

---

---

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

Washington, D. C. 20549

**FORM 8-K**

**CURRENT REPORT**

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

**January 4, 2006**

Date of Report (date of earliest event reported)

**VIVUS, INC.**

(Exact name of registrant as specified in charter)

**Delaware**

(State or other jurisdiction of  
incorporation)

**0-23490**

(Commission File Number)

**94-3136179**

(I. R. S. Employer Identification  
No.)

**1172 Castro Street, Mountain View, California 94040**

(Address of principal executive offices)

Registrant's telephone number, including area code: **(408) 435-9600**

**N/A**

(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- ☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
  - ☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
  - ☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
  - ☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))
- 
- 

**Item 1.01 – Entry into a Material Definitive Agreement.**

The disclosure set forth in Item 2.03 is incorporated herein by reference.

**Item 2.03 – Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of a Registrant.**

On January 4, 2006, VIVUS, Inc. and Vivus Real Estate LLC, a wholly owned subsidiary of VIVUS, Inc. (jointly, “the Company”) entered into a Term Loan Agreement and a Commercial Mortgage Note (the “Agreements”) with Crown Bank N. A. (“Crown”) secured by the land and buildings, among other assets, located at 735 Airport Road and 745 Airport Road in Lakewood, New Jersey (the “Facility”). The Facility is the Company’s principal manufacturing facility, which the Company purchased on December 22, 2005. Under the Agreements, the Company borrowed \$5,375,000 on January 4, 2006 from Crown payable over a 10-year term. The interest rate will be fixed at 8.25%, which is the prime rate plus 1% at the time of funding and then will be adjusted annually to a fixed rate for the year equal to the prime rate plus 1%, with a floor of 7.5 %. Principal and interest of \$46,202 are payable monthly for the first 12 months based upon a 20 year amortization schedule and are adjusted annually at the time of the interest rate reset. All remaining principal is due on February 1, 2016. The Agreements contain prepayment penalties, and a requirement to maintain a depository account at Crown with a minimum collected balance of \$100,000 which, if not maintained, will result in an automatic increase in the interest rate on the note of one-half (0.5%) percent. The Agreements are secured by the Facility, assignment of rents and leases on the Facility, and a \$700,000 Certificate of Deposit held by Crown.

The foregoing description is qualified in its entirety by reference to the Term Loan Agreement, the Commercial Mortgage Note, and the Mortgage and Security Agreement copies of which are filed herewith as Exhibit 10.57, Exhibit 10.58 and Exhibit 10.59, respectively, and are incorporated by reference as though fully set forth herein.

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

(d) Exhibits.

Exhibit No.

Description

10.57	Term Loan Agreement, dated January 4, 2006 by and between the VIVUS, Inc. and Vivus Real Estate LLC and Crown Bank, N.A.
10.58	Commercial Mortgage Note, dated January 4, 2006 by and between VIVUS, Inc. and Vivus Real Estate LLC and Crown Bank, N.A.
10.59	Mortgage and Security Agreement, dated January 4, 2006 by and between Vivus Real Estate LLC and Crown Bank, N. A.

### SIGNATURES

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

Dated: January 6, 2006

**VIVUS, INC.**

/s/ Timothy E. Morris

Timothy E. Morris

Vice President, Finance and Chief Financial Officer

### EXHIBIT INDEX

<u>Exhibit No.</u>	<u>Description</u>
10.57	Term Loan Agreement, dated January 4, 2006 by and between the VIVUS, Inc. and Vivus Real Estate LLC and Crown Bank, N.A.
10.58	Commercial Mortgage Note, dated January 4, 2006 by and between VIVUS, Inc. and Vivus Real Estate LLC and Crown Bank, N.A.
10.59	Mortgage and Security Agreement, dated January 4, 2006 by and between Vivus Real Estate LLC and Crown Bank, N. A.

## TERM LOAN AGREEMENT

VIVUS, INC., a Delaware Corporation and VIVUS REAL ESTATE LLC, a New Jersey Limited Liability Company with a business address of 1172 Castro Street, Mountain View, CA 94040 (jointly and severally if more than one, the “Borrower”) and Crown Bank, N.A., a banking association created and existing under the laws of the United States of America with a principal office located at 715 Route 70, Brick, NJ 08723 (the “Bank”), for valuable consideration, the receipt of which is hereby acknowledged, agree as follows:

### **I. DEFINITIONS.**

1. Each reference herein to:
  - a. **“Accounts”, “Chattel Paper”, “Consumer Goods”, “Documents”, “Equipment”, “Farm Products”, “Fixtures”, “General Intangibles”, “Goods”, “Instruments”, “Inventory”, “Money”, and “Securities”** shall have the meaning assigned to each in the Uniform Commercial Code from time to time in effect in the State (the “UCC”);
  - b. **“Affiliates of Borrower”** means any person or entity that, directly or indirectly, controls, is controlled by or is under common control with the Borrower or is an inside director or officer of the Borrower. For purposes of this definition, the term “control” (including the terms “controlling”, “controlled by” and “under common control with”) means the possession, direct or indirect, of the power to vote five percent (5%) or more of (i) the voting stock of a corporation, (ii) the partnership interests of a partnership, or (iii) the membership interests of a limited liability company, or to direct or cause the direction of the management and policies of any such entity, whether through the ownership of voting stock, partnership interests, membership interests, by contract or otherwise;
  - c. **“Books and Records”** shall mean all books, correspondence, credit files, records and other documents relating directly or indirectly to the Obligations and the Collateral, including, without limitation, all tapes, cards, runs, data bases, software programs, diskettes, and other papers and documents in the possession or control of the Borrower, any computer service bureau, or other agent or independent contractor;
  - d. **“Loan Documents”** shall mean this Agreement, the Note, any Bank issued Commitment Letter and any amendments thereto, and any and all mortgages, pledge agreements, security agreements, financing statements, guaranties and other documents related to this Agreement and/or the Loan;
  - e. **“Material Adverse Change”** shall mean with respect to the Borrower and any guarantors and any of their respective properties or revenues, an event, action or condition that would or is reasonably likely to (i) adversely affect the validity or enforceability of, or the authority of the Borrower and/or any guarantor to perform their respective obligations under, the Loan Documents, or (ii) materially adversely affect the business, operations, assets or condition (financial or otherwise) of the Borrower and/or any guarantor or the ability of the Borrower and/or any guarantor to perform their respective obligations under any of the Loan Documents, or (iii) materially adversely affect the value of any Collateral;
  - f. **“Rate”** For the first year of this Note, the interest rate will be fixed at eight and one-quarter (8.25%) percent, which is equal to the Wall Street Journal Prime Rate plus one (1%) percent and then adjusted annually to a fixed rate for the year equal to the Wall Street Journal Prime Rate plus one (1%) percent, with a floor rate of seven and one-half (7.50%) percent at all times, subject to Article V, Section 8.
  - g. **“State”** shall mean the State of New Jersey.

### **II. LOAN.**

1. **Term Loan; Purposes.** The Bank agrees on the terms and provisions of this Agreement to extend a term loan for the account of the Borrower in the principal sum of Five Million Three Hundred Seventy-Five Thousand and No/100 Dollars (\$5,375,000.00) (the “Loan”) for the following purpose(s): Purchase real estate
2. **Note; Interest Calculation.** The Loan shall be evidenced by the Borrower’s note of even date with this Agreement (which note and all amendments thereto and any additional or supplementary notes executed pursuant to this Agreement are herein referred to collectively as the “Note”). The interest rate initially set forth in the Note is a variable rate. Interest shall be calculated on the basis of a 360-day year using the actual number of days elapsed. On maturity, whether scheduled or otherwise, both principal and all accrued and unpaid interest shall be immediately due and payable.
3. **Late Fee.** If the entire amount of any required principal and/or interest is not paid in full within (15) days after the same is due, the Borrower shall pay to the Bank a late fee equal to five percent (5%) of the required payment.
4. **Prepayment.** During the term of the Loan, for the loss on income, there shall be a premium for the prepayment of the Loan before its scheduled maturity. (a) Except as set forth in subsection (b) below, if the Loan is prepaid, in whole or in part, within the first year of its term, the premium shall be five (5%) percent of the prepaid amount. If prepayment occurs in the second year of its term, the premium shall be four (4%) percent. If prepayment occurs in the third year the prepayment shall be three

1

(3%) percent. If prepayment occurs in the fourth year the premium shall be two (2%) percent, and one (1%) percent if it occurs in the fifth year. At no time shall the prepayment premium be less than one (1%) percent. (b) If the Borrower sells one of the two buildings to an independent party at a later date, the Bank will assess a one (1%) percent premium provided the Bank received a payment reducing the loan in an amount equal to forty (40%) percent of the initial appraised value and the remaining parcel has a loan to value not less than sixty (60%) percent of the remaining balance of the loan. In addition, the Borrower must pay a Five Thousand (\$5,000.00) and 00/100 Dollar release fee for the release of the parcel.

### **III. REPRESENTATIONS AND WARRANTIES.**

The Borrower represents and warrants that:

1. **Organization and Powers.** (a) If a corporate, partnership, limited liability company or trust Borrower, it is duly organized, validly existing and in good standing under the laws of the state of its formation and in every other jurisdiction, except where the failure to so qualify would not have a material adverse effect upon the Borrower, its property, its financial condition, or otherwise, (b) it has the power and authority to own its properties and to carry on its business as now being conducted and, if a corporate, partnership, limited liability company or trust Borrower, is qualified to do business in every jurisdiction where such qualification is necessary, (c) it has the power to execute, deliver and perform the Loan Documents,

(d) the execution, delivery and performance of the Loan Documents have been duly authorized by all requisite action, (e) the execution, delivery and performance of the Loan Documents will not violate any provision of law, any order of any court or other agency of government, the Articles of Formation or By-laws of a corporate Borrower, the partnership agreement of a partnership Borrower, the Articles of Incorporation or Operating Agreement of a limited liability company Borrower, or the trust agreement of a trust Borrower, or any indenture, agreement or other instrument to which it is a party, or by which it is bound, or be in conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any such indenture, agreement or other instrument, or result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of the property or assets of the Borrower (other than in favor of the Bank) or the acceleration of any of its outstanding indebtedness.

