earliest of (i) December 30, 2022, (ii) the time at which the Rights are redeemed or exchanged by our Board pursuant to the Rights Agreement, (iii) the repeal of Section 382 of the Internal Revenue Code of 1986, as amended, or any successor statute if the Board determines that the Rights Agreement is no longer necessary or desirable for the preservation of the Tax Benefits, (iv) the first business day following the date on which the Rights Agreement fails to be ratified by the our stockholders at our 2020 annual meeting, and (v) the beginning of a taxable year to which the Board determines that no Tax Benefits may be carried forward.

Redemption

At any time prior to such time as any person becomes an Acquiring Person, we may redeem the Rights in whole, but not in part, at a price of $0.0001 per Right. Immediately upon the action of the Board ordering redemption of the Rights, the Rights will terminate and the only right of the holders of Rights will be to receive the $0.0001 redemption price.

Anti-Dilution Provisions

The Purchase Price payable, and the number of units of Series A Participating Preferred Stock or other securities or property issuable, upon exercise of the Rights, are subject to adjustment from time to time to prevent dilution (i) in the event of a stock dividend on, or a subdivision, combination or reclassification of, the Series A Participating Preferred Stock, (ii) if holders of the Series A Participating Preferred Stock are granted certain rights or warrants to subscribe for Series A Participating Preferred Stock or convertible securities at less than the current market price of the Series A Participating Preferred Stock, or (iii) upon the distribution to holders of the Series A Participating Preferred Stock of evidences of indebtedness or assets (excluding regular quarterly cash dividends) or of subscription rights or warrants (other than those referred to above). Generally, no adjustments to the Purchase Price of less than 1% will be made.

Amendments

For so long as the Rights are then redeemable, any of the provisions of the Rights Agreement may be amended by the Board without the approval of any holders of the Rights. At any time when the Rights are not then redeemable, the provisions of the Rights Agreement may be amended by the Board to make changes which do not adversely affect the interests of holders of Rights, cause the Rights again to become redeemable or cause the Rights Agreement to become otherwise amendable. In addition, the redemption price under the Rights Agreement may not be amended at any time.

Stockholder Rights

Until a Right is exercised, the holder thereof, as such, will have no rights as the Company's stockholder, including the right to vote or to receive dividends. Stockholder may, depending on circumstances, recognize taxable income in the event that the Rights become exercisable for our Series A Participating Preferred Stock (or other consideration) or in the event the Rights are redeemed.

Anti-Takeover Effects of Provisions of Our Certificate of Incorporation, Bylaws, Other Agreements and Delaware Law

Rights Plan

As described above, the Rights Agreement, also referred to as our rights plan, is designed to protect stockholder value by mitigating the likelihood of an "ownership change" that would result in significant limitations to our ability to use our net operating losses or other tax attributes to offset future income. The rights plan provides, subject to certain exceptions that if any person or group acquires 4.9% or more of our outstanding common stock, there would be a triggering event potentially resulting in significant dilution in the voting power and economic ownership of that person or group. Existing stockholders who hold 4.9% or more of our outstanding common stock as of the date of the rights plan will trigger a dilutive event only if they acquire an additional 1% of the outstanding shares of our common stock. For more information about the Rights and the Rights Agreement, see "Rights to Purchase Series A Participating Preferred Stock."

Provisions of Our Certificate of Incorporation and Bylaws; Delaware Anti-Takeover Statute

Some provisions of our Certificate of Incorporation and Bylaws could delay or prevent a change in control of our Company, including provisions which:

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

In addition, we are governed by the provisions of Section 203 of the General Corporation Law of the State of Delaware. These provisions may prohibit large stockholders, in particular those owning 15% or more of our outstanding voting stock, from merging or combining with us. These and other provisions in our governing documents could reduce the price that investors might be willing to pay for shares of our common stock in the future and result in the market price being lower than it would be without these provisions, and may delay, deter or prevent a tender offer or takeover attempt that a stockholder might consider in its best interest.

Elimination of Stockholder Action by Written Consent

Under our Certificate of Incorporation, no action may be taken by the stockholders of the Company except at an annual or special meeting of the stockholders called in accordance with the Bylaws, and no action may be taken by our stockholders by written consent.

DESCRIPTION OF SECURITIES WE ARE OFFERING

We are offering (i) up to shares of our common stock and/or pre-funded warrants to purchase shares of our common stock and (ii) accompanying common warrants to purchase up to an aggregate of shares of our common stock. Each share of common stock or pre-funded warrant is being sold together with a common warrant to purchase one share of common stock. The shares of common stock or pre-funded warrants and accompanying common warrants will be issued separately. Concurrently with the filing of the registration statement of which this prospectus is a part, we are filing a registration statement covering the shares of common stock issuable from time to time upon exercise of the common warrants offered in this offering and the placement agent's warrants. We expect that the registration statement covering such shares will become effective on or after such date as we receive stockholder approval of an amendment to our certificate of incorporation to increase the number of shares of our authorized common stock so as to permit the exercise in full of the common warrants and placement agent's warrants and such amendment has become effective, or the Authorized Common Stock Increase.

Common Stock

The material terms and provisions of our common stock and each other class of our securities which qualifies or limits our common stock are described under the caption "Description of Capital Stock" in this prospectus.

Pre-Funded Warrants

The following summary of certain terms and provisions of pre-funded warrants that are being offered hereby is not complete and is subject to, and qualified in its entirety by, the provisions of the pre-funded warrant, the form of which will be filed as an exhibit to the registration statement of which this prospectus forms a part. Prospective investors should carefully review the terms and provisions of the form of pre-funded warrant for a complete description of the terms and conditions of the pre-funded warrants.

Duration and Exercise Price

Each pre-funded warrant offered hereby will have an initial exercise price per share equal to $0.001. The pre-funded warrants will be immediately exercisable and may be exercised at any time until all of the pre-funded warrants are exercised in full. The exercise price and number of shares of common stock issuable upon exercise is subject to appropriate adjustment in the event of stock dividends, stock splits, reorganizations or similar events affecting our common stock and the exercise price. The pre-funded warrants will be issued in certificated form.

Exercisability

The pre-funded warrants will be exercisable on or after the date of effectiveness of the Authorized Common Stock Increase, at the option of each holder, in whole or in part, by delivering to us a duly executed exercise notice accompanied by payment in full for the number of shares of our common stock purchased upon such exercise (except in the case of a cashless exercise as discussed below). Purchasers of the pre-funded warrants in this offering may elect to deliver their exercise notice following the pricing of the offering and prior to the issuance of the pre-funded warrants at closing to have their pre-funded warrants exercised immediately upon issuance and receive shares of common stock underlying the pre-funded warrants upon closing of this offering. A holder (together with its affiliates) may not exercise any portion of the pre-funded warrant to the extent that the holder would own more than 4.99% (or, at the election of the purchaser, 9.99%) of the outstanding common stock immediately after exercise, except that upon notice from the holder to us, the holder may increase or decrease the beneficial ownership limitation up to 9.99% of the number of shares of our common stock

outstanding immediately after giving effect to the exercise, as such percentage ownership is determined in accordance with the terms of the pre-funded warrants, provided that any increase in such beneficial ownership limitation shall not be effective until 61 days following notice from the holder to us. No fractional shares of common stock will be issued in connection with the exercise of a pre-funded warrant. In lieu of fractional shares, we will round up to the next whole share.

Cashless Exercise

In lieu of making the cash payment otherwise contemplated to be made to us upon such exercise in payment of the aggregate exercise price, the holder may elect instead to exercise its pre-funded warrants on a cashless basis and receive upon such exercise (either in whole or in part) the net number of shares of our common stock determined according to a formula set forth in the pre-funded warrant.

Transferability

Subject to applicable laws, a pre-funded warrant may be transferred at the option of the holder upon surrender of the pre-funded warrant to us together with the appropriate instruments of transfer.

Exchange Listing

There is no established trading market available for the pre-funded warrants on any securities exchange, nationally recognized trading system or otherwise and we do not expect an active trading market to develop. We do not intend to apply to list the pre-funded warrants on Nasdaq, any other securities exchange or any nationally recognized trading system.

Right as a Stockholder

Except as otherwise provided in the pre-funded warrants or by virtue of such holder's ownership of shares of our common stock, the holders of the pre-funded warrants do not have the rights or privileges of holders of our common stock, including any voting rights, until they acquire shares of our common stock upon exercise of their pre-funded warrants.

Fundamental Transaction

In the event of a fundamental transaction, as described in the pre-funded warrants and generally including any reorganization, recapitalization or reclassification of our common stock, the sale, transfer or other disposition of all or substantially all of our properties or assets, our consolidation or merger with or into another person, the acquisition of more than 50% of our outstanding common stock, or any person or group becoming the beneficial owner of 50% of the voting power represented by our outstanding common stock, the holders of the pre-funded warrants will be entitled to receive upon exercise of the pre-funded warrants the kind and amount of securities, cash or other property that the holders would have received had they exercised the pre-funded warrants immediately prior to such fundamental transaction.

Common Warrants

The following summary of certain terms and provisions of Common Warrants that are being offered hereby is not complete and is subject to, and qualified in its entirety by, the provisions of the Common Warrants, the form of which will be filed as an exhibit to the registration statement of which this prospectus forms a part. Prospective investors should carefully review the terms and provisions of the form of Common Warrants for a complete description of the terms and conditions of the common warrants.

Duration and Exercise Price

Each common warrant offered hereby will have an initial exercise price per share equal to $. The common warrants will be exercisable on or after the date of effectiveness of the Authorized Common Stock Increase, and will expire on the fifth anniversary of the date on which the common warrants become exercisable. The exercise price and number of shares of common stock issuable upon exercise is subject to appropriate adjustment in the event of stock dividends, stock splits, reorganizations or similar events affecting our common stock and the exercise price. The common warrants will be issued separately from the common stock, and may be transferred separately immediately thereafter. A common warrant to purchase one share of our common stock will be issued for every one share of common stock purchased in this offering. The common warrants will be issued in certificated form.

Exercisability

The common warrants will be exercisable on or after the date of effectiveness of the Authorized Common Stock Increase, at the option of each holder, in whole or in part, by delivering to us a duly executed exercise notice accompanied by payment in full for the number of shares of our common stock purchased upon such exercise (except in the case of a cashless exercise as discussed below). A holder (together with its affiliates) may not exercise any portion of the common warrant to the extent that the holder would own more than 4.99% (or, at the election of the purchaser, 9.99%) of the outstanding common stock immediately after exercise, except that upon notice from the holder to us, the holder may increase or decrease the beneficial ownership limitation up to 9.99% of the number of shares of our common stock outstanding immediately after giving effect to the exercise, as such percentage ownership is determined in accordance with the terms of the common warrants, provided that any increase in such beneficial ownership limitation shall not be effective until 61 days following notice from the holder to us. No fractional shares of common stock will be issued in connection with the exercise of a common warrant. In lieu of fractional shares, we will round up to the next whole share.

Cashless Exercise

If, at the time a holder exercises its common warrants, a registration statement registering the issuance of the shares of common stock underlying the common warrants under the Securities Act is not then effective or available, then in lieu of making the cash payment otherwise contemplated to be made to us upon such exercise in payment of the aggregate exercise price, the holder may elect instead to receive upon such exercise (either in whole or in part) the net number of shares of common stock determined according to a formula set forth in the common warrants.

Transferability

Subject to applicable laws, the common warrants may be transferred at the election of the holder upon surrender of the common warrant to the warrant agent together with the appropriate instruments of transfer.

Exchange Listing

There is no established trading market available for the pre-funded warrants on any securities exchange, any nationally recognized trading system or otherwise and we do not expect an active trading market to develop. In addition, we do not intend to list the common warrants on Nasdaq, any other securities exchange or any nationally recognized trading system.

Right as a Stockholder

Except as otherwise provided in the common warrants or by virtue of such holder's ownership of shares of our common stock, the holders of the common warrants do not have the rights or privileges of holders of our common stock, including any voting rights, until they acquire shares of our common stock upon exercise of their common warrants.

Fundamental Transaction

In the event of a fundamental transaction, as described in the form of common warrant, and generally including any reorganization, recapitalization or reclassification of our common stock, the sale, transfer or other disposition of all or substantially all of our properties or assets, our consolidation or merger with or into another person, the acquisition of more than 50% of our outstanding common stock, or any person or group becoming the beneficial owner of 50% of the voting power represented by our outstanding common stock, the holders of the common warrants will be entitled to receive upon exercise of the common warrants the kind and amount of securities, cash or other property that the holders would have received had they exercised the common warrants immediately prior to such fundamental transaction. Notwithstanding the foregoing, in the event of a fundamental transaction, the holders will have the option, which may be exercised within 30 days after the consummation of the fundamental transaction, to require us or our successor entity to purchase the common warrants from the holder by paying to the holder an amount of cash equal to the Black Scholes value of the remaining unexercised portion of the common warrant on the date of the consummation of the fundamental transaction. However, if the fundamental transaction is not within our control, including not approved by our board of directors, the holder will only be entitled to receive from us or our successor entity, as of the date of consummation of such fundamental transaction, the same type or form of consideration (and in the same proportion), at the value per share of Common Stock in the Fundamental Transaction for each Warrant Share underlying this Warrant, that is being offered and paid to the holders of Common Stock of the Company in connection with the Fundamental Transaction, whether that consideration be in the form of cash, stock or any combination thereof, or whether the holders of common stock are given the choice to receive from among alternative forms of consideration in connection with the fundamental transaction.

PLAN OF DISTRIBUTION

We engaged H.C. Wainwright & Co., LLC ("H.C. Wainwright" or the "placement agent") to act as our exclusive placement agent to solicit offers to purchase the securities offered by this prospectus on a reasonable best efforts basis. H.C. Wainwright is not purchasing or selling any securities, nor are they required to arrange for the purchase and sale of any specific number or dollar amount of securities, other than to use their "reasonable best efforts" to arrange for the sale of the securities by us. Therefore, we may not sell the entire amount of securities being offered. We will enter into a securities purchase agreement directly with the institutional investors, at the investor's option, who purchase our securities in this offering. The securities purchase agreements are expected to provide those investors with certain representations, warranties and covenants from us, which representations, warranties and covenants will not be available to other investors who will not execute a securities purchase agreement in connection with the purchase of our securities in this offering. Investors who do not enter into a securities purchase agreement with us shall rely solely on this prospectus in connection with the purchase of our securities in this offering. H.C. Wainwright may engage one or more sub-placement agents or selected dealers to assist with the offering.

Fees and Expenses

The following table show the per share and common warrant and pre-funded warrant and comment warrant placement agent fees and total placement agent fees we will pay in connection with the sale of the securities in this offering, assuming the purchase of all of the securities we are offering.

Per share and common warrant placement agent cash fees	$
Per pre-funded warrant and common warrant placement agent cash fees	$
Total	$

We have agreed to pay the placement agent a total cash fee equal to 7.0% of the gross proceeds of this offering and a management fee equal to 1.0% of the gross proceeds raised in this offering. We will also pay the placement agent a non-accountable expense allowance of $35,000, $12,900 for closing expenses, and will reimburse the placement agent's legal fees and expenses in an amount up to $50,000. We estimate the total offering expenses of this offering that will be payable by us, excluding the placement agent fees and expenses, will be approximately $. After deducting the placement agent fees and our estimated offering expenses, we expect the net proceeds from this offering to be approximately $.

Placement Agent's Warrants

We have agreed to grant compensation warrants to H.C. Wainwright to purchase a number of shares of our common stock equal to 6.0% of the aggregate number of shares of common stock and pre-funded warrants sold to the investors in this offering. The placement agent's warrants will have an exercise price of $ (125% of the combined public offering price per share of common stock and common warrant), will be exercisable on or after the date of effectiveness of the Authorized Common Stock Increase and will terminate on the five year anniversary of the date on which the placement agent's warrants become exercisable. The placement agent's warrants are registered on the registration statement of which this prospectus is a part. Pursuant to FINRA Rule 5110(g), the compensation warrants and any shares issued upon exercise of the compensation warrants shall not be sold, transferred, assigned, pledged, or hypothecated, or be the subject of any hedging, short sale, derivative, put, or call transaction that would result in the effective economic disposition of the securities by any person for a period of 180 days immediately following the date of effectiveness or commencement of sales of this offering, except the transfer of any security:

- by operation of law or by reason of our reorganization;

- to any FINRA member firm participating in the offering and the officers or partners thereof, if all securities so transferred remain subject to the lock-up restriction set forth above for the remainder of the time period;
- if the aggregate amount of our securities held by the placement agent or related persons do not exceed 1% of the securities being offered;
- that is beneficially owned on a pro rata basis by all equity owners of an investment fund, provided that no participating member manages or otherwise directs investments by the fund and the participating members in the aggregate do not own more than 10% of the equity in the fund; or
- the exercise or conversion of any security, if all securities remain subject to the lock-up restriction set forth above for the remainder of the time period.

Right of First Refusal

In addition, we have granted a right of first refusal to the placement agent pursuant to which it has the right to act as the exclusive advisor, manager or underwriter or agent, as applicable, if the Company or its subsidiaries sell or acquire a business, finance any indebtedness using an agent, or raise capital through a public or private offering of equity or debt securities at any time prior to the 12 month anniversary of the closing date of this offering.

Other Relationships

The placement agent acted as the placement agent in connection with our registered direct offering of common stock that closed on April 2, 2020, for which it received customary fees and expenses. The placement agent may, from time to time, engage in transactions with or perform services for us in the ordinary course of its business and may continue to receive compensation from us for such services.

Determination of Offering Price

The combined public offering price per share and common warrant and the combined public offering price per pre-funded warrant and common warrant we are offering and the exercise prices and other terms of the warrants were negotiated between us and the investors, in consultation with the placement agent based on the trading of our common stock prior to this offering, among other things. Other factors considered in determining the public offering prices of the securities we are offering and the exercise prices and other terms of the warrants include the history and prospects of our company, the stage of development of our business, our business plans for the future and the extent to which they have been implemented, an assessment of our management, general conditions of the securities markets at the time of the offering and such other factors as were deemed relevant.

Lock-up Agreements

We and each of our officers and directors have agreed with the placement agent to be subject to a lock-up period of 90 days following the date of this prospectus. This means that, during the applicable lock-up period, we may not offer for sale, contract to sell, or sell any shares of our common stock or any securities convertible into, or exercisable or exchangeable for, shares of our common stock subject to certain customary exception such as issuing stock options to directors, officers, employees and consultants under our existing plans. The placement agent may, in its sole discretion and without notice, waive the terms of any of these lock-up agreements. In addition, we have agreed to not issue any shares of common stock or securities exercisable or convertible into shares of common stock for a period of ninety (90) days following the closing date of this offering, subject to certain exceptions, and

to not issue any securities that are subject to a price reset based on trading prices of our common stock or upon a specified or contingent event in the future, or enter into an agreement to issue securities at a future determined price, until the date that no warrants are outstanding.

Transfer Agent and Registrar

The transfer agent and registrar for our common stock is Computershare Trust Company, N.A., 250 Royall Street, Canton, MA 02021.

The Nasdaq Global Select Market listing

Our common stock is listed on The Nasdaq Global Select Market under the symbol "VVUS."

Indemnification

We have agreed to indemnify the placement agent against certain liabilities, including liabilities under the Securities Act of 1933, or to contribute to payments the placement agent may be required to make with respect to any of these liabilities.

Regulation M

The placement agent may be deemed to be an underwriter within the meaning of Section 2(a)(11) of the Securities Act and any fees received by it and any profit realized on the sale of the securities by it while acting as principal might be deemed to be underwriting discounts or commissions under the Securities Act. The placement agent will be required to comply with the requirements of the Securities Act and the Exchange Act of 1934, as amended (the "Exchange Act"), including, without limitation, Rule 10b-5 and Regulation M under the Exchange Act. These rules and regulations may limit the timing of purchases and sales of our securities by the placement agent. Under these rules and regulations, the placement agent may not (i) engage in any stabilization activity in connection with our securities; and (ii) bid for or purchase any of our securities or attempt to induce any person to purchase any of our securities, other than as permitted under the Exchange Act, until they have completed their participation in the distribution.

MATERIAL U.S. FEDERAL INCOME TAX CONSIDERATIONS

The following is a general discussion of the material U.S. federal income considerations applicable to the ownership and disposition of shares of our common stock and warrants acquired in this offering. This discussion is for general information only and is not tax advice. Accordingly, all prospective holders of our common stock and warrants should consult their own tax advisors with respect to the U.S. federal, state, local and non-U.S. tax consequences of the purchase, ownership and disposition of our common stock and warrants. This discussion is based on current provisions of the U.S. Internal Revenue Code of 1986, as amended, which we refer to as the Code, existing and proposed U.S. Treasury Regulations promulgated thereunder, current administrative rulings and judicial decisions, all as in effect as of the date of this prospectus, all of which are subject to change or to differing interpretation, possibly with retroactive effect. Any change could alter the tax consequences described in this prospectus. We assume in this discussion that each holder holds shares of our common stock and warrants as capital assets within the meaning of Section 1221 of the Code (generally property held for investment).

This discussion does not address all aspects of U.S. federal income taxation that may be relevant to a particular holder in light of that holder's individual circumstances, does not address the alternative minimum or Medicare contribution taxes, and does not address any aspects of U.S. state, local or non-U.S. taxes or any U.S. federal taxes other than income tax. This discussion also does not consider any specific facts or circumstances that may apply to a holder and does not address aspects of U.S. federal income taxation that may be applicable to holders that are subject to special tax rules, including without limitation:

- insurance companies;
- tax-exempt organizations;
- financial institutions;
- brokers or dealers in securities;
- regulated investment companies;
- real estate investment trusts;
- pension plans, individual retirement accounts and other tax deferred accounts;
- persons that mark their securities to market;
- controlled foreign corporations;
- passive foreign investment companies;
- "dual resident" corporations;
- persons that receive our common stock or warrants as compensation for the performance of services;
- owners that hold our common stock or warrants as part of a straddle, hedge, conversion transaction, synthetic security or other integrated investment;
- owners that own, or are deemed to own, more than 5% of our capital stock (except to the extent specifically set forth below);
- persons that have a functional currency other than the U.S. dollar; and
- certain U.S. expatriates.

In addition, this discussion does not address the tax treatment of partnerships or other pass-through entities for U.S. federal income tax purposes, or persons who hold our common stock or warrants through partnerships or other pass-through entities for U.S. federal income tax purposes. A partner in a partnership or other pass-through entity that will hold our common stock or warrants should consult his, her or its own tax advisor regarding the tax consequences of acquiring, holding and disposing of our common stock or warrants through a partnership or other pass-through entity, as applicable.

As used in this prospectus, the term "U.S. holder" means a beneficial owner of common stock or warrants that is for U.S. federal income tax purposes:

- a citizen or individual resident of the United States;
- a corporation (or other entity properly classified as a corporation for U.S. federal income tax purposes) created or organized in or under the laws of the United States, any state within the United States, or the District of Columbia;
- an estate, the income of which is subject to U.S. federal income taxation regardless of its source; or
- a trust, if (i) a U.S. court is able to exercise primary supervision over the trust's administration and one or more "United States persons" (as defined in the Code) have the authority to control all substantial decisions of the trust, or (ii) in the case of a trust that was treated as a domestic trust under the laws in effect before 1997, a valid election is in place under applicable U.S. Treasury regulations to treat such trust as a domestic trust.

The term "non-U.S. holder" means any beneficial owner of common stock or warrants that is not a U.S. holder and is not a partnership or other entity properly classified as a partnership for U.S. federal income tax purposes. For the purposes of this prospectus, U.S. holders and non-U.S. holders are referred to collectively as "holders."

There can be no assurance that the Internal Revenue Service, which we refer to as the IRS, will not challenge one or more of the tax consequences described herein. We have not obtained, nor do we intend to obtain, a ruling from the IRS with respect to the U.S. federal income tax consequences of the purchase, ownership or disposition of our common stock or warrants.

Allocation of Purchase Price Between Share of Common Stock or Pre-Funded Warrant and Accompanying Common Warrant

Each share of common stock (or, in lieu of common stock, each pre-funded warrant) and the accompanying common warrant issued pursuant to this offering should be treated as an "investment unit" consisting of one share of common stock or pre-funded warrant, as the case may be, and the accompanying common warrant. The purchase price for each investment unit will be allocated between these components in proportion to their relative fair market values at the time the investment unit is purchased by the holder. This allocation will establish a holder's initial tax basis for U.S. federal income tax purposes in his, her or its share of common stock (or, in lieu of common stock, pre-funded warrant) and common warrant included in each investment unit. We will not be providing holders with such allocation, and it is possible that different holders will reach different determinations regarding such allocation. A holder's allocation of purchase price between each share of common stock (or, in lieu of common stock, each pre-funded warrant) and the accompanying common warrant is not binding on the IRS or the courts, and no assurance can be given that the IRS or the courts will agree with a holder's allocation. The separation of the share of common stock (or, in lieu of common stock, pre-funded warrant) and the common stock warrant included in each investment unit should not be a taxable event for U.S. federal income tax purposes.

