

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
FORM 10-Q

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

For the quarterly period ended September 30, 1996

OR

☐ TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from \_\_\_\_\_ to \_\_\_\_\_

Commission File Number: 0-23490

VIVUS, INC.

-----  
(Exact name of registrant as specified in its charter)

DELAWARE

94-3136179

-----  
(State or other jurisdiction of  
incorporation or organization)

(I.R.S. Employer  
identification Number)

545 MIDDLEFIELD ROAD, SUITE 200

MENLO PARK, CA 94025

-----  
(Address of Principal Executive Offices)

(Zip Code)

(415) 325-5511

-----  
(Registrant's Telephone Number, Including Area Code)

N/A

-----  
(Former name, former address and former fiscal year, if changed since last report)

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

APPLICABLE ONLY TO CORPORATE ISSUERS:

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date.

At October 22, 1996, 16,189,507 shares of common stock were outstanding.

Exhibit index on page 30

VIVUS, INC.  
(A Development Stage Company)

CONDENSED CONSOLIDATED BALANCE SHEETS  
(In thousands, except share data)

ASSETS		
	SEPTEMBER 30, 1996 ----- (unaudited)	DECEMBER 31, 1995 -----
Current assets:		
Cash and cash equivalents	\$ 10,284	\$ 973
Available-for-sale securities	56,638	21,136
Interest and other receivables	1,222	449
Prepaid expenses and other	310	141
	-----	-----
Total current assets	68,454	22,699
Property, net	5,270	3,888
Available-for-sale securities, non-current	28,420	17,415
Other	--	47
	-----	-----
Total Assets	\$ 102,144 =====	\$ 44,049 =====
LIABILITIES AND STOCKHOLDERS' EQUITY		
Current liabilities:		
Accounts payable	\$ 244	\$ 353
Accrued and other liabilities	3,614	2,515
	-----	-----
Total current liabilities	3,858	2,868
	-----	-----
Stockholders' equity:		
Preferred stock; no par value; shares authorized - 5,000,000 at September 30, 1996 and December 31, 1995; shares outstanding - none at September 30, 1996 and December 31, 1995	--	--
Common stock; \$.001 par value; shares authorized - 30,000,000 at September 30, 1996 and December 31, 1995; shares outstanding - September 30, 1996, 16,184,007; December 31, 1995, 13,475,570	16	13
Paid in capital	155,686	91,472
Unrealized gain (loss) on securities	(13)	114
Deferred compensation	(459)	(791)
Accumulated deficit	(56,944)	(49,627)
	-----	-----
Total stockholders' equity	98,286	41,181
	-----	-----
Total Liabilities and Stockholders' Equity	\$ 102,144 =====	\$ 44,049 =====

See accompanying notes to financial statements.

VIVUS, INC.  
(A DEVELOPMENT STAGE COMPANY)

CONDENSED CONSOLIDATED STATEMENT OF OPERATIONS  
(UNAUDITED, IN THOUSANDS, EXCEPT PER SHARE AMOUNTS)

	PERIOD FROM APRIL 16, 1991 (INCEPTION) THROUGH SEPTEMBER 30, 1996 -----	THREE MONTHS ENDED SEPTEMBER 30, -----		NINE MONTHS ENDED SEPTEMBER 30, -----	
		1996 ----	1995 ----	1996 ----	1995 ----
Revenue	\$ 20,000	\$10,000	\$ --	\$20,000	\$ --
Operating expenses:					
Research and development	68,492	5,462	4,592	23,007	15,808
General and administrative	15,776	3,118	1,009	6,501	2,935
	-----	-----	-----	-----	-----
Total operating expenses	84,268	8,580	5,601	29,508	18,743
	-----	-----	-----	-----	-----
Income (loss) from operations	(64,268)	1,420	(5,601)	(9,508)	(18,743)
Interest income	7,324	1,242	728	2,191	2,000
	-----	-----	-----	-----	-----
Net income (loss)	\$(56,944)	\$ 2,662	\$(4,873)	\$(7,317)	\$(16,743)
	=====	=====	=====	=====	=====
Net income (loss) per common and equivalent share		\$ 0.15	\$ (0.35)	\$ (0.49)	\$ (1.26)
		=====	=====	=====	=====
Shares used in the computation of net income (loss) per share		17,818	14,015	14,901	13,289
		=====	=====	=====	=====

VIVUS, INC.  
(A Development Stage Company)

CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS  
(unaudited, in thousands)

	PERIOD FROM APRIL 16, 1991 (INCEPTION) THROUGH SEPTEMBER 30, 1996 -----	----- Nine Months Ended SEPTEMBER 30, 1996 -----	----- 1995 -----
CASH FLOWS FROM OPERATING ACTIVITIES:			
Net loss	\$ (56,944)	\$ (7,317)	\$ (16,743)
Adjustments to reconcile net loss to net cash used for operating activities:			
Depreciation and amortization	1,868	719	483
Amortization of deferred compensation	1,317	332	333
Issuance of common stock for patent rights	6,683	5,821	-
Issuance of preferred stock for services	150	-	-
Changes in assets and liabilities:			
Interest and other receivables	(1,222)	(773)	(233)
Prepaid expenses and other	(310)	(169)	(45)
Accounts payable	244	(109)	(280)
Accrued and other liabilities	3,614	1,099	527
	-----	-----	-----
Net cash used for operating activities	(44,600)	(397)	(15,958)
	-----	-----	-----
CASH FLOWS FROM INVESTING ACTIVITIES:			
Property purchases	(7,136)	(2,101)	(2,730)
Securities purchases	(400,487)	(99,350)	(70,227)
Proceeds from sale/maturity of securities	315,416	52,716	66,639
Other assets	-	47	(17)
	-----	-----	-----
Net cash used for investing activities	(92,207)	(48,688)	(6,335)
	-----	-----	-----
CASH FLOWS FROM FINANCING ACTIVITIES:			
Sale of preferred stock	34,252	-	-
Sale of common stock	111,492	57,428	22,377
Exercise of common stock options	1,022	864	61
Purchase of common stock through employee stock purchase plan	326	104	80
Repurchase of common stock	(1)	-	-
	-----	-----	-----
Net cash provided by financing activities	147,091	58,396	22,518
	-----	-----	-----
NET INCREASE IN CASH AND CASH EQUIVALENTS	10,284	9,311	225
CASH AND CASH EQUIVALENTS:			
Beginning of period	-	973	2,037
	-----	-----	-----
End of period	\$10,284	\$10,284	\$2,262
	=====	=====	=====
NON-CASH INVESTING AND FINANCING ACTIVITIES:			
Deferred compensation recorded relating to stock option grants	\$ 1,774	\$ -	\$ -
Unrealized gain (loss) on securities	(13)	(127)	566

See accompanying notes to financial statements.

VIVUS, INC.  
(A DEVELOPMENT STAGE COMPANY)

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS  
SEPTEMBER 30, 1996

1. BASIS OF PRESENTATION

The accompanying unaudited condensed consolidated financial statements have been prepared in accordance with generally accepted accounting principles for interim financial information and with the instructions to Form 10-Q and Rule 10 of Regulations S-X. Accordingly, they do not include all of the information and footnotes required by generally accepted accounting principles for complete financial statements. In the opinion of management, all adjustments (consisting of normal recurring accruals) considered necessary for a fair presentation have been included. Operating results for the three and nine month periods ended September 30, 1996 are not necessarily indicative of the results that may be expected for the year ended December 31, 1996. For further information, refer to the financial statements and footnotes thereto included in the Company's Annual Report on Form 10-K for the year ended December 31, 1995.