2. **Financial Statements.** The Borrower has heretofore furnished to the Bank accurate and complete financial data and other information based on its operations in previous years, and said financial data fairly presents the financial position and the results of operations for the periods indicated therein. There has been no Material Adverse Change since the date of the most recent financial statement.
3. **Litigation.** There is no action, suit or proceeding at law or in equity or by or before any governmental instrumentality or other agency now pending or threatened against or affecting the Borrower.
4. **No Conflict.** The Borrower is not a party to any agreement or instrument or subject to any restriction materially or adversely affecting its business, properties or assets, operations or condition, financial or otherwise. The Borrower has no knowledge that it is in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions contained in any agreement or instrument to which it is a party.
5. **Use of Proceeds.** No part of the proceeds of the Loan will be used for consumer purposes or will be used, in whole or in part, to purchase or carry, directly or indirectly, any margin stock or margin security (within the meaning of Regulation U of the Board of Governors of the Federal Reserve System) or to extend credit to others for the purpose of purchasing or carrying any such margin stock or margin security. If requested by the Bank, the Borrower will furnish in connection with this Agreement a statement in conformity with the requirements of Federal Reserve Form U-1 referred to in said Regulation U.

#### IV. CONDITIONS OF LENDING.

1. The Bank shall be obligated to extend the credit and make the advances under this Agreement only if on the date such advance is requested:
  - a. The Bank shall have received, to the extent applicable (i) copies of the Articles of Incorporation, Certificate of Incorporation, Certificate of Limited Partnership, or Certificate of a Limited Liability Company or Partnership, each certified by the secretary of state of the state of its formation, (ii) copies of partnership, trust, or operating agreements, each certified to the Bank by a duly authorized representative of such Borrower, (iii) Good Standing, Subsistence and/or Existence Certificates of the state of formation of the Borrower if applicable, and from all other states where such Borrower conducts its business or holds property, (iv) duly adopted resolutions authorizing the execution, delivery and performance under the Loan Documents certified by an officer of the Borrower; (v) a title policy insuring that the Bank's loan is a first lien on the Property, (vi) copy of the Certificate of Inspection from the Department of Community Affairs, Bureau of Housing Inspection of the State of New Jersey and a copy of the Certificate of Occupancy of both Properties;
  - b. The representations and warranties in Part III hereof are true and correct;
  - c. No Event of Default shall have occurred;

#### V. COVENANTS.

The Borrower covenants and agrees that it will:

1.
  - a. **Legal Existence; Insurance; Etc.** Keep in full force and effect its legal existence (if a corporation, partnership, limited liability company or trust), authority, rights, licenses, permits and franchises and operate its business as conducted prior to the date hereof; maintain all property used in the conduct of its business and keep the same in good repair, working order and condition; and maintain adequate insurance on its properties against fire, theft, and extended coverage risks and against public liability and property damage and products liability and such other risks as may be required by law or as may be reasonably required by the Bank, in such form, for such periods, and written by such companies as may be satisfactory to the Bank, such insurance in the case of a secured loan to name the Bank as additional insured and/or mortgagee/loss payee. All policies of insurance shall provide for at least thirty (30) days' written notice to the Bank prior to cancellation or change in the coverage, scope or amount of any such policy or policies. Borrower shall furnish the Bank with certificates of compliance with the foregoing insurance provision.
  - b. **Compliance with Laws.** Comply with all present and future applicable laws, ordinances, rules, regulations, directives and other requirements of all governmental instrumentalities, including without limitation those relating to Hazardous Substances, within such time periods as required thereby, with time being of the essence.
2. **Operation of Business.** Maintain and operate its business in a proper and efficient manner.
3. **Payment of Taxes.** Pay and discharge all taxes, assessments, and governmental charges imposed upon Borrower, its income or its property before the same shall be in default, as well as all lawful claims for labor, materials and supplies or otherwise which, if unpaid, might become a lien upon any such properties.
4. **Financial Statements.** Furnish to the Bank:
  - a. promptly, from time to time as requested by the Bank, and in all events within one hundred twenty (120) days after the close of each applicable party's tax year, (i) with respect to the Borrower and all corporate, partnership or trust guarantors, financial statements (audited if requested), balance sheets, profit and loss statements, together with supporting schedules, signed and in such form as may be acceptable to the Bank; (ii) with respect to all individual guarantors, signed personal financial statements; and (iii) with respect to all entities and individuals referred to in (i) and (ii), current Federal income tax returns (with all schedules and exhibits), or in the case of a partnership,

Form 1065 (with all schedules and exhibits). In any event, all the documents referred to in this subparagraph (a), regardless of when last submitted, must be submitted to the Bank, as often as the Bank shall deem necessary, if there occurs a Material Adverse Change;

- b. promptly, from time to time, such other information regarding the operations, assets, business, affairs and financial condition of the Borrower and all guarantors, as the Bank may reasonably request; and
- c. with respect to all personal financial statements submitted by individual guarantors, such statements shall be on forms prescribed by the Bank.

- 5. **Inspection.** Permit agents or representatives of the Bank, at reasonable hours and upon reasonable notice, to inspect the Books and Records of the Borrower and to make abstracts or reproductions thereof, all at the Borrower's expense.
- 6. **Adverse Changes.** Promptly advise the Bank of any Material Adverse Change.
- 7. **Accounting System.** Maintain a standard system of accounting in accordance with generally accepted accounting principles.
- 8. **Depository.** Maintain the Bank as the Borrower's depository and maintain in one or more accounts at the Bank, a minimum collected balance of \$100,000.00, to be analyzed annually. If the minimum balance is not maintained the interest rate will be automatically increased by one-half (.5%) percent.
- 9. **Sales of Accounts and Instruments.** Not sell, assign, discount or dispose of any Accounts or Instruments held by the Borrower, with or without recourse, except for collection (including endorsements) in the ordinary course of business.
- 10. **Sales and Transfers.** Not sell, assign, lease, transfer, sell and leaseback, or otherwise dispose of all or any material amount of its assets not in the ordinary course of business to any person or entity or turn over the management of, or enter into a management contract with respect to, such assets.
- 11. **Valuation.** Not write up (by creating an appraisal surplus or otherwise) the value of any capital assets above their cost less the depreciation regularly allowable thereon.
- 12. **Fundamental Changes.** Not dissolve, liquidate, consolidate with or merge with any corporation, limited liability company or other entity or agree to do any of the foregoing.
- 13. **Additional Covenants.** Comply special provisions with the additional covenants, if any, set forth on affixed Exhibit A-1.

## VI. SECURITY AGREEMENT AND OTHER SECURITY DOCUMENTS.

- 1. **Security Interest; Collateral; Obligations.** The Borrower hereby grants to the Bank, as security for any and all obligations whatsoever of the Borrower to the Bank, whether direct, indirect, absolute or contingent, due or to become due, and whether

now existing or hereafter arising and howsoever evidenced or acquired, including without limitation all indebtedness and liabilities evidenced by the Loan, this Agreement, the other Loan Documents, checking account overdrafts, and letter of credit reimbursement agreements, excluding, however, indebtedness incurred primarily for personal, family or household purposes (collectively, the "Obligations"), a first lien on, and a security interest in and agrees and acknowledges that the Bank has and will continue to have a first lien on and a perfected security interest in all of the Collateral described below, both presently owned and after acquired, together with all proceeds and products thereof, additions and accessions thereto, and all replacements and substitutions therefor (collectively, the "Collateral"), including all such Collateral which constitutes Fixtures attached to the Property as set forth on Exhibit A-4 and the Certificate of Deposit (as defined below).

- 2. Borrower hereby warrants, covenants and agrees that:
  - a. **Title; Adverse Liens.** Except for prior security interests disclosed on Exhibit A-2 (if any) and except for the security interest granted hereby, the Borrower is the owner of presently owned Collateral and will be the owner of Collateral hereafter acquired free from any lien or encumbrance (other than those in favor of the Bank), and Borrower will defend the Collateral against the claims and demands of all persons at any time claiming the same or any interest therein.
  - b. **Financing Statements.** Except for financing statements evidencing the security interests which may be listed on Exhibit A-2 (if any), no financing statements covering any Collateral are on file in any public office. At the request of the Bank, the Borrower will execute one or more (i) financing statements pursuant to the UCC; (ii) title certificate lien application forms; and (iii) other documents necessary or advisable to perfect the security interests evidenced hereby, all in form satisfactory to the Bank. Where allowed by law, the Borrower hereby irrevocably authorizes the Bank to file financing statements and amendments without the signature of the Borrower. The Borrower will pay the cost of filing the aforesaid documents or filing or recording this Agreement in all public offices wherever filing or recording is deemed by the Bank to be necessary or desirable.
  - c. **Adverse Liens.** The Borrower will keep the Collateral free from any future adverse liens.
  - d. **Mortgages; Fixtures; Farm Products.** If the Borrower has granted a mortgage on real property and a security interest in Fixtures and/or Farm Products, there is affixed hereto as Exhibit A-4 a description of the mortgaged property and/or applicable real estate and the name(s) of the record owner.
  - e. **Certificate of Deposit.** The Borrower has granted a security interest in a \$700,000.00 Certificate of Deposit to be opened at the Bank (the "Certificate of Deposit"). Anything to the contrary herein, notwithstanding, the Certificate of Deposit shall be used by the Bank only to maintain current payments of interest in the event of a default.
  - f. **Taxes.** The Borrower will pay promptly when due all taxes and assessments upon the Collateral or for its use or operation or upon this Agreement and any of the other Loan Documents.
  - g. **Insurance.** With respect to all required insurance policies and coverage, the Bank may act either in its name or as attorney for the Borrower (for that purpose by these presents duly authorized and appointed with full power of substitution and revocation) in obtaining, adjusting, settling and canceling such insurance and endorsing any drafts in payment of any loss.
  - h. **Preservation of Collateral.** The Bank may, at its election, discharge taxes and liens levied or placed on the Collateral, pay for insurance on the Collateral and pay for the maintenance and preservation of the Collateral. The Borrower agrees to reimburse Bank on demand for any

payment made, or any expense incurred by the Bank pursuant to the foregoing authorization, and in any event all such payments and expenses shall constitute an Obligation hereunder. If the Borrower fails to insure Collateral as required by this Agreement or any of the Loan Documents, the Borrower shall pay to the Bank on the date of such failure a nonrefundable fee for each such failure equal to the sum of (i) \$100 plus (ii) the amount of the insurance premium cost incurred by the Bank. Notwithstanding the foregoing, neither the charging or payment of such fee nor this provision shall in any way be deemed to waive or imply or constitute a basis for waiver of any default occasioned by Borrower's failure to comply with the insurance requirements of this Agreement or any of the Loan Documents.