Accordingly, each prospective holder should consult his, her or its own tax advisor with respect to the allocation, and the risks associated with such allocation, of the holder's purchase price for the investment unit between our shares of common stock (or, in lieu of common stock, pre-funded warrants) and common warrants.

Treatment of Pre-Funded Warrants

Although it is not entirely free from doubt, a pre-funded warrant should be treated as a share of our common stock for U.S. federal income tax purposes and a holder of pre-funded warrants should generally be taxed in the same manner as a holder of common stock, as described below. Accordingly, no gain or loss should be recognized upon the exercise of a pre-funded warrant and, upon exercise, the holding period of a pre-funded warrant should carry over to the share of common stock received. Similarly, the tax basis of the pre-funded warrant should carry over to the share of common stock received upon exercise, increased by the exercise price of $0.001 per share. Each holder should consult his, her or its own tax advisor regarding the risks associated with the acquisition of pre-funded warrants pursuant to this offering (including potential alternative characterizations). The balance of this discussion generally assumes that the characterization described above will be respected for U.S. federal income tax purposes.

Tax Consequences to U.S. Holders

Exercise or Expiration of Common Warrants

Subject to the discussion below with respect to the cashless exercise of a common warrant, a U.S. holder will not recognize income, gain or loss on the exercise of a common warrant. A U.S. holder's tax basis in the common stock received upon the exercise of a common warrant will equal the sum of (i) the initial tax basis of the common warrant exercised (as determined pursuant to the rules discussed above under "Allocation of Purchase Price Between Common Stock or Pre-Funded Warrant and Accompanying Common Warrant to Purchase Our Common Stock") and (ii) the exercise price of the common warrant. The U.S. holder's holding period for the common stock received upon exercise of a common warrant will begin on the day after such exercise (or possibly on the date of exercise) and will not include the period during which the U.S. holder held the common warrant.

The tax consequences of a cashless exercise of a common warrant are not clear under current U.S. tax law. A cashless exercise may be tax-free, either because the exercise is not a realization event or because the exercise is treated as a recapitalization for U.S. federal income tax purposes. In either case, a U.S. holder's basis in the common stock received in connection with the cashless exercise would equal the U.S. holder's basis in the common warrants surrendered in connection with the cashless exercise. If the cashless exercise was not a realization event, it is unclear whether a U.S. holder's holding period for the common stock would be treated as commencing on the date of exercise or on the day following the date of exercise. If the cashless exercise were treated as a recapitalization, the holding period of the common stock would include the holding period of the common warrants surrendered in connection with the cashless exercise.

It is possible that a cashless exercise could be treated in part as a taxable exchange in which gain or loss would be recognized. In such event, a U.S. holder could be deemed to have surrendered common warrants having an aggregate fair market value equal to the exercise price for the total number of common warrants to be exercised. The U.S. holder would recognize capital gain or loss in an amount equal to the difference between the amount deemed realized (*i.e.*, the exercise price for the common warrants exercised) and the U.S. holder's tax basis in the common warrants deemed surrendered to pay the exercise price. In this case, a U.S. holder's tax basis in the common stock received would equal the sum of the U.S. holder's initial investment in the exercised common warrants and the exercise price for such common warrants. It is unclear whether a U.S. holder's holding period

for the common stock would commence on the date of exercise of the common warrants or the day following the date of exercise of the common warrants.

Due to the absence of authority on the U.S. federal income tax treatment of a cashless exercise, there can be no assurance which, if any, of the alternative approaches described above would be adopted by the IRS or a court of law. Accordingly, U.S. holders should consult their own tax advisors regarding the tax consequences of a cashless exercise.

If a common warrant is allowed to lapse unexercised, a U.S. holder generally will recognize a capital loss equal to such holder's tax basis in the common warrant. The deductibility of capital losses is subject to significant limitations.

Distributions on Our Common Stock

As discussed above under "—Dividend Policy," we do not currently expect to make distributions on our common stock. In the event that we do make distributions on our common stock to a U.S. holder, those distributions generally will constitute dividends for U.S. federal income tax purposes to the extent paid from our current or accumulated earnings and profits as determined under U.S. federal income tax principles. If a distribution exceeds our current and accumulated earnings and profits, the excess will be treated as a tax-free return of the U.S. holder's investment that is applied against and reduces, but not below zero, a U.S. holder's adjusted tax basis in our common stock. Any remaining excess will be treated as capital gain, subject to the tax treatment described below in "—Gain on Sale, Exchange or Other Taxable Disposition of Our Common Stock and Warrants." Dividends paid by us generally will be eligible for the reduced rates of tax for qualified dividend income allowed to individual U.S. holders and for the dividends received deduction allowed to corporate U.S. holders, in each case assuming that certain holding period and other requirements are satisfied.

Constructive Distributions on Our Warrants

Under Section 305 of the Code, an adjustment to the number of shares of common stock that will be issued on the exercise of our warrants (whether pre-funded warrants or common warrants), or an adjustment to the exercise price of such warrants, may be treated as a constructive distribution to a U.S. Holder of the warrants if, and to the extent that, such adjustment has the effect of increasing such U.S. Holder's proportionate interest in our "earnings and profits" or assets, depending on the circumstances of such adjustment (for example, if such adjustment is to compensate for a distribution of cash or other property to holders of our common stock). Adjustments to the exercise price of a warrant made pursuant to a bona fide reasonable adjustment formula that has the effect of preventing dilution of the interest of the holder of the warrant should generally not result in a constructive distribution. Any constructive distributions generally would be subject to the tax treatment described above under "—Distributions on our Common Stock."

Sale, Exchange or Other Taxable Disposition of Our Common Stock or Warrants

Upon the sale, exchange, or other taxable disposition of our common stock or warrants (whether pre-funded warrants or common warrants), a U.S. holder will recognize gain or loss equal to the difference between the amount realized upon the disposition and the U.S. holder's tax basis in the common stock or warrants sold or exchanged. Any gain or loss generally will be capital gain or loss, and will be long-term capital gain or loss if the U.S. holder's holding period for the common stock or common warrants exceeded one year at the time of the disposition. Certain U.S. holders (including individuals) are currently eligible for preferential rates of U.S. federal income taxation in respect of long-term capital gains. The deductibility of capital losses is subject to significant limitations.

Information Reporting and Backup Withholding

In general, information reporting requirements may apply to distributions (whether actual or constructive) paid to a U.S. holder on our common stock or warrants, and to the proceeds of the sale, exchange or other disposition of our common stock and warrants, unless the U.S. holder is an exempt recipient. Backup withholding will apply to such payments if the U.S. holder fails to provide a taxpayer identification number, a certification of exempt status or has been notified by the IRS that it is subject to backup withholding (and such notification has not been withdrawn). Backup withholding is not an additional tax. Any amounts withheld under the backup withholding rules will be allowed as a refund or a credit against a U.S. holder's U.S. federal income tax liability provided the required information is timely furnished to the IRS.

Tax Consequences to Non-U.S. Holders

Exercise or Expiration of Common Warrants

In general, a non-U.S. holder will not be required to recognize income, gain or loss upon the exercise of a common warrant by payment of the exercise price. To the extent that a cashless exercise results in a taxable exchange, the consequences would be similar to those described below under "—Disposition of our Common Stock or Warrants."

The expiration of a common warrant will be treated as if the non-U.S. holder sold or exchanged the common warrant and recognized a capital loss equal to the non-U.S. holder's basis in the common warrant. A non-U.S. holder will not be able to utilize a loss recognized upon expiration of a common warrant against the Non-U.S. holder's U.S. federal income tax liability, however, unless the loss (i) is effectively connected with the non-U.S. holder's conduct of a trade or business within the United States (and, if an income tax treaty applies, is attributable to a "permanent establishment" or "fixed base" in the United States) or (ii) is treated as a U.S. source loss and the non-U.S. holder is present in the United States 183 days or more in the taxable year of disposition and certain other conditions are met.

Distributions on Our Common Stock

As discussed above under "—Dividend Policy," we do not currently expect to make distributions on our common stock. In the event that we do make distributions to holders of our common stock or if we are treated as making a constructive distribution to holders of our warrants or pre-funded warrants, those distributions generally will constitute dividends for U.S. federal income tax purposes to the extent paid from our current or accumulated earnings and profits, as determined under U.S. federal income tax principles. If a distribution exceeds our current and accumulated earnings and profits, the excess will be treated as a tax-free return of the non-U.S. holder's investment, up to such non-U.S. holder's tax basis in the common stock. Any remaining excess will be treated as capital gain, subject to the tax treatment described below in "—Gain on Sale, Exchange or Other Taxable Disposition of Our Common Stock."

Distributions (including constructive distributions) made to a non-U.S. holder that are treated as dividends generally will be subject to withholding of U.S. federal income tax at a rate of 30% of the gross amount or such lower rate as may be specified by an applicable income tax treaty between the United States and such holder's country of residence, unless such dividends are effectively connected with a trade or business conducted by a non U.S. holder within the U.S (as discussed below). A non-U.S. holder of our common stock who claims the benefit of an applicable income tax treaty between the United States and such holder's country of residence generally will be required to provide a properly executed IRS Form W-8BEN or W-8BEN-E (or successor form), as applicable, and satisfy applicable certification and other requirements. Non-U.S. holders are urged to consult their own tax advisors regarding their entitlement to benefits under a relevant income tax treaty. A non-U.S. holder that is eligible for a reduced rate of U.S. withholding tax under an income tax treaty may be able to

obtain a refund or credit of any excess amounts withheld by timely filing the required information with the IRS.

Dividends that are treated as effectively connected with a trade or business conducted by a non-U.S. holder within the United States and, if an applicable income tax treaty so provides, that are attributable to a "permanent establishment" or a "fixed base" maintained by the non-U.S. holder within the United States, generally are exempt from the 30% withholding tax if the non-U.S. holder satisfies applicable certification and disclosure requirements. U.S. effectively connected income, net of specified deductions and credits, is generally taxed at the same graduated U.S. federal income tax rates applicable to United States persons (as defined in the Code). Any U.S. effectively connected income received by a non-U.S. holder that is a corporation may also be subject to an additional "branch profits tax" at a 30% rate or such lower rate as may be specified by an applicable income tax treaty between the United States and such holder's country of residence.

Constructive Distributions on Our Warrants

As described above under "—Tax Consequences to U.S. Holders—Constructive Distributions on our Warrants," an adjustment to the warrants could result in a constructive distribution to a non-U.S. holder, which would be treated as described under "—Distributions on Our Common Stock" above. Any resulting withholding tax attributable to deemed dividends would be collected from other amounts payable or distributable to the non-U.S. holder. Non U.S. holders should consult their tax advisors regarding the proper treatment of any adjustments to the warrants.

In addition, regulations governing "dividend equivalents" under Section 871(m) of the Code may apply to the pre-funded warrants. Under those regulations, an implicit or explicit payment made to the holder of pre-funded warrants that references a distribution on our common stock would generally be taxable to a non-U.S. holder in the manner described under "—Distributions on our Common Stock" below. Such dividend equivalent amount would be taxable and subject to withholding whether or not there is actual payment of cash or other property, and we may satisfy any withholding obligations by withholding from other amounts due to the non-U.S. holder. Non-U.S. holders are encouraged to consult their own tax advisors regarding the application of Section 871(m) of the Code to the pre-funded warrants.

Sale, Exchange or Other Taxable Disposition of Our Common Stock or Warrants

In general, a non-U.S. holder will not be subject to any U.S. federal income tax on any gain realized upon such holder's sale, exchange or other taxable disposition of shares of our common stock or warrants unless:

- the gain is effectively connected with the non-U.S. holder's conduct of a U.S. trade or business and, if an applicable income tax treaty so provides, is attributable to a "permanent establishment" or a "fixed base" maintained by such non-U.S. holder in the United States, in which case the non-U.S. holder generally will be taxed on such gain at the graduated U.S. federal income tax rates applicable to United States persons (as defined in the Code) and, if the non-U.S. holder is a foreign corporation, the branch profits tax described above in "—Distributions on Our Common Stock" also may apply to such gain;

- the non-U.S. holder is a nonresident alien individual who is present in the United States for 183 days or more in the taxable year of the taxable disposition and certain other conditions are met, in which case the non-U.S. holder will be subject to a 30% tax (or such lower rate as may be specified by an applicable income tax treaty between the United States and such holder's country of residence) on the net gain derived from the taxable disposition, which may be offset by certain U.S. source capital losses of the non-U.S. holder, if any; or

- we are, or have been, at any time during the five-year period preceding such taxable disposition (or the non-U.S. holder's holding period, if shorter) a "U.S. real property holding corporation," unless our common stock is regularly traded on an established securities market and the non-U.S. holder holds no more than 5% of our outstanding common stock, directly or indirectly, during the shorter of the 5-year period ending on the date of the taxable disposition or the period that the non-U.S. holder held our common stock. If we are determined to be a U.S. real property holding corporation and the foregoing exception does not apply, then a purchaser may withhold 15% of the proceeds payable to a non-U.S. holder from a sale of our common stock or warrants, and the non-U.S. holder generally will be taxed on its net gain derived from the disposition at the graduated U.S. federal income tax rates applicable to United States persons (as defined in the Code). Generally, a corporation is a U.S. real property holding corporation only if the fair market value of its U.S. real property interests equals or exceeds 50% of the sum of the fair market value of its worldwide real property interests plus its other assets used or held for use in a trade or business. Although there can be no assurance, we do not believe that we are, or have been, a U.S. real property holding corporation, or that we are likely to become one in the future. No assurance can be provided that our common stock will be regularly traded on an established securities market for purposes of the rules described above.

Information Reporting and Backup Withholding

We must report annually to the IRS and to each non-U.S. holder the gross amount of the distributions paid on our common stock (and constructive distributions on our warrants) to such holder and the tax withheld, if any, with respect to such distributions. Non-U.S. holders may have to comply with specific certification procedures to establish that the holder is not a United States person (as defined in the Code) in order to avoid backup withholding at the applicable rate with respect to dividends on our common stock or warrants. Dividends paid to non-U.S. holders subject to the U.S. withholding tax, as described above in "—Distributions on Our Common Stock," generally will be exempt from U.S. backup withholding.

Information reporting and backup withholding generally will apply to the proceeds of a disposition of our common stock and warrants by a non-U.S. holder effected by or through the U.S. office of any broker, U.S. or foreign, unless the holder certifies its status as a non-U.S. holder and satisfies certain other requirements, or otherwise establishes an exemption. Generally, information reporting and backup withholding will not apply to a payment of disposition proceeds to a non-U.S. holder where the transaction is effected outside the United States through a non-U.S. office of a broker. However, for information reporting purposes, dispositions effected through a non-U.S. office of a broker with substantial U.S. ownership or operations generally will be treated in a manner similar to dispositions effected through a U.S. office of a broker. Non-U.S. holders should consult their own tax advisors regarding the application of the information reporting and backup withholding rules to them.

Copies of information returns may be made available to the tax authorities of the country in which the non-U.S. holder resides or is incorporated under the provisions of a specific treaty or agreement.

Backup withholding is not an additional tax. Any amounts withheld under the backup withholding rules from a payment to a non-U.S. holder can be refunded or credited against the non-U.S. holder's U.S. federal income tax liability, if any, provided that an appropriate claim is filed with the IRS.

FATCA

The Foreign Account Tax Compliance Act, or FATCA, generally imposes a 30% withholding tax on dividends (including constructive dividends) on, and gross proceeds from the sale or other disposition of, our common stock and Warrants if paid to a non-U.S. entity, whether such non-U.S. entity is the beneficial owner or an intermediary, unless (i) if the non-U.S. entity is a "foreign financial institution,"

the non-U.S. entity undertakes certain due diligence, reporting, withholding, and certification obligations, (ii) if the non-U.S. entity is not a "foreign financial institution," the non-U.S. entity identifies certain of its U.S. investors, if any, or (iii) the non-U.S. entity is otherwise exempt under FATCA.

Withholding under FATCA generally will apply to payments of dividends (including constructive dividends) on our common stock and warrants. While withholding under FATCA may apply to payments of gross proceeds from a sale or other disposition of our common stock or warrants, under proposed U.S. Treasury Regulations withholding on payments of gross proceeds is not required. Although such regulations are not final, applicable withholding agents may rely on the proposed regulations until final regulations are issued.

An intergovernmental agreement between the United States and an applicable foreign country may modify the requirements described in this section. Under certain circumstances, a holder may be eligible for refunds or credits of the tax. Non-U.S. holders should consult their own tax advisors regarding the possible implications of FATCA on their investment in our common stock or warrants.

The preceding discussion of material U.S. federal income tax considerations is for informational purposes only. It is not tax advice. Prospective investors should consult their own tax advisors regarding the particular U.S. federal, state, local and non-U.S. tax consequences of purchasing, holding and disposing of our common stock or warrants, including the consequences of any proposed changes in applicable laws.

LEGAL MATTERS

Certain legal matters relating to the issuance of the securities offered by this prospectus will be passed upon for us by Hogan Lovells US LLP, San Francisco, California. Certain legal matters will be passed upon for the Placement Agent by Ellenoff Grossman & Schole LLP, New York, New York.

EXPERTS

The consolidated financial statements of VIVUS, Inc. as of December 31, 2019 and 2018 and for each of the two years in the period ended December 31, 2019 incorporated by reference in this prospectus have been so incorporated in reliance on the report of OUM & Co. LLP, an independent registered public accounting firm (the report on the financial statements contains an explanatory paragraph regarding our ability to continue as a going concern), incorporated in this prospectus by reference, given on the authority of such firm as experts in accounting and auditing.

WHERE YOU CAN FIND ADDITIONAL INFORMATION

We have filed with the SEC a registration statement on Form S-1 under the Securities Act with respect to the securities being offered under this prospectus. This prospectus does not contain all of the information set forth in the registration statement and the exhibits to the registration statement. For further information with respect to us and the securities being offered under this prospectus, we refer you to the registration statement and the exhibits and schedules filed as a part of the registration statement. We are a reporting company and file annual, quarterly and current reports, proxy statements and other information with the SEC. The SEC maintains an Internet site that contains reports, proxy and information statements, and other information regarding issuers, including us, that file electronically with the SEC. The SEC's Internet site can be found at www.sec.gov.

INCORPORATION OF CERTAIN INFORMATION BY REFERENCE

The SEC allows us to "incorporate by reference" into this prospectus information that we file with the SEC, which means that important information can be disclosed to you by referring you to those documents and those documents and information will be considered part of this prospectus. The information incorporated by reference is an important part of this prospectus that you should read. Any statement contained in this prospectus or in a document incorporated or deemed to be incorporated by reference in this prospectus will be deemed to be modified or superseded to the extent that a statement contained herein or in any other subsequently filed document that is incorporated or deemed to be incorporated herein modifies or supersedes that earlier statement. Any statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this prospectus. This prospectus also contains summaries of certain provisions contained in some of the documents described in this prospectus, but reference is made to the actual documents for complete information. All of these summaries are qualified in their entirety by reference to the actual documents.

The information and documents listed below, which the Company has filed with the SEC, are incorporated by reference into this prospectus:

- our Annual Report on Form 10-K for the fiscal year ended December 31, 2019, filed with the SEC on March 3, 2020, as amended by Amendment No. 1 to Annual Report on Form 10-K/A, filed with the SEC on April 29, 2020;
- our Quarterly Report on Form 10-Q for the quarter ended March 31, 2020, filed with the SEC on May 6, 2020;

- our Current Reports on Form 8-K filed with the SEC on January 7, 2020; January 31, 2020; February 5, 2020; February 19, 2020; February 21, 2020; March 2, 2020; March 6, 2020; March 31, 2020; April 1, 2020; April 2, 2020; April 3, 2020; May 1, 2020 and June 2, 2020; and

- description of our common stock contained in our Registration Statement on Form 8-A filed with the SEC on February 24, 1994, including any amendments or reports filed for the purpose of updating such description.

We also incorporate by reference any future filings (other than current reports furnished under Item 2.02 or Item 7.01 of Form 8-K and exhibits furnished with that form that are related to Item 2.02 or Item 7.01, unless the relevant report expressly provides to the contrary) we make with the SEC subsequent to this prospectus pursuant to Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act, including those made after the date of the initial filing of the registration statement of which this prospectus is a part and prior to effectiveness of such registration statement, until we file a post-effective amendment that indicates the termination of the offering of the securities made pursuant to this prospectus, which will become a part of this prospectus from the respective dates that those documents are filed with the SEC.

Documents incorporated by reference are available from us, without charge. You may obtain documents incorporated by reference in this prospectus (including exhibits to these documents) at no cost, by written or oral request directed to:

VIVUS, Inc.
900 E. Hamilton Avenue, Suite 500
Campbell, California 95008
Attn: Corporate Secretary
Phone: (650) 934-5200

Documents incorporated by reference may also be accessed on our website at http://ir.vivus.com/financial-information. The information contained on, or that may be accessed through, our website is not a part of, and is not incorporated by reference into, this prospectus or the registration statement of which this prospectus forms a part, and should not be considered a part of any other document filed with or furnished to the SEC. All website addresses contained in this prospectus are intended to be inactive, textual references only.

Table of Contents

Shares of Common Stock

Pre-Funded Warrants to Purchase up to Shares of Common Stock

Warrants to Purchase up to Shares of Common Stock

PRELIMINARY PROSPECTUS

H.C. Wainwright & Co.

, 2020

PART II
INFORMATION NOT REQUIRED IN PROSPECTUS

Item 13. Other Expenses of Issuance and Distribution

The following table sets forth the expenses to be incurred in connection with the offering described in this registration statement, all of which will be paid by the registrant. All amounts are estimates except the Securities and Exchange Commission ("SEC") registration fee.

	Amount
SEC registration fee	$ 24,078
FINRA filing fee	$ 18,000
Legal fees and expenses	$ 225,000
Clearing expenses	$ 12,900
Placement agent expenses	$ 85,000
Accounting fees and expenses	$ 45,000
Printing expenses	$ 18,000
Miscellaneous fees	$ 25,000
Total	$ 453,000

Item 14. Indemnification of Directors and Officers

The following is a general summary of certain aspects of the General Corporation Law of the State of Delaware (the "Delaware General Corporation Law") and the Amended and Restated Certificate of Incorporation (the "Certificate of Incorporation") and the Amended and Restated Bylaws, as amended (the "Bylaws") of VIVUS, Inc. (the "Company") related to arrangements under which controlling persons, directors and officers of the Company are indemnified against liability which they may incur in their capacities as such, and does not purport to be complete. It is qualified in its entirety by reference to the detailed provisions of the Delaware General Corporation Law, the Certificate of Incorporation and the Bylaws.

Delaware General Corporation Law

As a Delaware corporation, the Company is subject to the provisions of the Delaware General Corporation Law. Section 145(a) of the Delaware General Corporation Law provides that a corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation), by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by the person in connection with such action, suit or proceeding if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe the person's conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that the person's conduct was unlawful.

Section 145(b) of the Delaware General Corporation Law states that a corporation may indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against expenses (including attorneys' fees) actually and reasonably incurred by the person in connection with the defense or settlement of such action or suit if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which the person shall have been adjudged to be liable to the corporation unless and only to the extent that the Delaware Court of Chancery or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses as the Delaware Court of Chancery or such other court shall deem proper.

Section 145(c) of the Delaware General Corporation Law provides that to the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in subsections (a) and (b) of Section 145, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith.

Section 145(d) of the Delaware General Corporation Law states that any indemnification under subsections (a) and (b) of Section 145 (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the present or former director, officer, employee or agent is proper in the circumstances because the person has met the applicable standard of conduct set forth in subsections (a) and (b) of Section 145. Such determination shall be made with respect to a person who is a director or officer at the time of such determination (1) by a majority vote of the directors who are not parties to such action, suit or proceeding, even though less than a quorum, (2) by a committee of such directors designated by majority vote of such directors, even though less than a quorum, (3) if there are no such directors, or if such directors so direct, by independent legal counsel in a written opinion or (4) by the stockholders.