2. PROVISION FOR INCOME TAXES

The Company expects to incur a loss for the year ended December 31, 1996; therefore, no provision for income taxes has been recorded for the three months ended September 30, 1996.

3. NET INCOME (LOSS) PER SHARE

For the three months ended September 30, 1996, net income per common and equivalent share is based on the weighted average number of common and equivalent shares outstanding during the period, including outstanding options and warrants. Such options and warrants are excluded from the net loss per common and equivalent shares in the other periods presented because they are antidilutive.

Net loss per common and equivalent share is based on the weighted average number of common and equivalent shares outstanding during the period. Pursuant to Securities and Exchange Commission Staff Accounting Bulletin No. 83, common equivalent shares include all common shares issued and options and warrants to purchase shares of common stock granted by the Company at a price less than the initial public offering price during the period January 1, 1993 through the initial public offering date (using the treasury stock method for options and warrants and based on the public offering price of \$14.00 per share) as if they were outstanding for all periods. Options granted by the Company prior to January 1, 1993 have been excluded in the calculation of common and common equivalent shares outstanding since they would serve to reduce the net loss per share.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS  
SEPTEMBER 30, 1996

4. DELAWARE REINCORPORATION

The Company was incorporated on April 16, 1991 in California and reincorporated in Delaware on May 24, 1996. The classification of the capital accounts reflects the effect of the reincorporation for all periods presented.

MANAGEMENT'S DISCUSSION AND ANALYSIS  
OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

DESCRIPTION OF BUSINESS

Since its inception in April 1991, VIVUS, Inc. (the "Company"), a development stage company, has focused on the design and development of products for the treatment of erectile dysfunction. The Company has devoted substantially all its efforts to research and development conducted on its behalf and through collaboration with clinical institutions. The Company's primary product, MUSE(R) (alprostadil), has moved from preclinical development to regulatory application phase over the last three years. In October 1996, the Company received an approvable letter from the Food and Drug Administration (FDA) for MUSE (alprostadil). The Company expects to begin marketing the product in the United States following final FDA marketing clearance, which is subject to standard final labeling requirements and agreement that the Company's manufacturing facility, methods and controls comply with FDA requirements. In addition, the Company submitted applications for approval of MUSE (alprostadil) in the United Kingdom and Sweden. These applications will be subject to rigorous approval processes, and there can be no assurance such approval will be granted in a timely manner, if at all.

The Company has generated a cumulative net loss of \$56,944,000 for the period from its inception through September 30, 1996. The ability of the Company to successfully manufacture, obtain final FDA marketing clearance, and market MUSE (alprostadil) is dependent on many factors. The Company is subject to a number of risks including the regulatory approval of its product, its ability to scale-up its manufacturing capabilities and secure adequate supply of raw materials, its ability to successfully market, distribute and sell its product, and intense competition. Accordingly, there can be no assurance of the Company's future success.

Spending increased from 1993 through the period ended September 30, 1996 largely as a result of expanded operational activities related to the Company's Phase II and III clinical trials, preparing the MUSE (alprostadil) New Drug Application ("NDA") for submission to the FDA and expansion of its manufacturing capabilities. Spending levels will continue to increase during 1996 as the Company further develops its commercial manufacturing, marketing and sales capabilities, and begins commercial production.

In May 1996, the Company issued 200,000 shares of common stock to Alza in order for the Company to maintain exclusive rights to certain patents and patent applications beyond 1998. In connection with this issuance, the Company recorded a charge of approximately \$5,800,000 to the consolidated statement of operations.

To date, the Company has received no revenue from product sales. In May 1996, the Company completed a marketing agreement with Astra AB ("Astra") to purchase the Company's products for resale in Europe, South America, Central America, Australia and New

Zealand. As consideration for execution of the marketing agreement, Astra paid the Company \$10 million in June 1996. In September 1996, the Company received a \$10 million milestone payment from Astra upon filing an application for marketing authorization for MUSE (alprostadil) in the United Kingdom. The Company will be paid up to an additional \$10 million in the event it achieves certain milestones. The Company does not anticipate significant revenue from operations for at least two years. The Company does not have any experience in manufacturing or selling MUSE (alprostadil) in commercial quantities. Whether the Company can successfully manage the transition to a large scale commercial enterprise will depend upon the successful further development of its manufacturing capability and its distribution network and attainment of domestic and foreign regulatory approvals for MUSE (alprostadil) and other potential products. Failure to make such a transition successfully would have a material adverse effect on the Company's business, financial condition and results of operations.

The Company anticipates that it will continue to incur losses over at least the next twelve months as it expands its operations, prepares for the anticipated commercial introduction of MUSE (alprostadil) and expands its research and development activities with regard to other products. To achieve profitability, the Company must obtain the necessary regulatory approvals and successfully manufacture, introduce and market MUSE (alprostadil). The time required to reach profitability is highly uncertain and there can be no assurance that the Company will be able to obtain profitability on a sustained basis, if at all.

The Company currently relies on a single therapeutic approach to treat erectile dysfunction, the transurethral system for erection. The Company recently completed Phase III clinical trials and submitted an NDA to the FDA for its anticipated first product, MUSE (alprostadil). While the Company received an approvable letter from the FDA, there can be no assurance that the FDA will grant final approval on a timely basis, if at all, or if granted, that such approval will not contain significant limitations in the form of warnings, precautions or contraindications with respect to condition of use. Failure to obtain approval of the Company's NDA for MUSE (alprostadil) on a timely basis, if at all, or if granted, the failure to successfully commercialize MUSE (alprostadil) would have a material adverse effect on the Company.

In April 1994, the Company successfully completed an initial public offering of 2,473,000 shares of common stock, with net proceeds to the Company of \$31,578,000.

The Company completed a secondary public offering of 1,800,000 shares of common stock in April 1995. Of the total number of shares offered, 1,670,000 shares were sold by the Company and 130,000 shares were sold by a current stockholder. Net proceeds to the Company were \$22,483,000.

The Company completed a third public offering of 2,000,000 shares of common stock in June 1996. Net proceeds to the Company were approximately \$49,800,000. In July 1996, the underwriters for this offering exercised their option to purchase an additional



300,000 shares to cover over-allotments. The Company received approximately \$7,500,000 in net proceeds for these shares.

The first, third, fifth, sixth and seventh paragraphs of this Description of Business section contain forward-looking statements within the meaning of Section 27A of the Securities Act of 1993, as amended, and Section 21E of the Securities and Exchange Act of 1934, as amended. Actual results could differ materially from those projected in the forward-looking statements as a result of the factors set forth in the above mentioned paragraphs and the factors set forth in the Risk Factors section of this quarterly report.

## RESULTS OF OPERATIONS

Three months Ended September 30, 1996 and 1995, and Nine Months Ended September 30, 1996 and 1995

No revenues from product sales have been recorded from inception to September 30, 1996. As consideration for execution of the Astra marketing agreement, Astra paid the Company \$10 million in June 1996. In September 1996, the Company received a \$10 million milestone payment from Astra AB upon filing an application for marketing authorization for MUSE (alprostadil) in the United Kingdom. The Company recorded these receipts as milestone revenue in the consolidated statement of operations.