- i. **Possession and Use.** Other than with respect to Collateral in which the Bank's security interest is perfected by the Bank's possession thereof, such as instruments, documents, cash, bank accounts, etc., which so long as any of the Obligations remain outstanding and unpaid shall remain in the possession of the Bank, until an Event of Default, the Borrower may have possession of the Collateral, provided that the Borrower will not use the Collateral in any unlawful manner or in a manner inconsistent with this Agreement, the Loan Documents, or any policy of insurance thereon.
- j. **Power of Attorney.** The Borrower irrevocably designates and appoints the Bank its true and lawful attorney with full power of substitution and revocation to execute, deliver, and record in the name of the Borrower all financing statements, amendments, continuation statements, title certificate lien applications and other documents deemed by the Bank to be necessary or advisable to perfect or to continue the perfection of the security interests granted hereunder.
- k. **Reproduction as Financing Statement.** A carbon, photographic, or other reproduction of a security agreement or a financing statement is sufficient as a financing statement.
- l. **Remedies.** If an Event of Default occurs, the Bank shall have the rights and remedies provided in this Agreement, including without limitation in Part VII hereof. In addition, the Bank may exercise and shall have any and all rights and remedies accorded it by the UCC. The Bank may require the Borrower to assemble the Collateral and make it available to the Bank at a place to be designated by the Bank which is reasonably convenient to both parties. The requirement of reasonable notice shall be met, if notice is mailed, postage prepaid, to the Borrower or other person entitled thereto at least ten (10) days (including non-business days) before the time of sale or disposition of the Collateral. The Bank at its option may have a receiver appointed to take possession of the Collateral, to use and operate the Collateral, to collect the profits and proceeds

therefrom, and to apply the same as the court may direct. The Borrower agrees that the Bank's legal remedies are inadequate and that the Bank shall be entitled to obtain equitable relief upon the occurrence of an Event of Default. The Borrower shall pay to the Bank on demand all expenses, including reasonable legal expenses and attorney's fees (which may include costs allocated by the Bank's internal legal department), incurred or paid by the Bank in protecting or enforcing any rights of the Bank hereunder, including its right to take possession of the Collateral, storing and disposing of the same or in collecting the proceeds thereof.

- m. **Inspection and Appraisal.** The Bank and its agents and representatives (including without limitation appraisers, engineers, and other professionals) shall, upon reasonable advance notice, have access to the Borrower's premises for the purpose of inspecting and appraising the Collateral and/or performing environmental site assessments. If an event of default has occurred and is continuing, all fees and expenses incurred by the Bank in connection with such inspections, appraisals and site assessments shall be payable by the Borrower to the Bank upon demand, and until paid in full, shall be secured by the Bank's security interests.

## VII. EVENTS OF DEFAULT.

- 1. **Listing of Events of Default.** The happening of any of the following events or conditions with respect to the Borrower, individually and collectively, shall constitute an "Event of Default":
  - a. any representation or warranty made herein or in any report, certificate, financial statement or other instrument furnished in connection with this Agreement or the Loan shall prove to be false or misleading in any material respect;
  - b. failure to pay the principal of, or interest on, the Note or any other indebtedness of the Borrower to the Bank, within fifteen (15) days from the date the same or any installment thereof shall become due and payable, whether at the due date thereof or at a date fixed for prepayment or by acceleration or otherwise;
  - c. default in the due observance or performance of any other covenant, condition or agreement contained in this Agreement, any of the other Loan Documents, or in any other agreement or document evidencing or pertaining to Obligations, and such other default shall remain unremedied for fifteen (15) days or, except for non-monetary default, if such compliance cannot be effected within fifteen (15) days, Borrower commences such compliance within the fifteen (15) days, and diligently and continuously pursues the same;
  - d. the acceleration of the maturity of any of the Borrower's indebtedness other than to the Bank;
  - e. involvement in financial difficulties as evidenced by:
    - i. an attachment made on the Borrower's property or assets seeking a sum in excess of \$100,000.00 which remains unreleased for a period in excess of sixty (60) days; or
    - ii. the inability to pay its debts (including without limitation taxes) generally as they become due; or
    - iii. the appointment or authorization of a custodian as defined in the Bankruptcy Code; provided, however, that in the case of the appointment of a receiver in an involuntary proceeding such appointment continues in effect and undischarged for a period of sixty (60) days; or
    - iv. the entry of an order for relief in a voluntary case under any chapter of the Bankruptcy Code; or
    - v. the filing of an involuntary petition under any chapter of the Bankruptcy Code, which petition remains undismissed for a period of sixty (60) days; or
    - vi. any other judicial modification or adjustment of the rights of Borrower's creditors;
  - f. final judgment for the payment in excess of an aggregate of One Hundred Thousand Dollars (\$100,000.00) shall be rendered against the Borrower and the same shall remain undischarged for a period of thirty (30) consecutive days during which execution shall not be effectively stayed;
  - g. the suspension of business for cause, other than strike, casualty or other cause beyond the Borrower's control and in the event of such suspension for cause beyond the Borrower's control, failure to resume operations as soon as possible;
  - h. dissolution or termination of the legal existence of the Borrower;
  - i. seizure, forfeiture or confiscation by any federal or state governmental instrumentality of a material portion of the assets of Borrower which shall not have been stayed for a period of sixty (60) days;
  - j. if the Bank believes in good faith, at any time, that either (a) the prospect of the Borrower's (i) repayment of the Loan or payment of any of its other obligations under the Loan Documents or (ii) performance of its duties thereunder is impaired or (b) there is any Material Adverse Change;

- k. with respect to any guaranty and/or subordination agreement included in the Loan Documents, the failure of the same to remain in full force and effect until the Loan is paid in full and this Agreement is terminated;
  - l. the existence of any liens for taxes due with respect to the Property unless the liens are being contested in good faith and adequate reserves have been deposited with the Bank, or construction lien claims which have not been dismissed for 30 days or for which escrows, satisfactory in amount to the Bank, have not been established by the Borrower; or
  - m. the default of the Borrower or any Guarantor under any other obligation owed to the Bank, or any third party, now existing or arising after the date of this Note.
2. **Certain Cross-Defaults.** The happening of any event or condition set forth in Article VII subsection 1(c), (e), (f), (l), or (m) above, by the Borrower or any guarantor of the Loan shall likewise constitute an Event of Default.
3. **Acceleration.** If an Event of Default occurs, the Bank may declare all Obligations to be immediately due and payable.

**VIII. MISCELLANEOUS.**

1. **Waiver of Event of Default.** No delay in accelerating the maturity of any Obligation shall affect the rights of the Bank later to take such action with respect thereto, and no waiver as to one Event of Default shall affect rights as to any other default.
2. **Notices.** Except as otherwise specifically provided for herein, any notice, demand or communication hereunder shall be given in writing (including facsimile transmission or telex) and mailed or delivered to each party at its address set forth below, or, as to each party, at such other address as shall be designated by such party by a prior notice to the other party in accordance with the terms of this provision. Any notice to the Borrower shall be sent as follows: VIVUS, INC. AND VIVUS REAL ESTATE, LLC, 1172 Castro Street, Mountain View, CA 94040. All notices hereunder shall be effective upon the earliest to occur of (i) five (5) business days after such notice is mailed, by registered or certified mail, postage prepaid (return receipt requested), (ii) upon delivery by hand, (iii) upon delivery if delivered by overnight courier (such delivery to be evidenced by the courier's records), and (iv) in the case of any notice or communication by telex or telecopy, on the date when sent.
3. **Survival.** This Agreement and all covenants, agreements, representations and warranties made herein and in the certificates delivered pursuant hereto shall survive any making by the Bank of the Loan and the execution and delivery of any Loan Documents and shall continue in full force and effect until this Agreement is terminated and all the Obligations are paid in full.
4. **Legal Fees and Expenses; Additional Fees and Charges.** The Borrower will pay all reasonable expenses incurred by the Bank in connection with the preparation of the Loan Documents, the making of the Loan, and the enforcement of the rights of the Bank in connection with this Agreement, any of the other Loan Documents and the Loan, including, but not limited to, the reasonable fees of its counsel (which may include costs allocated by the Bank's internal legal department), plus the disbursements of said counsel. Borrower further agrees to pay to the Bank on demand all reasonable fees, costs and expenses incurred by the Bank in connection with the administration of the Loan, including, without limitation, overnight courier fees, lien search fees, and filing and recording fees.
5. **Choice of Law.** This Agreement and all the other Loan Documents shall be construed in accordance with and governed by the local laws (excluding the conflict of laws rules, so-called) of the State.
6. **Written Modification and Waiver.** No modification or waiver of any provision of this Agreement or of any of the other Loan Documents nor consent to any departure by the Borrower therefrom shall in any event be effective unless the same shall be in writing, and then such waiver or consent shall be effective only in the specific instance and for the purpose for which given. No notice to or demand on the Borrower in any case shall entitle the Borrower to any other or further notice or demand in the same, similar or other circumstances.
7. **Accounting Practice.** All matters involving accounting practice are to be determined both as to classification of items and amounts in accordance with generally accepted principles of accounting practice consistently applied by the Borrower's accountants in the preparation of its previous annual financial statements.
8. **Documentation.** All documents required hereunder shall be in form and substance reasonably satisfactory to the Bank.
9. **Replacement Documents.** Upon receipt of an affidavit of an officer of the Bank as to the loss, theft, destruction or mutilation of the Note or any security document which is not of public record, and, in the case of any such loss, theft, destruction, mutilation, upon cancellation of such Note or other security document, the Borrower will issue, in lieu thereof, a replacement note or other security document in the same principal amount thereof and otherwise of like tenor.
10. **Joint and Several Obligations.** If this Agreement is signed by more than one Borrower, all obligations of the Borrowers are their joint and several obligations, and all references to the Borrower herein shall be deemed to refer to each of them, either of them, and all of them.
11. **Unenforceability.** In the event any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be held invalid or unenforceable, the remainder of this Agreement or the application of such term or provision to persons or circumstances other than those to which it is held invalid or unenforceable, shall be valid and enforceable to the fullest extent permitted by law.
12. **Cumulative Remedies; Setoff.** The rights and remedies provided the Bank in this Agreement and in the other Loan Documents shall be cumulative and shall be in addition to and not in derogation of any rights or remedies provided the Bank in any other document, instrument or agreement or under applicable law or otherwise, and may be exercised concurrently or successively. The Borrower hereby grants to the Bank, a continuing lien, security interest and right of setoff as security for all liabilities and obligations to the Bank, whether now existing or hereafter arising, upon and against all deposits, credits, collateral and property, now or hereafter in the possession, custody, safekeeping or control of the Bank. Except for the Certificate of Deposit, at any time, without demand or notice (any such notice being expressly waived by the Borrower), the Bank may setoff the same or any part thereof and apply the same to any liability or obligation of the Borrower and any guarantor even though unmatured and regardless of the adequacy of any other collateral securing the Loan. ANY AND ALL RIGHTS TO REQUIRE THE BANK TO EXERCISE ITS RIGHTS OR REMEDIES WITH RESPECT TO ANY OTHER COLLATERAL WHICH SECURES THE LOAN, PRIOR TO EXERCISING ITS RIGHT OF SETOFF WITH RESPECT TO SUCH DEPOSITS, CREDITS OR OTHER

PROPERTY OF THE BORROWER OR ANY GUARANTOR, ARE HEREBY KNOWINGLY, VOLUNTARILY AND IRREVOCABLY WAIVED.

