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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

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**FORM 8-K  
CURRENT REPORT**

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

Date of Report (date of earliest event reported): **May 28, 2003**

**VIVUS, INC**

(Exact name of Registrant as specified in its charter)

**Delaware**

(State or other jurisdiction of  
incorporation or organization)

**0-23490**

(Commission File Number)

**94-3136179**

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

**1172 Castro Street**

**Mountain View, California 94040**

(Address, including zip code, of principal executive offices)

Registrant's telephone number, including area code:

**(650) 934-5200**

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**Item 5. Other Events.**

On May 23, 2003, the Registrant completed a private placement of shares of its common stock raising aggregate gross proceeds of \$17.5 million. In connection with the private placement, the Registrant issued 4,375,000 shares of its common stock at \$4.00 per share. The purchase price of \$4.00 per share was based on an approximate 9% discount to the 5-day trailing average ended May 21, 2003. The Registrant has agreed to file a registration statement covering resales of these shares.

The foregoing matters are further described in the press release issued by the Registrant on May 28, 2003, a copy of which is filed herewith as Exhibit 99.1 and incorporated herein by reference. The private placement of the shares of common stock was made pursuant to a Common Stock Purchase Agreement entered into between the Registrant and the investors, a copy of which is filed herewith as Exhibit 99.2.

**Item 7. Financial Statements and Exhibits.**

(a) Not applicable.

(b) Not applicable.

(c) Exhibits.

99.1 Press Release of VIVUS, Inc. dated May 28, 2003 regarding private placement of shares of common stock.

99.2 Form Common Stock Purchase Agreement, dated May 23, 2003 between the Company and the Purchasers a signatory thereto.

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.

Date: May 28, 2003

VIVUS, INC.  
a Delaware corporation

/s/ Richard Walliser

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Richard Walliser  
Vice President and Chief Financial Officer

/s/ Leland F. Wilson

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Leland F. Wilson  
President and Chief Executive Officer

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VIVUS, INC.  
EXHIBIT INDEX

<b><u>Exhibit Number</u></b>	<b><u>Description</u></b>
99.1	Press Release of the Registrant dated May 28, 2003
99.2	Common Stock Purchase Agreement, dated May 23, 2003

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**[VIVUS LOGO]**COMPANY CONTACT:

**VIVUS, Inc.**  
Richard Walliser  
(650) 934-5200  
[ir@vivus.com](mailto:ir@vivus.com)  
[www.vivus.com](http://www.vivus.com)

INVESTOR CONTACTS:

**Lippert/Heilshorn & Associates, Inc.**  
Bruce Voss ([bvoss@lhai.com](mailto:bvoss@lhai.com))  
(310) 691-7100  
Jody Cain ([jcain@lhai.com](mailto:jcain@lhai.com))  
[www.lhai.com](http://www.lhai.com)

**FOR IMMEDIATE RELEASE****VIVUS ANNOUNCES \$17.5 MILLION PRIVATE PLACEMENT**

**MOUNTAIN VIEW, Calif. (May 28, 2003) VIVUS, Inc. (Nasdaq NM: VVUS)** today announced that on Friday, May 23, 2003, it completed a private placement of 4,375,000 shares of common stock for aggregate gross proceeds of \$17.5 million. The shares of common stock were sold at \$4.00 per share, an approximate 9% discount to the five-day trailing average ended May 21, 2003. The shares were purchased by a select group of investors consisting of accounts managed by Zesiger Capital Group LLC, SAC Capital Associates, LLC, Royal Bank of Canada, Special Situations Funds and Baystar Capital II, L.P. C.E. Unterberg, Towbin acted as the exclusive placement agent to VIVUS for this private placement.

The net proceeds of this financing are intended for general corporate purposes, including the possible licensing of new technology and for clinical development programs in the areas of Female Sexual Dysfunction, Erectile Dysfunction and Premature Ejaculation.

This press release does not constitute an offer to sell or the solicitation of an offer to buy any security. The common stock has not been registered under the Securities Act of 1933 or applicable state securities laws and may not be offered or sold in the United States absent registration or an applicable exemption from registration requirements. VIVUS has agreed to file a registration statement covering resales of the shares of common stock by the investors.