For the three months ended September 30, 1996, research and development expenses were \$5,462,000 compared with \$4,592,000 for the three months ended September 30, 1995, an increase of 19%. The increase was a result of higher pre-launch manufacturing and quality assurance expenses, partially offset by lower clinical costs resulting from the completion of the Phase II and III clinical trials in 1995.

For the nine months ended September 30, 1996, research and development expenses were \$23,007,000 compared with \$15,808,000 for the nine months ended September 30, 1995, an increase of 46%. The increase was due primarily to the Company issuing 200,000 shares of common stock to Alza in May 1996 in order for the Company to maintain exclusive rights to certain patents and patent applications beyond 1998. In connection with this issuance, the Company recorded a charge of approximately \$5,900,000 to the consolidated statement of operations. The increase was also a result of higher pre-launch manufacturing and quality assurance expenses. These were partially offset by lower clinical costs resulting from the completion of the Phase II and III clinical trials in 1995.

General and administrative expenses for the three months ended September 30, 1996 were \$3,118,000 compared with \$1,009,000 for the three months ended September 30, 1995, an increase of 209%. The increase primarily resulted from higher marketing expenses and the costs associated with additional personnel to support the growth of the Company's operations.

General and administrative expenses for the nine months ended September 30, 1996 were \$6,501,000 compared with \$2,935,000 for the nine months ended September 30, 1995, an increase of 122%. The increase resulted primarily from higher marketing and legal expenses, as well as the costs associated with hiring additional personnel to support the growth of the Company's operations.

Spending levels will continue to increase during 1996 as the Company further develops its commercial manufacturing, marketing and sales capabilities, and begins commercial production.

Interest income for the three months ended September 30, 1996 was \$1,242,000 compared with \$728,000 for the three months ended September 30, 1995. Interest income for the nine months ended September 30, 1996 was \$2,191,000 compared with \$2,000,000 for the nine months ended September 30, 1995. The increases were primarily the result of higher average invested cash balances.

#### LIQUIDITY AND CAPITAL RESOURCES

Since inception, the Company has financed operations primarily from the sale of preferred and common stock. Through September 30, 1996, VIVUS has raised \$147,091,000 from financing activities. Cash, cash equivalents and securities available-for-sale totaled \$95,342,000 at September 30, 1996 compared with \$39,524,000 at December 31, 1995. The Company maintains its current excess cash balances in a variety of interest bearing investment-grade financial investments such as U.S. government securities, corporate debt and certificates of deposit. Principal preservation, liquidity and safety are the primary investment objectives.

Cash used in operations in the nine months ended September 30, 1996 was \$397,000 compared with \$15,958,000 in the nine months ended September 30, 1995. The decreased use of cash was primarily due to a net loss of \$7,317,000, partially offset by the \$5,821,000 non-cash charge to operations related to the issuance of 200,000 shares of stock to Alza, in the nine months ended September 30, 1996 compared with a net loss of \$16,743,000 for the same period in 1995. Cash used for operations is expected to increase in 1996 as the Company further develops its commercial manufacturing, marketing and sales capabilities, and begins commercial production.

Prepaid and other current assets at September 30, 1996 were \$1,532,000 compared with \$590,000 at December 31, 1995, an increase of \$942,000. This increase resulted primarily from an increase in interest receivables related to the Company's investment portfolio and prepaid insurance.

Current liabilities were \$3,858,000 at September 30, 1996 compared with \$2,868,000 at December 31, 1995. This increase was primarily due to an increase in expenditures in 1996.

Capital expenditures in the nine months ended September 30, 1996 were \$2,101,000 compared with \$2,730,000 for the same period ended September 30, 1995. Capital expenditures during the period in 1996 and 1995 consisted primarily of manufacturing and quality

control equipment. Capital expenditures were higher in 1995 due to the construction of the Company's dedicated manufacturing and testing space within the Paco Pharmaceutical Services, Inc. ("Paco") facility in Lakewood, New Jersey. Major capital expenditures over the next two years are likely to increase as they are expected to include a Company-owned manufacturing facility, expansion of its current facility in the United States and establishing a research and quality control laboratory.

In 1995, the Company implemented an international product distribution strategy for VIVUS products. Implementation included the transfer of international product marketing rights to VIVUS International Limited in a taxable transaction. The transfer of rights and related allocation of research and development costs resulted in the current utilization of \$29,467,000 of the Company's net operating loss carryforward.

The Company expects to incur substantial additional costs, including expenses related to its marketing and sales organization, a second manufacturing plant and expansion of the Company's existing plant, new product preclinical and clinical costs, ongoing research and development activities, and general corporate purposes. The Company anticipates that its existing capital resources will be sufficient to support the Company's operations through commercial introduction of MUSE (alprostadil) in the United States and Europe, but may not be sufficient for the introduction of any additional future products. While the Company received an approvable letter from the FDA for MUSE (alprostadil) in October 1996, the Company cannot begin marketing the product in the United States until it has received final FDA marketing clearance, which is subject to final standard labeling requirements and agreement that the Company's manufacturing facility, methods, and controls comply with FDA requirements. Accordingly, the Company anticipates that it may be required to issue additional equity or debt securities and may use other financing sources including, but not limited to, corporate alliances and lease financings to fund the future development and possible commercial launch of its products. The sale of additional equity securities can be expected to result in additional dilution to the Company's stockholders. There can be no assurance that such funds will be available on terms satisfactory to the Company, or at all. Failure to obtain adequate funding could cause a delay or cessation of the Company's product development and marketing efforts and would have a material adverse effect upon the Company's business, financial condition and results of operations. The Company's working capital and additional funding requirements will depend upon numerous factors, including: (i) the ability to obtain and timing and costs of obtaining regulatory approvals; (ii) the level of resources that the Company devotes to sales and marketing capabilities; (iii) the level of resources that the Company devotes to expanding manufacturing capacity; (iv) the activities of competitors; (v) the progress of the Company's research and development programs; (vi) the timing and results of preclinical testing and clinical trials; and (vii) technological advances.

The second, fifth, and seventh paragraphs of this Liquidity and Capital Resources section contain forward-looking statements within the meaning of Section 27A of the Securities Act of 1993, as amended, and Section 21E of the Securities and Exchange Act of 1934, as amended. Actual results could differ materially from those projected in the forward-looking statements as a result of the factors set forth in this Liquidity and Capital Resources section, the Risk Factors section and the Description of Business section. The discussion of those factors is incorporated herein by this reference as if said discussion was fully set forth at this point.

## RISK FACTORS

This quarterly report on Form 10-Q contains forward-looking statements that involve risks and uncertainties. The Company's actual results could differ from those set forth in such forward-looking statements as a result of certain factors, including those set forth in this Risk Factors section.

## DEPENDENCE ON THE COMPANY'S TRANSURETHRAL SYSTEM FOR ERECTION

The Company currently relies upon a single therapeutic approach to treat erectile dysfunction, its transurethral system for erection. No assurance can be given that the Company's therapeutic approach, or its proposed pharmacologic formulations, will be shown to be safe and effective or ultimately be approved by appropriate regulatory agencies. Certain side effects have been found to occur with the use of MUSE (alprostadil). Mild to moderate transient penile/perineal pain was suffered by 21% to 42% of patients (depending on dosage) treated with MUSE (alprostadil) in the Company's Phase II/III Dose Ranging study. Moderate to severe (i.e., syncope) decreases in blood pressure was experienced by 1% to 4% of patients (depending on dosage) treated with MUSE (alprostadil) in such study. The existence of side effects or dissatisfaction with product results may impact a patient's decision to use or continue to use, or a physician's decision to recommend, MUSE (alprostadil) as a therapy for the treatment of erectile dysfunction thereby affecting the commercial viability of MUSE (alprostadil). The Company has never commercially introduced a product and no assurance can be given that any of the transurethral products will be successfully introduced. In addition, technological changes or medical advancements could diminish or eliminate the commercial viability of the Company's products. As a result of the Company's single therapeutic approach and its current focus on MUSE (alprostadil), the failure to obtain final FDA marketing clearance, or approval in other countries, for MUSE (alprostadil) on a timely basis, if at all, or to successfully commercialize such product would have an adverse effect on the Company and could threaten the Company's ability to continue as a viable entity.