13. **Special Provisions.** A) the Borrower shall pay to the Bank, each month, together with its monthly payment of principal and interest, an amount equal to one twelfth (1/12) of the annual property taxes on the Properties set forth on Exhibit A-4, attached hereto. No interest shall be paid on the amount held in escrow for the property taxes. Furthermore, an amount equal to two (2) months of the annual property taxes is due at closing. B) The Borrower may, in its sole discretion, release certain of the collateral, provided, that the Borrower pay a one (1%) percent prepayment premium and the Bank receives a payment reducing the loan in an amount equal to forty (40%) percent of the initial appraised value and the remaining parcel has a loan to value not less than sixty (60%) percent of the remaining balance of the loan. C) At the time the Bank provides each individual release of mortgage, the Borrower shall pay a fee in an amount equal to \$5,000.00 per release.
14. **Assignments and Participations; Credit Reporting.** The Borrower agrees that the Bank shall have the right at all times to sell all or any portion of the Loan and all Loan Documents, and to grant one or more participations in the Loan and in all Loan Documents. In connection therewith, the Borrower hereby irrevocably authorizes the Bank to deliver to each such purchaser, participant and prospective purchaser and prospective participant originals and copies of all Loan Documents and all financial statements and other credit and factual data from time to time in the Bank's possession which relate to the Borrower and/or all guarantors, if any, of the Loan. The Borrower further agrees that the Bank shall have the right at all times to disclose and report to credit reporting agencies and credit rating agencies such information pertaining to the Borrower and/or all guarantors, if any, as is consistent with the Bank's policies and practices from time to time in effect.
15. **Maximum Rate of Interest.** All provisions of this Agreement are expressly subject to the condition that in no event, whether by reason of acceleration of the maturity of the Loan or otherwise, shall the amount paid or agreed to be paid to the Bank hereunder and deemed interest under applicable law exceed the maximum rate of interest on the unpaid principal balance of the Loan allowed by applicable law (the "Maximum Allowable Rate"), which shall mean the law in effect on the date of this Agreement, except that if there is a change in such law which results in a higher Maximum Allowable Rate being applicable to this Agreement, then this Agreement shall be governed by such amended law from and after its effective date. In the event that fulfillment of any provision of this Agreement results in the interest rate hereunder being in excess of the Maximum Allowable Rate, the obligation to be fulfilled shall automatically be reduced to eliminate such excess. If, notwithstanding the foregoing, the Bank receives an amount which under applicable law would cause the interest rate set forth in this Agreement to exceed the Maximum Allowable Rate, the portion thereof which would be excessive shall automatically be applied to and deemed a prepayment of the unpaid principal balance of the Loan and not a payment of interest.
16. **Pledge to Federal Reserve.** The Bank may at any time pledge or assign all or any portion of its rights under the Loan Documents [including any portion of the promissory note] to any of the twelve (12) Federal Reserve Banks organized under Section 4 of the Federal Reserve Act, 12 U.S.C. Section 341. No such pledge or assignment or enforcement thereof shall release the Bank from its obligations under any of the Loan Documents.
17. **WAIVER OF JURY TRIAL. THE BORROWER WAIVES ANY RIGHTS IT MAY HAVE TO A TRIAL BY JURY OF ANY DISPUTE ARISING UNDER OR RELATING TO THIS AGREEMENT AND ANY OF THE OTHER LOAN DOCUMENTS, AND AGREES THAT ANY SUCH DISPUTE SHALL BE TRIED BEFORE A JUDGE SITTING WITHOUT A JURY.**
18. **Jurisdiction and Venue.** The Borrower irrevocably consents that any legal action or proceeding against it or any of its property with respect to any matter arising under or relating to this Agreement and the other Loan Documents may be brought in any court of the State, or any Federal Court of the United States of America located in the State, as the Bank may elect, and by execution and delivery of this Agreement the Borrower hereby submits to and accepts with regard to any such action or proceeding, for itself and in respect of its property, generally and unconditionally, the jurisdiction of the aforesaid courts. The Borrower further irrevocably consents to the service of process in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to the Borrower at its address set forth herein. The foregoing, however, shall not limit the Bank's rights to serve process in any other manner permitted by law or to bring any legal action or proceeding or to obtain execution of judgment in any other jurisdiction. The Borrower irrevocably waives any objection which it may now or hereafter have to the laying of the venue of any suit, action or proceeding arising out of or relating to this Agreement and the other Loan Documents, and further irrevocably waives any claim that the State is not a convenient forum for any such suit, action or proceeding.
19. **Presentment; Etc.** The Borrower waives presentment, notice of dishonor, protest, notice of non-payment, demand and other notice of any kind.
20. **Debit.** The Borrower hereby irrevocably authorizes the Bank and any subsequent holder of the Note, both before and after demand, to debit any of the Borrower's business accounts maintained with the Bank (or subsequent holder) for all sums (including without limitation principal, interest, late fees, and other fees) payable from time to time under this Agreement and the other Loan Documents. In addition, if the Borrower has signed a separate authorization, the Bank is authorized to initiate ACH debit transfers for the Loan payments and on the business account(s) specified in the authorization. These provisions

shall not obligate the Bank to create or allow any overdraft, and such authority shall not relieve the Borrower of the obligation to assure that payments are made when due.

21. **Integration.** The Loan Documents supersede all prior agreements between the parties with respect to the Loan, whether oral or written, including, without limitation, all correspondence between counsel for the respective parties. The Loan Documents constitute the entire agreements between the parties with respect to the Loan, and the rights, duties, and obligations of the parties with respect thereto.
22. **Lender Liability.** The Bank shall not be liable for any loss sustained by any party resulting from any action, omission, or failure to act by the Bank, whether with respect to the exercise or enforcement of the Bank's rights or remedies under the Loan Documents, the Loan, or otherwise, unless such loss is caused by the actual willful misconduct of the Bank conducted in bad faith. **IN NO EVENT SHALL THE BANK EVER BE**



**LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES, ANY RIGHT OR CLAIM THERETO BEING EXPRESSLY AND UNCONDITIONALLY WAIVED.**

23. **Bank's Decisional Standards.** To the extent that applicable laws require the Bank's actions or decisions under the Loan Documents to be conducted in good faith, the term "good faith" shall be defined (using a subjective standard) as honesty in fact with regard to the conduct or transaction concerned based upon the facts and circumstances actually known to the individual(s) acting for the Bank, and such requirement may be satisfied by reliance upon the advice of attorneys, accountants, appraisers, architects, engineers, or other qualified professionals.
24. **Descriptive Headings; Context.** The captions in this Agreement are for convenience of reference only and shall not define or limit any provision. Whenever the context requires, reference in this Agreement to the neuter gender shall include the masculine and/or feminine gender, and the singular number shall include the plural, and, in each case, vice versa.
25. **Acknowledgment of Copy.** The Borrower acknowledges that it has received a fully executed copy of this Agreement.

IN WITNESS WHEREOF, the Borrower and the Bank, by persons duly authorized, have executed this Agreement as of January 4, 2006.

**ATTEST OR WITNESSED BY:**

**BORROWER:**

**Vivus, Inc., a Delaware Corporation**

By: /s/ Jay Samuels  
Jay Samuels, Esq.

By: /s/ Timothy E. Morris  
Timothy E. Morris, Vice President Finance  
and Chief Financial Officer

**Vivus Real Estate, LLC,  
a New Jersey Limited Liability Company**

By: /s/ Jay Samuels  
Jay Samuels, Esq.

By: /s/ Timothy E. Morris  
Vivus, Inc., a Delaware Corporation, Sole Member  
Timothy E. Morris, Vice President Finance  
and Chief Financial Officer

**Crown Bank, N.A.**

By: \_\_\_\_\_  
Name: Patricia J. Downs  
Title: Vice President

**EXHIBIT A-1**

Additional Covenants

None

**EXHIBIT A-2**

Prior Security Interests in Collateral

None

**EXHIBIT A-3**

**Location of Equipment**

None

**Location of Inventory**

None

**Offices Containing Records of Accounts**

None

**EXHIBIT A-4**

**Description of Real Estate**

735 and 745 Airport Road, , Block 1160.01, Lots 229 and 232, Lakewood, Ocean County, NJ

**Name(s) of Record Owner**

VIVUS REAL ESTATE LLC

**COMMERCIAL MORTGAGE NOTE**  
(for use in New Jersey)

**CROWN BANK, N.A.**

Amount: \$5,375,000.00

Dated: January 4, 2006

**FOR VALUE RECEIVED**, the undersigned (individually and collectively (if more than one), jointly and severally, the “Borrower”), with an address at 1172 Castro Street, Mountain View, CA 94040, unconditionally promises to pay to the order of Crown Bank, N.A. (the “Bank”), at its office located at 715 Route 70, P.O. Box 130, Brick, New Jersey 08723, or at such other place as the Bank may direct, FIVE MILLION THREE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS (\$5,375,000.00), together with interest at the rate and on the terms provided in this Commercial Mortgage Note (including all renewals, extensions and/or modifications, this “Note”). The Commitment Letter from the Bank to Borrower, this Note and all documents executed in connection with this Note are referred to herein collectively as the “Loan Documents.”

**1. INTEREST RATE.** The Borrower will pay the Bank interest on the unpaid principal balance at the annual rate set forth below (calculated on the actual number of days elapsed over a 360-day year) from the date of this Note until the entire principal balance has been paid whether or not judgment is obtained. At no time, however, will the interest rate exceed the maximum allowable by law.

☒ **Adjustable Rate.** For the first year of this Note, the interest rate will be fixed at eight and one-quarter (8.25 %) percent, which is equal to the Wall Street Journal Prime Rate plus one (1%) percent and then adjusted annually to a fixed rate for the year equal to the Wall Street Journal Prime Rate plus one (1%) percent, with a floor rate of seven and one-half (7.50%) percent at all times, subject to the Term Loan Agreement.

**2. TERM.** This Note matures, and all unpaid principal, accrued interest and all other amounts recoverable under the Loan Documents are payable on February 1, 2016 (the “Maturity Date”).

**3. PAYMENTS.** The Borrower will pay principal and interest and real estate taxes by making payments as follows (which payments, will be applied first to any fees, costs, expenses or charges under the Loan Documents, then to the payment of accrued interest, and the balance only applied to principal): 12 consecutive monthly installments of principal and interest in the amount of \$46,202.30 plus real estate taxes, said amount being based upon a twenty (20) year amortization schedule at the interest rate as set forth above with principal and interest payments adjusted annually at the time of interest rate reset. Payments will be made by the Borrower on the first day of each month beginning March 1, 2006, until the Maturity Date of February 1, 2016, at which time the Borrower will pay all remaining outstanding principal plus interest and any fees and charges incurred.