Section 145(f) of the Delaware General Corporation Law states that the indemnification and advancement of expenses provided by, or granted pursuant to, the other subsections of Section 145 shall not be deemed exclusive of any other rights to which those seeking indemnification or advancement of expenses may be entitled under any bylaw, agreement, vote of stockholders or disinterested directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office.

Section 145(g) of the Delaware General Corporation Law provides that a corporation shall have the power to purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, against any liability asserted against such person and incurred by such person in any such capacity or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under the provisions of Section 145.

Section 145(j) of the Delaware General Corporation Law states that the indemnification and advancement of expenses provided by, or granted pursuant to, Section 145 shall, unless otherwise provided when authorized or ratified, continue as to a person who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

Certificate of Incorporation

The Certificate of Incorporation provides for the indemnification of the officers and directors of the Company to the fullest extent permitted by applicable law. The Certificate of Incorporation generally states that each person who was or is made a party to, or is threatened to be made a party to, any civil or criminal action, suit or administrative or investigative proceeding by reason of the fact that such person or his or her testator or intestate is or was a director, officer or employee of the Company or serves or served at any other enterprise as a director, officer or employee at the request of the Company shall be indemnified and held harmless by the Company to the fullest extent authorized by the Delaware General Corporation Law. In addition, the Certificate of Incorporation provides that, to the fullest extent permitted by the Delaware General Corporation Law, the Company's directors will not be personally liable to the Company or its stockholders for monetary damages resulting from a breach of their fiduciary duties as directors, except for such liability as is expressly not subject to limitation under the Delaware General Corporation Law, as the same exists or may hereafter be amended to further limit or eliminate such liability. Section 102(b)(7) of the Delaware General Corporation Law provides that a provision of the certificate of incorporation of a corporation eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director shall not eliminate or limit the liability of a director (1) for any breach of the director's duty of loyalty to the corporation or its stockholders, (2) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (3) under Section 174 of the Delaware General Corporation Law or (4) for any transaction from which the director derived an improper personal benefit.

Bylaws

The Bylaws provide for the indemnification of the officers and directors of the Company to the fullest extent permitted by applicable law. The Bylaws state that each person who was or is made a party to, or is threatened to be made a party to, any civil or criminal action, suit or administrative or investigative proceeding by reason of the fact that such person is or was or has agreed to become a director or officer of the Company or, while a director or officer of the Company, is or was serving or has agreed to serve at the request of the Company as a director or officer of another corporation or of a partnership, joint venture, trust, or other enterprise, shall be indemnified and held harmless by the Company to the fullest extent authorized by the Delaware General Corporation Law against all liability and loss suffered and all expenses (including attorneys' fees) reasonably incurred by such person in connection therewith.

Indemnification Agreements and Insurance

The Company has entered into indemnification agreements with its directors and executive officers, in addition to the indemnification provided for in the Certificate of Incorporation and Bylaws, and the Company intends to enter into indemnification agreements with any new directors and executive officers in the future.

The Company has an insurance policy covering its officers and directors with respect to certain liabilities, including certain liabilities arising under the Securities Act.

Item 15. Recent Sales of Unregistered Securities

On April 1, 2020, in connection with the entrance into an engagement agreement between the Company and H.C. Wainwright & Co., LLC ("Wainwright"), the Company issued to affiliates of Wainwright warrants ("Wainwright Warrants") to purchase 433,125 shares of the Company's common stock. The Wainwright Warrants are exercisable immediately for five years from issuance with an exercise price of $2.00 per share. The Company issued the warrants and will issue the underlying

common stock pursuant to the exemption from registration provided by Section 4(a)(2) of the Securities Act.

On June 8, 2018, the Company issued a warrant to purchase 3.3 million shares of the Company's common stock to affiliates of Athyrium Capital Management. The warrant has an exercise price of $0.3951 per share, is immediately exercisable and will expire six years after the issuance date. The Company issued the warrant and will issue the underlying common stock pursuant to the exemption from registration provided by Section 4(a)(2) of the Securities Act.

On April 30, 2018, the Company issued warrants to purchase 3.6 million shares of the Company's common stock to the shareholders of Willow Biopharma Inc., with an exercise price of $0.37 per share. The warrants are immediately exercisable and will expire seven years after the date of issuance. The Company issued the warrants and will issue the underlying common stock pursuant to the exemption from registration provided by Section 4(a)(2) of the Securities Act.

On February 23, 2018, the Company issued a warrant to purchase 1.5 million shares of the Company's common stock to Torreya Capital, LLC, with an exercise price of $0.44 per share, a five-year term and a cashless exercise feature. 750,000 shares vested immediately and the remaining 750,000 shares will vest over a ten month period beginning February 28, 2018, subject to continued services being offered by Torreya Capital, LLC. The Company issued the warrant and will issue the underlying common stock pursuant to the exemption from registration provided by Section 4(a)(2) of the Securities Act.

Item 16. Exhibits and Financial Statement Schedules

(a) Exhibits

Exhibit Number	Description	Incorporation by reference		
		Exhibit	Form	Filing Date
2.1†	Asset Purchase Agreement between the Registrant and K-V Pharmaceutical Company dated as of March 30, 2007	2.1	Form 10-K for the fiscal year ended December 31, 2012 (001-33389)	February 26, 2013
2.2†	Asset Purchase Agreement dated October 1, 2010, between the Registrant, MEDA AB and Vivus Real Estate, LLC	2.2	Form 10-K/A for the fiscal year ended December 31, 2012 (001-33389)	June 12, 2013
2.3†	Asset Purchase Agreement between the Registrant and Janssen Pharmaceuticals, Inc. dated April 30, 2018	2.1	Form 10-Q for the fiscal quarter ended June 30, 2018 (001-33389)	August 7, 2018
3.1	Amended and Restated Certificate of Incorporation of the Registrant, as amended and restated through September 10, 2018	3.1	Form 8-K (001-33389)	September 10, 2018
3.2	Amended and Restated Bylaws of the Registrant, as further amended	3.2	Form 10-Q for the fiscal quarter ended June 30, 2018 (001-33389)	August 7, 2018

Exhibit Number	Description	Incorporation by reference		
		Exhibit	Form	Filing Date
3.3	Amended and Restated Certificate of Designation of Rights, Preferences and Privileges of Series A Participating Preferred Stock of the Registrant	3.3	Form 8-A (001-33389)	March 28, 2007
4.1	Specimen Common Stock Certificate of the Registrant	4.1	Form 10-K/A for the fiscal year ended December 31, 1996 (001-33389)	April 16, 1997
4.2	Preferred Stock Rights Agreement, dated as of December 30, 2019, between the Registrant and Computershare Trust Company, N.A.	4.1	Form 8-K (001-33389)	December 31, 2019
4.3	Indenture dated as of May 21, 2013, by and between the Registrant and Deutsche Bank Trust Company Americas, as trustee	4.1	Form 8-K (001-33389)	May 21, 2013
4.4	Form of 4.50% Convertible Senior Note due May 1, 2020 (included in Exhibit 4.3)	4.2	Form 8-K (001-33389)	May 21, 2013
4.5	Indenture, dated as of June 8, 2018, among the Registrant, the other guarantors from time to time party thereto and U.S. Bank National Association, as trustee and collateral agent	4.1	Form 8-K (001-33389)	June 11, 2018
4.6	First Supplemental Indenture, dated as of October 11, 2018, among the Registrant, as issuer and U.S. Bank National Association, as trustee and collateral agent	4.3	Form 8-K (001-33389)	October 17, 2018
4.7	Second Supplemental Indenture, dated as of September 30, 2019, among the Registrant, as issuer and U.S. Bank National Association, as trustee and collateral agent	4.2	Form 8-K (001-33389)	October 3, 2019
4.8	Form of 2024 Note (included in Exhibit 4.5)	4.2	Form 8-K (001-33389)	June 11, 2018
4.9	Warrant to Purchase Shares of Common Stock issued to Torreya Capital, LLC dated February 23, 2018	4.5	Form 10-Q for the fiscal quarter ended March 31, 2018 (001-33389)	May 8, 2018
4.10	Form of Athyrium Warrant, dated as of June 8, 2018	4.3	Form 8-K (001-33389)	June 11, 2018

Exhibit Number	Description	Incorporation by reference		
		Exhibit	Form	Filing Date
4.11*	Form of Warrant to be issued by the Registrant to certain shareholders of Willow Biopharma Inc.	4.9	Form 10-Q for the fiscal quarter ended June 30, 2018 (001-33389)	August 7, 2018
4.12#	Form of Pre-Funded Warrant			
4.13#	Form of Common Warrant			
4.14#	Form of Placement Agent's Warrant			
5.1#	Opinion of Hogan Lovells US LLP			
10.1*	Form of Indemnification Agreement by and among the Registrant and the Officers of the Registrant	10.11	Form 8-B (001-33389)	June 25, 1996
10.2*	Form of Indemnification Agreement by and among the Registrant and the Directors of the Registrant	10.1	Form 8-K (001-33389)	August 12, 2014
10.3*	1994 Employee Stock Purchase Plan	4.2	Form S-8 (001-33389)	August 6, 2019
10.4*	2001 Stock Option Plan and Form of Agreement thereunder	10.44	Form S-8 (001-33389)	November 15, 2001
10.5*	2001 Stock Option Plan, as amended on July 12, 2006	10.1	Form 8-K (001-33389)	July 13, 2006
10.6*	Form of Notice of Grant and Restricted Stock Unit Agreement under the VIVUS, Inc. 2001 Stock Option Plan	10.2	Form 8-K (001-33389)	July 13, 2006
10.7*	2010 Equity Incentive Plan and Form of Agreement thereunder	10.7	Form 10-K for the fiscal year ended December 31, 2010 (001-33389)	March 1, 2011
10.8*	2010 Equity Incentive Plan	4.1	Form S-8 (001-33389)	December 15, 2017
10.9*	Stand-Alone Stock Option Agreement with Michael P. Miller dated as of April 30, 2010	10.1	Form 8-K (001-33389)	May 6, 2010
10.10*	2018 Inducement Equity Incentive Plan	4.1	Form S-8 (001-33389)	June 1, 2018
10.11*	Form of Agreement under the 2018 Inducement Equity Incentive Plan	10.4	Form 10-Q for the fiscal quarter ended June 30, 2018 (001-33389)	August 7, 2018
10.12*	2018 Equity Incentive Plan	4.1	Form S-8 (001-33389)	August 6, 2019

Exhibit Number	Description	Incorporation by reference		
		Exhibit	Form	Filing Date
10.13*	Form of Restricted Stock Units Agreement under the 2018 Equity Incentive Plan	10.2	Form 10-Q for the fiscal quarter ended September 30, 2018 (001-33389)	November 1, 2018
10.14*	Form of Stock Option Agreement under the 2018 Equity Incentive Plan	10.3	Form 10-Q for the fiscal quarter ended September 30, 2018 (001-33389)	November 1, 2018
10.15†	Agreement effective as of December 28, 2000, between the Registrant and Tanabe Seiyaku Co., Ltd.	10.15	Form 10-K for the fiscal year ended December 31, 2012 (001-33389)	February 26, 2013
10.16	Amendment No. 1 effective as of January 9, 2004, to the Agreement effective as of December 28, 2000, between the Registrant and Tanabe Seiyaku Co., Ltd.	10.42A	Form 10-Q for the fiscal quarter ended March 31, 2004 (001-33389)	May 7, 2004
10.17	Termination and Release executed by Tanabe Holding America, Inc. dated May 1, 2007	10.61	Form 8-K (001-33389)	May 4, 2007
10.18†	Second Amendment effective as of August 1, 2012, to the Agreement dated as of December 28, 2000, between the Registrant and Mitsubishi Tanabe Pharma Corporation (formerly Tanabe Seiyaku Co., Ltd.)	10.1	Form 8-K (001-33389)	August 10, 2012
10.19†	Third Amendment effective as of February 21, 2013, to the Agreement dated as of December 28, 2000, between the Registrant and Mitsubishi Tanabe Pharma Corporation (formerly Tanabe Seiyaku Co., Ltd.)	10.1	Form 8-K (001-33389)	February 25, 2013
10.20	Fourth Amendment to the Agreement dated as of December 28, 2000, between the Registrant and Mitsubishi Tanabe Pharma Corporation (formerly Tanabe Seiyaku Co., Ltd.), effective as of July 1, 2013	10.1	Form 8-K (001-33389)	July 29, 2013
10.21†	Settlement and Modification Agreement dated July 12, 2001, between ASIVI, LLC, AndroSolutions, Inc., Gary W. Neal and the Registrant	10.20	Form 10-K for the fiscal year ended December 31, 2012 (001-33389)	February 26, 2013

Exhibit Number	Description	Incorporation by reference		
		Exhibit	Form	Filing Date
10.22†	Assignment Agreement between Thomas Najarian, M.D. and the Registrant dated October 16, 2001	10.79	Form 10-K for the fiscal year ended December 31, 2009 (001-33389)	March 10, 2010
10.23†	Master Services Agreement dated as of September 12, 2007, between the Registrant and Medpace, Inc.	10.2	Form 10-Q for the fiscal quarter ended March 31, 2013 (001-33389)	May 8, 2013
10.24†	Exhibit A: Medpace Task Order Number: 06 dated as of December 15, 2008, pursuant to that certain Master Services Agreement, between the Registrant and Medpace, Inc., dated as of September 12, 2007	10.1	Form 8-K/A (001-33389)	July 15, 2009
10.25†	Commercial Manufacturing and Packaging Agreement by and between the Registrant and Catalent Pharma Solutions, LLC dated as of July 17, 2012	10.1	Form 8-K (001-33389)	July 23, 2012
10.26†	Purchase and Sale Agreement effective as of March 25, 2013, between the Registrant and BioPharma Secured Investments III Holdings Cayman LP	10.1	Form 10-Q for the fiscal quarter ended March 31, 2013 (001-33389)	May 8, 2013
10.27	Capped Call Confirmation dated May 15, 2013, by and between the Registrant and Deutsche Bank AG, London Branch	10.1	Form 8-K (001-33389)	May 16, 2013
10.28*	Form of Amended and Restated Change of Control and Severance Agreement	10.1	Form 8-K (001-33389)	July 5, 2013
10.29*	Form of Second Amended and Restated Change of Control and Severance Agreement	10.1	Form 8-K (001-33389)	June 24, 2015
10.30*	Form of Third Amended and Restated Change of Control and Severance Agreement	10.5	Form 10-Q for the fiscal quarter ended June 30, 2018 (001-33389)	August 7, 2018
10.31†	License and Commercialization Agreement dated July 5, 2013, between the Registrant and Berlin-Chemie AG	10.3	Form 10-Q for the fiscal quarter ended June 30, 2013 (001-33389)	August 8, 2013

Exhibit Number	Description	Incorporation by reference		
		Exhibit	Form	Filing Date
10.32†	Commercial Supply Agreement dated as of July 5, 2013, between the Registrant and Berlin-Chemie AG	10.4	Form 10-Q for the fiscal quarter ended June 30, 2013 (001-33389)	August 8, 2013
10.33††	Amendment No. 1 to License and Commercialization Agreement and Commercial Supply Agreement dated May 21, 2019 between the Registrant and the Menarini Group through its subsidiary Berlin-Chemie AG	10.3	Form 10-Q (001-33389)	August 6, 2019
10.34	Agreement dated July 18, 2013, by and between the Registrant and First Manhattan Co.	10.1	Form 8-K (001-33389)	July 19, 2013
10.35*	Letter Agreement dated July 18, 2013, by and among the Registrant, First Manhattan Co. and Peter Y. Tam	10.1	Form 8-K (001-33389)	July 24, 2013
10.36*	Employment Agreement dated September 3, 2013, by and between the Registrant and Seth H. Z. Fischer	10.1	Form 8-K (001-33389)	September 4, 2013
10.37*†	Confidential Separation, General Release and Post-Separation Consulting Agreement effective December 31, 2017, between the Registrant and Seth H. Z. Fischer	10.55	Form 10-K for the fiscal year ended December 31, 2017 (001-33389)	March 14, 2018
10.38†	License and Commercialization Agreement dated as of October 10, 2013, by and between the Registrant and Auxilium Pharmaceuticals, Inc.	10.9	Form 10-Q for the quarter ended September 30, 2013 (001-33389)	November 7, 2013
10.39†	Commercial Supply Agreement dated as of October 10, 2013, by and between the Registrant and Auxilium Pharmaceuticals, Inc.	10.10	Form 10-Q for the quarter ended September 30, 2013 (001-33389)	November 7, 2013
10.40	Letter Regarding Termination Notice dated December 30, 2015, from Auxilium Pharmaceuticals, Inc. and Endo Ventures Limited to the Registrant	10.53	Form 10-K for the fiscal year ended December 31, 2015 (001-33389)	March 9, 2016
10.41	Letter Regarding Termination Notice dated as of June 30, 2016, from Auxilium Pharmaceuticals, Inc. and Endo Ventures Limited to the Registrant	10.1	Form 10-Q for the fiscal quarter ended June 30, 2016 (001-33389)	August 4, 2016

Exhibit Number	Description	Incorporation by reference		
		Exhibit	Form	Filing Date
10.42	Letter Regarding Termination Notice dated as of August 29, 2016, from Auxilium Pharmaceuticals, LLC and Endo Ventures Limited to the Registrant	10.1	Form 10-Q for the fiscal quarter ended September 30, 2016 (001-33389)	November 9, 2016
10.43*	Letter Agreement dated November 4, 2013, by and between the Registrant and Timothy E. Morris	10.1	Form 8-K (001-33389)	November 5, 2013
10.44†	Commercial Supply Agreement dated July 31, 2013, by and between the Registrant and Sanofi Chimie	10.8	Form 10-Q for the fiscal quarter ended June 30, 2013 (001-33389)	August 8, 2013
10.45†	Termination, Rights Reversion and Transition Services Agreement dated March 23, 2017, by and between the Registrant and Sanofi	10.3	Form 10-Q for the fiscal quarter ended March 31, 2017 (001-33389)	May 3, 2017
10.46†	Manufacturing and Supply Agreement dated November 18, 2013, by and between the Registrant and Sanofi Winthrop Industrie	10.45	Form 10-K for the fiscal year ended December 31, 2013 (001-33389)	February 28, 2014
10.47††	Amendment Nº 1 to the Manufacturing and Supply Agreement dated May 22, 2019 between the Registrant and Sanofi Winthrop Industrie	10.2	Form 10-Q (001-33389)	August 6, 2019
10.48†	License and Commercialization Agreement dated December 11, 2013, by and between the Registrant and Sanofi	10.46	Form 10-K for the fiscal year ended December 31, 2013 (001-33389)	February 28, 2014
10.49†	Supply Agreement effective as of December 11, 2013, by and between the Registrant and Sanofi Winthrop Industrie	10.47	Form 10-K for the fiscal year ended December 31, 2013 (001-33389)	February 28, 2014
10.50†	Patent Assignment Agreement, dated August 24, 2014, by and between the Registrant and Janssen Pharmaceuticals, Inc.	10.1	Form 10-Q for the fiscal quarter ended September 30, 2014 (001-33389)	November 5, 2014
10.51*	Letter Agreement dated April 13, 2015, by and between the Registrant and Guy P. Marsh	10.1	Form 10-Q for the fiscal quarter ended June 30, 2015 (001-33389)	August 3, 2015
10.52*	Letter Agreement dated July 20, 2015, by and between the Registrant and Wesley W. Day, Ph.D.	10.3	Form 10-Q for the fiscal quarter ended June 30, 2015 (001-33389)	August 3, 2015

Exhibit Number	Description	Incorporation by reference		
		Exhibit	Form	Filing Date
10.53*	Letter Agreement dated August 17, 2015, by and between the Registrant and Svai S. Sanford	10.3	Form 10-Q for the fiscal quarter ended September 30, 2015 (001-33389)	November 4, 2015
10.54	Lease Agreement effective December 11, 2012, by and between the Registrant and SFERS Real Estate Corp. U.	10.34	Form 10-K for the fiscal year ended December 31, 2012 (001-33389)	February 26, 2013
10.55	First Amendment to Lease effective August 30, 2016, between the Registrant and MV Campus Owner, LLC, the successor in interest to SFERS Real Estate Corp. U.	10.2	Form 10-Q for the fiscal quarter ended September 30, 2016 (001-33389)	November 9, 2016
10.56	Office Lease effective September 2, 2016, between the Registrant and AG-SW Hamilton Plaza Owner, L.P.	10.3	Form 10-Q for the fiscal quarter ended September 30, 2016 (001-33389)	November 9, 2016
10.57†	License and Commercialization Agreement dated as of September 30, 2016, by and between the Registrant and Metuchen Pharmaceuticals LLC	10.4	Form 10-Q for the fiscal quarter ended September 30, 2016 (001-33389)	November 9, 2016
10.58†	Commercial Supply Agreement dated as of September 30, 2016, by and between the Registrant and Metuchen Pharmaceuticals LLC	10.5	Form 10-Q for the fiscal quarter ended September 30, 2016 (001-33389)	November 9, 2016
10.59†	Patent Assignment Agreement dated as of January 6, 2017, by and between the Registrant and Selten Pharma, Inc.	10.55	Form 10-K for the fiscal year ended December 31, 2016 (001-33389)	March 8, 2017
10.60†	License Assignment Agreement dated as of January 6, 2017, by and between the Registrant and Selten Pharma, Inc.	10.56	Form 10-K for the fiscal year ended December 31, 2016 (001-33389)	March 8, 2017
10.61†	Settlement Agreement dated June 29, 2017, by and between the Registrant and Actavis Laboratories FL, Inc.	10.1	Form 10-Q for the fiscal quarter ended June 30, 2017 (001-33389)	August 3, 2017
10.62	Collateral Agreement, dated as of June 8, 2018, among the Registrant, the other guarantors from time to time party thereto and U.S. Bank National Association, as trustee and collateral agent	10.1	Form 8-K (001-33389)	June 11, 2018

Exhibit Number	Description	Incorporation by reference		
		Exhibit	Form	Filing Date
10.63	Purchase Agreement between the Registrant and affiliates of Athyrium Capital Management dated April 30, 2018	10.3	Form 10-Q for the fiscal quarter ended June 30, 2018 (001-33389)	August 7, 2018
10.64†	Amendment Nº1 to Commercial Supply Agreement dated December 7, 2018 between Sanofi Chimie and the Registrant	10.62	Form 10-K for the fiscal year ended December 31, 2018 (001-33389)	February 26, 2019
10.65	Amendment No. 1 to Collateral Agreement dated as of July 6, 2018 between the Registrant and U.S. Bank National Association, as trustee and collateral agent	10.63	Form 10-K for the fiscal year ended December 31, 2018 (001-33389)	February 26, 2019
10.66	Amendment No. 2 to Collateral Agreement dated as of October 11, 2018 between the Registrant and U.S. Bank National Association, as trustee and collateral agent	10.64	Form 10-K for the fiscal year ended December 31, 2018 (001-33389)	February 26, 2019
10.67	Amendment No. 3 to Collateral Agreement dated as of December 7, 2018 between the Registrant and U.S. Bank National Association, as trustee and collateral agent	10.65	Form 10-K for the fiscal year ended December 31, 2018 (001-33389)	February 26, 2019
10.68	Amendment No. 4 to Collateral Agreement dated as of March 20, 2019 between the Registrant and U.S. Bank National Association, as trustee and collateral agent	10.1	Form 10-Q (001-33389)	April 30, 2019
10.69	Amendment No. 5 to Collateral Agreement dated as of June 5, 2019 between the Registrant and U.S. Bank National Association, as trustee and collateral agent	10.1	Form 10-Q (001-33389)	August 6, 2019
10.70††	Amended and Restated Know-How License and Supply Agreement dated November 3, 2017 between Janssen Pharmaceuticals, Inc. and Nordmark Arzneimittel GmbH & Co. KG	10.4	Form 10-Q (001-33389)	August 6, 2019
10.71††	First Amendment to the Amended and Restated Know-How License and Supply Agreement dated June 26, 2019 between the Registrant and Nordmark Arzneimittel GmbH & Co. KG	10.5	Form 10-Q (001-33389)	August 6, 2019

Exhibit Number	Description	Incorporation by reference		
		Exhibit	Form	Filing Date
10.72	Form of Securities Purchase Agreement, dated April 1, 2020, by and between the Company and the Purchasers	10.1	Form 8-K (001-33389)	April 2, 2020
10.73	Engagement Agreement, dated April 1, 2020, by and between the Company and H.C. Wainwright & Co., LLC	10.2	Form 8-K (001-33389)	April 2, 2020
10.74	Agreement Regarding Convertible Notes, dated as of April 29, 2020, among the Company, IEH Biopharma LLC and Deutsche Bank Trust Company Americas	10.1	Form 8-K (001-33389)	May 1, 2020
10.75#	Form of Placement Agency Agreement			
10.76#	Form of Securities Purchase Agreement			
10.77†††	Restructuring Support Agreement, dated May 31, 2020, by and between the Company and Icahn Enterprise Holdings L.P. (dba IEH Biopharma, LLC)			
21.1	List of Subsidiaries	21.1	Form 10-K for the fiscal year ended December 31, 2019 (001-33389)	March 3, 2020
23.1†††	Consent of Independent Registered Public Accounting Firm			
23.2#	Consent of Hogan Lovells US LLP (included in Exhibit 5.1)			
24.1	Power of Attorney (included in signature page)			

† Confidential treatment granted.