## GOVERNMENT REGULATION AND UNCERTAINTY OF PRODUCT APPROVALS

The Company's research, preclinical development, clinical trials, manufacturing and marketing of its products are subject to extensive regulation by numerous governmental authorities in the United States and other countries. Clinical trials, manufacturing and marketing of the Company's products will be subject to the rigorous testing and approval processes of the FDA and equivalent foreign regulatory agencies. The process of obtaining FDA and other required regulatory approvals is lengthy and expensive. The time required for FDA approvals is uncertain, and typically takes a number of years, depending on the type, complexity and novelty of the product. Since the Company's products involve transurethral delivery, a new therapeutic approach, regulatory approvals may be obtained more slowly than for products produced using more conventional delivery systems. The Company completed pivotal clinical trials in 1995 and submitted an NDA for its anticipated first product, MUSE (alprostadil), to the FDA in March 1996. In October 1996, the Company received an approvable letter from the Food and Drug Administration (FDA) for MUSE (alprostadil). Final FDA marketing clearance is subject to agency clearance of standard final labeling requirements and agreement that the Company's manufacturing facility, methods and controls comply with FDA requirements. In addition, the Company submitted applications for approval of MUSE (alprostadil) in the United Kingdom and Sweden. These applications will be subject to rigorous approval processes. There can be no assurance that final FDA marketing clearance, or approval in other countries, will be granted on a timely basis, if at all, or if granted, that such approval will not contain significant limitations in the form of warnings, precautions or contraindications with respect to condition of use. Any delay in obtaining, or failure to obtain, such approval would adversely affect the Company's ability to generate product revenue.

The Company's clinical trials for future products will seek safety data as well as efficacy data and will require substantial time and significant funding. There is no assurance that clinical trials related to future products will be completed successfully within any specified time period, if at all. Furthermore, the FDA may suspend clinical trials at any time if it is believed that the subjects participating in such trials are being exposed to unacceptable health risks. There can be no assurance that FDA or other regulatory approvals for any products developed by the Company will be granted on a timely basis, if at all, or if granted, that such approval will not contain significant limitations in the form of warnings, precautions or contraindications with respect to conditions of use. Any delay in obtaining, or failure to obtain, such approvals would adversely affect the Company's ability to generate product revenue. Failure to comply with the applicable regulatory requirements can, among other things, result in fines, suspensions of regulatory approvals, product recalls, operating restrictions and criminal prosecution. In addition, the marketing and manufacturing of pharmaceutical products are subject to continuing FDA review, and later discovery of previously unknown problems with a product, manufacturer or

facility may result in the FDA requiring further clinical research or restrictions on the product or the manufacturer, including withdrawal of the product from the market. The restriction, suspension or revocation of regulatory approvals or any other failure to comply with regulatory requirements would have a material adverse effect on the Company's business, financial condition and results of operations.

The Company obtains the necessary raw materials and components for the manufacture of MUSE (alprostadil) from third parties. The Company currently contracts with contract manufacturing organizations that are required to comply with strict standards established by the Company. Contract manufacturers are required by the Federal Food, Drug, and Cosmetic Act, as amended, and by FDA regulations to follow Good Manufacturing Practices ("GMP"). The Company is required to identify its suppliers to the FDA and is dependent upon its contract manufacturers and its suppliers to comply with the Company's specifications and, as required, GMP or similar standards imposed by foreign regulators. There can be no assurance that the FDA, or a state, local or foreign regulator will not take action against a contract manufacturer or supplier found to be violating applicable regulations. Such an action could have a material adverse effect on the Company's business, financial condition and results of operations.

#### LIMITED MANUFACTURING EXPERIENCE AND DEPENDENCE ON SOLE CONTRACT MANUFACTURER

The Company has only limited experience in manufacturing MUSE (alprostadil) and has not yet manufactured it in commercial quantities. As a result, the Company has no experience manufacturing its product in volumes necessary for the Company to achieve significant commercial sales, and there can be no assurance that reliable high volume manufacturing can be achieved at commercially reasonable cost. If the Company encounters any manufacturing difficulties, including problems involving production yields, quality control and assurance, supplies of components or raw materials or shortages of qualified personnel, it could have a material adverse effect on the Company's business, financial condition and results of operations.

The formulation, filling, packaging and testing of MUSE (alprostadil) is performed by Paco Pharmaceutical Services, Inc. ("Paco"), a wholly owned subsidiary of The West Company, at its facility in Lakewood, New Jersey. In June 1995, the Company completed construction of its approximately 6,000 square feet of dedicated manufacturing and testing space within Paco's facility. The Company will be required to expand its manufacturing and testing space at Paco or to find additional facilities, if FDA marketing clearance is obtained and MUSE (alprostadil) is successfully introduced. The Company also intends to establish a Company owned and operated manufacturing facility. Until the Company develops an in-house manufacturing capability or is able to identify and qualify alternative contract manufacturers, it will be entirely dependent upon Paco for the manufacture of its products.

As part of the approval process for the Company's NDA, Paco will be subject to audit by the FDA as part of its GMP inspection. There can be no assurance that the facility will receive the necessary GMP approval. There can be no assurance that the Company's reliance on Paco or others for the manufacture of its products will not result in problems with product supply, and there can be no assurance that the Company will be able to establish a second manufacturing facility or expand its existing facility at Paco. Interruptions in the availability of products could delay or prevent the development and commercial marketing of MUSE (alprostadil) and other potential products and would have a material adverse effect on the Company's business, financial condition and results of operations.

#### LIMITED SALES AND MARKETING EXPERIENCE

The Company has no experience in the sale, marketing and distribution of pharmaceutical products. If required approvals are received, the Company intends to market and sell its products initially through a direct sales force in the United States. In order to market its products directly, the Company must develop a sales force with proper technical expertise. There can be no assurance that the Company will be able to build a sales force or that the Company's domestic sales and marketing efforts will be successful.

In February 1996, the Company entered into a distribution agreement with a wholly owned subsidiary of Cardinal Health, Inc. ("Cardinal"). Under this agreement, Cardinal will warehouse the Company's finished goods, take customer orders, pick, pack and ship its product, invoice customers and collect related receivables. The Company will also have access to Cardinal's information systems that support these functions. As a result of this distribution agreement with Cardinal, the Company is heavily dependent on Cardinal's efforts to fulfill orders and warehouse its products effectively. There can be no assurance such efforts will be successful.