VIVUS, Inc. is a pharmaceutical company engaged in the development of innovative therapies for the treatment of quality-of-life disorders in men and women, with a focus on sexual dysfunction. Current development programs target Female Sexual Dysfunction (FSD), Erectile Dysfunction (ED) and Premature Ejaculation (PE). VIVUS developed and markets in the U.S. MUSE<sup>®</sup> (alprostadil) and ACTIS<sup>®</sup>, two innovations in the treatment of erectile dysfunction, and has partnered with Meda AB (Stockholm: MEDAa.ST) for the international marketing and distribution of its male transurethral ED products. In Canada, VIVUS has partnered exclusively with Paladin Labs (TSE: PLB) to market and distribute MUSE. For more information, please visit the Company's Web site at: [www.vivus.com](http://www.vivus.com).

This news release contains forward-looking statements about the expected use of funds and the potential development and commercialization of products in treating male and female sexual dysfunction that are forward-looking statements within the meaning of the "safe harbor" provisions of the Private Securities Litigation Reform Act of 1995. Such forward looking statements are subject to risks and uncertainties may cause actual results to be materially different from any future results expressed or implied by such forward-looking statements. As with any pharmaceutical under development, there are significant risks and uncertainties in development, regulatory approval and commercialization of new products. There are no guarantees that future clinical studies discussed in this news release will be successful or that any product will receive regulatory approval for any indication. Further, even if the Company were to receive regulatory approval for a product, there could be no assurance that such a product would prove to be commercially successful. Please see the Company's filings with the Securities and Exchange Commission including, without limitation, the Company's Annual Report on Form 10-K for the year ended December 31, 2002 and its Quarterly Report on Forms 10-Q for the quarter ended March 31, 2003, which identify these and other risks and uncertainties that may cause actual results or events to differ materially from those described in this news release.

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## COMMON STOCK PURCHASE AGREEMENT

This Common Stock Purchase Agreement (this "Agreement") is made and entered into as of May \_\_, 2003, by and among VIVUS, Inc., a Delaware corporation (the "Company"), and each of the purchasers listed on Exhibit A attached hereto (collectively, the "Purchasers" and individually, a "Purchaser").

### RECITALS

WHEREAS, the Company desires to sell to the Purchasers, and the Purchasers desire to purchase from the Company, shares of Common Stock, par value \$0.001 per share, of the Company (the "Common Stock") on the terms and conditions set forth in this Agreement; and

WHEREAS, the Company and each Purchaser are executing and delivering this Agreement in reliance upon the exemption from securities registration afforded by the provisions of Regulation D ("Regulation D"), as promulgated by the United States Securities and Exchange Commission (the "SEC") under the Securities Act of 1933, as amended (the "Securities Act").

NOW, THEREFORE, in consideration of the foregoing, the mutual promises hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

#### 1. AGREEMENT TO PURCHASE AND SELL STOCK.

(a) Authorization. The Company's Board of Directors has authorized the issuance, pursuant to the terms and conditions of this Agreement, of up to 4,375,000 shares of Common Stock (the "Purchased Shares").

(b) Agreement to Purchase and Sell Securities. Subject to the terms and conditions of this Agreement, each Purchaser severally agrees to purchase, and the Company agrees to sell and issue to each Purchaser, at the Closing (as defined below), that number of Purchased Shares set forth opposite such Purchaser's name on Exhibit A attached hereto. The purchase price of each Purchased Share (the "Per Share Price") shall be \$4.00.

(c) Use of Proceeds. The Company intends to apply the net proceeds from the sale of the Purchased Shares for general corporate purposes.

2. CLOSING. The purchase and sale of the Purchased Shares shall take place at the offices of Wilson Sonsini Goodrich & Rosati, Professional Corporation, 650 Page Mill Road, Palo Alto, California, at 10:00 a.m. California time, on May \_\_, 2003, or at such other time and place as the Company and Purchasers that represent at least a majority of the Purchased Shares mutually agree

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upon (which time and place are referred to in this Agreement as the "Closing"). At the Closing, the Company shall authorize its transfer agent to issue to each Purchaser, against delivery of payment for the Purchased Shares by wire transfer of immediate available funds in accordance with the Company's instructions, one or more stock certificates (the "Certificates") registered in the name of each Purchaser (or in such nominee name(s) as designated by such Purchaser in the Stock Certificate Questionnaire attached hereto as Appendix I), representing the number of shares set forth opposite the appropriate Purchaser's name on Exhibit A hereto, and bearing the legend set forth in Section 4(j) herein. Closing documents may be delivered by facsimile with original signature pages sent by overnight courier. The date of the Closing is referred to herein as the Closing Date.