**4. PREPAYMENTS.** During the term of the Loan, for the loss on income, there shall be a premium for the prepayment of the Loan before its scheduled maturity. (a) Except as set forth in subsection (b) below, if the Loan is prepaid, in whole or in part, within the first year of its term, the premium shall be five (5%) percent of the prepaid amount. If prepayment occurs in the second year of its term, the premium shall be four (4%) percent. If prepayment occurs in the third year the prepayment shall be three (3%) percent. If prepayment occurs in the fourth year the premium shall be two (2%) percent, and one (1%) percent if it occurs in the fifth year. At no time shall the prepayment premium be less than one (1%) percent. (b) If the Borrower sells one of the two buildings to an independent party at a later date, the Bank will assess a one (1%) percent premium provided that the Bank receives a payment reducing the Loan in an amount equal to forty (40%) percent of the initial appraised value and the remaining parcel has a loan to value not less than sixty (60%) percent of the remaining balance of the Loan. In addition, the Borrower must pay a Five Thousand (\$5,000.00) and 00/100 Dollar release fee for the release of the parcel.

**5. LATE FEE.** If the Bank does not receive the entire amount of any payment required under this Note within fifteen (15) days of its due date, the Borrower will pay a late fee of five (5%) percent of that entire amount. Any such late charge assessed is immediately due and payable.

---

**6. MORTGAGE, OTHER COLLATERAL AND GUARANTEES.** Borrower’s payment and performance obligations hereunder shall be secured by a first mortgage lien on certain real property located generally at 735 and 745 Airport Road, (Block 1160.01, Lots 229 and 232) Lakewood, Ocean County, New Jersey (referred to as the “Property” and sometimes referred to as the “Mortgaged Premises”), assignment of rents and leases on the Mortgaged Premises, a lien on all property of Vivus Real Estate, LLC affixed to and used in the operation of the Mortgaged Premises, and the assignment of a \$700,000.00 Certificate of Deposit to be opened with the Bank prior to or at Closing and may also be secured by other liens, assignments or security interests in certain property and guaranteed by certain guarantees (any party executing a guarantee being referred to herein as a “Guarantor”). Any security interests in any other collateral given to the Bank by any Borrower or Guarantor in connection with any other obligation to the Bank will also secure repayment of this Note, including but not limited to fixtures, rents, equipment and machinery.

**7. REPRESENTATIONS AND WARRANTIES.** Borrower continually represents and warrants to the Bank that (a) if Borrower or any Guarantor is an entity, it is duly organized and existing and in good standing in the state of its organization, has the authority to conduct business in the state where the Mortgaged Premises are located and has the power to own its properties and to carry on its business, and the execution, delivery and performance of the Loan Documents have been duly authorized by all necessary action; (b) the execution, delivery, and performance of the Loan Documents by Borrower and any other parties thereto do not require the consent or approval of any other party and do not conflict with, result in a violation of, or constitute a default under any agreement or other instrument binding upon such parties or any law, regulation, court decree, or order applicable to such parties; and (c) the Loan Documents constitute legal, valid and binding obligations of the parties thereto enforceable in accordance with their respective terms.

**8. AFFIRMATIVE COVENANTS.** Borrower covenants and agrees with the Bank that, at all times any amounts owing to the Bank exist, Borrower shall (a) furnish or cause others under the control of Borrower to furnish such information (including, without limitation, tax returns and financial information) with respect to Borrower’s or any Guarantor’s financial condition and business operations as the Bank may reasonably request from time to time and cooperate; (b) permit employees or agents of the Bank full and complete access to the Mortgaged Premises, and to Borrower’s financial records, to make extracts from and/or audit such records and to discuss Borrower’s business, finances and affairs with Borrower’s officers and outside accountants, all at

Borrower's expense, if an event of default has occurred and is continuing; and (c) observe any financial covenants set forth in the Commitment Letter, including the Borrower's agreement to maintain a checking account for the purpose of transacting the business of the Borrower, including, but not limited to, direct debit of the Loan payments under this Note. At no time during the term of this Note shall the amount in the account be less than the monthly payment due under this Note, Borrower will continue to maintain its authority to do business in the State of New Jersey, where the Mortgaged Premises are located.

**9. NEGATIVE COVENANTS.** Borrower covenants and agrees with the Bank that, at all times any amounts owing to the Bank exist, Borrower shall not permit any secondary financing on the Mortgaged Premises, unless prior approval of the Bank is granted; such prior approval shall not be unreasonably withheld so long as the Borrower applies first to the Bank for such secondary financing.

**10. DEFAULT.** Each of the following shall constitute an event of default ("Event of Default") under this Note: (a) failure of Borrower to make any payment to the Bank (whether upon the Maturity Date or otherwise) when due hereunder; (b) failure of Borrower or any Guarantor to comply with or to perform any term, condition or covenant contained in the Loan Documents that remain uncured for fifteen (15) days after Borrower received written notice of such failure or the occurrence of any default or "Event of Default" under any other Loan Document or, except for non-monetary default, if such compliance cannot be effected within fifteen (15) days, Borrower commences such compliance within the fifteen (15) days, and diligently and continuously pursues the same; (c) any representation, warranty, certification, or other information furnished by or on behalf of the Borrower or any Guarantor was false or misleading in any material respect when made; (d) the institution of proceedings by or against the Borrower or any Guarantor under any bankruptcy or insolvency law, or any law for the benefit of creditors or relief of debtors, (provided, however, that the institution of involuntary proceedings against the Borrower or any Guarantor will not be an Event of Default if such proceeding is discharged or dismissed within thirty (30) days after the commencement date thereof), or a custodianship, trusteeship, receivership or assignment for the benefit of creditors is imposed upon or sought by the Borrower, any Guarantor or any part of the Property; (e) the existence of any liens for taxes due with respect to the Property unless the liens are being contested in good

---

faith and adequate reserves have been deposited with the Bank, or construction lien claims which have not been dismissed for thirty (30) days or for which escrows, satisfactory in amount to the Bank, have not been established by the Borrower; (f) the failure of the Borrower or any Guarantor to comply with any other obligation owed to the Bank, now existing or arising after the date of this Note; and (g) any event which, in the Bank's judgment, materially adversely affects (a) the ability of the Borrower or any Guarantor to perform any of its obligations under the Loan Documents or any Guaranty as applicable; (b) the business or financial condition of the Borrower or any Guarantor; or (c) the operations or value of the Property or other collateral or the Bank's lien or security interest on the Property or other collateral.

**11. REMEDIES.** Upon the occurrence of an Event of Default, at Bank's option (with the exception of (d) above, which shall be automatic upon said occurrence), all amounts owing to Bank will become due and payable immediately, without additional notice of any kind to Borrower or any Guarantor, and interest will continue to accrue on the full amount thereof at a rate equal to 2% per annum in excess of the rate of interest otherwise charged hereunder. In addition, the Bank shall have all the rights and remedies provided in the other Loan Documents or available at law, in equity, or otherwise. All of the Bank's rights and remedies shall be cumulative and may be exercised singularly or concurrently. Election by the Bank to pursue any remedy shall not exclude pursuit of any other remedy, and an election to make expenditures or take action to perform any obligation of Borrower or of any Guarantor shall not affect the Bank's right to declare an Event of Default and to exercise its rights and remedies.

**12. RIGHT OF SETOFF.** Borrower grants to the Bank a contractual possessory security interest in, and hereby assigns, conveys, delivers, pledges, and transfers to the Bank all of Borrower's right, title and interest in and to, Borrower's present and future bank accounts. Borrower authorizes the Bank to charge or set off all sums owing to the Bank against any and all such accounts and, at the Bank's option, to administratively freeze all such accounts to allow the Bank to protect the Bank's charge and setoff rights provided in this paragraph.

**13. EXPENSES.** Borrower agrees to pay the Bank upon demand all reasonable costs and expenses of collection of this Note (including the reasonable fees and expenses of outside counsel), and any judicial or non-judicial enforcement of the Bank's rights under the Note and other Loan Documents including, without limitation, any court proceeding, bankruptcy or insolvency case, appeal, or post-judgment collection services.

**14. GENERAL PROVISIONS.** Borrower waives presentment, demand for payment, protest, notice of dishonor, and notice of default or of an Event of Default. Upon any change in the terms of this Note or any of the other Loan Documents, and unless otherwise expressly stated in writing, Borrower and any Guarantor shall not be released from liability. Borrower agrees that the Bank may renew or extend this Note, or release any party, Guarantor or collateral, or impair, fail to realize upon or perfect the Bank's security interest in any collateral, and take any other action deemed necessary by the Bank without the consent of or notice to anyone.

**15. GOVERNING LAW.** This Note shall be construed according to the laws of the State of New Jersey, without regard to conflicts of law.

**16. SEVERABILITY.** If any provision of the Loan Documents is found to be invalid or unenforceable, such provision shall be stricken and all remaining provisions of the Loan Documents shall remain valid and enforceable.

**17. WAIVER; AMENDMENTS.** No amendment of the Loan Documents, and no waiver of any one or more of the provisions hereof and thereof, shall be effective unless set forth in a writing prepared by Borrower or Guarantor, whichever is applicable, and signed by the Bank; provided, however, that any such waiver shall be restricted to the matters specified in such writing.

**18. ENTIRE AGREEMENT.** The Loan Documents constitute the sole agreement of the parties regarding the subject matter hereof and thereof and supersede all oral negotiations and prior writings regarding the subject matter hereof and thereof.

**19. WAIVER OF JURY TRIAL; CONSENT TO JURISDICTION; SERVICE OF PROCESS. BORROWER KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY MATTER RELATING TO, ARISING FROM OR IN CONNECTION WITH THE LOAN DOCUMENTS. BORROWER ALSO CONSENTS TO THE JURISDICTION OF THE COURTS OF THE STATE WHOSE LAWS GOVERN THE LOAN DOCUMENTS AND**

---

**AGREES THAT SERVICE OF PROCESS MAY BE MADE UPON BORROWER BY MAILING A COPY OF SUCH PROCESS TO BORROWER.**

**20. FURTHER ASSURANCES.** Borrower agrees to cooperate and take all necessary steps as reasonably requested by the Bank to carry out the spirit and intent of the Loan Documents, including, without limitation, executing or reexecuting any of the Loan Documents.

**21. SUCCESSORS AND ASSIGNS.** The Loan Documents shall be binding upon Borrower and Borrower’s successors and assigns and shall inure to the benefit of the Bank, its successors and assigns. Borrower may not assign or transfer Borrower’s rights under the Loan Documents without the prior written consent of the Bank.