In May 1996, the Company completed a marketing agreement with Astra AB ("Astra") to purchase the Company's products for resale in Europe, South America, Central America, Australia and New Zealand. As consideration for execution of the marketing agreement, Astra paid the Company \$10 million in June 1996. In September 1996, the Company received a \$10 million milestone payment from Astra upon filing an application for marketing authorization for MUSE (alprostadil) in the United Kingdom. The Company will be paid up to an additional \$10 million in the event it achieves certain milestones. The Company does not anticipate significant revenue from operations for at least two years. The marketing agreement does not have minimum purchase commitments, and Astra may take up to twelve months to introduce a product in a given country following regulatory approval in such country. As a result of this marketing agreement with Astra, the Company is dependent on Astra's efforts to market, distribute and sell the Company's products



effectively in the above mentioned markets. There can be no assurance that such efforts will be successful.

In July 1996, the Company entered into a distribution agreement with Alternate Site Distributors, Inc. ("ASD"), a subsidiary of Bergen Brunswig Corporation. ASD will provide "direct-to-physician" distribution, telemarketing and customer service capabilities in support of the U.S. marketing and sales efforts. Pursuant to the terms of this agreement, ASD will develop a customer service organization to respond to all VIVUS sales representative and physician inquiries. A central feature of this customer service will be a dedicated Vivus owned 1-800 number with an automated response menu covering various options. As a result of this distribution agreement with ASD, the Company is dependent on ASD's efforts to distribute, telemarket, and provide customer service effectively. There can be no assurance that such efforts will be successful.

The Company intends to market and sell its products in other foreign markets through distribution, co-promotion or license agreements with corporate partners. To the extent that the Company enters into distribution, co-promotion or license agreements for the sale of its products, the Company will be dependent upon the efforts of third parties. These third parties may have other commitments, and there can be no assurance that they will commit the necessary resources to effectively market, distribute and sell the Company's product.

#### INTENSE COMPETITION

Competition in the pharmaceutical and medical products industries is intense and is characterized by extensive research efforts and rapid technological progress. Certain treatments for erectile dysfunction exist, such as needle injection therapy, vacuum constriction devices, penile implants and oral medications, and the manufacturers of these products will continue to improve these therapies. In July 1995, the FDA approved the use of alprostadil in The Upjohn Company's needle injection therapy product for erectile dysfunction. Previously, Upjohn had obtained approval in a number of European countries. Additional competitive therapies under development include an oral medication by Pfizer, Inc., which is currently in Phase III clinical trials. Other large pharmaceutical companies are also actively engaged in the development of therapies for the treatment of erectile dysfunction. These companies have substantially greater research and development capabilities as well as substantially greater marketing, financial and human resources than the Company. In addition, these companies have significantly greater experience than the Company in undertaking preclinical testing, human clinical trials and other regulatory approval procedures. There are also small companies, academic institutions, governmental agencies and other research organizations that are conducting research in the area of erectile dysfunction. For instance, Zonagen, Inc. and Pentech Pharmaceutical, Inc. have oral medications under development. These entities may also market commercial products either on their own or

through collaborative efforts. The Company's competitors may develop technologies and products that are available for sale prior to the Company's products or that are more effective than those being developed by the Company. Such developments would render the Company's products less competitive or possibly obsolete. If the Company is permitted to commence commercial sales of products, it will also be competing with respect to marketing capabilities and manufacturing efficiency, areas in which it has limited experience.

#### PROPRIETARY RIGHTS AND RISK OF LITIGATION

The Company's success will depend, in large part, on the strength of its current and future patent position relating to the transurethral delivery of pharmacologic agents for the treatment of erectile dysfunction. The Company's patent position, like that of other pharmaceutical companies, is highly uncertain and involves complex legal and factual questions. Claims made under patent applications may be denied or significantly narrowed and issued patents may not provide significant commercial protection to the Company. The Company could incur substantial costs in proceedings before the United States Patent Office, including interference proceedings. These proceedings could also result in adverse decisions as to the priority of the Company's licensed or assigned inventions. There is no assurance that the Company's patents will not be challenged or designed around by others. The Company is aware of a patent application involving the transurethral application of prostaglandin E2. The corresponding application in Europe has been abandoned. Failure of the Company's licensed patents to block issuance of such patent could have a material adverse effect on the Company's business, financial condition and results of operations.

There can be no assurance that the Company's products do not or will not infringe on the patent or proprietary rights of others. A patent opposition to the Company's exclusively licensed European patents has been filed with the European Patent Office. The Company is vigorously defending the patents, however an adverse decision could affect the Company's ability, based on its patent rights, to limit potential competition in Europe. The Company may be required to obtain additional licenses to the patents, patent applications or other proprietary rights of others. There can be no assurance that any such licenses would be made available on terms acceptable to the Company, if at all. If the Company does not obtain such licenses, it could encounter delays in product introductions while it attempts to design around such patents, or the development, manufacture or sale of products requiring such licenses could be precluded. The Company believes there will continue to be significant litigation in the pharmaceutical industry regarding patent and other intellectual property rights.

A former consultant to the Company has claimed that he is the inventor of certain technology disclosed in two of the Company's patents. The former consultant further claims that the Company defrauded him by allegedly failing to inform him that it intended to use and patent this technology and by failing to compensate him

for the technology in the manner allegedly promised. On May 28, 1996, the Company filed a complaint for declaratory judgment against the former consultant in the United States District Court for the Northern District of California, which seeks a declaration from the court that the former consultant is not an inventor of any of the technology disclosed in the patent. On July 17, 1996, the former consultant filed a lawsuit which seeks to have two of the Company's patents declared invalid on the grounds that they fail to list him as an inventor. On September 16, 1996, the Court dismissed the consultant's lawsuit, and ordered the consultant to refile his claims or counterclaims to the action initiated by the Company on May 28, 1996. The consultant filed his counterclaim on September 26, 1996. In a separate matter, on April 10, 1996, the licensors in an agreement by which the Company acquired a patent license filed a lawsuit in a Texas State court that alleges that they were defrauded in connection with the renegotiation of the license agreement between the Company and the licensors. On May 8, 1996, the action was removed to the United States District Court for the Western District of Texas. In addition to monetary damages, the licensors seek to return to the terms of the original license agreement. The Company has conducted a review of the circumstances surrounding these two matters and believes that the allegations are without merit. Although the Company believes that it should prevail, the uncertainties inherent in litigation prevent the Company from giving any assurances about the outcome of such litigation.

The Company also relies on trade secrets and other unpatented proprietary technology. No assurance can be given that the Company can meaningfully protect its rights in such unpatented proprietary technology or that others will not independently develop substantially equivalent proprietary products and processes or otherwise gain access to the Company's proprietary technology. The Company seeks to protect its trade secrets and proprietary know-how, in part, with confidentiality agreements with employees and consultants. There can be no assurance that these agreements will not be breached, that the Company will have adequate remedies for any breach or that the Company's trade secrets will not otherwise become known or be independently developed by competitors. In addition, protracted and costly litigation may be necessary to enforce and determine the scope and validity of the Company's proprietary rights.