†† Portions of this exhibit have been omitted pursuant to Item 601(b) of Regulation S-K.

††† Filed herewith.

To be filed by amendment.

* Indicates management contract or compensatory plan or arrangement.

(b) Financial Statement Schedules

No financial statement schedules are provided because the information called for is not required or is shown either in the financial statements or related notes, which are incorporated in this prospectus by reference.

Item 17. Undertakings

The undersigned registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) to include any prospectus required by Section 10(a)(3) of the Securities Act of 1933;

(ii) to reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than a 20% change in the maximum aggregate offering price set forth in the "Calculation of Registration Fee" table in the effective registration statement; and

(iii) to include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement.

Provided, however, that:

Paragraphs (1)(i), (1)(ii) and (1)(iii) of this section do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 that are incorporated by reference in the registration statement, or, as to a registration statement on Form S-3, Form SF-3 or Form F-3, is contained in a form of prospectus filed pursuant to Rule 424(b) that is part of the registration statement.

(2) That, for the purpose of determining any liability under the Securities Act of 1933, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

(4) That, for the purpose of determining liability under the Securities Act of 1933 to any purchaser in the initial distribution of the securities, the undersigned registrant undertakes that in a primary offering of securities of the undersigned registrant pursuant to this registration statement, regardless of the method used to sell the securities to the purchaser, if the securities are offered or sold to such purchaser by means of any of the following communications, the undersigned registrant will be a seller to the purchaser and will be considered to offer or sell such securities to such purchaser:

(i) Any preliminary prospectus or prospectus of the undersigned registrant relating to the offering required to be filed pursuant to Rule 424;

(ii) Any free writing prospectus relating to the offering prepared by or on behalf of the undersigned registrant or used or referred to by the undersigned registrant;

(iii) The portion of any other free writing prospectus relating to the offering containing material information about the undersigned registrant or its securities provided by or on behalf of the undersigned registrant; and

(iv) Any other communication that is an offer in the offering made by the undersigned registrant to the purchaser.

(5) That, for purposes of determining any liability under the Securities Act of 1933, each filing of the registrant's annual report pursuant to section 13(a) or section 15(d) of the Securities Exchange Act of 1934, as amended, or the Exchange Act, (and, where applicable, each filing of an employee benefit plan's annual report pursuant to section 15(d) of the Exchange Act) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(6) That, for purposes of determining any liability under the Securities Act of 1933:

(i) the information omitted from the form of prospectus filed as part of this Registration Statement in reliance upon Rule 430A and contained in a form of prospectus filed by the Registrant pursuant to Rule 424(b)(1) or (4) or 497(h) under the Securities Act shall be deemed to be part of this Registration Statement as of the time it was declared effective;

(ii) each post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

Insofar as indemnification for liabilities arising under the Securities Act of 1933 may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Act and will be governed by the final adjudication of such issue.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereunto duly authorized in the City of Campbell, State of California, on June 8, 2020.

VIVUS, INC.

By: /s/ JOHN P. AMOS

John P. Amos
Chief Executive Officer
(Principal Executive Officer)

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints each of John P. Amos, Mark K. Oki, and John L. Slebir as his or her attorney-in-fact for him or her, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this registration statement or any registration statement relating to this registration statement under Rule 462, and to file the same, with all exhibits thereto and all other documents in connection therewith, with the Securities and Exchange Commission, hereby ratifying and confirming all that each such attorney-in-fact or his substitute or substitutes may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this registration statement has been signed below by the following persons in the capacities and on the dates indicated:

Signature	Title	Date
/s/ JOHN P. AMOS John P. Amos	Chief Executive Officer (Principal Executive Officer) and Director	June 8, 2020
/s/ DAVID Y. NORTON David Y. Norton	Chairman of the Board of Directors and Director	June 8, 2020
/s/ MARK K. OKI Mark K. Oki	Senior Vice President, Chief Financial Officer and Chief Accounting Officer (Principal Financial and Accounting Officer)	June 8, 2020
/s/ KAREN FERRELL Karen Ferrell	Director	June 8, 2020
/s/ EDWARD A. KANGAS Edward A. Kangas	Director	June 8, 2020
/s/ THOMAS B. KING Thomas B. King	Director	June 8, 2020
/s/ JORGE PLUTZKY Jorge Plutzky	Director	June 8, 2020
/s/ HERMAN ROSENMAN Herman Rosenman	Director	June 8, 2020

Exhibit 10.77

THIS RESTRUCTURING SUPPORT AGREEMENT IS NOT AN OFFER OR ACCEPTANCE WITH RESPECT TO ANY SECURITIES OR A SOLICITATION OF ACCEPTANCES OF A CHAPTER 11 PLAN WITHIN THE MEANING OF SECTION 1125 OF THE BANKRUPTCY CODE. ANY SUCH OFFER OR SOLICITATION WILL COMPLY WITH ALL APPLICABLE SECURITIES LAWS AND/OR PROVISIONS OF THE BANKRUPTCY CODE. NOTHING CONTAINED IN THIS RESTRUCTURING SUPPORT AGREEMENT SHALL BE AN ADMISSION OF FACT OR LIABILITY OR, UNTIL THE OCCURRENCE OF THE SUPPORT EFFECTIVE DATE ON THE TERMS DESCRIBED IN THIS AGREEMENT, DEEMED BINDING ON ANY OF THE PARTIES TO THIS AGREEMENT.

RESTRUCTURING SUPPORT AGREEMENT

This RESTRUCTURING SUPPORT AGREEMENT (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time in accordance with the terms hereof, including the exhibits hereto, this "**Agreement**"), dated as of May 31, 2020, is entered into by and among:

(a) VIVUS, Inc., a Delaware corporation ("**VIVUS**");

(b) Vivus Pharmaceuticals Limited, a Canadian limited company ("**Vivus Limited**");

(c) Vivus B.V., a private company with limited liability (*besloten vennootschap met beperkte aansprakelijkheid*) incorporated under the laws of the Netherlands ("**Vivus B.V.**");

(d) Vivus Digital Health Corporation, a Delaware corporation (Vivus Digital Health Corporation along with VIVUS, Vivus Limited, and Vivus B.V., collectively, the "**Company**" or the "**Debtors**"); and

(e) the undersigned holder of the notes issued under that certain Indenture, dated as of May 21, 2013 (as amended, restated, amended and restated, supplemented or otherwise modified from time to time, the "**Convertible Notes Indenture**"), by and among VIVUS, Deutsche Bank Trust Company Americas, as Convertible Notes Trustee (in such capacity, the "**Trustee**"), and Icahn Enterprises Holdings L.P. (dba IEH Biopharma LLC), as the sole remaining holder holding notes issued thereunder (the "**Convertible Notes**") and party thereto (the "**Convertible Noteholder**" and the undersigned Convertible Noteholder, together with its respective successors and permitted assigns and any subsequent Convertible Noteholder that becomes party hereto in accordance with the terms hereof, the "**Supporting Noteholder**," as to each, solely in such capacity).

The Company, the Supporting Noteholder, and any subsequent person or entity that becomes a party hereto in accordance with the terms hereof are referred to herein as the "**Parties**" and each individually as a "**Party**." Capitalized terms used but not defined herein shall have the meanings ascribed to them, as applicable, in the Term Sheet (as defined below) attached hereto as **Exhibit A**.

When a reference is made in this Agreement to a Section, Exhibit, or Schedule, such reference shall be to a Section, Exhibit, or Schedule, respectively, of or attached to this Agreement unless otherwise indicated. Unless the context of this Agreement otherwise requires, (i) words using the singular or plural number also include the plural or singular number, respectively, (ii) the terms "hereof," "herein," "hereby," and derivative or similar words refer to this entire Agreement, including all exhibits to this Agreement, (iii) the words "include," "includes," and "including" when used herein shall be deemed in each case to be followed by the words "without limitation," and (iv) the word "or" shall not be exclusive and shall be read to mean "and/or." The Parties agree that they have been represented by legal counsel during the negotiation and execution of this Agreement and, therefore, waive the application of any law, regulation, holding, or rule of construction providing that ambiguities in an agreement or other document shall be construed against the party drafting such agreement or document.

RECITALS

WHEREAS, pursuant to that certain Agreement Regarding Convertible Notes, dated as of April 29, 2020 (the "**Convertible Notes Agreement**"), by and between VIVUS and the Convertible Noteholder, on May 1, 2020 the maturity date of all obligations set forth in the Convertible Notes Indenture occurred (the "**Convertible Notes Maturity Date**") and, (i) VIVUS (a) paid the Convertible Noteholder all accrued and unpaid interest with respect to the Convertible Notes, in the amount of $3,828,712.50; and (b) honored all payments or conversions, as applicable, due in respect to the Convertible Notes to holders of such Convertible Notes other than the Convertible Noteholder, leaving $170,165,000.00 as the outstanding principal amount of Convertible Notes (the "**Principal Amount**") and the Convertible Noteholder as the sole remaining Convertible Noteholder; and (ii) subject to certain conditions, the Convertible Noteholder granted a Grace Period (as such term is defined in the Convertible Notes Agreement) to VIVUS with respect to the payment of Principal Amount on the Convertible Notes owed to it and further agreed to forbear from exercising any and all remedies available to the Convertible Noteholder with respect to the receipt of the Principal Amount on the Convertible Notes Maturity Date under the Convertible Notes Indenture during the Grace Period (as defined therein);

WHEREAS, the Convertible Notes Agreement provides, among other things, that until the Termination Date under the Convertible Notes Agreement, the Company, its Affiliate entities, its subsidiary entities, and/or its agents shall not directly or indirectly, solicit, initiate, negotiate, consummate or encourage any proposals or offers from any other person or entity relating to a transaction involving a financial or other restructuring of the Company or any of its subsidiaries, or any Alternative Transaction (as defined in the Convertible Notes Agreement);

WHEREAS, the Parties have agreed, subject to completion of the Convertible Noteholder's due diligence to its satisfaction and the resulting amendment and restatement of the Term Sheet, to enter into certain transactions reflected in the Term Sheet, as so modified (the "**Restructuring Transactions**"), in furtherance of a global restructuring of the Company's capital structure in accordance therewith (the "**Restructuring**"), which is to be implemented through a joint prearranged plan of reorganization (as may be amended or modified from time to time, the "**Plan**"), a solicitation of votes thereon (the "**Solicitation**") pursuant to chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"), and the commencement by the

Company of voluntary cases (the "**Chapter 11 Cases**") under the Bankruptcy Code in a bankruptcy court to be mutually agreed by the Company and the Supporting Noteholder (the "**Bankruptcy Court**");

WHEREAS, as of the date hereof, the Supporting Noteholder holds 100% of the outstanding principal amount of the Convertible Notes;

WHEREAS, the Supporting Noteholder (in such capacity, the "**DIP Commitment Party**") has agreed, subject to completion of due diligence to its satisfaction, to commit to provide the DIP Facility (as defined below), in accordance with and subject to the terms and conditions set forth in the DIP Term Sheet (as defined below) and pursuant to the terms and conditions set forth in the DIP Orders (defined below); and

WHEREAS, the Parties desire to express to each other their mutual support and commitment in respect of the matters set forth in the Term Sheet and this Agreement.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, agree as follows:

1. **Certain Definitions.**

As used in this Agreement, the following terms have the following meanings:

(a) "**Affiliate**" means, when used with respect to a specified Person, a Person that, directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with such specified Person. As used in this definition, the term "control" (including with correlative meanings, "controlled by" and "under common control with"), when used with respect to any specified Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or other interests, by contract, agreement, obligation, indenture, instrument, lease, promise, arrangement, release, warranty, commitment, undertaking or otherwise. For purposes of this definition, with respect to any Person in which IEH (as defined in the Term Sheet) does not (i) beneficially own, either directly or indirectly, more than fifty percent (50%) of (x) the total combined voting power of all classes of voting securities of such Person, (y) the total combined equity interests or (z) the capital or profit interests, in the case of a partnership, or (ii) otherwise have the power to vote, either directly or indirectly, sufficient securities to elect a majority of the board of directors or similar governing body, IEH shall only be deemed to control such Person to the extent that, with respect to any particular matter, IEH or its other Affiliates, or IEH's or such Affiliate's employees, in their capacities as a shareholder, director, manager or general partner (or similar position) of such Person have voted or consented to take action, or encouraged others to vote or consent to take action (or take action if no vote or consent is required) with respect to such matter. For the avoidance of doubt, "Affiliate" shall not include the Company.

(b) "**Alternative Restructuring**" means any (A) direct or indirect issuance, acquisition, purchase, sale, or transfer of any debt or equity securities or right or interest therein,

(B) recapitalization, financing, refinancing, restructuring, bankruptcy, merger, consolidation, sale of all or any portion of assets outside the ordinary course of business, liquidation, dissolution, or similar action or transaction, or (C) other action, transaction, or agreement which would reasonably be expected to materially interfere with, delay, or prevent a potential financial restructuring with the consent of the Supporting Noteholder, including dissolution, winding up, liquidation, reorganization, recapitalization, assignment for the benefit of creditors, merger, transaction, consolidation, business combination, joint venture, partnership, sale, financing (debt or equity), plan proposal, or restructuring of the Company, other than the Plan that contemplates the Restructuring Transactions, as to each, applicable to or involving any of the Company or any of its subsidiary or Affiliate entities individually or in the aggregate; *provided*, *however*, that a Permitted Refinancing prior to the Permitted Refinancing Deadline and the Restructuring set forth in the Plan shall not be an Alternative Restructuring.

(c) "**Claim**" has the meaning set forth in section 101(5) of the Bankruptcy Code.

(d) "**Confirmation Order**" means the order of the Bankruptcy Court approving the Disclosure Statement and confirming the Plan in the Chapter 11 Cases.

(e) "**Definitive Documents**" means (i) this Agreement, (ii) the Plan and Plan Supplement, and (iii) all documents (including any related orders, agreements, instruments, schedules, or exhibits) that are described in or contemplated by this Agreement and the Plan and that are otherwise necessary or desirable to implement, or otherwise relate to, the Restructuring, including (1) the Disclosure Statement, (2) the Solicitation materials, (3) the Confirmation Order, (4) first day and other motions and orders of the Bankruptcy Court approving any first day or other motions, (5) the Plan Supplement, (6) the motion seeking approval by the Bankruptcy Court of the DIP Facility and the DIP Orders, (7) the order of the Bankruptcy Court approving the Debtors' assumption of this Agreement, (8) the DIP Agreement, (9) the Exit Facility, (10) the New Corporate Governance Documents, (11) the No Trading Order, (12) the Exit Facility credit agreement, (13) the Bar Date Order (defined below), and (14) any other material documents, instruments, schedules, or exhibits described in, related to, or contemplated in, or necessary to implement, each of the foregoing. The Definitive Documents not executed or in a form attached to this Agreement as of the date of this Agreement remain subject to negotiation and completion.

(f) "**DIP Commitment**" means the commitment of the DIP Commitment Party to provide the DIP Facility in accordance with the terms set forth in the DIP Term Sheet.

(g) "**DIP Agreement**" means the credit agreement evidencing the DIP Facility.

(h) "**DIP Facility**" means the debtor-in-possession priming loan facility to be provided to the Company in accordance with the terms, and subject in all respects to the conditions, as set forth in the DIP Agreement and pursuant to the terms and conditions of the DIP Orders.

(i) "**DIP Orders**" means the Interim DIP Order and Final DIP Order.

(j) "**DIP Term Sheet**" means the term sheet describing the terms of the DIP facility, which shall be acceptable in form and substance to the Company, the Supporting Noteholder, DIP Lender, and DIP Agent, each in its respective sole discretion (and which they shall use commercially reasonable efforts to finalize and attach as an exhibit to this Agreement on or before June 5, 2020 or otherwise as soon as practicable).

(k) "**Disclosure Statement**" means the disclosure statement containing adequate information for the Plan, as supplemented from time to time, which is prepared and distributed in accordance with sections 1125, 1126(b), or 1145 of the Bankruptcy Code, Bankruptcy Rules 3016 and 3018, or other applicable law, and all exhibits, schedules, supplements, modifications, amendments, annexes, and attachments to such disclosure statement.

(l) "**Effective Date**" means the date that is the first Business Day on which (i) all conditions to the effectiveness of the Plan have been satisfied or waived in accordance with the terms of the Plan and (ii) no stay of the Plan or Confirmation Order is in effect.

(m) "**Enforcement Actions**" has the meaning set forth in the Convertible Notes Agreement.

(n) "**Exit Facility**" means the loan facility to be provided by the Supporting Noteholder to the Company in accordance with the terms, and subject in all respects to the conditions, as set forth in the Exit Financing Commitment Letter.

(o) "**Exit Financing Commitment Letter**" means the commitment letter to be agreed by the parties thereto, which shall be acceptable in form and substance to the Company, the Supporting Noteholder, DIP Lender, and DIP Agent, each in its respective sole discretion.

(p) "**Final DIP Order**" means the final order to be entered by the Bankruptcy Court, approving, among other things, the Company's entry into the DIP Facility.

(q) "**Interests**" means collectively, (a) any equity security as defined in section 101(16) of the Bankruptcy Code, (b) any other instrument evidencing an ownership interest, whether or not transferable, (c) any option, warrant, or right, contractual or otherwise, to acquire, sell or subscribe for any such interest, and (d) any and all Claims that are otherwise determined by the Court to be an equity interest, including any Claim or debt that is recharacterized as an equity interest, as to each, in or with respect to the Company.

(r) "**Interim DIP Order**" means the interim order to be entered by the Bankruptcy Court, approving, among other things, the Company's entry into the DIP Facility on an interim basis.

(s) "**New Corporate Governance Documents**" means (i) amended by-laws, (ii) an amended certificate of incorporation, and (iii) any other applicable material governance and/or organizational documents of the Reorganized Debtors.

(t) "**Ownership Change Analysis**" means that certain analysis, dated April 17, 2020 prepared by that certain "Big 4" accounting firm showing that no "ownership change"

of the Company (within the meaning of Section 382 of the Code) has occurred during the period from January 1, 2013 through April 17, 2020.

(u) "**Permitted Refinancing**" means any financing or financings (but only if closed concurrently), the proceeds of which are used to pay full in cash all amounts due and owing under the Convertible Notes (as well as all of IEH's and the Trustee's reasonable and documented fees and expenses, including attorneys' fees) no later than Permitted Refinancing Deadline; provided, however, that if such financing(s) shall cause an "ownership change" of the Company (within the meaning of Section 382 of the Internal Revenue Code of 1986, as amended, the "**Code**")), the proceeds shall immediately be used to fully pay the Convertible Notes prior to or concurrently with such ownership change.

(v) "**Permitted Refinancing Deadline**" means June 30, 2020.

(w) "**Person**" means an individual, corporation, partnership, limited liability company, association, trust or other entity or organization, including any governmental authority.

(x) "**Plan Document**" means any of the documents concerning the Plan to be executed, delivered, assumed, or performed in connection with the occurrence of the Effective Date, including the documents to be included in the Plan Supplement.

(y) "**Plan Supplement**" means a supplement or supplements to the Plan containing certain documents relevant to the implementation of the Plan, to be filed with the Bankruptcy Court no later than seven (7) calendar days before the Voting Deadline, which shall include (i) the New Corporate Governance Documents, (ii) to the extent known and determined, the number and slate of directors to be appointed to the New Board, and any information required to be disclosed in accordance with section 1129(a)(5) of the Bankruptcy Code, (iii) any contingent value right documents, (iv) the management incentive plan for the Reorganized Debtors, (v) schedule of rejected contracts, and (vi) all documents related to the Exit Facility; *provided, however,* that, through the Effective Date, the Company shall have the right to amend documents contained in, and exhibits to, the Plan Supplement in accordance with the terms of the Plan and this Agreement.

(z) "**Released Parties**" means, collectively, (i) the Debtors, (ii) the Reorganized Debtors, (iii) the Supporting Noteholder, (iv) the Convertible Notes Trustee, (v) the DIP Agent, (vi) the DIP Lender, (vii) the Exit Agent, (viii) the Exit Lender, and (ix) with respect to each of the foregoing Persons in clauses (i) through (viii), such Persons' predecessors, successors, assigns, subsidiaries, affiliates, managed accounts and funds, and all of their respective equity holders (including shareholders), regardless of whether such interests are held directly or indirectly, current and former officers and directors, principals, members, partners, managers, employees, subcontractors, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, investment managers, investment advisors, management companies, fund advisors, and other professionals, and such Persons' respective heirs, executors, estates, and nominees, in each case in their capacity as such. Notwithstanding the foregoing, any Person that opts out of the releases by the Releasing Parties (as defined in the Term Sheet) set forth in the Plan shall not be deemed a Released Party hereunder.

(aa) "**Reorganized Debtor(s)**" means with respect to each Debtor, such Debtor as reorganized as of the Effective Date in accordance with the Plan.

(bb) "**Reorganized VIVUS**" means reorganized VIVUS, which will, in accordance with the terms hereof and the Definitive Documents, receive equity interests in VIVUS, to be held directly or indirectly.

(cc) "**Requisite Creditors**" means, as of the date of determination, consenting creditors holding at least a majority of the outstanding Convertible Notes.

(dd) "**Securities Act**" means the Securities Act of 1933, as amended.

(ee) "**Solicitation**" means the solicitation of votes on the Plan.

(ff) "**Support Effective Date**" means the date on which counterpart signature pages to this Agreement shall have been executed and delivered by (i) the Company, and (ii) the Supporting Noteholder.

(gg) "**Support Period**" means the period commencing on the Support Effective Date and ending on the earlier of the (i) date on which this Agreement is terminated in accordance with Section 5 hereof and (ii) the Effective Date.

(hh) "**Supporting Noteholder's Counsel**" means Dentons US LLP, as counsel to the Supporting Noteholder.

(ii) "**Term Sheet**" means that certain Restructuring Term Sheet, dated as of May 31, 2020, attached hereto as Exhibit A (including any schedules, annexes, and exhibits attached thereto).

(jj) "**Voting Deadline**" means ten (10) days before the hearing to consider confirmation of the Plan or such date and time as may set by the Bankruptcy Court.

2. **Bankruptcy Process; Plan of Reorganization; Convertible Notes Agreement.**

(a) The Term Sheet. The Term Sheet is expressly incorporated herein and made a part of this Agreement. The terms and conditions of the Restructuring are set forth in the Term Sheet; *provided*, that the Term Sheet is supplemented by the terms and conditions of this Agreement. In the event of any inconsistencies between the terms of this Agreement and the Term Sheet, the terms of the Term Sheet shall govern. Any amendment to the Term Sheet shall be acceptable to the Company and the Supporting Noteholder, each in its sole discretion.

(b) Definitive Documents. Each of the Definitive Documents shall (i) contain terms and conditions consistent in all material respects with this Agreement each as amended, restated, amended and restated, supplemented or otherwise modified from time to time in accordance with Section 9 herein, and (ii) shall otherwise be in form and substance reasonably acceptable to the Supporting Noteholder and the Company; *provided, however*, that the DIP Facility, the DIP Orders, the DIP Agreement, the Confirmation Order, the Exit Facility, and the

Exit Facility credit agreement, the key employee incentive plan, the management incentive plan and the New Corporate Governance Documents shall be acceptable to each of the Supporting Noteholder, DIP Lender, DIP Agent, Exit Lender and Exit Agent, as applicable, each in its sole discretion.

(c) Bankruptcy Court Approval. The Company shall obtain a Final Order (as defined in the Term Sheet), in form and substance reasonably acceptable to the Supporting Noteholder, approving the assumption of this Agreement and the Termination Fee by no later than thirty-five (35) days after the Petition Date.