3. REPRESENTATIONS AND WARRANTIES OF THE COMPANY. The Company hereby represents and warrants to each Purchaser that the statements in this Section 3 are true and correct, except as set forth in the SEC Documents (as defined below) or in the Disclosure Letter on Exhibit C attached hereto delivered to the Purchasers concurrently herewith:

(a) Organization Good Standing and Qualification. The Company is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and has all corporate power and authority required to (i) carry on its business as presently conducted and (ii) enter into this Agreement and the other agreements, instruments and documents contemplated hereby, and to consummate the transactions contemplated hereby and thereby. The Company is qualified to do business and is in good standing in each jurisdiction in which the failure to so qualify would have a Material Adverse Effect. As used in this Agreement, "Material Adverse Effect" means a material adverse effect on, or a material adverse change in, or a group of such effects on or changes in, the business, operations, prospects, financial condition, results of operations, assets or liabilities of the Company and its subsidiaries.

(b) Capitalization. The capitalization of the Company, without listing the Purchased Shares to be issued pursuant to this Agreement, is as follows:

(i) The authorized capital stock of the Company consists of 200,000,000 shares of Common Stock and 5,000,000 shares of Preferred Stock, all of which shares are designated as Series A Participating Preferred Stock.

(ii) As of April 15, 2003, the issued and outstanding capital stock of the Company consisted of 33,012,817 shares of Common Stock. The shares of issued and outstanding capital stock of the Company have been duly authorized and validly issued, are fully paid and nonassessable and have not been issued in violation of or are not otherwise subject to any preemptive or other similar rights.

(iii) As of April 15, 2003, the Company had 2,993,204 shares of Common Stock reserved for issuance upon exercise of outstanding options granted under the Company's 1991 Incentive Stock Plan (the "1991 Plan"), which plan terminated in November 2001 by its terms on the tenth (10<sup>th</sup>) anniversary from the date of adoption by the Company's Board of Directors.

(iv) As of April 15, 2003, the Company had 176,000 shares of Common Stock reserved for issuance upon exercise of outstanding options granted under the Company's 1994

(v) As of April 15, 2003, the Company had 3,384,732 shares of Common Stock available for future grant under the Company's 2001 Stock Option Plan (the "2001 Plan"), plus (a) any shares returned to the 1991 Plan after April 15, 2003 as a result of termination of options or repurchase of shares issued under the 1991 Plan, and (b) an automatic annual increase on the first day of each fiscal year beginning in 2004 equal to the lesser of (i) 1,000,000 shares, (ii) two and one-half percent (2.5%) of the Company's outstanding shares of Common Stock on such date and (iii) a lesser number determined by the Company's Board of Directors.

(vi) As of April 15, 2003, the Company had 976,000 shares of Common Stock reserved for future purchase by employees of the Company under the Company's 1994 Employee Stock Purchase Plan (the "ESPP") (provided the Company's stockholders approve amendments to the ESPP to increase the total number of shares reserved under the ESPP from 800,000 shares to 1,400,000 shares and to extend the term of the ESPP by an additional ten (10) years at the Company's 2003 Annual Meeting of Stockholders on June 4, 2003).

With the exception of the foregoing in this Section 3(b), there are no outstanding subscriptions, options, warrants, convertible or exchangeable securities or other rights granted to or by the Company to purchase shares of Common Stock or other securities of the Company and there are no commitments, plans or arrangements to issue any shares of Common Stock or any security convertible into or exchangeable for Common Stock.

(c) Subsidiaries. Except for VIVUS International Limited, VIVUS UK Limited, VIVUS BV Limited, VIVUS Ireland Limited and ASIVI, LLC, a Delaware limited liability company, the Company does not have any subsidiaries, nor does the Company own any capital stock of, assets comprising the business of, obligations of, or any other interest (including any equity or partnership interest) in, any person or entity.