**IN WITNESS WHEREOF, BORROWER, INTENDING TO BE LEGALLY BOUND, HAS EXECUTED THIS NOTE AS OF THE DATE ABOVE WRITTEN.**

**ATTEST OR WITNESSED BY:**

**BORROWER:**

**Vivus, Inc., a Delaware Corporation**

**By:** /s/ Jay Samuels  
Jay Samuels, Esq.

**By:** /s/ Timothy E. Morris  
Timothy E. Morris, Vice President Finance  
and Chief Financial Officer

**Vivus Real Estate, LLC,  
a New Jersey Limited Liability Company**

**By:** /s/ Jay Samuels  
Jay Samuels, Esq.

**By:** /s/ Timothy E. Morris  
Vivus, Inc., a Delaware Corporation, Sole Member  
Timothy E. Morris, Vice President Finance  
and Chief Financial Officer

---

**MORTGAGE AND SECURITY AGREEMENT****CROWN BANK, N.A.**

**Date:** January 4, 2006

**Mortgagee:** **CROWN BANK, N.A.**  
715 Route 70  
Brick, New Jersey 08723

If Mortgagor is not the Borrower, the Borrower is also: Vivus, Inc.

**Mortgagor:** Vivus Real Estate, LLC

o Individual(s)  
o Husband and wife  
o General partnership/joint venture State:  
o Limited partnership State:  
☒ Limited Liability Company State: New Jersey  
o Corporation State:

**Address of Mortgagor:** 1172 Castro Street  
Mountain View, CA 94040

**Mortgaged Premises:** See Exhibit "A"  
Tract 1:  
Street 735 Airport Road  
Township Lakewood County Ocean, New Jersey  
Tax Map Block(s) 1160.01, Lot(s) 229  
Tract 2:  
Street 745 Airport Road  
Township Lakewood County Ocean, New Jersey  
Tax Map Block(s) 1160.01, Lot(s) 232

**Obligations:** Loan in the principal amount of **\$5,375,000.00** described in that certain Commercial Mortgage Note dated even date hereof by Borrower in favor of Mortgagee (the "Note").

o This is a purchase money mortgage given to secure all or a portion of the consideration paid for the Mortgaged Premises.

☒ This is a first purchase money mortgage lien on the Mortgaged Premises.

**1. DEFINITIONS; INCORPORATION OF NOTE.** All terms not otherwise defined herein shall have the meaning given them in the Note, and if not defined, then the Uniform Commercial Code in effect in the state in which the Mortgaged Premises is located. All liabilities of Mortgagor to Mortgagee, whether under the Note, any guarantee, any other Loan Document, other obligation or otherwise, now existing or hereafter incurred, matured or unmatured, direct or contingent, joint or several, whether created directly or acquired by assignment or otherwise, and any extensions, modifications or renewals thereof and substitutions therefore; all amounts paid by Mortgagee on behalf of Mortgagor; all principal, interest, late charges, penalties, fees and all other such sums due or recoverable under the Loan Documents or otherwise are referred to herein as the "Indebtedness."

**2. PROPERTY MORTGAGED.** To secure payment of the Indebtedness and performance of Mortgagor's obligations to Mortgagee under the Loan Documents, Mortgagor mortgages, grants, and conveys to Mortgagee all of the rights and interest which Mortgagor now has or will acquire with regard to the following property (together the "Property"):

1

- 
- a. the Mortgaged Premises;
  - b. all buildings, structures and other improvements located on the Mortgaged Premises and all rights of way, easements and appurtenances;
  - c. all fixtures, machinery, equipment and other articles of real, personal or mixed property of Mortgagor attached to, situate or installed in or upon, or used in the operation or maintenance of, the Mortgaged Premises or any plant or business situated thereon, whether or not such real, personal or mixed property is or shall be affixed to the same, and all replacements, substitutions, accretions and proceeds of the foregoing, including all furnishings, furniture, and appliances; machinery and equipment of any kind whatsoever; and all parts, fittings, accessories, accessions, substitutions and replacements thereof;
  - d. all leases, licenses, occupancy agreements or agreements to lease all or any part of the Mortgaged Premises and all extensions, renewals, amendments, and modifications thereof, and any options, rights of first refusal, or guarantees relating thereto; all rents, income, receipts, revenues, security deposits, escrow accounts, reserves, profits, and payments of any kind payable under the leases or otherwise arising from the Mortgaged Premises; all contract rights, accounts receivable and general intangibles relating to the Mortgaged Premises or the use, occupancy, maintenance, construction, repair or operation thereof; all management agreements, franchise agreements, utility agreements and deposits, building service contracts, maintenance contracts, construction contracts, architect's agreements, and plans and specifications; all warranties and guaranties; and all permits, licenses and approvals;

e. all estates, rights, privileges, easements, and appurtenances of any kind benefiting the Mortgaged Premises; all means of access to and from the Mortgaged Premises, whether public or private; all water and mineral rights; and all rights of Mortgagor as declarant under any declaration of condominium or association applicable to the Mortgaged Premises; and

f. all "Proceeds" of any of the Property, which shall additionally include whatever is received upon the use, lease, sale, exchange, collection, or other utilization or any disposition of any of the Mortgaged Premises, voluntary or involuntary, whether cash or noncash, including proceeds of insurance and condemnation awards, rental or lease payments, accounts, chattel paper, instruments, documents, contract rights, general intangibles, equipment and inventory.

**3. SECURITY AGREEMENT.** This Mortgage is also a security agreement pursuant to the Uniform Commercial Code. Mortgagor agrees to execute and deliver to Mortgagee, upon request, any financing statements or other documents as Mortgagee may require to perfect its security interest. Mortgagor irrevocably appoints Mortgagee attorney-in-fact for Mortgagor to execute, deliver and file such instruments. This Mortgage is effective as a financing statement under the Uniform Commercial Code and may be filed as a "fixture filing."

**4. COVENANTS.** The Mortgagor, represents, warrants, covenants and agrees that:

a. Title and Right to Mortgage. Mortgagor has good and marketable fee simple absolute title to the Mortgaged Premises subject only to those exceptions to title more particularly described in the title commitment issued to, and accepted by, Mortgagee in connection with this transaction (the "Permitted Encumbrances") and Mortgagor shall defend the validity, priority and enforceability of the lien of this Mortgage against the claims of all persons excepting only those claiming under Permitted Encumbrances. Mortgagor has full power and lawful authority to subject the Mortgaged Premises to the lien of this Mortgage. The execution, delivery and performance of this Mortgage and the other Loan Documents will not contravene any legal requirements or any agreement, document or instrument to which Mortgagor is a party or by which Mortgagor or the Mortgaged Premises is bound. Mortgagor shall make, execute, acknowledge and deliver all such further or other deeds, documents, instruments or assurances and cause to be done all such further acts and things as may at any time be required by Mortgagee to confirm and fully protect the lien and priority of this Mortgage.

b. Taxes and Other Charges. Mortgagor shall pay when due and before interest or penalties commence to accrue thereon, all taxes, assessments, water and sewer rents, condominium or other homeowners association fees, dues or maintenance charges, levies, encumbrances and all other charges or claims of any nature and kind, which may be assessed, levied, imposed, suffered, placed or filed at any time against the Property or any part thereof or which by any present or future law may have priority. If requested by Mortgagee, Mortgagor will

---

immediately deliver to Mortgagee receipts evidencing such payments. If such receipts are not delivered within ten (10) days after such request, then Mortgagee will have the right to procure an official search, the cost of which shall be added to the monies secured by this Mortgage. If Mortgagor is a corporation or partnership, Mortgagor shall keep in effect and in good standing its existence and rights as a corporation or partnership, as the case may be, under the laws of the state of its formation and its right to own property and transact business in the state in which the Mortgaged Premises is situated and file returns for all taxes with the proper governmental authorities, and pay, when due and before interest or penalties are due thereon, all taxes owing to any governmental authorities.

c. Insurance. Mortgagor will maintain hazard insurance and flood insurance (if the Mortgaged Premises is in an area designated as a flood hazard area by any governmental body) on the Mortgaged Premises. Mortgagor shall also maintain any other insurance as Mortgagee may require, including title insurance, builder's risk insurance, general public liability insurance and loss of rents coverage. The insurer, agent or broker, amounts of coverage, and forms of all policies must be acceptable to Mortgagee. These policies will become the absolute property of Mortgagee on the occurrence of an Event of Default under any of the Loan Documents. Each insurance company concerned is hereby authorized and directed to make payment under such insurance including return of unearned premiums, directly to Mortgagee instead of to Mortgagor and Mortgagee jointly, and Mortgagor appoints Mortgagee, irrevocably, as Mortgagor's attorney-in-fact to endorse any draft therefore or assign any policy to itself or its nominee in the event of foreclosure of this Mortgage or other extinguishment of the debt evidenced by the Note. All policies shall provide that the insurer cannot cancel or refuse to renew without giving at least 30 days' prior notice to Mortgagee and will insure Mortgagee as mortgagee, as to interests in real property and fixtures, and will otherwise name Mortgagee as additional insured, with respect to general public liability insurance, or under a lender's loss payable endorsement, as to interests in personal property (or as otherwise designated by Mortgagee). All insurance proceeds will be payable to Mortgagor and Mortgagee. In case of any loss or damage to the Property, the Mortgagor shall promptly notify the insurance company and Mortgagee. Mortgagee may, in its absolute discretion, use the insurance proceeds received to (i) repair and restore the Mortgaged Premises in accordance with Mortgagee's requirements, or (ii) reduce any amounts due under this Mortgage and/or the Note. If Mortgagee elects to apply such proceeds to restore the Mortgaged Premises and, in Mortgagee's judgment, said proceeds are insufficient to complete the restoration, the Mortgagor shall deposit the amount of such deficiency with Mortgagee. If Mortgagee elects to apply such proceeds to reduce any amounts due under this Mortgage and/or the Note, Mortgagee shall pay to the Mortgagor any money left after paying the entire principal, interest, and any other amounts due under this Mortgage and the Note.