(d) Commencement of the Chapter 11 Cases. The Company further agrees that if the Permitted Refinancing is not completed by the Permitted Refinancing Deadline, no later than July 13, 2020 (the "**Outside Petition Date**," and the date on which such filing occurs, the "**Petition Date**"), the Company shall file with the Bankruptcy Court voluntary petitions for relief under chapter 11 of title 11 of the Bankruptcy Code and any and all other documents necessary to commence the Chapter 11 Cases; *provided, however*, that the Company and Supporting Noteholder will use commercially reasonable efforts to expedite the Petition Date so that it occurs as soon as possible after the Permitted Refinancing Deadline.

(e) Bar Date. If the Permitted Refinancing is not completed by the Permitted Refinancing Deadline, (i) on the Petition Date, the Company shall file a motion with the Bankruptcy Court seeking a bar date order establishing the last date by which all known, unknown, liquidated, or contingent claims may be asserted against the Company and (ii) the Company shall obtain entry of such bar date order no later than five (5) business days after the Petition Date (the "**Bar Date Order**"). The Bar Date Order shall provide that the bar date for non-governmental claims shall not be later than forty-five (45) days after the Petition Date.

(f) DIP Financing. If the Permitted Refinancing is not completed by the Permitted Refinancing Deadline (i) on the Petition Date, the Company shall file a motion with the Bankruptcy Court seeking entry of the DIP Orders and (ii) the Company shall obtain (x) entry of the Interim DIP Order by the Bankruptcy Court no later than five (5) business days after the Petition Date, and (y) entry of the Final DIP Order, by the Bankruptcy Court, no later than thirty-five (35) calendar days after the Petition Date.

(g) Filing of Plan and Disclosure Statement. If the Permitted Refinancing is not completed by the Permitted Refinancing Deadline, the Company shall file the Plan and the Disclosure Statement by the Petition Date.

(h) Approval of Disclosure Statement and Confirmation of Plan. If the Permitted Refinancing is not completed by the Permitted Refinancing Deadline, the Company shall obtain the Disclosure Statement Order by no later than thirty-five (35) days after the Petition Date and Confirmation Order by no later than seventy-five (75) days after the Petition Date.

(i) Effective Date. The Debtors shall cause the Effective Date to occur no later than ninety (90) days after the Petition Date; provided however, that the Company and Supporting Noteholder shall use commercially reasonable efforts to cause the Effective Date to

occur as soon as is practicable after the entry of the Confirmation Order (including seeking the waiver of any stay to consummate the Plan).

(j) Convertible Notes Agreement. The term "Termination Date" in the Convertible Notes shall be replaced with the term "Grace Period Termination" from this Agreement and the terms and conditions of the Convertible Notes Agreement, including as to exclusivity, shall remain in full force and effect; provided, however, notwithstanding anything to the contrary herein, the pursuit, negotiation, and consummation of the Permitted Refinancing by the Permitted Refinancing Deadline shall not constitute a breach of the Convertible Notes Agreement.

3. **Agreements of the Supporting Noteholder.**

(a) Voting; Support. The Supporting Noteholder agrees that, solely for the duration of the Support Period, and subject in all respects to the terms and conditions of this Agreement, the DIP Facility, the Exit Facility and the Plan Documents, the Supporting Noteholder shall:

i. vote its claims under the Convertible Notes to accept the Plan by delivering its duly executed and completed ballot or ballots, as applicable, accepting the Plan following the commencement of Solicitation and its actual receipt of the Disclosure Statement and other related Solicitation materials no later than five (5) business days from commencement of Solicitation;

ii. consent to and not opt-out of the releases of the Company, Reorganized Debtors, and the Released Parties substantially in the form set forth in the Plan, on a timely basis following commencement of the Solicitation;

iii. not change or withdraw (or cause or direct to be changed or withdrawn) any such vote or release described in clauses (i) or (ii) above; *provided*, *however*, that, notwithstanding anything in this Agreement, the vote of the Supporting Noteholder in respect of the Plan shall be, immediately and automatically without further action by the Supporting Noteholder, deemed a vote to reject the Plan and an opt-out of the releases in the Plan upon termination of this Agreement or the Support Period prior to the Effective Date pursuant to the terms hereof;

iv. not directly or indirectly, through any person or entity (including, without limitation, any trustee), seek, solicit, propose, support, assist, engage in negotiations in connection with or participate in the formulation, preparation, filing, or prosecution of any restructuring or reorganization of any Debtor that is inconsistent with the Plan or object to or take any other action that is materially inconsistent with or that would reasonably be expected to prevent, interfere with, delay, or impede the Solicitation, approval of the Disclosure Statement, or the confirmation and consummation of the Plan and the Restructuring Transactions;

v. not direct the Trustee to take any action inconsistent with the Supporting Noteholder's obligations under this Agreement or the Plan, and, if the

Trustee takes any action inconsistent with such Supporting Noteholder's obligations under this Agreement or the Plan, such Supporting Noteholder shall direct and use its commercially reasonable efforts to cause the Trustee to cease, withdraw, and refrain from taking any such action;

vi. support and take all actions necessary or reasonably requested by the Company to facilitate the Solicitation, obtain approval and entry of the DIP Orders, approval of the Disclosure Statement, and confirmation and consummation of the Plan within the timeframes contemplated by this Agreement;

vii. negotiate in good faith and use commercially reasonable efforts to negotiate, execute and deliver such other related Definitive Documents as may be required to implement the Restructuring Transactions and obtain entry of the Confirmation Order;

viii. not take any action that is inconsistent in any material respect with, or is intended to frustrate, delay or impede in any material respect the timely approval and entry of the Confirmation Order and consummation of the Restructuring Transactions;

ix. to the extent any legal or structural impediments arise that would prevent, hinder or delay the consummation of the Plan and Restructuring Transactions contemplated by the Definitive Documents, negotiate, in good faith, appropriate additional or alternative provisions to address any such impediments; *provided*, *however*, that the Parties agree no such legal or structural impediments exist as of the Support Effective Date; and

x. promptly notify the Company, in writing, of any material governmental or third-party complaints, litigations, investigations, or hearings (or written communications indicating that the same may be contemplated or threatened) with respect to the Restructuring.

(b) Transfers. The Supporting Noteholder agrees that, for the duration of the Support Period, the Supporting Noteholder shall not sell, transfer, loan, issue, pledge, hypothecate, assign, or otherwise dispose of or offer or contract to pledge, encumber, assign, sell or otherwise transfer (each, a "**Transfer**"), directly or indirectly, in whole or in part, any of its Claims under the Convertible Notes or interest therein (including for the stock receivable from Reorganized VIVUS pursuant to the Plan), or any other claims against or interests in the Company (including grant any proxies, deposit any Claims against or interests in the Company into a voting trust or entry into a voting agreement with respect to any such Claims or interests unless the transferee thereof, prior to such Transfer, agrees in writing for the benefit of the Parties to become a Supporting Noteholder and to be bound by all of the terms of this Agreement applicable to the Supporting Noteholder (including with respect to any and all Claims or other claims or interests it already may hold against or in the Company prior to such Transfer) by executing a joinder agreement, a form of which is attached hereto as **Exhibit B** (the "**Joinder Agreement**"), and delivering an executed copy thereof within two (2) business days following

such execution and prior to the Effective Date, to Weil, Gotshal & Manges LLP ("**Weil**"), as counsel to the Company, and the Supporting Noteholder's Counsel, in which event (A) the transferee (including the Supporting Noteholder transferee, if applicable) shall be deemed to be a Supporting Noteholder hereunder to the extent of such transferred rights and obligations and (B) the transferor shall be deemed to relinquish its rights (and be released from its obligations) under this Agreement to the extent of such transferred rights and obligations. The Supporting Noteholder agrees that, for the duration of the Support Period, the Supporting Noteholder shall not convert any Convertible Notes to equity of VIVUS; *provided*, that notwithstanding anything to the contrary in this Section 3(b), the Supporting Noteholder shall not be restricted from purchasing or acquiring any Claims against the Company (including the Secured Note Claims (as defined in the Term Sheet)).

The Supporting Noteholder agrees that any (x) Transfer of any Claims or Interests it has under the Convertible Notes or interests therein that does not comply with the terms and procedures set forth herein and (y) conversion of Convertible Notes to equity of VIVUS shall, in each case, be deemed void *ab initio*, and the Company and each other Supporting Noteholder shall have the right to enforce the voiding of such Transfer or conversion. If the Supporting Noteholder effectuates a Transfer in accordance with this Agreement, the Supporting Noteholder shall have no liability under this Agreement arising from or related to the failure of the transferee to comply with the terms of this Agreement.

Notwithstanding the above, a Supporting Noteholder may Transfer its Claims to an entity that is acting in its capacity as a Qualified Marketmaker(1) without the requirement to execute a Joinder Agreement, *provided* that, as to a Qualified Marketmaker, (I) such Qualified Marketmaker must Transfer such right, title, or interest within seven (7) calendar days following its receipt thereof, (II) any subsequent Transfer by such Qualified Marketmaker of the right, title, or interest in such Claims is to a transferee that is or becomes a Supporting Noteholder at the time of such Transfer, and (III) the Qualified Marketmaker complies with Section (d) hereof.

(c) Additional Claims and Interests. Other than the sentence immediately set forth above, this Agreement shall in no way be construed to preclude the Supporting Noteholder from acquiring additional Claims against or equity interests in the Company; provided, that (i) if the Supporting Noteholder acquires additional Claims against or Interests in the Company after the date hereof, the Supporting Noteholder shall notify the Company and Weil within a reasonable period of time following such acquisition and (ii) the Supporting Noteholder hereby acknowledges and agrees that such additional Claims and Interests shall automatically and immediately upon acquisition by the Supporting Noteholder be subject to the terms of this Agreement.

(d) Obligations of Qualified Marketmaker. If, during the Support Period, and at the time of a proposed Transfer of Claims to a Qualified Marketmaker, such Claims (i) may be

(1) As used herein, the term "***Qualified Marketmaker***" means an entity that (a) holds itself out to the public or the applicable private markets as standing ready in the ordinary course of business to purchase from customers and sell to customers Claims against the Company (or enter with customers into long and short positions in Claims against the Company), in its capacity as a dealer or marketmaker in Claims against the Company and (b) is, in fact, regularly in the business of making a market in Claims against issuers or borrowers (including debt securities or other debt).

voted on the Plan, the proposed transferor Supporting Noteholder must first vote such Claims in accordance with Section 3(a) or (ii) have not yet been and may not yet be voted on the Plan and such Qualified Marketmaker does not Transfer such Claims or Interests to a subsequent transferee prior to the third (3rd) Business Day prior to the expiration of the applicable Voting Deadline (such date, the "**Qualified Marketmaker Joinder Date**"), such Qualified Marketmaker shall be required to (and the transfer documentation to the Qualified Marketmaker shall have provided that it shall), on the first (1st) Business Day immediately following the Qualified Marketmaker Joinder Date, become a Supporting Noteholder with respect to such Claims in accordance with the terms hereof (including the obligation to vote in favor of the Plan) and shall vote in favor of the Plan in accordance with Section 3(a) hereof; *provided*, that, the Qualified Marketmaker shall automatically, and without further notice or action, no longer be a Supporting Noteholder with respect to such Claims at such time that the transferee of such Claims becomes a Supporting Noteholder, with respect to such Claims.

(e) Grace Period.(2) Each Supporting Noteholder agrees that the Grace Period shall be extended until and terminate, automatically without any notice or action, upon the earliest to occur of (the "**Grace Period Termination**") (i) indefeasible payment in full in cash of all Obligations under the Convertible Notes pursuant to the terms of the Convertible Notes Indenture (as well as all of IEH's and the Trustee's reasonable and documented fees and expenses, including attorneys' fees) pursuant to a Permitted Refinancing on or before the Permitted Refinancing Deadline, (ii) the Petition Date, (iii) the termination of the Support Period, (iv) at the time of any breach or failure to fulfill or comply with any obligations under Section 5 of the Convertible Notes Agreement unless expressly permitted under this Agreement, or (v) as may be otherwise agreed by the Company and the Supporting Noteholder in a signed agreement. For the avoidance of doubt, upon the Grace Period Termination all Obligations shall be accelerated and immediately due and payable in full in cash. For further avoidance of doubt, during the Support Period, the Supporting Noteholder agrees to forbear from taking, and hereby directs the Trustee to forbear from taking, any of the Enforcement Actions. The Supporting Noteholder further agrees that if the Trustee takes any Enforcement Action inconsistent with such the Supporting Noteholder's obligations under this Agreement with respect such Enforcement Action, such Supporting Noteholder shall use commercially reasonable efforts to cause the Trustee to cease and refrain from taking such Enforcement Action. For the avoidance of doubt, any portion of the Convertible Notes rolled up into the DIP Facility pursuant to any DIP Order shall be considered part of the DIP Facility and shall not constitute Convertible Notes for any and all purposes under this Agreement.

(f) D&O Claims. Regardless of whether or not the Bankruptcy Court approves the releases set forth in the Term Sheet against the Released Parties, during the Support Period and after the Effective Date, the Supporting Noteholder (in any capacity) hereby covenants and agrees not to pursue any claims that the Supporting Noteholder may have against the Released Parties, including the current and former directors and officers of the Company.

(g) DIP Facility. The Supporting Noteholder agrees to work in good faith to negotiate and execute the DIP Term Sheet. Subject to the conditions set forth in the DIP Term

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(2) Capitalized terms used in this Section 3(e) and not otherwise defined shall have the meanings ascribed in the Convertible Notes Agreement.

Sheet, the Supporting Noteholder agrees to (i) work in good faith to negotiate and execute the DIP Credit Agreement and to prepare the DIP Orders, (ii) use its commercially reasonable efforts to assist the Company in obtaining entry of and to support such entry of the DIP Orders, and (iii) object to and not propose, seek approval for, or support any debtor in possession financing that is not consistent with the DIP Facility, DIP Term Sheet, and DIP Credit Agreement.

(h) Exit Facility. The Supporting Noteholder agrees to work in good faith to negotiate and execute the Exit Financing Commitment Letter. Subject to the conditions set forth in the Exit Financing Commitment Letter, the Supporting Noteholder agrees to (i) work in good faith to negotiate and execute the Exit Facility credit agreement, (ii) use its commercially reasonable efforts to assist the Company in obtaining approval of the Exit Facility and any documentation thereof in the Confirmation Order, and (iii) object to and not propose, seek approval for, or support any financing to consummate the Plan that is not consistent with the Exit Facility, Exit Financing Commitment Letter, and Exit Facility credit agreement.

(i) New Corporate Governance Documents. The Supporting Noteholder hereby agrees to provide drafts of the New Corporate Governance Documents through the Supporting Noteholder's Counsel to Weil no later than fourteen (14) calendar days before the Voting Deadline.

4. **Agreements of the Company.**

(a) General Covenants.

i. The Company acknowledges and agrees to the provisions in Section 3(e) of this Agreement;

ii. Subject to the conditions set forth in the DIP Term Sheet, the Company agrees to (i) work in good faith to negotiate and execute the DIP Credit Agreement and to finalize the proposed DIP Orders, (ii) use commercially reasonable efforts to obtain entry of and to support such entry of the DIP Orders, and (iii) object to and not propose, seek approval for, or support any debtor in possession financing that is not consistent with the DIP Facility, DIP Term Sheet, and DIP Credit Agreement;

iii. Subject to the conditions set forth in the Exit Financing Commitment Letter, the Company agrees to (i) work in good faith to negotiate and execute the Exit Facility credit agreement, (ii) use its commercially reasonable efforts in obtaining approval of the Exit Facility and any documentation thereof in the Confirmation Order, and (iii) object to and not propose, seek approval for, or support any financing to consummate the Plan that is not consistent with the Exit Facility, Exit Financing Commitment Letter, and Exit Facility credit agreement;

iv. The Plan shall provide that all obligations in respect of the Convertible Notes constitute allowed claims in an amount agreed between the Debtors and the Supporting Noteholder, which shall not be less than

$169,165,000.00 plus accrued interest, fees and expenses (including the Supporting Noteholder's and Trustee's reasonable fees and expenses); and

v. The Company shall redeem $1,000,000 of principal amount of the Convertible Notes for cash in an equal amount to be paid to the Supporting Noteholder no later than three (3) business days from the Support Effective Date.

(b) Support Period Covenants. The Company agrees that the Company shall, and shall cause each of its subsidiaries included in the definition of Company, to:

i. not rescind, cancel, modify, supplement or replace its Preferred Stock Rights Agreement, dated as of December 30, 2019, or execute or implement any agreement, plan or document with terms or intent similar thereto;

ii. (i) not take or permit any action to (w) cause an "ownership change" of the Company (within the meaning of Section 382 of the Code), other than any ownership change resulting from any action taken by or caused by the Supporting Noteholder or any Affiliate thereof on or after April 4, 2020 (an "**Ownership Change**"), (x) amend any of its income tax returns, (y) file any income tax return in a manner inconsistent with past practice (unless otherwise required by law), or (z) dispose of any of its assets (or otherwise recognized income or gain) outside the ordinary course of business (other than as a result of or as contemplated by the Restructuring Transactions or this Agreement), in each case, to the extent such action would impair the value or availability for use of the Company's net operating loss carryforwards, tax credits, or other tax attributes for U.S. federal income tax purposes as of the Company's taxable year ending on December 31, 2019 (collectively, the "**Tax Attributes**"), assuming, for avoidance of doubt, that since January 1, 2013, an Ownership Change has not occurred as of the Support Effective Date and (ii) shall seek entry of an Order of the Bankruptcy Court, enjoining actions by holders of Interests that could impair the value or availability for use of the Company's Tax Attributes as compared to the Support Effective Date (the "**No Trading Order**");

iii. support and take all actions necessary or reasonably requested by the Supporting Noteholder to effectuate and facilitate the Solicitation, approval of the Disclosure Statement, approval and entry of the Confirmation Order, and confirmation and consummation of the Plan within the timeframes contemplated by this Agreement;

iv. work in good faith to (A) negotiate, deliver and execute the remaining Definitive Documents and any other required agreements to effectuate and consummate the Restructuring Transactions as contemplated by this Agreement and (B) obtain (1) approval by the Bankruptcy Court of the Solicitation materials and (2) entry of the Confirmation Order by the Bankruptcy Court in accordance with the Bankruptcy Code, the Bankruptcy Rules and the timeframes set forth in this Agreement;

v. use commercially reasonable efforts to obtain any and all required regulatory and/or third-party approvals for the Restructuring Transactions embodied in the Plan, if any;

vi. not take any action that is inconsistent in any material respect with, or is intended to frustrate, delay or impede in any material respect the timely approval and entry of the Confirmation Order and consummation of the Restructuring Transactions;

vii. not directly or indirectly, through any person or entity (including, without limitation, any trustee), seek, solicit, propose, support, assist, fail to object to, engage in negotiations in connection with or participate in the formulation, preparation, filing, or prosecution of any restructuring or reorganization of any Debtor that is inconsistent with the Plan or object to or take or fail to take any other action that is inconsistent with or that would reasonably be expected to prevent, interfere with, delay, or impede the Solicitation, approval of the Disclosure Statement, approval and entry of the Confirmation Order or the confirmation and consummation of the Plan and the Restructuring Transactions;

viii. provide draft copies of all motions or applications and other documents related to the Restructuring Transaction (including all substantive "first day" and "second day" motions and orders, the Plan, the Disclosure Statement, ballots, Plan Supplement and other Solicitation materials in respect of the Plan and any proposed amended version of the Plan or the Disclosure Statement, and a proposed Confirmation Order) the Company intends to file with the Bankruptcy Court to the Supporting Noteholder' Counsel, if reasonably practicable, at least four (4) days prior to the date when the Company intends to file any such pleading or other document, and any other required agreements to effectuate and consummate the Restructuring Transactions as contemplated by this Agreement (*provided*, that if delivery of such motions, orders, or materials at least four (4) days in advance is not reasonably practicable prior to filing, such motion, order or material shall be delivered as soon as reasonably practicable prior to filing) and shall consult in good faith with the Supporting Noteholder' Counsel regarding the form and substance of any such proposed filing with the Bankruptcy Court; provided, however, the Company shall not file any Definitive Document without first obtaining the approval of the Supporting Noteholder as required in Section 2(b) hereof.

ix. to the extent any legal or structural impediments arise that would prevent, hinder or delay the consummation of the Plan and Restructuring Transactions contemplated by the Definitive Documents, negotiate, in good faith, appropriate additional or alternative provisions to address any such impediments; provided, however, that the Parties agree no such legal or structural impediments exist as of the Support Effective Date;

x. timely file with the Bankruptcy Court a written objection to any motion filed with the Bankruptcy Court by a third party seeking the entry of an

order (A) directing the appointment of an examiner with expanded powers or a trustee, (B) converting the Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code, (C) dismissing the Chapter 11 Cases, or (D) modifying or terminating the Company's exclusive right to file and/or solicit acceptances of a plan of reorganization;

xi. pay in cash all reasonable and documented fees and expenses of Supporting Noteholder (including attorney's fees) and the Trustee within five (5) business days of receipt of an invoice therefor, (A) one business day immediately preceding the Petition Date and (B) subject to any required approvals of the Bankruptcy Court, from time to time thereafter (but not more often than monthly and for payment on the Effective Date) regardless of whether the Restructuring Transaction is or has been consummated;

xii. if the Company becomes aware of any breach by the Company or its representatives of any of the obligations, representations, warranties or covenants of the Company set forth in this Agreement or the Plan, the Company shall furnish prompt written notice (and in any event within three (3) business days of obtaining actual knowledge) to counsel to the Supporting Noteholder and shall use commercially reasonable efforts to take all remedial action reasonably necessary as soon as reasonably practicable to cure such breach;

xiii. operate their business in the ordinary course in a manner consistent with past practice in all material respects (other than any changes in operations resulting from or relating to the Plan or the commencement of the Chapter 11 Cases with the Supporting Noteholder's consent);

xiv. to the extent any legal or structural impediments arise that would prevent, hinder or delay the consummation of the Plan and Restructuring Transactions contemplated by the Definitive Documents, negotiate, in good faith, appropriate additional or alternative provisions to address any such impediments to the Supporting Noteholder's satisfaction;

xv. not acquire or divest (by merger, exchange, consolidation, acquisition of stock or assets, or otherwise), or file any motion or application seeking authority to acquire or divest, (A) any corporation, partnership, limited liability company, joint venture, or other business organization or division or (B) the Company's assets other than in the ordinary course of business or with the advance written consent of the Supporting Noteholder;

xvi. not challenge the validity and enforceability of the Convertible Notes or the Obligations in any way, including seeking any such determination or the avoidance, disallowance, recharacterization, reduction, offset, recoupment or subordination of the Convertible Notes or the Obligations;

xvii. not redeem, purchase, issue, acquire or offer to acquire any Interests, or pay any dividend or make any distribution on account thereof; and

5. **Termination of Agreement.**

(a) This Agreement shall terminate (i) automatically upon completion of (x) the Permitted Refinancing prior to the Permitted Refinancing Deadline or (y) an Alternative Restructuring, (ii) automatically upon the Effective Date, or (iii) unless cured prior thereto, three (3) business days following the delivery of written notice (in accordance with Section 19 hereof) that has not been retracted by the sender in writing from: (x) the Supporting Noteholder to the Company at any time after the occurrence and during the continuance of any Creditor Termination Event (as defined below); or (y) the Company to the Supporting Noteholder at any time after the occurrence and during the continuance of any Company Termination Event (as defined below). Notwithstanding any provision to the contrary in this Section 5, no Party may exercise any of its respective termination rights as set forth herein if such Party has breached, or failed to perform or comply in all material respects with the terms and conditions of this Agreement (unless such failure to perform or comply arises as a result of another Party's actions or inactions), with such failure to perform or comply causing, or resulting in, the occurrence of a Creditor Termination Event or Company Termination Event specified herein. The Company acknowledges and agrees and shall not dispute that after the commencement of the Chapter 11 Cases, the giving of notice of termination of this Agreement by any Party pursuant to this Agreement shall not be a violation of the automatic stay of section 362 of the Bankruptcy Code (and the Company hereby waives, to the fullest extent permitted by law, the applicability of the automatic stay to the giving of such notice); *provided*, *however*, that nothing herein shall prejudice any Party's rights to argue that the giving of notice of default or termination was not proper under the terms of this Agreement.