(d) Due Authorization. All corporate actions on the part of the Company necessary for the authorization, execution, delivery of, and the performance of all obligations of the Company under this Agreement and the authorization, issuance, reservation for issuance and delivery of all of the Purchased Shares being sold under this Agreement have been taken, no further consent or authorization of the Company or the Board of Directors or its stockholders is required (including NASD Marketplace Rule 4350(i)(1)(D)), and this Agreement constitutes the legal, valid and binding obligation of the Company, enforceable against the Company in accordance with its terms, except (i) as may be limited by (1) applicable bankruptcy, insolvency, reorganization or others laws of general application relating to or affecting the enforcement of creditors' rights generally and (2) the effect of rules of law governing the availability of equitable remedies and (ii) as rights to indemnity or contribution may be limited under federal or state securities laws or by principles of public policy thereunder.

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(e) Valid Issuance of Stock.

(i) Valid Issuance. The shares of Common Stock to be issued pursuant to this Agreement will be, upon payment therefor by the Purchasers in accordance with this Agreement, duly authorized, validly issued, fully paid and non-assessable free from all taxes, liens, claims, encumbrances with respect to the issuance of such shares and will not be subject to any pre-emptive rights or similar rights.

(ii) Compliance with Securities Laws. Subject to the accuracy of the representations made by the Purchasers in Section 4 hereof, the Purchased Shares (assuming no change in applicable law and no unlawful distribution of Purchased Shares by the Purchasers or other parties) will be issued to the Purchasers in compliance with applicable exemptions from (1) the registration and prospectus delivery requirements of the Securities Act and (2) the registration and qualification requirements of all applicable securities laws of the states of the United States.

(f) Governmental Consents. No consent, approval, order or authorization of, or registration, qualification, designation, declaration or filing with, or notice to, any federal, state or local governmental authority or self regulatory agency on the part of the Company is required in connection with the issuance of the Purchased Shares to the Purchasers, or the consummation of the other transactions contemplated by this Agreement, except (i) such filings as have been made prior to the date hereof, (ii) the filing of a notification form with The Nasdaq National Market ("Nasdaq") and (iii) such additional post-Closing filings as may be required to comply with applicable state and federal securities laws and the listing requirements of Nasdaq.

(g) Non-Contravention. The execution, delivery and performance of this Agreement by the Company, and the consummation by the Company of the transactions contemplated hereby (including issuance of the Purchased Shares), do not (i) contravene or conflict with the Amended and Restated Certificate of Incorporation or Bylaws of the Company; (ii) constitute a material violation of any provision of any federal, state, local or foreign law, rule, regulation, order or decree binding upon or applicable to the Company; or (iii) constitute a default or require any consent under, give rise to any right of termination, cancellation or acceleration of, or to a loss of any material benefit to which the Company is entitled under, or result in the creation or imposition of any lien, claim or encumbrance on any assets of the Company under, any material contract to which the Company is a party or any material permit, license or similar right relating to the Company or by which the Company may be bound or affected.

(h) Litigation. Except as set forth in the SEC Documents or in the Disclosure Letter, there is no action, suit, proceeding, claim, arbitration or investigation ("Action") pending or, to the Company's knowledge, threatened in writing: (i) against the Company, its activities, properties or assets, or any officer, director or employee of the Company in connection with such officer's, director's or employee's relationship with, or actions taken on behalf of, the Company, that is reasonably likely to have a Material Adverse Effect on the Company, or (ii) that seeks to prevent, enjoin, alter, challenge or delay the transactions contemplated by this Agreement (including issuance of the Purchased Shares). The Company is not a party to or subject to the provisions of, any order, writ, injunction, judgment or decree of any court or government agency or instrumentality. No

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Action by the Company is currently pending nor does the Company intend to initiate any Action that is reasonably likely to have a Material Adverse Effect on the Company.