#### DEPENDENCE ON DUAL SOURCE OF SUPPLY

To date, the Company has obtained its supply of alprostadil from two sources. The first is Spolana Chemical Works AS ("Spolana") pursuant to a supply agreement that expires at the end of 1996. In January 1996, the Company completed a long-term alprostadil supply agreement with CHINOIN Pharmaceutical and Chemical Works Co., Ltd. ("Chinoin"). Chinoin is the Hungarian subsidiary of the French pharmaceutical company Sanofi Winthrop. The Company's sources of supply will be subject to GMP requirements of the FDA. There can be no assurance FDA approval will be

received. Alprostadil, a generic drug, is extremely difficult to manufacture and is only available to the Company from a limited number of other suppliers, none of which currently produce it in commercial quantities. While the Company is seeking additional sources, there can be no assurance that it will be able to identify and qualify such sources. The Company is required to identify its suppliers to the FDA and the FDA may require additional clinical trials or other studies prior to accepting a new supplier. Unless the Company secures and qualifies additional sources of alprostadil, it will be entirely dependent upon Spolana and Chinoin for the delivery of alprostadil. If interruptions in the supply of alprostadil were to occur for any reason, including a decision by Spolana and/or Chinoin to discontinue manufacturing, political unrest, labor disputes or a failure of Spolana and/or Chinoin to follow regulatory guidelines, the development and commercial marketing of MUSE (alprostadil) and other potential products could be delayed or prevented. An interruption in the Company's supply of alprostadil would have a material adverse effect on the Company's business, financial condition and results of operations.

#### HISTORY OF LOSSES AND LIMITED OPERATING HISTORY

The Company is a development stage company with a limited operating history. The Company has not generated any product revenue since its inception in April 1991. As consideration for execution of the Astra marketing agreement, Astra paid the Company \$10 million in June 1996. In September 1996, the Company received a \$10 million milestone payment from Astra upon filing an application for marketing authorization for MUSE (alprostadil) in the United Kingdom. The Company recorded these receipts as milestone revenue in the consolidated statement of operations. At September 30, 1996, the Company had an accumulated deficit of approximately \$56.9 million. The Company's losses will increase significantly over the next twelve months as it incurs expenses related to its marketing and sales organization, constructing a second manufacturing plant, and expanding the Company's existing plant, preclinical and clinical assessment of potential new products and ongoing research and development activities. To achieve profitability, the Company must successfully obtain required regulatory approvals, manufacture, introduce and market the MUSE (alprostadil) product. The time required to reach profitability is highly uncertain and there is no assurance that the Company will be able to achieve profitability on a sustained basis, if at all.

#### FUTURE CAPITAL NEEDS AND UNCERTAINTY OF ADDITIONAL FINANCING

The Company expects to incur substantial additional costs, including expenses related to its marketing and sales organization, a second manufacturing plant and expansion of the Company's existing plant, new product preclinical and clinical costs, ongoing research and development activities, and general corporate purposes. The Company anticipates that its existing capital resources will be sufficient to support the Company's operations

through commercial introduction of MUSE (alprostadil) in the United States and Europe but may not be sufficient for the introduction of any additional future products. While the Company received an approvable letter from the FDA for MUSE (alprostadil) in October 1996, the Company cannot begin marketing the product in the United States until it has received final FDA marketing clearance, which is subject to final standard labeling requirements and agreement that the Company's manufacturing facility, methods, and controls comply with FDA requirements. Accordingly, the Company anticipates that it may be required to issue additional equity or debt securities and may use other financing sources including, but not limited to, corporate alliances and lease financings to fund the future development and possible commercial launch of its products. The sale of additional equity securities can be expected to result in additional dilution to the Company's stockholders. There can be no assurance that such funds will be available on terms satisfactory to the Company, or at all. Failure to obtain adequate funding could cause a delay or cessation of the Company's product development and marketing efforts and would have a material adverse effect upon the Company's business, financial condition and results of operations. The Company's working capital and additional funding requirements will depend upon numerous factors, including: (i) the ability to obtain and timing and costs of obtaining regulatory approvals; (ii) the level of resources that the Company devotes to sales and marketing capabilities; (iii) the level of resources that the Company devotes to expanding manufacturing capacity; (iv) the activities of competitors; (v) the progress of the Company's research and development programs; (vi) the timing and results of preclinical testing and clinical trials; and (vii) technological advances.

#### DEPENDENCE ON KEY PERSONNEL

The Company's progress to date has been highly dependent upon the skills of a limited number of key management personnel. To reach its future business objectives, the Company will need to hire numerous other qualified personnel in the areas of sales, manufacturing, clinical trial management and preclinical testing. There can be no assurance that the Company will be able to hire such personnel, as the Company must compete with other companies, academic institutions, government entities and other agencies. The loss of any of the Company's key personnel or the failure to attract or retain necessary new employees could have an adverse effect on the Company's research, product development and business operations.

#### RISKS RELATING TO INTERNATIONAL OPERATIONS

In the event the Company receives necessary foreign regulatory approvals, the Company plans to market its products internationally. Changes in overseas economic conditions, currency exchange rates, foreign tax laws or tariffs or other trade regulations could have a material adverse effect on the Company's

business, financial condition and results of operations. The anticipated international nature of the Company's business is also expected to subject it and its representatives, agents and distributors to laws and regulations of the foreign jurisdictions in which they operate or the Company's products are sold. The regulation of drug therapies in a number of such jurisdictions, particularly in the European Union, continues to develop, and there can be no assurance that new laws or regulations will not have a material adverse effect on the Company's business, financial condition and results of operations. In addition, the laws of certain foreign countries do not protect the Company's intellectual property rights to the same extent as do the laws of the United States.

#### PRODUCT LIABILITY AND AVAILABILITY OF INSURANCE

The use of the Company's products in clinical trials may expose the Company to product liability claims and possible adverse publicity. These risks also exist with respect to the Company's products, if any, that receive regulatory approval for commercial sale. The Company currently maintains insurance coverage for the clinical use of its products, but does not have insurance coverage for the commercial sale of its products. There can be no assurance that the Company will be able to obtain product liability insurance. There can be no assurance that the Company's present or future insurance will provide adequate coverage or be available at a reasonable cost or that product liability claims would not adversely affect the business or financial condition of the Company.

#### UNCERTAINTY OF PHARMACEUTICAL PRICING AND REIMBURSEMENT

In the United States and elsewhere, sales of pharmaceutical products currently are dependent, in part, on the availability of reimbursement to the consumer from third party payors, such as government and private insurance plans. Third party payors are increasingly challenging the prices charged for medical products and services. If the Company succeeds in bringing one or more products to the market, there can be no assurance that these products will be considered cost effective and that reimbursement to the consumer will be available or sufficient to allow the Company to sell its products on a competitive basis.

#### UNCERTAINTY AND POSSIBLE NEGATIVE EFFECTS OF HEALTHCARE REFORM

The healthcare industry is undergoing fundamental changes that are the result of political, economic and regulatory influences. The levels of revenue and profitability of pharmaceutical companies may be affected by the continuing efforts of governmental and third party payors to contain or reduce healthcare costs through various means. Reforms that have been and may be considered include mandated basic healthcare benefits, controls on healthcare spending

through limitations on the increase in private health insurance premiums and Medicare and Medicaid spending, the creation of large insurance purchasing groups and fundamental changes to the healthcare delivery system. Due to uncertainties regarding the outcome of healthcare reform initiatives and their enactment and implementation, the Company cannot predict which, if any, of the reform proposals will be adopted or the effect such adoption may have on the Company. There can be no assurance that future healthcare legislation or other changes in the administration or interpretation of government healthcare or third-party reimbursement programs will not have a material adverse effect on the Company. Healthcare reform is also under consideration in some other countries.

#### CONTROL BY EXISTING STOCKHOLDERS

As of September 30, 1996, the Company's officers, directors and principal stockholders, and certain of their affiliates, beneficially owned approximately 11% of the Company's outstanding Common Stock. Such concentration of ownership may have the effect of delaying, defining or preventing a change in control of the Company. Additionally, these stockholders will have significant influence over the election of directors of the Company. This concentration of ownership may allow significant influence and control over Board decisions and corporate actions.