(b) A "Creditor Termination Event" shall mean any of the following:

i. the Supporting Noteholder elects to terminate this Agreement and its obligations under the Term Sheet and DIP Term Sheet because it is not satisfied with its diligence review in its sole discretion; *provided*, *however*, that the Supporting Noteholder may not terminate or deliver a notice of termination due to the foregoing Creditor Termination Event before June 30, 2020 if reasonably requested diligence information is being provided by the Company; provided, further, that the Supporting Noteholder shall be permitted in all circumstances to terminate or deliver a notice of termination due to the foregoing Creditor Termination Event on or before July 6, 2020.

ii. the breach or default by the Company or its failure to fulfill or comply with any of the undertakings, representations, warranties, or covenants of the Company set forth herein (for the avoidance of doubt, including the Term Sheet and DIP Term Sheet) or in the Convertible Notes Agreement in any material respect;

iii. the issuance by any governmental authority, including any regulatory authority or court of competent jurisdiction, of any ruling, judgment, or order enjoining the consummation of or rendering illegal the Plan or the Restructuring, and either (A) such ruling, judgment, or order has been issued at the request of or with the acquiescence of the Company, or (B) in all other

circumstances, such ruling, judgment, or order has not been stayed, reversed, or vacated within ten (10) business days after such issuance;

iv. if a Permitted Refinancing has not occurred by the Permitted Refinancing Deadline and the Company has not satisfied any of the following milestones:(3)

1. On or before July 9, 2020, the Debtors and IEH, as Exit Lender, shall execute the Exit Financing Commitment Letter;

2. The Debtors shall commence the respective prearranged Chapter 11 Cases in the Bankruptcy Court no later than July 13, 2020;

3. The Debtors shall file their Schedules D and E/F of Assets and Liabilities, and the Statements of Financial Affairs no later than seven (7) business days after the Petition Date;

4. The Debtors shall obtain the Bar Date Order no later than five (5) business days after the Petition Date;

5. Each Debtor shall file the Plan and Disclosure Statement by no later than the Petition Date;

6. The Debtors shall file a motion seeking approval of the DIP Facility on the Petition Date;

7. The Interim DIP Order shall be entered in the Chapter 11 Cases by no later than five (5) business days after the Petition Date, and shall not be reversed, vacated, stayed, appealed, or subject to a request for a new trial, reargument, or rehearing as of the entry of the Final DIP Order;

8. The No Trading Order shall have been entered by the Bankruptcy Court by no later than three (3) calendar days after the Petition Date, and shall become a Final Order by no later than 35 days after the Petition Date;

(3) The Supporting Noteholder may determine, by no later than July 6, 2020, in its sole discretion to eliminate the bar date process and GUC Account and permit all Allowed General Unsecured Claims (as defined in the Term Sheet) to be paid in the ordinary course of business; provided, that to the extent the Supporting Noteholder determines to revert to such a timeline, the Milestones (including for the avoidance of doubt, the Petition Date) shall be modified as mutually agreed by the Company and the Supporting Noteholder.

9. A Final Order of the Bankruptcy Court approving the assumption of this Agreement and the Termination Fee (as defined below) shall be entered by no later than 35 days after the Petition Date;

10. The Final DIP Order shall be entered in the Chapter 11 Cases by no later than thirty-five (35) calendar days after the Petition Date, and shall not be reversed, vacated, stayed, appealed, or subject to a request for a new trial, reargument, or rehearing as of the Effective Date;

11. An order approving the Disclosure Statement shall be entered in the Chapter 11 Cases by no later than thirty-five (35) calendar days after the Petition Date;

12. An order confirming the Plan shall be entered in the applicable Chapter 11 Cases by no later than seventy-five (75) calendar days after the Petition Date; and

13. The Effective Date shall occur no later than ninety (90) calendar days after the Petition Date, provided however, that the Company and Supporting Noteholder shall use commercially reasonable efforts to cause the Effective Date to occur as soon as is practicable after the entry of the Confirmation Order (including seeking waiver of any stay to consummate the Plan).

v. an event of default occurs and is continuing under the DIP Credit Agreement, DIP Facility, DIP Orders, or Exit Facility Commitment Letter;

vi. the Company files any plan of reorganization or liquidation (or disclosure statement related thereto) in the Chapter 11 Cases other than the Plan without the prior written consent of the Supporting Noteholder;

vii. after filing of any Definitive Document with the Bankruptcy Court, (A) any amendment or modification to any such Definitive Document is made by the Company or (B) any pleading or request that seeks Bankruptcy Court approval to amend or modify any such Definitive Document is made by the Company, and such amendment, modification, request or filing is (1) inconsistent in any material respect with any Definitive Document and (2) not in form and substance reasonably acceptable to the Supporting Noteholder;

viii. the Bankruptcy Court grants relief that is inconsistent in any material respect with any Definitive Document that has been filed with the Bankruptcy Court;

ix. (A) a trustee, receiver, or examiner with expanded powers is appointed in one or more of the Chapter 11 Cases, (B) the filing by the Company of a motion or other request for relief seeking to dismiss any of the Chapter 11 Cases or convert any of the Chapter 11 Cases to cases under Chapter 7 of the Bankruptcy Code, or (C) entry of an order by the Bankruptcy Court dismissing any of the Chapter 11 Cases or conversion of any of the Chapter 11 Cases to a case under Chapter 7 of the Bankruptcy Code;

x. the Company challenges, or fails to defend, the validity and enforceability of the Convertible Notes or the Obligations in any way, including seeking any such determination or concerning the avoidance, disallowance, recharacterization, reduction, offset, recoupment or subordination of the Convertible Notes or the Obligations;

xi. the Bankruptcy Court enters an order in the Chapter 11 Cases terminating the Company's exclusive right to file or solicit a plan or plans of reorganization or liquidation pursuant to Section 1121 of the Bankruptcy Code;

xii. the Company sells, or files any motion or application seeking authority to sell or abandon a portion of the Company's assets outside the ordinary course without the prior written consent of the Supporting Noteholder;

xiii. the Company (A) gives notice of termination of this Agreement, or (B) files a motion or pleading with the Bankruptcy Court seeking to reject or authority to terminate this Agreement;

xiv. the Company fails to pay, in accordance with this Agreement, the Supporting Noteholder's and the Trustee's reasonable and documented fees and expenses, including attorneys' fees, promptly upon invoice;

xv. an order is (or orders are) entered by the Bankruptcy Court granting relief from the automatic stay, under Section 362 of the Bankruptcy Code, to the holder or holders of any security interest to permit any exercise of remedies as to any of the Company's assets (other than in respect of collection solely from available insurance proceeds) having a fair market value of $2,000,000 or more in the aggregate;

xvi. the Company (A) seeks to enter into or the Bankruptcy Court approves an Alternative Restructuring or (B) provides notice to counsel to the Supporting Noteholder of its intent to enter into an Alternative Restructuring, including a refinancing of the Convertible Notes after the Permitted Refinancing Deadline;

xvii. the Confirmation Order fails to expressly provide (A) that General Unsecured Claims (as defined in the Term Sheet), other than governmental claims, are discharged, and (B) that the GUC Amount from the GUC Account (as defined in the Term Sheet) shall be the sole consideration and distributions available in respect of General Unsecured Claims;

xviii. the GUC Amount shall be in excess of an amount reasonably acceptable to the Supporting Noteholder;

xix. (w) an "Ownership Change," (x) any amendment of the Company's income tax returns, (y) any filing of the Company's income tax returns in a manner inconsistent with past practice (unless otherwise required by law), or (z) any disposition of the Company's assets (or other income or gain recognition) outside the ordinary course of business (other than as a result of or as contemplated by the Restructuring Transactions or this Agreement), in each case, to the extent such action would impair the value or availability for use of the Company's Tax Attributes, assuming, for avoidance of doubt, that since January 1, 2013, an Ownership Change has not occurred as of the Support Effective Date;

xx. if the Company fails to provide the Supporting Noteholder at least three (3) business days before the Petition Date an updated Ownership Change Analysis, based on facts known to the Company at such time, prepared by a "Big 4" accounting firm, but covering the additional period through a date that is no more than seven (7) days before the date of delivery, showing that no "ownership change" of the Company (within the meaning of Section 382 of the Code) has occurred; and/or

xxi. the occurrence of any breach, Default or Event of Default under the Convertible Notes Indenture not caused by or related to the failure to make the Principal Payment on the Maturity Date.(4)

(c) A "Company Termination Event" shall mean any of the following:

i. the breach by the Supporting Noteholder of any of the undertakings, representations, warranties, or covenants of the Supporting Noteholder set forth herein in any material respect;

ii. the board of directors, managers, members, or partners, as applicable, of any Company entity party hereto determines, after consultation with counsel, that continued performance under this Agreement would be reasonably expected to violate the exercise of its fiduciary duties under applicable law;

iii. the issuance by any governmental authority, including any regulatory authority or court of competent jurisdiction, of any ruling, judgment, or order enjoining the consummation of or rendering illegal the Plan or the Restructuring, and (a) such ruling, judgment, or order has not been stayed, reversed, or vacated within ten (10) business days after such issuance despite the commercially reasonable efforts of the Company, (b) absent a prior agreement of the Supporting Noteholder, DIP Lenders, DIP Agent, or IEH as Exit Facility lender to modify the Plan or the Restructuring in such a manner as to moot the

(4) Capitalized terms used in Section 5(b)(xxi) shall have the meanings ascribed in the Convertible Notes Agreement.

aspects of the Plan or Restructuring enjoined or rendered illegal in their sole discretion;

iv. if the Supporting Noteholder terminates this Agreement;

v. the Bankruptcy Court enters an order (A) directing the appointment of a trustee in the Chapter 11 Cases, (B) converting the Chapter 11 Cases to cases under chapter 7 of the Bankruptcy Code, or (C) dismissing the Chapter 11 Cases absent a request for relief and despite opposition thereto by the Company;

vi. the GUC Amount shall be less than the amount reasonably acceptable to the Company; and/or

vii. if the Effective Date has not occurred by the Outside Date.

Notwithstanding the foregoing, any of the dates or deadlines set forth in Section 5(a), 5(b) and 5(c) may be extended in writing by Agreement of the Company and the Supporting Noteholder (email being sufficient).

(d) Mutual Termination. This Agreement may be terminated by mutual agreement of the Company and the Supporting Noteholder, including upon the receipt of written notice delivered in accordance with Section 19 hereof.

(e) Effect of Termination. Subject to the proviso contained in Section 5(a) hereof, upon the termination of this Agreement in accordance with this Section 5, and except as provided in Section 13 hereof, this Agreement (and the Support Period and the Grace Period) shall forthwith become void and of no further force or effect and each Party shall, except as provided otherwise in this Agreement, be immediately released from its liabilities, obligations, commitments, undertakings and agreements under or related to this Agreement, the Term Sheet and DIP Term Sheet, the Exit Financing Commitment Letter, (and the Convertible Notes Agreement as to forbearance of rights and remedies during the Grace Period) and shall have all the rights and remedies that it would have had and shall be entitled to take all actions, whether with respect to the Restructuring or otherwise, that it would have been entitled to take had it not entered into this Agreement (or agreed to forbearance of rights and remedies during the Grace Period in the Convertible Notes Agreement), including all rights and remedies available to it under applicable law; *provided*, however, that in no event shall any such termination relieve a Party from liability for its breach or non-performance of its obligations hereunder prior to the date of such termination.

(f) Termination Fee. If the Supporting Noteholder terminates this Agreement prior to the commencement of the Chapter 11 Cases for any reason other than the termination event set forth in Sections 5(b)(i), or 5(b)(iv)(1), then the Company shall promptly remit to Supporting Noteholder $5,000,000 (five million United States Dollars) in cash or add such amount to the principal amount of the Convertible Notes as of the date of termination. If the Supporting Noteholder terminates this Agreement after the commencement of the Chapter 11 Cases as a result of a Creditor Termination Event under Sections 5(b)(ii); 5(b)(iv)(2),(3),(5) and (6); 5(b)(vi); 5(b)(vii); 5(b)(x); 5(b)(xii); 5(b)(xiii); 5(b)(xiv); 5(b)(xvi); 5(b)(xix) to the extent

resulting from an action or omission by the Company, or 5(b)(xx); then the Company shall promptly remit to Supporting Noteholder $5,000,000 (five million United States Dollars) in cash or add such amount to the principal amount of the Convertible Notes as of the date of termination; *provided*, that for the avoidance of doubt (i) no Termination Fee will be due, if the Supporting Noteholder terminates this Agreement as a result of the Company's determination that the DIP Term Sheet, Exit Facility, Commitment Letter or proposed amendments to the Term Sheet are not reasonably satisfactory, and (ii) no Termination Fee shall be payable upon the occurrence of a Permitted Refinancing prior to the Permitted Refinancing Deadline or a Termination of this Agreement upon completion of a Permitted Refinancing prior to the Permitted Refinancing Deadline.

(g) No Waiver. If the Restructuring is not consummated, nothing herein shall be construed as a waiver by any Party of any or all of such Party's rights, and the Parties expressly reserve any and all of their respective rights. Pursuant to Federal Rule of Evidence 408 and any other applicable rules of evidence, this Agreement and all negotiations relating hereto shall not be admissible into evidence in any proceeding other than a proceeding to enforce its terms.

6. **Definitive Documents; Good Faith Cooperation; Further Assurances.**

Each Party hereby covenants and agrees to cooperate with each other in good faith in connection with, and shall exercise commercially reasonable efforts with respect to the pursuit, approval, negotiation, execution, delivery, implementation, and consummation of the Plan and the Restructuring, as well as the negotiation, drafting, execution, and delivery of the Definitive Documents. Furthermore, subject to the terms hereof, each of the Parties shall (i) take such action as may be reasonably necessary or reasonably requested by the other Parties to carry out the purposes and intent of this Agreement, including making and filing any required regulatory filings, and (ii) refrain from taking any action that would frustrate the purposes and intent of this Agreement.

7. **Representations and Warranties.**

(a) Each Party, severally (and not jointly), represents and warrants to the other Parties that the following statements are true, correct, and complete as of the date hereof (or as of the date a party becomes a Supporting Noteholder party hereto):

i. such Party is validly existing and in good standing under the laws of its jurisdiction of incorporation or organization, and has all requisite corporate, partnership, limited liability company, or similar authority to enter into this Agreement and carry out the transactions contemplated hereby and perform its obligations contemplated hereunder; and the execution and delivery of this Agreement and the performance of such Party's obligations hereunder have been duly authorized by all necessary corporate, limited liability company, partnership or other similar action on its part;

ii. the execution, delivery, and performance by such Party of this Agreement does not and will not (A) violate any material provision of law, rule,

or regulation applicable to it or any of its subsidiaries or its charter or bylaws (or other similar governing documents) or those of any of its subsidiaries, or (B) conflict with, result in a breach of, or constitute (with due notice or lapse of time or both) a default under any material debt obligation to which it or any of its subsidiaries is a party except for the filing of the Chapter 11 Cases and the execution, delivery, and performance of the DIP Agreement or related documents;

iii. the execution, delivery, and performance by such Party of this Agreement does not and will not require any material registration or filing with, consent or approval of, or notice to, or other action, with or by, any federal, state or governmental authority or regulatory body, except such filings as may be necessary and/or required by the SEC or other securities regulatory authorities under applicable securities laws; and

iv. this Agreement is the legally valid and binding obligation of such Party, enforceable against it in accordance with its terms, except as enforcement may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws relating to or limiting creditors' rights generally.

(b) The Supporting Noteholder represents and warrants to the other Parties that, as of the date hereof (or as of the date the Supporting Noteholder becomes a party hereto), such Supporting Noteholder (i) is the owner of the aggregate principal amount of the Convertible Notes or Interests set forth below its name on the signature page hereto (or below its name on the signature page of a Joinder Agreement for any Supporting Noteholder that becomes a party hereto after the date hereof) and does not own any other Convertible Notes or Interests, and/or (ii) has, with respect to the beneficial owners of such Convertible Notes, (A) sole investment or voting discretion with respect thereto, (B) full power and authority to vote on and consent to matters concerning such Convertible Notes or to exchange, assign, and transfer such Convertible Notes, and (C) full power and authority to bind or act on the behalf of, such beneficial owners.

(c) The Supporting Noteholder makes the representations and warranties set forth in Section 20(c) hereof, and in each case, to the other Parties.

(d) The Company represents and warrants that:

i. as of the Support Effective Date and Plan Effective Date, the Company has not and will not have had an ownership change pursuant to Section 382 of the Code since January 1, 2013 that would impair the value or availability of the Company's Tax Attributes, other than any ownership change resulting from any action taken by or caused by the Supporting Noteholder or any Affiliate thereof on or after April 4, 2020; and

ii. from and after the Support Effective Date, the Company shall not have (x) amended any of its income tax returns, (y) filed any income tax return in a matter inconsistent with past practice (unless otherwise required by law), or (z) disposed of any of its assets (or otherwise recognized income or gain) outside the ordinary course of business (other than as a result of or as contemplated by the Restructuring Transactions or this Agreement), in each case,

to the extent such action would impair the value or availability for use of the Company's Tax Attributes.

8. **Disclosure; Publicity.**

The Company shall submit drafts to the Supporting Noteholder's Counsel of any press releases that constitute disclosure of the existence of the terms of this Agreement or any amendment to the terms of this Agreement at least (1) business day prior to making any such disclosure, and consult with the Supporting Noteholder's with respect thereto in good faith. Except as required by applicable law or otherwise permitted under the terms of any other agreement between the Company and any Supporting Noteholder, no Party or its advisors shall disclose to any person or entity (including, for the avoidance of doubt, any other Party), other than advisors to the Company, the principal amount or percentage of the Convertible Notes held by any Supporting Noteholder without such Supporting Noteholder's consent; *provided*, *however*, that if such disclosure is required by law, subpoena, or other legal process or regulation, the disclosing Party shall afford the relevant Supporting Noteholder a reasonable opportunity to review and comment in advance of such disclosure and consult with the Supporting Noteholder with respect thereto in good faith, and shall take all reasonable measures to limit such disclosure (the expense of which, if any, shall be borne by the relevant Supporting Noteholder). Notwithstanding the provisions in this Section 8, any Party may disclose, to the extent consented to in writing by the Supporting Noteholder, such Supporting Noteholder's individual holdings.

9. **Amendments and Waivers.**

(a) Other than as set forth in Section 9(b), this Agreement, including any exhibits or schedules hereto, may not be waived, modified, amended, or supplemented except with the written consent of the Company and the Requisite Creditors (such consent to be provided or withheld by the Supporting Noteholder on the terms and conditions otherwise set forth in this Agreement, and if not expressly set forth in this Agreement, then not to be unreasonably withheld, conditioned, or delayed);

(b) Notwithstanding Section 9(a):

i. any waiver, modification, amendment, or change to this Section 9 shall require the written consent of all of the Parties;

ii. any modification, amendment, or change to the definition of "Requisite Creditors" shall require the written consent of each Supporting Noteholder included in such definition and the Company;

iii. any material modification, amendment, or change with respect to the DIP Term Sheet, DIP Facility, or DIP Orders shall require the consent of the DIP Lender and DIP Agent; and

iv. any material modification, amendment, or change with respect to the Exit Financing Commitment Letter or the Exit Facility shall require the consent of IEH as Exit Facility lender.

10. **Effectiveness.**

This Agreement shall become effective and binding upon each Party upon the execution and delivery by all Parties of an executed signature page hereto and shall become effective and binding on all Parties on the Support Effective Date.

11. **Governing Law; Jurisdiction; Waiver of Jury Trial.**

(a) Except to the extent that the Bankruptcy Code or other federal law is applicable or to the extent that a Definitive Document provides otherwise, the rights, duties, and obligations arising under the Agreement shall be governed by, and construed and enforced in accordance with, the internal laws of the State of New York, without giving effect to the principles of conflicts of laws thereof.

(b) Each of the Parties irrevocably agrees that any legal action, suit, or proceeding arising out of or relating to this Agreement brought by any Party shall be brought and determined in any federal or state court in New York, New York ("**NY Courts**") and each of the Parties hereby irrevocably submits to the exclusive jurisdiction of the aforesaid courts for itself and with respect to its property, generally and unconditionally, with regard to any such proceeding arising out of or relating to this Agreement or the Restructuring. Each of the Parties agrees not to commence any proceeding relating to this Agreement or the Restructuring except in the NY Courts, other than proceedings in any court of competent jurisdiction to enforce any judgment, decree, or award rendered by any NY Courts. Each of the Parties further agrees that notice as provided in Section 19 shall constitute sufficient service of process and the Parties further waive any argument that such service is insufficient. Each of the Parties hereby irrevocably and unconditionally waives, and agrees not to assert, by way of motion or as a defense, counterclaim or otherwise, in any proceeding arising out of or relating to this Agreement or the Restructuring, (i) any claim that it is not personally subject to the jurisdiction of the NY Courts for any reason, (ii) that it or its property is exempt or immune from jurisdiction of any such court or from any legal process commenced in such courts (whether through service of notice, attachment prior to judgment, attachment in aid of execution of judgment, execution of judgment, or otherwise) and (iii) that (A) the proceeding in any such court is brought in an inconvenient forum, (B) the venue of such proceeding is improper, or (C) this Agreement, or the subject matter hereof, may not be enforced in or by such courts. Notwithstanding the foregoing, during the pendency of the Chapter 11 Cases, all proceedings contemplated by this Section 11(b) shall be brought in the Bankruptcy Court and each of the Parties (a) irrevocably submits to the exclusive jurisdiction of the Bankruptcy Court; (b) waives any objection to laying venue in any such action or proceeding in the Bankruptcy Court; and (c) waives any objection that the Bankruptcy Court is an inconvenient forum or does not have jurisdiction over any Party to this Agreement.

(c) EACH PARTY HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY (WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER THEORY). EACH PARTY (I) CERTIFIES THAT NO REPRESENTATIVE, AGENT, OR ATTORNEY

OF ANY OTHER PARTY HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PARTY WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (II) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

12. **Specific Performance/Remedies.**

It is understood and agreed by the Parties that money damages would not be a sufficient remedy for any breach of this Agreement by any Party and each non-breaching Party shall be entitled to seek specific performance and injunctive or other equitable relief as a remedy of any such breach, without the necessity of proving the inadequacy of money damages as a remedy, including an order of the Bankruptcy Court requiring any Party to comply promptly with any of its obligations hereunder. Except as set forth in Section 5(f) hereof, the Parties agree that such relief will be their only remedy against the applicable other Party with respect to any such breach, and that in no event will any Party be liable for momentary damages (including consequential, special, indirect or punitive damages or damages for lost profits).

13. **Survival.**

Notwithstanding the termination of this Agreement pursuant to Section 5 hereof, the agreements and obligations of the Parties in this Section 13 and Sections 5(e), 5(f), 5(g), 12, 15, 16, 17, 18, 19, 20 and 21 hereof (and any defined terms used in any such Sections) shall survive such termination and shall continue in full force and effect in accordance with the terms hereof; *provided*, *however*, that any liability of a Party for failure to comply with the terms of this Agreement shall survive such termination.

14. **Headings.**

The headings of the sections, paragraphs, and subsections of this Agreement are inserted for convenience only and shall not affect the interpretation hereof or, for any purpose, be deemed a part of this Agreement.

15. **Successors and Assigns; Severability; Several Obligations.**

This Agreement is intended to bind and inure to the benefit of the Parties and their respective successors, permitted assigns, heirs, executors, administrators and representatives; *provided*, *however*, that nothing contained in this Section 15 shall be deemed to permit Transfers of the Convertible Notes or Claims arising under the Convertible Notes other than in accordance with the express terms of this Agreement. If any provision of this Agreement, or the application of any such provision to any person or entity or circumstance, shall be held invalid or unenforceable in whole or in part, such invalidity or unenforceability shall attach only to such provision or part thereof and the remaining part of such provision hereof and this Agreement shall continue in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any Party. Upon any such determination of invalidity, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in order that the

transactions contemplated hereby are consummated as originally contemplated to the greatest extent possible. The agreements, representations, and obligations of the Parties are, in all respects, ratable and several and neither joint nor joint and several.

16. **No Third-Party Beneficiaries.**

Unless expressly stated herein, this Agreement shall be solely for the benefit of the Parties and no other person or entity shall be a third-party beneficiary hereof.

17. **Prior Negotiations; Entire Agreement.**

The Convertible Notes Agreement and this Agreement, including the exhibits and schedules hereto (including the Term Sheet), constitutes the entire agreement of the Parties and supersedes all other prior negotiations, with respect to the subject matter hereof and thereof, except that the Parties acknowledge that any confidentiality agreements (if any) heretofore executed between the Company and each Supporting Noteholder shall continue in full force and effect in accordance with their terms; *provided*, *however*, that this Agreement supersedes the Convertible Notes Agreement solely to the extent this Agreement is expressly inconsistent with the Convertible Notes Agreement.