(i) Compliance with Law and Charter Documents. The Company is not in violation or default of any provisions of its Amended and Restated Certificate of Incorporation or Bylaws, each as amended. The Company has complied in all respects and is currently in compliance with all applicable statutes, laws, rules, regulations and orders of the United States of America and all states thereof, foreign countries and other governmental bodies and agencies having jurisdiction over the Company's business or properties, except for any instance of non-compliance that has not had, and would not reasonably be expected to have, a Material Adverse Effect.

(j) Material Non-Public Information. To the Company's knowledge, it has not provided to the Purchasers any material non-public information other than information related to the transactions contemplated by this Agreement.

(k) SEC Documents.

(1) Reports. The Company has filed in a timely manner all reports, schedules, forms, statements and other documents required to be filed by it with the SEC pursuant to the reporting requirements of the Securities Exchange Act of 1934, as amended (the “Exchange Act”), and the rules and regulations promulgated thereunder. The Company has made available to the Purchasers prior to the date hereof copies of its Annual Report on Form 10-K for the fiscal year ended December 31, 2002 (the “Form 10-K”), its quarterly report on Form 10-Q for the fiscal quarter ended March 31, 2003 (the “Form 10-Q”) and its Proxy Statement for its 2003 Annual Meeting of Stockholders (the “Proxy Statement”) filed by the Company with the SEC (the Form 10-K, the Form 10-Q and Proxy Statement are collectively referred to herein as the “SEC Documents”). Each of the SEC Documents, as of the respective date thereof (or if amended or superseded by a filing prior to the Closing Date, then on the date of such filing), did not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made therein, in light of the circumstances under which they were made, not misleading. Each SEC Document, as it may have been subsequently amended by filings made by the Company with the SEC prior to the date hereof, complied in all material respects with the requirements of the Exchange Act and the rules and regulations of the SEC promulgated thereunder applicable to such SEC Document.

(2) Financial Statements. The financial statements of the Company in the SEC Documents present fairly, in accordance with United States generally accepted accounting principles (“GAAP”), consistently applied, the financial position of the Company as of the dates indicated, and the results of its operations and cash flows for the period therein specified, subject, in the case of unaudited financial statements for interim periods, to normal year-end audit adjustments.

(l) Absence of Certain Changes Since Balance Sheet Date. Since March 31, 2003, the business and operations of the Company have been conducted in the ordinary course consistent with past practice, and there has not been:

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(i) any declaration, setting aside or payment of any dividend or other distribution of the assets of the Company with respect to any shares of capital stock of the Company or any repurchase, redemption or other acquisition by the Company or any subsidiary of the Company of any outstanding shares of the Company’s capital stock;

(ii) any damage, destruction or loss, whether or not covered by insurance, except for such occurrences, individually and collectively, that have not had, and would not reasonably be expected to have, a Material Adverse Effect;

(iii) any waiver by the Company of a valuable right or of a material debt owed to it, except for such waivers, individually and collectively, that have not had, and would not reasonably be expected to have, a Material Adverse Effect;

(iv) any material change or amendment to, or any waiver of any material right under a material contract or arrangement by which the Company or any of its assets or properties is bound or subject, except for changes, amendments or waivers that are expressly provided for or disclosed in this Agreement;

(v) any change by the Company in its accounting principles, methods or practices or in the manner in which it keeps its accounting books and records, except any such change required by a change in GAAP or by the SEC; or

(vi) any other event or condition of any character, except for such events and conditions that have not resulted, and are not expected to result, either individually or collectively, in a Material Adverse Effect.

(m) Intellectual Property. The Company owns or possesses adequate rights to use all patents, patent rights, inventions, trade secrets, know-how, trademarks, service marks, trade names, copyrights or other information (collectively, “Intellectual Property”), which are necessary to conduct its businesses as currently conducted, except where the failure to currently own or possess would not reasonably be expected to result, either individually or in the aggregate, in a Material Adverse Effect. The Company has not received any written notice of, and has no actual knowledge of, any infringement of or conflict with asserted rights of others with respect to any Intellectual Property which, singly or in the aggregate, if the subject of an unfavorable decision, ruling or finding, would reasonably be expected to have a Material Adverse Effect, and to the Company’s knowledge, none of the patent rights owned or licensed by the Company are unenforceable or invalid.