#### POTENTIAL VOLATILITY OF STOCK PRICE

The stock market has recently experienced significant price and volume fluctuations unrelated to the operating performance of particular companies. In addition, the market price of the Company's Common Stock, like the securities of other therapeutic companies without approved products, has been highly volatile and is likely to continue to be so. Factors such as variations in the Company's financial results, comments by security analysts, the Company's ability to scale up its manufacturing capability to commercial levels, the Company's ability to successfully sell its product in the United States and Europe, any loss of key management, the results of the Company's clinical trials or those of its competition, adverse regulatory actions or decisions, announcements of technological innovations or new products by the Company or its competition, changing governmental regulations and developments with respect to FDA submissions, patents or other proprietary rights, product or patent litigation or public concern as to the safety of products developed by the Company, may have a significant effect on the market price of the Company's Common Stock.

#### ANTI-TAKEOVER EFFECT OF SHAREHOLDER RIGHTS PLAN AND CERTAIN CHARTER AND BYLAW PROVISIONS

In February 1996, the Company's Board of Directors authorized its reincorporation in the State of Delaware (the

"Reincorporation") and adopted a Shareholder Rights Plan. The Shareholder Rights Plan provides for a dividend distribution of one Preferred Shares Purchase Right (a "Right") on each outstanding share of the Company's Common Stock. Each Right entitles stockholders to buy 1/1000th of a share of VIVUS Series A Participating Preferred Stock at an exercise price of \$100.00. The Rights will become exercisable following the tenth day after a person or group announces acquisition of 20% or more of the Company's Common Stock, or announces commencement of a tender offer, the consummation of which would result in ownership by the person or group of 20% or more of the Company's Common Stock. The Company will be entitled to redeem the Rights at \$0.01 per Right at any time on or before the tenth day following acquisition by a person or group of 20% or more of the Company's Common Stock. The Company's reincorporation into the State of Delaware was approved by its stockholders and effective in May 1996.

The Shareholder Rights Plan and certain provisions of the Company's Certificate of Incorporation and Bylaws, as adopted in connection with the reincorporation, may have the effect of making it more difficult for a third party to acquire, or of discouraging a third party from attempting to acquire, control of the Company. The Company's Certificate of Incorporation allows the Company to issue Preferred Stock without any vote or further action by the stockholders, and certain provisions of the Company's Certificate of Incorporation and Bylaws eliminate the right of stockholders to act by written consent without a meeting, specify procedures for director nominations by stockholders and submission of other proposals for consideration at stockholder meetings, and eliminate cumulative voting in the election of directors. Certain provisions of Delaware law could also delay or make more difficult a merger, tender offer or proxy contest involving the Company, including Section 203, which prohibits a Delaware corporation from engaging in any business combination with any interested stockholder for a period of three years unless certain conditions are met. The Shareholder Rights Plan, the possible issuance of Preferred Stock, the procedures required for director nominations and stockholder proposals and Delaware law could have the effect of delaying, deferring or preventing a change in control of the Company, including without limitation, discouraging a proxy contest or making more difficult the acquisition of a substantial block of the Company's Common Stock. These provisions could also limit the price that investors might be willing to pay in the future for shares of the Company's Common Stock.

#### ABSENCE OF DIVIDENDS

The Company has never paid dividends on its Common Stock and will not pay dividends in the foreseeable future.



## PART II: OTHER INFORMATION

## Item 1. Legal Proceedings

A former consultant to the Company has claimed that he is the inventor of certain technology disclosed in two of the Company's patents. The former consultant further claims that the Company defrauded him by allegedly failing to inform him that it intended to use and patent this technology and by failing to compensate him for the technology in the manner allegedly promised. On May 28, 1996, the Company filed a complaint for declaratory judgment against the former consultant in the United States District Court for the Northern District of California, which seeks a declaration from the court that the former consultant is not an inventor of any of the technology disclosed in the patent. On July 17, 1996, the former consultant filed a lawsuit which seeks to have two of the Company's patents declared invalid on the grounds that they fail to list him as an inventor. On September 16, 1996, the Court dismissed the consultant's lawsuit, and ordered the consultant to refile his claims or counterclaims to the action initiated by the Company on May 28, 1996. The consultant filed his counterclaim on September 26, 1996. In a separate matter, on April 10, 1996, the licensors in an agreement by which the Company acquired a patent license filed a lawsuit in a Texas State court that alleges that they were defrauded in connection with the renegotiation of the license agreement between the Company and the licensors. On May 8, 1996, the action was removed to the United States District Court for the Western District of Texas. In addition to monetary damages, the licensors seek to return to the terms of the original license agreement. The Company has conducted a review of the circumstances surrounding these two matters and believes that the allegations are without merit. Although the Company believes that it should prevail, the uncertainties inherent in litigation prevent the Company from giving any assurances about the outcome of such litigation.

## Item 4. Submission of Matters to a Vote of Security Holders.

None.

## Item 6. Exhibits and Reports on Form 8-K

## (a) Exhibits (in accordance with Item 601 of Regulation S-K)

- \*\* 3.1 Articles of Incorporation, as amended
- \* 3.2 Bylaws of the Registrant
- \* 4.1 Specimen Common Stock Certificate of the Registrant
- \* 4.2 Registration Rights as amended
- \*\* 4.3 Form of Agreement Not to Sell by and between the

Registrant and certain shareholders and option holders

- \* 4.4 Form of Preferred Stock Purchase Warrant issued by the Registrant to Invemed Associates, Inc., Frazier Investment Securities, L.P., and Cristina H. Kepner
- # 4.5 Amended and Restated Preferred Shares Rights Agreement, dated as of June 18, 1996 by and between Vivus, Inc. and First Interstate Bank of California, including the Certificate of Determination, the form of Rights Certificate and the Summary of Rights attached thereto as Exhibits A, B, and C, respectively.
- \*+10.1 Assignment Agreement by and between Alza Corporation and the Registrant dated December 31, 1993
- \*+10.2 Memorandum of Understanding by and between Ortho Pharmaceutical Corporation and the Registrant dated February 25, 1992
- \*10.3 Assignment Agreement by and between Ortho Pharmaceutical Corporation and the Registrant dated June 9, 1992
- \*+10.4 License Agreement by and between Gene A. Voss, M.D., Allen C. Eichler, M.D., and the Registrant dated December 28, 1992
- \*+10.5A License Agreement by and between Ortho Pharmaceutical Corporation and Kjell Holmquist AB dated June 23, 1989
- \*+10.5B Amendment by and between Kjell Holmquist AB and the Registrant dated July 3, 1992
- \*10.5C Amendment by and between Kjell Holmquist AB and the Registrant dated April 22, 1992
- \*+10.5D Stock Purchase Agreement by and between Kjell Holmquist AB and the Registrant dated April 22, 1992
- \*+10.6A License Agreement by and between Amsu, Ltd., and Ortho Pharmaceutical Corporation dated June 23, 1989
- \*+10.6B Amendment by and between Amsu, Ltd., and the Registrant dated July 3, 1992
- \*10.6C Amendment by and between Amsu, Ltd., and the Registrant dated April 22, 1992
- \*+10.6D Stock Purchase Agreement by and between Amsu, Ltd., and the Registrant dated July 10, 1992
- \*10.7 Supply Agreement by and between Paco Pharmaceutical Services, Inc., and the Registrant dated November 10, 1993
- \*+10.8 Agreement by and among Pharmatech, Inc., Spolana Chemical Works AS, and the Registrant dated June 23, 1993
- \*10.9 Master Services Agreement by and between the Registrant and Teknekron Pharmaceutical Systems dated August 9, 1993
- \*10.10 Lease by and between McCandless-Triad and the Registrant dated November 23, 1992, as amended