18. **Counterparts.**

This Agreement may be executed in several counterparts, each of which shall be deemed to be an original, and all of which together shall be deemed to be one and the same agreement. Execution copies of this Agreement may be delivered by electronic mail, or otherwise, which shall be deemed to be an original for the purposes of this paragraph.

19. **Notices.**

All notices hereunder shall be deemed given if in writing and delivered, if contemporaneously sent by electronic mail or overnight courier (including via Fedex, DHL, UPS, etc.) to the following addresses:

(1) If to the Company, to:

VIVUS, Inc.
900 East Hamilton Avenue, Suite 550.
Campbell, CA 95008
Attn: John Amos
(amos@vivus.com)
John L. Slebir
(slebir@vivus.com)

With a copy to:

Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Attention: Matt Barr, Esq.
(matt.barr@weil.com)
Gabriel A. Morgan, Esq.
(gabriel.morgan@weil.com)
Natasha S. Hwangpo, Esq.
(natasha.hwangpo@weil.com)

(2) If to the Supporting Noteholder, or a transferee thereof, to the address set forth below the Supporting Noteholder's signature (or as directed by any transferee thereof), as the case may be, with copies to:

Dentons US LLP
1221 Avenue of the Americas
New York, NY 10020
Attention: Oscar N. Pinkas, Esq.
(oscar.pinkas@dentons.com)
Brian E. Greer, Esq.
(brian.greer@dentons.com)
Lauren Macksoud
(lauren.macksoud@dentons.com)

Any notice given by electronic mail, or overnight courier (including via Fedex, DHL, UPS, etc.) shall be effective when received. Any notice given by electronic mail shall be effective upon oral, machine, or electronic mail (as applicable) confirmation of transmission.

20. **No Solicitation; Representation by Counsel; Adequate Information.**

(a) This Agreement is not and shall not be deemed to be a solicitation for votes in favor of the Plan in the Chapter 11 Cases. The acceptances of any Supporting Noteholder with respect to the Plan will not be solicited until such Supporting Noteholder has received the Disclosure Statement and related ballots and solicitation materials. In addition, this Agreement is not and shall not be deemed an offer with respect to the issue or sale of securities to any person or entity, or the solicitation of an offer to acquire or buy securities, in any jurisdiction where such offer or solicitation would be unlawful.

(b) Each Party acknowledges that it has had an opportunity to receive information from the Company and that it has been represented by counsel in connection with this Agreement and the transactions contemplated hereby. Accordingly, any rule of law or any legal decision that would provide any Party with a defense to the enforcement of the terms of this Agreement against such Party based upon lack of legal counsel shall have no application and is expressly waived.

(c) The Supporting Noteholder acknowledges, agrees, and represents to the other Parties that it (i) is a "qualified institutional buyer" as such term is defined in Rule 144A of the Securities Act, (ii) is an "accredited investor" as such term is defined in Rule 501 of Regulation D of the Securities Act, (iii) understands that if it is to acquire any securities, as defined in the Securities Act, pursuant to the Restructuring, such securities have not been registered under the Securities Act and that such securities are, to the extent not acquired pursuant to section 1145 of the Bankruptcy Code, being offered and sold pursuant to an exemption from registration contained in the Securities Act, based in part upon such Supporting Noteholder's representations contained in this Agreement and cannot be sold unless subsequently registered under the Securities Act or an exemption from registration is available, and (iv) has such knowledge and experience in financial and business matters that such Supporting Noteholder is capable of evaluating the merits and risks of the securities to be acquired by it (if any) pursuant to the Restructuring and understands and is able to bear any economic risks with such investment.

21. **No Waiver of Participation and Preservation of Rights.**

(a) For the avoidance of doubt, nothing in this Agreement shall limit any rights of any Party, subject to applicable law and the agreements contained in any Definitive Document to (a) initiate, prosecute, appear, or participate as a party in interest in any contested matter or adversary proceeding to be adjudicated in the Chapter 11 Cases so long as such initiation, prosecution, appearance or participation and the position advocated in connection therewith are not inconsistent with this Agreement or the Definitive Documents, (b) object to any motion to approve or confirm, as applicable, any other plan of reorganization, sale transaction, or any motion related thereto filed in the Chapter 11 Cases, to the extent the terms of any such motions, plans or transactions are inconsistent with this Agreement or any Definitive Document, (c) appear as a party in interest in the Chapter 11 Cases for the purpose of contesting whether any matter of fact is or results in a breach of, or is inconsistent in any material respect with this Agreement or any Definitive Document, and (d) file a proof of claim, if required.

(b) Except as provided in any Definitive Document, nothing herein or therein is intended to, does or shall be deemed in any manner to, waive, limit, impair or restrict the ability of any Party to protect and preserve its rights, remedies and interests, including Claims against the Company. Without limiting the foregoing in any way, if this Agreement is terminated in accordance with it terms for any reason, each Party fully reserves any and all of its respective rights, remedies and interests.

22. **Time is of the Essence.**

The Parties acknowledge and agree that time is of the essence and that they must each use commercially reasonable efforts to effectuate and consummate the Restructuring Transaction as soon as reasonably practicable.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed and delivered by their respective duly authorized officers, solely in their respective capacity as officers of the undersigned and not in any other capacity, as of the date first set forth above.

VIVUS, INC.

By: /s/ Mark Oki
Name: Mark Oki
Title: Senior Vice President, Chief Financial Officer & Chief Accounting Officer

VIVUS PHARMACEUTICALS LIMITED

By: /s/ Mark Oki
Name: Mark Oki
Title: Treasurer & Chief Financial Officer

VIVUS B.V.

By: /s/ Mark Oki
Name: Mark Oki
Title: Managing Director A

VIVUS DIGITAL HEALTH CORPORATION

By: /s/ Mark Oki
Name: Mark Oki
Title: Chief Financial Officer

ICAHN ENTERPRISES HOLDINGS L.P. (DBA IEH BIOPHARMA LLC),
IN ITS CAPACITY AS SUPPORTING NOTEHOLDER

By: /s/ Keith Cozza
Name: Keith Cozza
Title: President

Principal Amount of Convertible Notes: $170,165,000.00

Number of Common Stock (as applicable): N/A

Notice Address:

Icahn Enterprises Holdings L.P. (dba IEH Biopharma LLC)
16690 Collins Avenue — Penthouse Suite
Sunny Isles Beach, FL 33160
Attention: Keith Cozza
Email: kcozza@ielp.com

EXHIBIT A

TERM SHEET

VIVUS, Inc.

THIS PRELIMINARY TERM SHEET (THIS "**RSA TERM SHEET**") SUMMARIZES TERMS AND CONDITIONS OF A PROPOSED RESTRUCTURING OF THE DEBTORS (AS DEFINED BELOW). THE TERMS SET FORTH IN THIS RSA TERM SHEET ARE BEING PROVIDED AS PART OF A COMPREHENSIVE COMPROMISE, EACH ELEMENT OF WHICH IS CONSIDERATION FOR THE OTHER ELEMENTS AND AN INTEGRAL ASPECT OF THE PROPOSED RESTRUCTURING OF THE DEBTORS. THE PROPOSED RESTRUCTURING DESCRIBED HEREIN WOULD BE IMPLEMENTED BY MEANS OF A "PREARRANGED" PLAN OF REORGANIZATION, FOR THE DEBTORS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE (AS DEFINED BELOW). THIS RSA TERM SHEET IS NOT AN OFFER WITH RESPECT TO ANY SECURITIES OR SOLICITATION OF ACCEPTANCES OF A CHAPTER 11 PLAN PURSUANT TO SECTION 1125 OF THE BANKRUPTCY CODE. ANY SUCH OFFER OR SOLICITATION WILL BE MADE ONLY IN COMPLIANCE WITH ALL APPLICABLE SECURITIES LAWS AND/OR PROVISIONS OF THE BANKRUPTCY CODE. THIS DOCUMENT IS BEING PROVIDED IN FURTHERANCE OF SETTLEMENT DISCUSSIONS AND IS ENTITLED TO PROTECTION PURSUANT TO FED. R. EVID. 408 AND ANY SIMILAR RULE OF EVIDENCE. THE TRANSACTIONS DESCRIBED IN THIS RSA TERM SHEET (THE "**RESTRUCTURING TRANSACTIONS**") ARE SUBJECT IN ALL RESPECTS TO, AMONG OTHER THINGS, THE RSA (AS DEFINED BELOW), ACCEPTABLE DUE DILIGENCE TO IEH'S SATISFACTION, EXECUTED DEFINITIVE DOCUMENTATION, INCLUDING THE PLAN, APPROPRIATE DISCLOSURE MATERIAL AND RELATED DOCUMENTS.

1. Defined Terms(1)

Debtors:	VIVUS, Inc. ("**VIVUS**"), Vivus Pharmaceuticals Limited, Vivus B.V., and Vivus Digital Health Corporation, as to each on or prior to the Effective Date (collectively, the "**Company**" or the "**Debtors**"). The Debtors constitute all affiliates and subsidiaries of VIVUS. The Debtors, as reorganized pursuant to the Plan on the Effective Date, shall be the "**Reorganized Debtors**."
Supporting Noteholder:	Icahn Enterprises Holdings L.P. (dba IEH Biopharma LLC) ("**IEH**" or "**Supporting Noteholder**") as the holder of the 4.50% Convertible Senior Notes due 2020 (the "**Convertible Notes**" and all Claims under that certain Indenture, dated as of May 21, 2013 or related thereto, the "Convertible Note Claims").
Secured Noteholders:	Holders of the 10.375% Senior Secured Notes due 2024 (the "**Secured Notes**" and all Claims under that certain Indenture, dated as of June 8, 2018 or related thereto, the "**Secured Note Claims**" and the holders thereof, the "**Secured Noteholders**").
Interests:	Collectively, (a) any equity security as defined in section 101(16) of the Bankruptcy Code, (b) any other instrument evidencing an ownership interest, whether or not transferable, (c) any option, warrant, or right, contractual or otherwise, to acquire, sell or subscribe for any such interest, and (d) any and all Claims that are otherwise determined by the

(1) Capitalized terms used but not defined herein shall have the meanings ascribed to them, as applicable in the RSA (as defined herein).

	Court to be an equity interest, including any Claim or debt that is recharacterized as an equity interest (the "**Interests**").
General Unsecured Claims:	Any general unsecured claim that is not separately classified under the Plan ("**General Unsecured Claims**").
DIP Facility:	If desirable (as determined by the Debtors and the Supporting Noteholder), senior secured super-priority debtor-in-possession priming loan facility (the "**DIP Facility**") to be provided by IEH, subject to customary market testing, to the Debtors during their chapter 11 cases (the "**Chapter 11 Cases**") in an amount agreed to by the Debtors, IEH as lender (the "**DIP Lender**") and agent (if any) (the "**DIP Agent**") under the DIP Facility in its sole discretion.
Exit Facility:	A new first lien credit facility to be provided by IEH to the Reorganized Debtors on the Effective Date on the terms reflected in the Exit Financing Commitment Letter (as defined herein) and otherwise as acceptable to the Debtors and IEH, as lender (the "**Exit Lender**") and agent (if any) (the "**Exit Agent**") under the Exit Facility, each in their sole discretion. The Exit Facility shall provide for a backstop fee acceptable to the Debtors and IEH in their sole respective discretion.(2)
Plan:	The Debtors' Joint Prearranged Chapter 11 Plan of Reorganization (as may be amended, modified, or supplemented, the "**Plan**") and any documents concerning the Plan, including any Plan supplement (collectively, the "**Plan Documents**") that are in accordance with the terms and conditions of this Term Sheet and the Restructuring Support Agreement (as amended from time to time, the "**RSA**") and otherwise as reasonably acceptable to the Debtors and the Supporting Noteholder.
2. Restructuring Terms	
Refinancing / Chapter 11 Toggle:	If the Company is unable to refinance and pay in full in cash all amounts due and owing under the Convertible Notes (as well as the payment in full in cash of all of IEH's reasonable documented fees and expenses, including attorneys' fees) (the "**Refinancing**") on or before June 30, 2020, the Company and the Supporting Noteholder shall exclusively pursue the Restructuring Transactions and commence the Chapter 11 Cases no later than July 13, 2020 (the "**Toggle**").
DIP Facility Claims:(3)	To be paid in full in cash on the effective date of the Plan (the "**Effective Date**") with the proceeds of the Exit Facility.

(2) IEH to provide an Exit Facility Term Sheet upon receipt and review of outstanding requested diligence materials, but prior to June 30, 2020.
(3) The DIP Facility can be upsized to refinance the Secured Notes upon entry of the Final DIP Order (defined below) at the sole discretion of the DIP Lender and DIP Agent.

Administrative Expenses:	Except to the extent a holder of an Allowed(4) administrative expense claim already has been paid during the Chapter 11 Cases or such holder, together with the Debtors and the Supporting Noteholder, agrees to less favorable treatment with respect to such holder's claim, each holder of an Allowed administrative expense claim shall receive, in full satisfaction, settlement, release and discharge of, and in exchange for, its administrative expense claim, cash equal to the unpaid portion of its Allowed administrative expense claim, to be paid on the latest of: (a) the Effective Date, or as soon as reasonably practicable thereafter, if such administrative expense claim is Allowed as of the Effective Date; (b) the date such administrative expense claim is Allowed, or as soon as reasonably practicable thereafter; (c) the date such Allowed administrative expense claim becomes due and payable, or as soon as reasonably practicable thereafter; provided, however, that Allowed administrative expense claims that arise postpetition in the ordinary course of the Debtors' businesses shall be paid in the ordinary course of business as permitted by the DIP Facility, in accordance with the terms and subject to the conditions of any agreements governing, instruments evidencing, or other documents relating to such transactions; or (d) such other date as may be agreed upon between the Debtors (with the reasonable consent of the Supporting Noteholder) or the Reorganized Debtors, as the case may be and the holder of such Allowed administrative expense claim. Fee Claims shall be treated separately and are not subject to the above.
Priority Tax Claims:	Except to the extent a holder of an Allowed priority tax claim, together with the Debtors and the Supporting Noteholder, agrees to a different treatment, in full and final satisfaction, settlement, release, and discharge of, and in exchange for each Allowed priority tax claim, each such holder shall be paid, at the option of the Debtors, with the reasonable consent of the Supporting Noteholder, the unpaid portion of the Allowed priority tax claim to the extent such claims are Allowed, (i) in the ordinary course of the Debtors' business, consistent with past practice; provided, however, that in the event any portion of any such claim becomes due during the pendency of the Chapter 11 Cases and remains unpaid as of the Effective Date, the holder of such claim shall be paid in full in cash on the Effective Date, or (ii) in installment payments over a period of time not to exceed five years after the Petition Date, pursuant to Section 1129(a)(9)(C) of Title 11 of the

(4) "**Allowed**" means with reference to any Claim or Interest, (i) any Claim or Interest arising on or before the Effective Date (a) as to which no objection to allowance has been interposed within the time period set forth in the Plan, or (b) as to which any objection has been determined by a Final Order of the Bankruptcy Court to the extent such objection is determined in favor of the respective holder, (ii) any Claim or Interest as to which the liability of the Debtors and the amount thereof are determined by a Final Order, or (iii) any Claim or Interest expressly Allowed under the Plan; provided, however, that notwithstanding the foregoing, (x) the Allowed amount of Claims shall be subject to and shall not exceed the limitations or maximum amounts permitted by the Bankruptcy Code, including sections 502 and 503 of the Bankruptcy Code, to the extent applicable, and (y) the Reorganized Debtors will retain all claims and defenses with respect to Allowed Claims that are reinstated or otherwise unimpaired pursuant to the Plan.

	United States Code (the "**Bankruptcy Code**").
Other Priority Claims:	Except to the extent that a holder of an Allowed other priority claim, together with the Debtors and the Supporting Noteholder, agrees to a less favorable treatment, in full and final satisfaction, settlement, release, and discharge of, and in exchange for, each Allowed other priority claim, each such holder shall be paid, to the extent such claim has not already been paid during the Chapter 11 Cases, in full in cash in the ordinary course of business by the Debtors or the Reorganized Debtors, as applicable, on or as soon as reasonably practicable after (i) the Effective Date, (ii) the date on which such other priority claim against the Debtor becomes Allowed, or (iii) such other date as may be ordered by the United States Bankruptcy Court for the District of Delaware or other venue agreed by the Supporting Noteholder and the Debtors (the "**Bankruptcy Court**").
Fee Claims	All estate-retained professionals shall (i) file, on or before the date that is thirty (30) days after the Effective Date, their respective applications for final allowances of compensation for services rendered, and reimbursement of expenses incurred, postpetition and (ii) be paid in full, in Cash, in such amounts as are Allowed by the Bankruptcy Court or authorized to be paid in accordance with the order(s) allowing any such postpetition, estate-retained professional fee and expense claim (each, a "**Fee Claim**"); provided, however, that any payment in respect of a final fee application shall be made after the entry of a Final Order approving such application and delineating the unpaid portion of fees and expenses with respect to such estate-retained professional. The Debtors are authorized to pay compensation for professional services rendered and reimbursement of expenses incurred after the Effective Date in the ordinary course and without the need for Bankruptcy Court approval. On or before the Effective Date, the Debtors shall establish an escrow account to pay fees and expenses of estate-retained professionals (the "**Fee Escrow Account**"). On the Effective Date, the Debtors shall fund the Fee Escrow Account with Cash equal to the estate-retained professionals' good faith estimates of their actual, unpaid Fee Claims as of the Effective Date; provided that the professionals shall deliver such good faith estimate and a detailed calculation thereof to the Debtors and counsel to the Supporting Noteholder no later than five (5) Business Days prior to the Effective Date. Funds held in the Fee Escrow Account shall not be considered property of the Debtors' estates or property of the Reorganized Debtors, but shall revert to the Reorganized Debtors only after all Fee Claims Allowed by the Bankruptcy Court have been irrevocably paid in full. The Fee Escrow Account shall be held in trust for estate-retained professionals and for no other parties until all Fee Claims Allowed by the Bankruptcy Court have been paid in full. To the extent surplus funds remain in the Fee Escrow Account after all Fee Claims have been resolved by the Court or settled, such funds shall be returned to the Reorganized Debtors.

Secured Note Claims:	Unless otherwise agreed in writing amongst the Company, the Supporting Noteholder and the Secured Noteholders prior to the Petition Date (as defined below): · If the class of Secured Note Claims votes to accept the Plan and provide the releases and exculpations therein, the Secured Noteholders shall receive payment of outstanding principal, interest and reasonable expenses on the Effective Date, but shall be deemed to have expressly waived the right to recover, and shall not receive any distribution on account of, any penalty, fee or premium under the Secured Notes for redemption, change of control or otherwise. · If the class of Secured Note Claims does not vote to accept the Plan and provide the releases and exculpations therein, the Secured Noteholders shall, at the option of Supporting Noteholder receive new secured notes subordinate to the Exit Facility in an amount, tenor, term and rate acceptable to the Company and the Supporting Noteholder and approved by the Bankruptcy Court (the "**New Notes**").
Convertible Note Claims:	The RSA and the Plan shall provide that all obligations in respect of the Convertible Notes constitute Allowed claims in an amount agreed between the Debtors and the Supporting Noteholder, which shall not be less than $169,165,000.00 plus accrued interest, fees and expenses (including the IEH and Trustee's reasonable fees and expenses). The Convertible Notes shall be exchanged for (a) 100% of the equity in the Reorganized Debtors and (b) payment in cash of accrued and unpaid interest (and accrued and unpaid IEH and Trustee reasonable fees and expenses).
General Unsecured Claims:	Except to the extent that a holder of a General Unsecured Claim agrees to less favorable treatment with the Debtors and the Supporting Noteholder, Allowed General Unsecured Claims shall be paid from a segregated account (the "**GUC Account**") containing an amount sufficient to pay the amount of Allowed General Unsecured Claims in full in cash on the later of the Effective Date or when they become Allowed (such amount, the "**GUC Amount**"). The Court shall enter a bar date order establishing a date by which all known, unknown, liquidated or contingent General Unsecured Claims must be filed.(5)
Intercompany Claims:	Intercompany Claims shall be reinstated, cancelled or compromised as determined by the Reorganized Debtors.
Claims Subordinated Under Section 510 of the	"**Subordinated Claims**" means any claims arising from rescission of a purchase or sale of a security of the Company or an affiliate of the Company, for damages arising from the purchase or sale of a security

(5) The Supporting Noteholder may determine, by no later than July 6, 2020, in its sole discretion to eliminate the bar date process and GUC Account and permit all Allowed General Unsecured Claims to be paid in the ordinary course of business; provided, that to the extent the Supporting Noteholder determines to revert to such a timeline, the Milestones (including for the avoidance of doubt, the Petition Date) shall be modified as mutually agreed by the Debtors and the Supporting Noteholder.

Bankruptcy Code:	of the Company or an affiliate of the Company, or for indemnification, reimbursement or contribution allowed under section 502 on account such a Claim. Subordinated Claims (i) shall not constitute General Unsecured Claims (or any other class of claim), and (ii) shall not receive any distributions under the Plan; provided however, holders of Subordinated Claims may participate in the 9019 Settlement (defined below) if the Conditions (defined below) are satisfied. The Company shall obtain a Bankruptcy Court order subordinating any proofs of claims concerning Subordinated Claims to General Unsecured Claims prior to entry or in the Confirmation Order. The Company's schedules and statements of financial affairs shall provide that all Subordinated Claims are subordinated to the level of Interests.
Classification of Interests	All Interests shall be disallowed and shall be canceled under the Plan; provided however, holders of Interests may participate in the 9019 Settlement if the Conditions are satisfied.
9019 Settlement:	The Plan shall provide for (and the Confirmation Order shall approve) a settlement in accordance with Federal Rule of Bankruptcy Procedure 9019 (the "**9019 Settlement**") which shall provide as follows: In the event the Conditions are satisfied, with respect to a holder of issued and outstanding common stock of VIVUS (the "**Existing Stock**") as of the Petition Date (the "**Stock Record Date**"), such holder of Existing Stock shall receive, in exchange for the surrender or cancellation of such Interests and for the release by such holders of the Released Parties and exculpation of the Exculpated Parties, its *pro rata* share of (a) $5 million and (b) a non-transferable contractual contingent value right in form and substance acceptable to the Supporting Noteholder (the "**Contingent Value Right**") to earn another $2 per share on the date that is two years following the Effective Date if financial metrics agreed to by the Debtors and Supporting Noteholder have been achieved, including the Reorganized Debtors' achieving Adjusted EBITDA projections of $32.3 million in 2021 and $66.2 million in 2022 (collectively, the "**Existing Stock Distributions**"). A holder of Existing Stock or of a Subordinated Claim on the Stock Record Date or thereafter that fails to satisfy the following conditions (collectively, the "**Conditions**") shall not be entitled to receive its *pro rata* portion of the Existing Stock Distribution and the *pro* rata portion of the Existing Stock Distribution shall be cancelled and the total Existing Stock Distributions reduced accordingly: (a) takes any direct or indirect action to object to, contest, frustrate, delay or interfere with the transactions contemplated by the DIP Facility, Exit Facility, Plan or RSA, (b) opts out of the voluntary releases and exculpations set forth in the Plan, (c) asserts a claim (including a proof of claim) or cause of action against the Company or the Company's directors or officers for damages related to the purchase and sale of a security of the Company or an affiliate of the Company or (d) seeks to form or serve upon an

	equity committee.
Management Incentive Plan:	The Plan will establish a management incentive plan to be mutually agreed by the Debtors and the Supporting Noteholder prior to the Petition Date. For the avoidance of doubt, the management incentive plan shall include synthetic equity interests in place of, but will not include, any stock or options for stock in the Reorganized Debtors.
Survival of Indemnification Obligations and D&O Insurance	Any claims relating to obligations (including indemnification obligations) of the Company pursuant to corporate charters, bylaws, limited liability company agreements, or any other documents to current and former managers, officers, directors, agents, and/or employees with respect to all present and future actions, suits, claims and proceedings against the Company or such managers, officers, directors, agents, and/or employees, based upon any claim or cause of action, act or omission, or other circumstance relating to a period of time or that occurred or accrued on or prior to the Effective Date are subject to the Supporting Noteholder's ongoing diligence, and treatment thereof shall be agreed to by the Company and the Supporting Noteholder by no later than the Diligence Deadline (defined below). Notwithstanding the foregoing, on and after the Effective Date, the Reorganized Debtors will not terminate or otherwise reduce the coverage under any directors' and officers' insurance policies (including any "tail policy") in effect or purchased as of the Petition Date, and all members, managers, directors, and officers of the Company who served in such capacity at any time prior to the Effective Date will be entitled to the full benefits of any such policy for the full term of such policy regardless of whether such members, managers, directors, and/or officers remain in such positions on or after the Effective Date. The purchase or binding of any insurance policy, tail policy or runoff policy for directors and/or officers is subject to ongoing diligence, and treatment thereof shall be agreed to by the Company and the Supporting Noteholder by no later than the Diligence Deadline (defined below).
D&O Compensation / Key Employee Incentive Plan	Prior to the Petition Date, the Company shall have caused and each director or officer of the Company shall have consented to, in an executed agreement acceptable to the Debtors and the Supporting Noteholder (each in its sole discretion), a waiver of any rights or payments in respect of compensation other than guaranteed salary or fees and reasonable expenses (for example, waiving incentive bonuses or payments upon a change of control) for any transaction or circumstance on or after the execution of the RSA and on or through the Effective Date, and the Company shall not make any such payment or alter the terms of director or officer compensation during such period. The Plan shall provide for a Key Employee Incentive Plan to pay a bonus to key executives of the Company on the Effective Date of the Plan, which Key Employee Incentive Plan shall be in form and substance acceptable to the Debtors and the Supporting Noteholder,

each in its sole discretion.