(n) Registration Rights. Except as provided in Section 5 herein, effective upon the Closing, the Company is not currently subject to any agreement providing any person or entity any rights (including piggyback registration rights) to have any securities of the Company registered with the SEC or registered or qualified with any other governmental authority.

(o) Title to Property and Assets. The properties and assets of the Company are owned by the Company free and clear of all mortgages, deeds of trust, liens, charges, encumbrances and security interests except for (i) statutory liens for the payment of current taxes that are not yet

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delinquent, and (ii) liens, encumbrances and security interests that arise in the ordinary course of business and do not in any material respect affect the properties and assets of the Company. With respect to the property and assets it leases, the Company is in compliance with such leases in all material respects.

(p) Taxes. The Company has filed all necessary federal, state, and foreign income and franchise tax returns due prior to the date hereof and has paid or accrued all taxes shown as due thereon, and the Company has no knowledge of any material tax deficiency which has been or might be asserted or threatened against it.

(q) Insurance. The Company maintains insurance of the types and in the amounts that the Company reasonably believes is prudent and adequate for its business, all of which insurance is in full force and effect.

(r) General Solicitation. Neither the Company nor any other person or entity authorized by the Company to act on its behalf has engaged in a general solicitation or general advertising (within the meaning of Regulation D of the Securities Act) of investors with respect to offers or sales of the Purchased Shares.

(s) Registration Statement Matters. The Company meets the eligibility requirements for use of a Form S-3 Registration Statement for the resale of the Purchased Shares by the Purchasers. Assuming the completion and timely delivery of the Registration Statement Questionnaire by each Purchaser to the Company,

the Company is not aware of any facts or circumstances that would prohibit or delay the preparation and filing of a registration statement with respect to the Purchased Shares.

(t) No Integrated Offering. Neither the Company, nor any Affiliate (as hereafter defined) of the Company, nor any person acting on its or their behalf has, directly or indirectly, made any offers or sales of any security or solicited any offers to buy any security, under circumstances that would cause this offering of the Purchased Shares to be integrated with prior offerings by the Company for purposes of the Securities Act, any applicable state securities laws or any applicable stockholder approval provisions, including, without limitation, under the rules and regulations of any national securities exchange or automated quotation system on which any of the securities of the Company are listed or designated, nor will the Company take any action or steps that would cause the offering of the Purchased Shares to be integrated with other offerings.

(u) Nasdaq Listing Matters. The Common Stock of the Company is registered and listed on Nasdaq under the ticker symbol “VVUS.” The Company has not received any notice that it is not in compliance with the listing or maintenance requirements of Nasdaq. The issuance and sale of the Purchased Shares under this Agreement does not contravene the rules and regulations of Nasdaq.

**4. REPRESENTATIONS, WARRANTIES AND CERTAIN AGREEMENTS OF THE PURCHASERS**. Each Purchaser hereby represents and warrants to the Company, severally and not jointly, and agrees that:

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(a) Organization Good Standing and Qualification. The Purchaser has all corporate, membership or partnership power and authority required to enter into this Agreement and the other agreements, instruments and documents contemplated hereby, and to consummate the transactions contemplated hereby and thereby.

(b) Authorization. The execution of this Agreement has been duly authorized by all necessary corporate, membership or partnership action on the part of the Purchaser. This Agreement constitutes the Purchaser’s legal, valid and binding obligation, enforceable in accordance with its terms, except (i) as may be limited by (1) applicable bankruptcy, insolvency, reorganization or other laws of general application relating to or affecting the enforcement of creditors’ rights generally and (2) the effect of rules of law governing the availability of equitable remedies and (ii) as rights to indemnity or contribution may be limited under federal or state securities laws or by principles of public policy thereunder.

(c) Litigation. There is no Action pending to which such Purchaser is a Party that seeks to prevent, enjoin, alter or delay the transactions contemplated by this Agreement.

(d) Purchase for Own Account. The Purchased Shares are being acquired for investment for the Purchaser’s own account, not as a nominee or agent, and not with a view to the public resale or distribution thereof within the meaning of the Securities Act. The Purchaser also represents that it has not been formed for the specific purpose of acquiring the Purchased Shares.