d. Repairs; Inspection. Mortgagor will keep the Mortgaged Premises in good condition and repair and will not damage, destroy, abandon or permit any impairment or deterioration of the Mortgaged Premises. The Mortgagor will allow Mortgagee, its agents or representatives to enter onto and inspect the Mortgaged Premises at reasonable times, except in any emergency when Mortgagee will have the right to enter the Mortgaged Premises at any time. The Mortgagor will make such repairs or replacements as may be reasonably required by Mortgagee and will replace any fixture or appliance or equipment which is destroyed or removed with another of at least equal quality and condition, within 30 days of such destruction or removal. Mortgagor shall not, without the prior written consent of Mortgagee, (i) abandon the Mortgaged Premises or any portion thereof or allow the same to become vacant; (ii) commit or suffer waste with respect to the Mortgaged Premises; (iii) impair or diminish the value or integrity of the Mortgaged Premises or the priority or security of the lien of this Mortgage; (iv) remove, demolish or materially alter any of the Mortgaged Premises except that Mortgagor shall have the right to remove and dispose of, free of the lien of this Mortgage, such fixtures as may, from time to time, become worn out or obsolete, provided that, simultaneously with or prior to such removal, any such fixtures shall be replaced with other fixtures which shall have a value and utility at least equal to that of the replaced fixtures and, by such removal and replacement, Mortgagor shall be deemed to have subjected such replacement fixtures to the lien and priority of this Mortgage; (v) make, install or permit to be made or installed, any additions or improvements to the Mortgaged Premises except in a good and workmanlike manner, free of mechanic's liens, in compliance with legal requirements, and in accordance with plans and specifications approved by Mortgagee; or (vi) make, suffer or permit any nuisance to exist on the Mortgaged Premises or any portion thereof.

e. Compliance with Laws and Regulations. Mortgagor shall comply with all present and future laws, statutes, codes, ordinances, orders, judgments, decrees, injunctions, rules, regulations, restrictions and requirements, and Mortgagor will not permit the Mortgaged

Premises to be used for any unlawful purpose. If the Mortgaged Premises is a condominium or part of a planned unit development, Mortgagor will perform all of Mortgagor's obligations under the master deed, declaration covenants or by-laws and regulations creating or governing same, and the documents constituent thereto.

f. Condemnation. In the event of any condemnation or taking of any part of the Mortgaged Premises by any public or quasi-public authority or corporation, all proceeds otherwise allocable to Mortgagor, after deducting therefrom all costs and expenses, including, without limitation, attorneys' fees incurred by Mortgagee in connection with the collection of such proceeds, are assigned and shall be paid to Mortgagee and applied, at Mortgagee's election, (i) toward restoration of the Mortgaged Premises; or (ii) to the Indebtedness. No settlement for damages sustained shall be made by Mortgagor without Mortgagee's prior written approval. Mortgagee shall have the right to prosecute to final determination, or settlement, an appeal or other appropriate proceedings in the name of Mortgagee or Mortgagor, for which Mortgagee will then be appointed as attorney-in-fact for Mortgagor, which appointment, being for security, is irrevocable. Nothing herein shall limit the rights otherwise available to Mortgagee, at law or in equity, including the right to intervene as a party to any condemnation proceeding.

g. Certification of Amount Due. Upon the request of Mortgagee, Mortgagor will, within five (5) days after such request, certify to Mortgagee in writing: (i) the amount due under this Mortgage and the Note, and (ii) that there are no defenses to its obligations under any of the other Documents or, if there are defenses, a description of such defenses.

h. No Transfer of Title or Further Encumbrances. Without the prior written consent of Mortgagee, Mortgagor will not sell, convey, transfer or alter any interest or permit any of the foregoing in all or any part of the Property. Mortgagor will not create, incur, assume or suffer to exist any mortgage, lien, security interest, encumbrance, attachment, levy, distraint or other judicial process of any kind on or with respect to any portion of, or interest in, the Property.

i. Covenants Regarding Financial Statements and Information; Inspection of Books and Records. Mortgagor will provide Mortgagee with any and all information regarding the Mortgagor, the Mortgaged Premises or any guarantor as requested by Mortgagee, including annual financial statements, manually signed copies of federal and state tax returns and certified rent rolls as to the Mortgaged Premises. Mortgagor will permit Mortgagee to inspect and make copies of the Mortgagor's books, records and income tax returns upon reasonable notice.

j. Indemnification. Mortgagor will indemnify, defend and save harmless Mortgagee against and from all liabilities, obligations, damages, penalties, claims, costs, charges and expenses, including, without limitation, reasonable attorneys' fees, which may be imposed upon or incurred by Mortgagee by reason of the Mortgagor's ownership, use or operation of the Mortgaged Premises, including (but not limited to) those arising by reason of any action against Mortgagor or any other party to any of the transactions evidenced by the Loan Documents. Unless arising from the gross negligence or willful misconduct of Mortgagee, this indemnity will apply notwithstanding any negligent or other contributory conduct by or on the part of any third parties and will survive: (i) repayment of the Indebtedness and the full release of this Mortgage; (ii) the extinguishment of Mortgagee's lien by foreclosure or any other action; or (iii) the delivery of a deed in lieu of foreclosure.

**5. ENVIRONMENTAL COVENANTS.** The Mortgagor further warrants, represents, covenants and agrees that:

a. Except as may have been disclosed in writing to Mortgagee, neither Mortgagor nor, to the best of Mortgagor's knowledge, any other person has (i) used, installed or disposed of any Hazardous Materials (hereafter defined) in, on, from, or affecting the Mortgaged Premises except in full compliance with Applicable Environmental Laws (hereafter defined); or (ii) received any notice from any governmental authority with regard to Hazardous Materials in, on, from or affecting the Mortgaged Premises. To the best of Borrower's knowledge, no portion of the Mortgaged Premises is or has been at any time an "industrial establishment" as defined in the New Jersey Industrial Site Recovery Act ("ISRA"), and Mortgagor does not know or have reason to know of any lien or threatened lien on its personal or real property requiring or obligating Mortgagor to make payment pursuant to the New Jersey Spill Compensation and Control Act ("SCCA"). If the Mortgaged Premises is or has been an "industrial establishment," Mortgage shall provide Mortgagee with a letter of non-applicability on and as of the date hereof. If the Mortgaged Premises was used as an "industrial establishment," and hazardous substances were

handled there, and Mortgagor's transactions constitute a closing, termination of, or transfer of, operations, Mortgagor has provided Mortgagee with an approved cleanup plan or a negative declaration, obtained at its own expense, and Mortgagor, at its own expense, shall implement the cleanup plan to clean up such contamination.

b. Mortgagor shall not use the Mortgaged Premises, nor allow it to be used, to generate, manufacture, refine, transport, treat, store, handle, dispose of, transfer, produce or process Hazardous Materials except in full compliance with Applicable Environmental Laws. Mortgagor shall not cause or permit, intentionally or unintentionally, a release of Hazardous Materials in, on, from or affecting the Mortgaged Premises or any other use, installation, or disposition of Hazardous Materials in violation of Applicable Environmental Laws.

c. If Mortgagor receives any notice from any governmental authority with regard to Hazardous Materials in, on, from or affecting the Mortgaged Premises, or any notice of violation of Applicable Environmental Laws, Mortgagor shall promptly notify Mortgagee. Mortgagor shall conduct and complete all investigations, studies, sampling and testing, and all remedial, removal, and other actions necessary to clean up and remove all Hazardous Materials in, on, from or affecting the Mortgaged Premises in accordance with all Applicable Environmental Laws and to the satisfaction of Mortgagee.

d. The term "Applicable Environmental Laws" shall mean, without limitation, all legal requirements of any governmental authority pertaining to the preservation or enhancement of the quality of the environment or regulating or restricting the use, transfer, storage or remediation of Hazardous Materials, including the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. Section 9601, et seq.), the Hazardous Materials Transportation Act, as amended (49 U.S.C. Sections 1801, et seq.), the Resource Conservation and Recovery Act, as amended (42 U.S.C. Sections 6901, et seq.), the SCCA, the ISRA and the rules and regulations adopted and publications promulgated pursuant thereto at any time. The term "Hazardous Materials" shall mean, without limitation, any flammable explosives, radioactive materials, hazardous materials, hazardous wastes,



hazardous or toxic substances, or related materials, asbestos or any material containing asbestos, or any other substance or material regulated under any Applicable Environmental Laws.

e. At any time while any Indebtedness is outstanding, upon reasonable suspicion of any environmental condition, violation or problem, Mortgagee may require that the Mortgagor, at the Mortgagor's expense and within thirty (30) days after notice from Mortgagee, promptly cause such tests, inspections and/or procedures to be conducted by a professional engineering firm or others for the purpose of ensuring compliance with all Applicable Environmental Laws and having the Mortgaged Premises certified to Mortgagee as such. Without limitation of Mortgagee's rights, (i) Mortgagee will retain the right to enter onto the Mortgaged Premises and cause such tests, inspections, and/or procedures to be conducted and having the Mortgaged Premises certified to Mortgagee as such; and (ii) Mortgagee will have the right, but not the obligation, to enter onto the Mortgaged Premises or any other facility operated by Mortgagor or to take such other actions as are necessary or advisable to test, cleanup, remove, resolve, or minimize the impact of, any environmental condition which, in the sole opinion of Mortgagee, could jeopardize or affect Mortgagee's collateral security. All costs and expenses incurred by Mortgagee in the exercise of any such rights will be payable by Mortgagor upon demand and will be secured by this Mortgage and other collateral held by Mortgagee.

**6. TAX AND INSURANCE ESCROW.** The Mortgagor will, if required by Mortgagee, make regular monthly payments to Mortgagee in addition to and simultaneously with payments due under the Note equal to 1/12 of the actual or estimated yearly real estate taxes, assessments, and insurance premiums on the Mortgaged Premises. In the even the Mortgagee requests the Mortgagor to make payments of real estate taxes or insurance on the Mortgaged premises, then Mortgagor shall deposit two (2) months of payments into an escrow account. If permitted by law, such funds retained by Mortgagee will bear no interest and may be commingled with other funds of Mortgagee. The Mortgagor pledges these funds as additional security for the sums secured by this Mortgage. These funds will not be deemed to be trust funds and Mortgagee does not act as the Mortgagor's agent in the payment of taxes, assessments, and insurance premiums, or other charges. Escrowed funds shall be used by Mortgagee to pay the taxes, assessments, and insurance premiums when due. If the amounts held by Mortgagee are insufficient at any time to pay the taxes, assessments, and insurance premiums as they fall due, the Mortgagor will pay to Mortgagee on demand any amount necessary to make up the deficiency. The Mortgagor will not

5

---

receive any credit on or make any deduction from amounts due under the Note by reason of this deposit with Mortgagee.

**7. PROTECTION OF MORTGAGEE'S SECURITY.** If Mortgagor fails to pay any lien or charge against the Mortgaged Premises when due, or otherwise fails to perform any covenant or agreement in the Loan Documents, or upon any event which jeopardizes the value of the Mortgaged Premises, then Mortgagee, at its option and sole discretion, may disburse such sums, and take such actions as necessary to protect its interest, including, but not limited to, defending any action or proceeding, disbursing reasonable attorneys' fees and entering upon the Mortgaged Premises to make repairs without becoming liable to Mortgagor or any other person. Any amount disbursed by Mortgagee will be added to the principal of the Note, accrue interest from the date of disbursement at a rate of two percent in excess of the rate specified in the Note and be secured by this Mortgage. Upon demand, the Mortgagor will repay these amounts, together with interest, to Mortgagee.