Private Company Status: The Reorganized Debtors shall be a private, non-SEC reporting company on the Effective Date. All securities issued under the Plan will be exempt from SEC registration.

Diligence: The Supporting Noteholder's obligations under this RSA Term Sheet are expressly subject to and conditioned upon its reaffirming the RSA Term Sheet in writing after the completion of due diligence in the sole discretion of the Supporting Noteholder on or before July 6, 2020 (the "**Diligence Deadline**"); provided, however, that the RSA Term Sheet will be reaffirmed if the Supporting Noteholder does not indicate otherwise in writing on or before July 6, 2020.

The Debtors shall use their commercially reasonable efforts to respond to all Supporting Noteholder due diligence as soon as practicable.

Tax: The Plan is intended to meet the requirements of Section 382(l)(5) of the Internal Revenue Code of 1986, as amended (the "**Code**"), and the Debtors shall take no action inconsistent with such treatment (other than as required or contemplated by the Restructuring Transactions or the RSA). The Plan and any related restructuring transactions shall, to the extent possible, be structured to preserve the value of all of the Company's Tax Attributes, in a tax efficient manner for the benefit of the Supporting Noteholder and such structuring shall be reasonably acceptable to Supporting Noteholder.

Milestones: On or before May 31, 2020, the Debtors and the Supporting Noteholder must execute the RSA, which shall be in form and substance acceptable to the Debtors and the Supporting Noteholder.

If as of 11:59 p.m. prevailing Eastern Time on June 30, 2020, the Company has not completed the Permitted Refinancing, the following Toggle milestones (which shall be included in the DIP Facility and RSA) shall apply:

1. On or before July 9, 2020, the Debtors and IEH, as Exit Lender, shall execute a commitment letter for the Exit Facility (the "**Exit Financing Commitment Letter**") which shall be included in the RSA by amendment and the Plan (in the Plan supplement), and shall be satisfactory in all respects to the Supporting Noteholder, DIP Lender, DIP Agent and IEH as lender under the Exit Facility;

2. The Debtors shall commence the respective prearranged Chapter 11 Cases in the Bankruptcy Court no later than July 13, 2020 (such date the cases are commenced, the "**Petition Date**";

3. The Debtors shall file their Schedules of Assets and Liabilities and Statements of Financial Affairs no later than seven (7) business days after the Petition Date;

4. The Debtors shall file a motion on the Petition Date establishing a

bar date forty-five (45) calendar days after the Petition Date;

5. The Court shall enter an order establishing the requested bar date no later than five (5) business days after the Petition Date;

6. Each Debtor shall file the Plan, and an accompanying disclosure statement (the "**Disclosure Statement**"), which Disclosure Statement shall be reasonably acceptable in form and substance to the Debtors and the Supporting Noteholder, in the Chapter 11 Cases by no later than the Petition Date;

7. The Debtors shall file a motion seeking approval of the DIP Facility on the Petition Date;

8. An interim order of the Bankruptcy Court in form and substance acceptable to DIP Agent and DIP Lender in their sole discretion, approving the DIP Facility and authorizing the use of cash collateral in accordance with the Budget (the "**Interim DIP Order**") shall be entered in the Chapter 11 Cases by no later than five (5) business days after the Petition Date, and shall not be reversed, vacated, stayed, appealed, or subject to a request for a new trial, reargument, or rehearing as of the entry of the Final DIP Order;

9. The No Trading Order (as defined in the RSA) shall have been entered by the Bankruptcy Court by no later than three (3) calendar days after the Petition Date, and shall become a Final Order by no later than thirty-five (35) calendar days thereafter;

10. A Final Order of the Bankruptcy Court, in form and substance reasonably acceptable to the Supporting Noteholder, approving assumption of the RSA (as amended to reflect the final RSA Term Sheet just prior to the Petition Date) and the Termination Fee shall be entered in the Chapter 11 Cases by no later than thirty-five (35) calendar days after the Petition Date;

11. An order of the Bankruptcy Court in form and substance acceptable to the DIP Agent and the DIP Lender in their sole discretion, approving the DIP Facility and authorizing the use of cash collateral in accordance with the budget approved by DIP Lender and DIP Agent (the "**Final DIP Order**", and together with the Interim DIP Order, the "**DIP Orders**") shall be entered in the Chapter 11 Cases by no later than thirty-five (35) calendar days after the Petition Date, and shall not be reversed, vacated, stayed, appealed, or subject to a request for a new trial, reargument, or rehearing as of the Effective Date;

12. An order approving the Disclosure Statement, which shall be reasonably acceptable in form and substance to the Supporting Noteholder, shall be entered in the Chapter 11 Cases by no later than thirty-five (35) calendar days after the Petition Date;

13. An order confirming the Plan, which shall be acceptable in form and substance to Supporting Noteholder, shall be entered in the applicable Chapter 11 Cases by no later than seventy-five (75) calendar days after the Petition Date; and

14. The Effective Date shall occur no later than ninety (90) calendar days after the Petition Date; provided however, that the Company and Supporting Noteholder shall use commercially reasonable efforts to cause the Effective Date to occur as soon as is practicable after the entry of the Confirmation Order (including seeking waiver of any stay to consummate the Plan).

Conditions Precedent to Confirmation of the Plan

Conditions precedent to confirmation of the Plan shall include, but not be limited to, the following:

- The Company shall not have breached, defaulted upon (and failed to cure, if applicable) or failed to satisfy any of its obligations within any applicable grace period (including the "Milestones") in the RSA, RSA Term Sheet, Plan, Plan Documents, or DIP Facility documents without the consent or express waiver in writing of the Supporting Noteholder.

- (i) Since January 1, 2013, there shall have been no "ownership change" of the Company (within the meaning of Section 382 of the Code), other than any ownership change resulting from any action taken by or caused by the Supporting Noteholder or any Affiliate(6) thereof on or after April 4, 2020, and (ii) since January 1, 2020, the Company shall not have (x) amended any of its income tax returns, (y) filed any income tax return in a manner inconsistent with past practice (unless otherwise required by law) or (z) disposed of any of its assets (or otherwise recognized income or gain) outside the ordinary course of business (other than as a result of or as contemplated

(6) "**Affiliate**" means, when used with respect to a specified Person, a Person that, directly or indirectly, through one or more intermediaries, controls, is controlled by or is under common control with such specified Person. As used in this definition, the term "control" (including with correlative meanings, "controlled by" and "under common control with"), when used with respect to any specified Person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities or other interests, by contract, agreement, obligation, indenture, instrument, lease, promise, arrangement, release, warranty, commitment, undertaking or otherwise. For purposes of this definition, with respect to any Person in which IEH does not (i) beneficially own, either directly or indirectly, more than fifty percent (50%) of (x) the total combined voting power of all classes of voting securities of such Person, (y) the total combined equity interests or (z) the capital or profit interests, in the case of a partnership, or (ii) otherwise have the power to vote, either directly or indirectly, sufficient securities to elect a majority of the board of directors or similar governing body, IEH shall only be deemed to control such Person to the extent that, with respect to any particular matter, IEH or its other Affiliates, or IEH's or such Affiliate's employees, in their capacities as a shareholder, director, manager or general partner (or similar position) of such Person have voted or consented to take action, or encouraged others to vote or consent to take action (or take action if no vote or consent is required) with respect to such matter. "**Person**" means an individual, corporation, partnership, limited liability company, association, trust or other entity or organization, including any governmental authority. For the avoidance of doubt, Affiliate shall not include the Company.

by the Restructuring Transactions or the RSA), in each case to the extent such action would impair the value or availability for use of the Company's Tax Attributes.

- The Fee Escrow Account and the GUC Account shall have been formed.

Conditions Precedent to the Effective Date

Conditions precedent to the Effective Date shall include, but not be limited to, the following:

- The Company shall not have breached, defaulted upon (and failed to cure, if applicable) or failed to satisfy any of its obligations within any applicable grace period (including the "Milestones") in the RSA, RSA Term Sheet, Plan, Plan Documents, or DIP Facility documents without the consent or express waiver in writing of the Supporting Noteholder.

- (i) Since January 1, 2013, there shall have been no "ownership change" of the Company (within the meaning of Section 382 of the Code), other than any ownership change resulting from any action taken by or caused by the Supporting Noteholder or any Affiliate thereof on or after April 4, 2020, and (ii) since January 1, 2020, the Company shall not have (x) amended any of its income tax returns, (y) filed any income tax return in a manner inconsistent with past practice (unless otherwise required by law) or (z) disposed of any of its assets (or otherwise recognized income or gain) outside the ordinary course of business (other than as a result of or as contemplated by the Restructuring Transactions or the RSA), in each case to the extent such action would impair the value or availability for use of the Company's Tax Attributes.

- The Exit Facility shall have closed and funded on the terms of the Exit Financing Term Sheet.

- The Fee Escrow Account and the GUC Account shall have been funded.

- The New Notes shall have been issued to the extent the Secured Noteholders do not vote in favor of and provide the releases and exculpations under the Plan.

- The Plan and confirmation order shall provide that all General Unsecured Claims are discharged and shall receive no consideration or distributions other than the GUC Amount from the GUC Account.

No Waiver Without Consent	The conditions precedent to confirmation of the Plan and the Effective Date may not be waived, in whole or in part, without the express, prior written consent of the Debtors and the Supporting Noteholder, each in its sole discretion.

IEH and Trustee Fees and Expenses:	The RSA and Plan shall provide that the Debtors shall pay all of IEH's and the indenture trustee for the Convertible Notes' (the "**Trustee**") documented and reasonable fees and expenses in full in Cash upon invoice (the "**IEH Expenses**").
Releases by Debtors:	As of the Effective Date and to the maximum extent permitted by law, except for the rights and remedies that remain in effect from and after the Effective Date, including as expressly provided in the Plan and the Plan Documents, for good and valuable consideration, the adequacy of which is hereby confirmed, including the service of the Released Parties to facilitate the reorganization of the Debtors and the implementation of the Restructuring Transactions, on and after the Effective Date, the Released Parties(7) shall be deemed conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged by the Debtors, the Reorganized Debtors, and the Debtors' estates, in each case on behalf of themselves and their respective successors, assigns, and representatives and any and all other persons or entities that may purport to assert any causes of action derivatively, by or through the foregoing persons or entities, from any and all claims, interests, obligations, suits, judgments, damages, demands, debts, rights, causes of action, losses, remedies, or liabilities whatsoever, including any derivative claims or causes of action, asserted or assertable on behalf of the Debtors, the Reorganized Debtors, or the Debtors' estates, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity, contract, tort, or otherwise, by statute, violations of federal or state securities laws or otherwise that the Debtors, the Reorganized Debtors, or the Debtors' estates would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of a claim or Interest or other person or entity, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, their Chapter 11 cases, the purchase, sale, issuance, cancellation or rescission of the purchase or sale of any security of the Debtors or the Reorganized Debtors, the subject matter of, or the transactions or events giving rise to, any claim or Interest that is treated in the Plan, the business or contractual arrangements between the Debtors and any Released Party, the restructuring of claims and Interests before or during the Debtors' Chapter 11 cases, the Restructuring Transactions, the DIP Facility, the

(7) "**Released Parties**" means, collectively, (i) the Debtors, (ii) the Reorganized Debtors, (iii) the Supporting Noteholder, (iv) the Convertible Notes Trustee, (v) the DIP Agent, (vi) the DIP Lender, (vii) the Exit Agent, (viii) the Exit Lender, and (ix) with respect to each of the foregoing Persons in clauses (i) through (viii), such Persons' predecessors, successors, assigns, subsidiaries, affiliates, managed accounts and funds, and all of their respective equity holders (including shareholders), regardless of whether such interests are held directly or indirectly, current and former officers and directors, principals, members, partners, managers, employees, subcontractors, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, investment managers, investment advisors, management companies, fund advisors, and other professionals, and such Persons' respective heirs, executors, estates, and nominees, in each case in their capacity as such. Notwithstanding the foregoing, any Person that opts out of the releases by the Releasing Parties set forth in the Plan shall not be deemed a Released Party hereunder.

	Exit Facility, the negotiation, formulation, preparation or consummation of the Plan (including the Plan supplement), the RSA and any exhibits or documents relating thereto, or the solicitation of votes with respect to the Plan, in all cases based upon any act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date; provided that claims or causes of action arising out of or related to any act or omission of a Released Party that is a criminal act or constitutes intentional fraud, gross negligence, recklessness, or willful misconduct as determined by a Final Order(8) shall not be released. Notwithstanding the foregoing, the Debtors' right to object to or seek the subordination of any claim related to the purchase and sale of a security under Section 510(b) of the Bankruptcy Code shall not be released.
Releases by Releasing Parties:	As of the Effective Date and to the maximum extent permitted by law, except for the rights and remedies that remain in effect from and after the Effective Date, including as expressly provided in the Plan and the Plan Documents, for good and valuable consideration, the adequacy of which is hereby confirmed, including the service and contribution of the Released Parties to facilitate the reorganization of the Debtors and the implementation of the Restructuring Transactions, on and after the Effective Date, the Released Parties shall be deemed conclusively, absolutely, unconditionally, irrevocably and forever released and discharged by (collectively, the "**Releasing Parties**") the (i) holders of all claims or Interests who do not opt out of the releases under the Plan, (ii) holders of all claims or Interests that are unimpaired under the Plan, (iii) the holders of all claims whose vote to accept or reject the Plan is solicited but who do not vote either to accept or to reject the Plan, (iv) the holders of all claims who vote to reject the Plan but do not opt out of granting the releases set forth herein, (v) the holders of all claims who are deemed to reject the Plan and who do not file a timely objection to the releases provided for in the Plan, (vi) the holders of all claims or Interests who were given notice of the opportunity to opt out of granting the releases set forth herein but did not opt out, (vii) the Supporting Noteholder, (viii) the Secured Noteholders, (ix) the Secured Notes Trustee, (x) the Convertible Notes Trustee, (xi) the Exit Agent, (xii) the Exit Lender, (xiii) the DIP Lenders, and (xiv) the DIP Agent from any and all claims, interests, obligations, suits, judgments,

(8) "**Final Order**" means an order or judgment of a court of competent jurisdiction that has been entered on the docket maintained by the clerk of such court, which has not been reversed, vacated, or stayed and as to which (i) the time to appeal, petition for *certiorari*, or move for a new trial, reargument, or rehearing has expired and as to which no appeal, petition for *certiorari*, or other proceedings for a new trial, reargument, or rehearing shall then be pending, or (ii) if an appeal, writ of *certiorari*, new trial, reargument, or rehearing thereof has been sought, such order or judgment shall have been affirmed by the highest court to which such order was appealed, or *certiorari* shall have been denied, or a new trial, reargument, or rehearing shall have been denied or resulted in no modification of such order, and the time to take any further appeal, petition for *certiorari* or move for a new trial, reargument, or rehearing shall have expired; *provided*, *however*, that no order or judgment shall fail to be a "Final Order" solely because of the possibility that a motion under Rules 59 or 60 of the Federal Rules of Civil Procedure or any analogous federal or local rule of bankruptcy procedure (or any analogous rules applicable in another court of competent jurisdiction) or sections 502(j) or 1144 of the Bankruptcy Code has been or may be filed with respect to such order or judgment.

	damages, demands, debts, rights, causes of action, liens, remedies, losses, contributions, indemnities, costs, and liabilities whatsoever, including any derivative claims, asserted or assertable on behalf of the Debtors, the Reorganized Debtors, or the Debtors' estates, whether known or unknown, foreseen or unforeseen, liquidated or unliquidated, fixed or contingent, matured or unmatured, asserted or unasserted, accrued or unaccrued, existing or hereinafter arising, whether in law, equity, contract, tort, or otherwise, by statute, violations of federal or state securities law or otherwise, that such holders or their affiliates would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the holder of any claim or Interest or other person or entity, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Reorganized Debtors, or the Debtors' estates, their Chapter 11 cases, the purchase, sale, issuance, cancellation or rescission of the purchase or sale of any security of the Debtors or the Reorganized Debtors, the subject matter of, or the transactions or events giving rise to, any claim or Interest that is treated in the Plan, the business or contractual arrangements or interactions between the Debtors and any Released Party, the Restructuring Transactions, the restructuring of any Claim or Interest before or during the Debtors' Chapter 11 cases, the DIP Facility, the Exit Facility, the RSA, the Plan Documents and related agreements, instruments, and other documents, and the negotiation, formulation, preparation, or implementation thereof, the solicitation of votes with respect to the Plan, or any other act or omission, or any other relief obtained by the Debtors in their Chapter 11 cases; provided, however, with the exception of claims or causes of action or defenses arising out of or related to any act or omission of a Released Party that is a criminal act or constitutes intentional fraud, gross negligence, recklessness, or willful misconduct as determined by a Final Order; provided further, however, any Person that receives consideration in the 9019 Settlement shall have provided releases notwithstanding (and shall not be entitled to rely upon) the prior proviso.
Exculpation:	To the fullest extent permitted by applicable law, no Exculpated Party(9) shall have or incur, and each Exculpated Party is hereby exculpated from, any claim, Interest, obligation, suit, judgment, damage, demand, debt, right, cause of action, loss, remedy, or liability for any claim, solely to the extent released in the "Releases by Debtors" and Releases

(9) "**Exculpated Parties**" means, collectively, and in each case in their capacities as such during the Chapter 11 Cases, (i) the Debtors, (ii) Supporting Noteholder, (iii) Convertible Notes Trustee, (iv) DIP Lender, (v) DIP Agent, (vi) Exit Lender, (vii) Exit Agent, and (viii) with respect to each of the foregoing Persons in clauses (i) through (viii) all of their respective predecessors, successors and permitted assigns, subsidiaries, affiliates, managed accounts or funds, and all of their respective equity holders (including shareholders), regardless of whether such interests are held directly or indirectly, current and former officers, directors, principals, stockholders, members, partners, employees, managers, subcontractors, agents, advisory board members, financial advisors, attorneys, accountants, investment bankers, consultants, representatives, investment managers, investment advisors, management companies, fund advisors, and other professionals, and such Persons' respective heirs, executors, estates, and nominees, in each case in their capacity as such. Notwithstanding the foregoing, any Person that opts out of the releases by the Releasing Parties set forth in the Plan shall not be deemed an Exculpated Party hereunder.

	by Releasing Parties" immediately above, in connection with or arising out of the administration of the Debtors' Chapter 11 cases, the negotiation and pursuit of the DIP Facility, the Exit Facility, the Key Employee Incentive Plan, the Disclosure Statement, the RSA, the Restructuring Transactions, and the Plan (including the Plan Documents), or the solicitation of votes for, or confirmation of, the Plan, the funding of the Plan, the occurrence of the Effective Date, the administration of the Plan or the property to be distributed under the Plan; the cancellation or issuance of securities under or in connection with this Plan; or the transactions in furtherance of any of the foregoing; other than claims or causes of action arising out of or related to any act or omission of an Exculpated Party that is a criminal act or constitutes intentional fraud, gross negligence, recklessness or willful misconduct as determined by a Final Order, but such entities shall be entitled to assert the defense that it reasonably relied upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan. The Exculpated Parties have acted in compliance with the applicable provisions of Title 11 of the United States Code (the "**Bankruptcy Code**") with regard to the solicitation and distribution of securities pursuant to the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan, including the issuance of securities thereunder. This exculpation shall be in addition to, and not in limitation of, all other releases, indemnities, exculpations, and any other applicable law or rules protecting such Exculpated Parties from liability.
Injunction:	The confirmation order shall permanently enjoin the commencement or prosecution by any person or entity, whether directly, derivatively, or otherwise, of any claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action, losses, or liabilities released or discharged pursuant to the Plan, including, without limitation, the claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action, and liabilities released or exculpated in the Plan.

EXHIBIT B

FORM OF JOINDER AGREEMENT FOR SUPPORTING NOTEHOLDER

This Joinder Agreement (the "**Joinder Agreement**") to the Restructuring Support Agreement, dated as of May [·], 2020 (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time, the "**Agreement**"), by and among the Company, and the holder of certain principal amounts outstanding under the Convertible Notes Indenture (together with their respective successors and permitted assigns, the "**Supporting Noteholder**") is executed and delivered by (the "**Joining Party**") as of [·], 2020. Each capitalized term used herein but not otherwise defined shall have the meaning set forth in the Agreement.

1. Agreement to be Bound. The Joining Party hereby agrees to be bound by all of the terms of the Agreement, a copy of which is attached to this Joinder Agreement as Annex I (as the same has been or may be hereafter amended, restated, amended and restated, supplemented or otherwise modified from time to time in accordance with the provisions hereof). The Joining Party shall hereafter be deemed to be a "Supporting Noteholder" and a "Party" for all purposes under the Agreement and with respect to any and all Claims held by such Joining Party.

2. Representations and Warranties. With respect to the aggregate principal amount of the Convertible Notes, set forth below its name on the signature page hereto, the Joining Party hereby makes the representations and warranties of the Supporting Noteholder set forth in Section 7 of the Agreement to each other Party to the Agreement.

3. Governing Law. Except to the extent that the Bankruptcy Code or other federal law is applicable or to the extent that an applicable Plan Document provides otherwise, the rights, duties, and obligations arising under the Joinder Agreement shall be governed by, and construed and enforced in accordance with, the internal laws of the State of New York, without giving effect to the principles of conflicts of laws thereof that would require the application of the law of any other jurisdiction. Notwithstanding the foregoing, during the pendency of the Chapter 11 Cases, all proceedings contemplated by Section 11(b) of the Agreement shall be brought in the Bankruptcy Court and each of the Parties (a) irrevocably submits to the exclusive jurisdiction of the Bankruptcy Court; (b) waives any objection to laying venue in any such action or proceeding in the Bankruptcy Court; and (c) waives any objection that the Bankruptcy Court is an inconvenient forum or does not have jurisdiction over any Party to this Agreement.

[*Signature Page Follows*]

IN WITNESS WHEREOF, the Joining Party has caused this Joinder to be executed as of the date first written above.

SUPPORTING NOTEHOLDER

[·]

By: _____

Name: _____

Title: _____

Principal Amount of Convertible Notes: $ _____

Number of Common Stock (as applicable): _____

Notice Address:

_____

_____

_____

Fax: _____
Attention: _____
Email: _____

Acknowledged:

VIVUS, INC., on behalf of itself and its direct and indirect subsidiaries

By: _____
Name:
Title:

[*Signature Page to Joinder Agreement*]

Exhibit 23.1

CONSENT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

We consent to the incorporation by reference in the Prospectus constituting a part of this Registration Statement on Form S-1 of our report dated March 3, 2020 (which report expresses an unqualified opinion and includes an explanatory paragraph related to substantial doubt about the Company's ability to continue as a going concern) relating to the consolidated financial statements and financial statement schedule of VIVUS, Inc., which appears in VIVUS, Inc.'s Annual Report on Form 10-K for the year ended December 31, 2019.

We also consent to the reference to us under the caption "Experts" in the Prospectus.

/s/ OUM & CO. LLP

San Francisco, California
June 8, 2020