(e) Investment Experience. The Purchaser understands that the purchase of the Purchased Shares involves substantial risk. The Purchaser has experience as an investor in securities of companies and acknowledges that it can bear the economic risk of its investment in the Purchased Shares and has such knowledge and experience in financial or business matters that it is capable of evaluating the merits and risks of this investment in the Purchased Shares and protecting its own interests in connection with this investment.

(f) Accredited Purchaser Status. The Purchaser is an “accredited investor” within the meaning of Regulation D promulgated under the Securities Act.

(g) Reliance Upon Purchaser’s Representations. The Purchaser understands that the issuance and sale of the Purchased Shares to it will not be registered under the Securities Act on the ground that such issuance and sale will be exempt from registration under the Securities Act pursuant to Section 4(2) thereof, and that the Company’s reliance on such exemption is based on each Purchaser’s representations set forth herein.

(h) Receipt of Information. The Purchaser has had an opportunity to ask questions and receive answers from the Company regarding the terms and conditions of the issuance and sale of the Purchased Shares and the business, properties, prospects and financial condition of the Company and to obtain any additional information requested and has received and considered all information it deems relevant to make an informed decision to purchase the Purchased Shares.

(i) Restricted Securities. The Purchaser understands that the Purchased Shares have not been registered under the Securities Act and will not sell, offer to sell, assign, pledge,

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hypothecate or otherwise transfer any of the Purchased Shares unless (i) pursuant to an effective registration statement under the Securities Act, (ii) such holder provides the Company with an opinion of counsel, in a generally acceptable form, to the effect that a sale, assignment or transfer of the Securities may be made without registration under the Securities Act and the transferee agrees to be bound by the terms and conditions of this Agreement, or (iii) such holder provides the Company with reasonable assurances (in the form of seller and broker representation letters) that the Securities can be sold pursuant to Rule 144 promulgated under the Securities Act (“Rule 144”), or (iv) pursuant to Rule 144(k) following the applicable holding period. Notwithstanding anything to the contrary contained in this Agreement, including but not limited to in Section 5(c)(i) below, the Purchaser may transfer (without restriction and without the need for an opinion of counsel) the Purchased Shares to its affiliates provided that such affiliate is an “accredited investor” under Regulation D and such affiliate agrees to be bound by the terms and conditions of this Agreement.

(j) Legends. The Purchaser agrees that the certificates for the Purchased Shares shall bear the following legend:

“THE SECURITIES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 OR WITH ANY STATE SECURITIES COMMISSION, AND MAY NOT BE TRANSFERRED OR DISPOSED OF BY THE HOLDER IN THE ABSENCE OF A REGISTRATION STATEMENT WHICH IS EFFECTIVE UNDER THE SECURITIES ACT OF 1933 AND APPLICABLE STATE LAWS AND RULES, OR, UNLESS, IMMEDIATELY PRIOR TO THE TIME SET FOR TRANSFER, SUCH TRANSFER MAY BE EFFECTED WITHOUT VIOLATION OF THE SECURITIES ACT OF 1933 AND OTHER APPLICABLE STATE LAWS AND RULES.”

In addition, the Purchaser agrees that the Company may place stop transfer orders with its transfer agents with respect to such certificates in order to implement the restrictions on transfer set forth in this Agreement. The appropriate portion of the legend and the stop transfer orders will be removed promptly upon delivery to the Company of such satisfactory evidence as reasonably may be required by the Company that such legend or stop orders are not required to ensure compliance with the Securities Act.

(k) Questionnaires. The Purchaser has completed or caused to be completed the Stock Certificate Questionnaire and the Registration Statement Questionnaire, attached to this Agreement as Appendices I and II, for use in preparation of the Registration Statement (as defined in Section 5(a)(ii) below), and the answers to such Questionnaires are true and correct as of the date of this Agreement and will be true and correct as of the effective date of the Registration Statement; provided that the Purchasers shall be entitled to update such information by providing written notice thereof to the Company before the effective date of such Registration Statement.

(l) Restrictions on Short Sales. The Purchaser represents and warrants that, during the period beginning on the date on which C.E. Unterberg, Towbin, a financial advisor to the Company, first contacted such Purchaser regarding a transaction contemplated by this Agreement