**8. EVENTS OF DEFAULT.** An event of default will occur under this Mortgage upon each of the following events (each, an "Event of Default"):

- a. any default or "Event of Default" under any other Loan Document;
- b. failure of Mortgagor to pay any sum required to be paid under this Mortgage as and when due; or
- c. nonperformance of, or noncompliance with, any of the agreements, covenants, conditions, warranties, representations or other provisions contained in this Mortgage.

**9. REMEDIES.** Upon the occurrence of an Event of Default, and at all times thereafter, Mortgagee shall have the right to enforce its rights under this Mortgage and the other Loan Documents by exercising such remedies as are available to Mortgagee under applicable law, either by suit in equity or action at law, or both, whether for specific performance of any provision contained in this Mortgage or any of the other Loan Documents or in aid of the exercise of any power granted in this Mortgage or the other Loan Documents.

- a. Mortgagee shall have the right to obtain judgment for the Indebtedness (including all amounts advanced or to be advanced by Mortgagee, all costs and expenses of collection and suit, including any bankruptcy or insolvency proceeding affecting Mortgagor, and reasonable attorneys' fees incurred in connection with any of the foregoing) together with interest on such judgment at the highest rate set forth in the Note until payment in full is received by Mortgagee.
- b. Mortgagee shall have the right to institute an action of mortgage foreclosure against the Mortgaged Premises or take such other action for realization on the security provided herein as applicable law or the provisions of the Loan Documents may allow.
- c. Mortgagee may, at any time without notice, either in person, by agent or by a receiver appointed by a court, and without regard to the adequacy of any security for the Indebtedness, enter upon the Mortgaged Premises and, with or without taking possession of the Mortgaged Premises, and with or without legal action, collect all income (which term shall also include amounts determined by Mortgagee as fair rental value for use and occupation of the Mortgaged Property by any person, including Mortgagor) and, after deducting all costs of collection and administration expense including attorneys' fees and reasonable reserves, apply the net income to any of the Indebtedness in such order and amounts as Mortgagee in its sole discretion may determine. Mortgagee shall not be accountable for more monies than it actually receives from the Mortgaged Premises nor shall it be liable for failure to collect the income therefrom. Mortgagee shall have the right to determine the method of collection and the extent to which enforcement of collection of income shall be prosecuted and Mortgagee's judgment shall be deemed conclusive and reasonable.
- d. Mortgagee may, with or without legal action, take possession and control of the Mortgaged Premises to the exclusion of Mortgagor and all others excepting only those claiming under Permitted Encumbrances. Mortgagee shall have the authority while so in possession to insure (at Mortgagor's expense) against all risks by reason of having taken such possession and Mortgagor will transfer and deliver to the Mortgagee all policies of insurance upon the Mortgaged Premises not theretofore transferred and delivered to Mortgagee.

6

---

e. Mortgagee shall have the right to take possession of any portion of the Property constituting fixtures or other personal property subject to the Uniform Commercial Code and any records pertaining thereto. Mortgagee shall have the right to use, operate, manage, lease or otherwise control the Property in any lawful manner and, in its sole discretion, but without any obligation to do so, insure, maintain, repair, renovate, alter or remove the Property; use, in connection with any assembly, use or disposition of the Property any trade mark, trade name, trade style, copyright, brand, patent right or technical process used or utilized by Mortgagor; sell or otherwise dispose of all or any of the Property at any public or private sale at any time or times without advertisement or demand upon or notice to Mortgagor, all of which are expressly waived to the extent permitted by law, with the right of Mortgagee or its nominee to become purchaser at any sale (unless prohibited by statute) free from any equity of redemption and from all other claims, and after deducting all legal and other expenses for maintaining or selling the Property, and all attorneys' fees, legal or other expenses for collection, sale and delivery, apply the remaining proceeds of any sale to pay (or hold as a reserve against) the Indebtedness and exercise all rights and remedies of a secured party under the Uniform Commercial Code or any other applicable law.

f. Mortgagee, without notice, shall have the right to obtain the appointment of a receiver for the Mortgaged Premises (which appointment is consented to by Mortgagor) without regard to the adequacy of any security for the Indebtedness or the insolvency of Mortgagor.

**10. REMEDIES CUMULATIVE.** All of Mortgagee's remedies hereunder are distinct and cumulative and may be exercised concurrently, independently, or successively and will be in addition to every other right and remedy provided by law. If any Indebtedness secured by this Mortgage is now or hereafter secured by any other collateral, Mortgagee may, at its option, exhaust all or any part of such collateral and the security hereunder, either concurrently or independently, and in such order as it may determine. Mortgagee may, at any time, without notice or consent, and without affecting any of its rights or the liability of Mortgagor or any other party to the transactions evidenced by the Note and this Mortgage: (a) release any person liable for payment of all or any part of such Indebtedness or for performance of any obligation; (b) exercise or refrain from exercising or waive any right Mortgagee may have; (c) accept additional security of any kind; and (d) release or otherwise deal with any property, real or personal, securing the Indebtedness. Any forbearance or action by Mortgagee in exercising any right or remedy under this Mortgage, the Note, or otherwise afforded by applicable law, will not be a waiver, or preclude the exercise, of any such right or remedy by Mortgagee.

**11. NOTICES.** All notices under this Mortgage must be in writing and may be given by person, overnight courier or by certified mail, return receipt requested. Each party must accept the certified mail sent by the other. Notices will be addressed to the other party at the address written at the beginning of this Mortgage. Address changes may be made upon written notice to the other party.

**12. RENEWALS AND EXTENSIONS.** Any renewal or extension, modification or amendment of the Note will not operate to release, in any manner, the liability of Mortgagor or any other party liable for the Indebtedness and their respective successors in interest. All such modifications are subject to the protections afforded to modifications in N.J.S.A. 46:9-8.1.

**13. GOVERNING LAW.** This Mortgage will be governed by, and construed in accordance with, the laws of the state in which the Property is located.

**14. WAIVER OF JURY TRIAL; SERVICE OF PROCESS. THE MORTGAGOR WAIVES THE RIGHT TO TRIAL BY JURY IN ANY ACTION PROCEEDING, CLAIM, DISPUTE OR COUNTERCLAIM ARISING OUT OF THE TRANSACTIONS EVIDENCED BY THIS MORTGAGE AND AGREES THAT SERVICE OF PROCESS MAY BE MADE UPON MORTGAGOR BY MAILING A COPY OF SUCH PROCESS TO MORTGAGOR.**

**15. RECEIPT OF COPY.** The Mortgagor acknowledges receipt of a true copy of this Mortgage without charge.

**16. NO ORAL CHANGE.** This Mortgage may only be modified or amended by an agreement in writing signed by the Mortgagor and Mortgagee, and may only be released, discharged or satisfied of record by an agreement in writing signed by Mortgagee.

7

**17. JOINT AND SEVERAL LIABILITY.** Mortgagor, if more than one, are jointly and severally liable, and the term "Mortgagor" means each of the parties executing this Mortgage.

**18. RELEASE PROVISIONS.** The release provisions of the Note are hereby incorporated.

**IN WITNESS WHEREOF, MORTGAGOR, INTENDING TO BE LEGALLY BOUND, HAS EXECUTED THIS MORTGAGE AS OF THE DAY AND YEAR FIRST ABOVE WRITTEN.**

**ATTEST OR WITNESSED BY:**

**MORTGAGOR:**

**Vivus Real Estate, LLC, a New Jersey Limited Liability Company**

By: /s/ Jay Samuels  
Jay Samuels, Esq.

By: /s/ Timothy E. Morris  
Vivus, Inc., a Delaware Corporation, Sole Member  
Timothy E. Morris, Vice President Finance and Chief  
Financial Officer

8

**LIMITED LIABILITY COMPANY ACKNOWLEDGMENT**

STATE OF NEW JERSEY

:  
SS.

On the 4 day of January, 2006, before me, the undersigned, an Attorney or Notary Public in and for said State, personally appeared Timothy E. Morris, who acknowledged himself to be the Vice President Finance and Chief Financial Officer of Vivus, Inc., Sole Member of Vivus Real Estate, LLC, a New Jersey Limited Liability Company and that he as such Member, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the company by themselves as such Member.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

/s/ Jay Samuels

Jay Samuels, Esq.

An Attorney at Law in the State of New Jersey

**MORTGAGE  
VIVUS REAL ESTATE LLC  
TO  
CROWN BANK, N.A.**

**Dated: January , 2006**

**Record and return to:  
CROWN BANK, N.A.  
715 ROUTE 70  
BRICK, NJ 08723**

To the County Recording Officer of

County:

This Mortgage is fully paid.

authorizes you to cancel it of record.

Dated:

ATTEST:

CROWN BANK, N.A.

By: \_\_\_\_\_

9

**EXHIBIT "A"  
LEGAL DESCRIPTION OF MORTGAGED PREMISES**

As to Tract 1 (Block 1160.01, Lot 229):

Being the same premises conveyed to Mortgagor herein by Deed from 735 Airport Road, LLC, a New Jersey Limited Liability Company dated of even date herewith and recorded simultaneously herewith.

As to Tract 2 (Block 1160.01, Lot 232):

Being the same premises conveyed to Mortgagor herein by Deed from 745 Airport Road, LLC, a New Jersey Limited Liability Company dated of even date herewith and recorded simultaneously herewith.

10

This is a first purchase money mortgage lien.

**EXHIBIT "B"  
SECURITY INTEREST PROPERTY**

The buildings, structures and improvements now and hereafter constructed on the land described below and the fixtures and equipment now and hereafter installed thereon and necessary for of adapted to the appropriate use and enjoyment thereof, all of which shall be deemed real property; and

In addition, all property of the Debtor (Mortgagor herein) including without limitation, all tangible goods, chattels, fixtures, furniture, furnishings, machines, equipment, all floor coverings, screens, awnings, lighting, heating, ventilation, air-conditioning, sprinkling, plumbing, irrigating, gas, water, sewer, incinerating and laundry systems and fixtures, all engines, machinery, boilers, ranges, furnaces, refrigerators, storm windows and doors, which are now or which may hereafter be placed or located in, or on or upon the premises herein defined, together, with all additions and accessories thereto, substitutions therefore, and replacements thereof. Also, included, without limitation are oil, gas or electric furnaces and heaters, air-conditioners and floor coverings.

All leases now and hereafter enforce and the rents due or to come due thereunder.

All condemnation awards, rents under the assignment of rent clause and the proceeds of insurance.