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\*\*\*10.11 Form of Indemnification Agreements by and among the Registrant and the Directors and Officers of the Registrant

\*\*10.12 1991 Incentive Stock Plan and Form of Agreement, as amended

\*10.13 1994 Director Option Plan and Form of Agreement

\*10.14 Form of 1994 Employee Stock Purchase Plan and Form of Subscription Agreement

\*10.15 Stock Restriction Agreement between the Company and Virgil A. Place, M.D. dated November 7, 1991

\*10.16 Stock Purchase Agreement between the Company and Leland F. Wilson dated June 26, 1991, as amended

\*10.17 Letter Agreement between the Registrant and Leland F. Wilson dated June 14, 1991 concerning severance pay

\*10.18 Letter Agreement between the Registrant and Paul Doherty dated January 26, 1994 concerning severance pay

\*\*10.19 Guaranteed Maximum Price Contract by and between the Registrant and Marshall Contractors, Inc. dated January 27, 1995

\*\*10.20 Sub-lease by and among the Registrant, Argonaut Technologies, Inc., ESCAgenetics Corp. and Tanklage Construction Co. dated March 13, 1995

\*\*\*\*+10.21 Distribution Services Agreement between the Registrant and Synergy Logistics, Inc. (a wholly- owned subsidiary of Cardinal Health, Inc.) dated February 9, 1996

\*\*\*\*+10.22 Manufacturing Agreement between the Registrant and CHINOIN Pharmaceutical and Chemical Works Co., Ltd. dated December 20, 1995

+10.23 Distribution and Services Agreement between the Registrant and Alternate Site Distributors, Inc. dated July 17, 1996

\*\*\*\*\*+10.24 Distribution Agreement made as of May 29, 1996 between the Registrant and Astra AB

10.25 Menlo McCandless Office Lease made as of August 30, 1996 by and between Registrant and McCandless - Triad

10.26 Sublease Agreement made as of August 22, 1996 by and between Registrant and Plant Research Technologies

11.1 Computation of net loss per share

27.1 Financial Data Schedule

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\* Incorporated by reference to the same-numbered exhibit filed with the Registrant's Registration Statement on Form S-1 No. 33-75698.

\*\* Incorporated by reference to the same-numbered exhibit filed with the Registrant's Registration Statement on Form S-1 No. 33-90390.

- \*\*\* Incorporated by reference to the same-numbered exhibit filed with the Registrant's Form 8-B filed with the Commission on June 24, 1996
- \*\*\*\* Incorporated by reference to the same-numbered exhibit filed with the Registrant's Quarterly Report on Form 10Q for the quarter ended March 31, 1996.
- \*\*\*\*\* Incorporated by reference to the same numbered exhibit filed with the Registrant's Current Report on Form 8-K/A filed with the Commission on June 21, 1996.
- # Incorporated by reference to exhibit 99.1 filed with the Registrants Amendment No. 1 to Form 8-A filed with the Commission on June 24, 1996.
- + Confidential treatment granted.

(b) Reports on Form 8-K

None.

## 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 thereunto duly authorized.

VIVUS, Inc.

Date: November 13, 1996

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/s/ DAVID C. YNTEMA

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David C. Yntema  
Chief Financial Officer

/s/ LELAND F. WILSON

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Leland F. Wilson  
President and Chief  
Executive Officer

## INDEX TO EXHIBITS

Exhibit	Description
- - - - -	- - - - -
10.23	Distribution and Services Agreement between the Registrant and Alternate Site Distributors, Inc. dated July 17, 1996
10.25	Menlo McCandless Office Lease made as of August 30, 1996 by and between Registrant and McCandless - Triad
10.26	Sublease Agreement made as of August 22, 1996 by and between Registrant and Plant Research Technologies
11.1	Computation of net income (loss) per share
27.1	Financial Data Schedule

## DISTRIBUTION AND SERVICES AGREEMENT

This Agreement is made July 17, 1996, between VIVUS, Inc., a California corporation ("VIVUS") and Alternate Site Distributors, Inc., a California corporation ("ASD").

## Background Information

A. VIVUS is, among other things, in the business of manufacturing, selling, and distributing pharmaceutical and therapeutic products in the United States.

B. ASD is, among other things, in the business of purchasing pharmaceutical products for resale to alternate care markets, including to physician offices, and in the business of providing telemarketing to physicians and providing customer service to physicians and manufacturer's sales representatives.

C. VIVUS desires to engage ASD (as limited pursuant to the terms of Section 2 below), for various services relating to its Products (as such term is defined in Appendix A attached hereto) including its first advanced pharmacological and therapeutic product and application system for the treatment of erectile dysfunction known as MUSE(R) (aplprostadi) ("MUSE") as (1) its primary agent on a non-exclusive basis for distribution and reporting of all samples (as such term is defined in Appendix A attached hereto) which VIVUS shall provide in its sole discretion for distribution in the United States, (2) its primary agent on a non-exclusive basis for storage, distribution and reporting of all promotional and literature marketing materials developed by VIVUS for the Products which VIVUS shall provide in its sole discretion for distribution in the United States, (3) its primary telemarketing agent on a non-exclusive basis in the United States, and (4) an agent for servicing 1-800 customer service line(s) to be accessed by U.S. physicians and VIVUS's U.S. sales representatives for the Products. VIVUS also desires to identify ASD to it called on physician practices in the United States for Products as a competitively priced, full service physician supplier for VIVUS's trade pharmaceutical products listed in Exhibit A, and such other products that may be added to Exhibit A by VIVUS and ASD from time to time. All services to be performed by ASD are described in this Agreement, and are to be performed upon the terms and conditions set forth in this Agreement.

## Statement of Agreement

VIVUS and ASD (the "Parties") hereby acknowledge the accuracy of the above background information and agree as follows:

1. Definitions. Except as otherwise provided in this Agreement, capitalized terms used herein shall have the respective meanings assigned thereto in Appendix A for all purposes hereof (all definitions shall be equally applicable to both singular and plural forms of the terms defined.)

2. Appointment. (a) Upon the terms and conditions described in this Agreement, VIVUS hereby appoints ASD: (i) as its primary agent on a non-exclusive basis for distribution of Samples to physicians as selected and approved by VIVUS in the United States, (ii) as its primary agent on a non-exclusive basis for storage of Marketing Materials for the Products and distribution, at VIVUS's direction, to physicians in the United States and to VIVUS's U.S. sales representatives, (iii) as its primary telemarketing agent on a non-exclusive basis for outbound telemarketing for the Products at VIVUS's direction to physician practices in the United States, (iv) an agent for servicing a dedicated VIVUS U.S. customer service operation including VIVUS owned 1-800 inbound telephone service line(s) to be accessed by U.S. physicians and VIVUS's U.S. sales representatives. ASD will be a purchaser of Products for resale to physicians in the United States. VIVUS will identify ASD as a competitively priced, physician supply alternative for Products and a full service supply alternative for other physician product and supply needs. This identification of ASD as a supplier will be provided by VIVUS so long as ASD represents a competitive, full service (as described in this Section 2) supply source for the Products. Notwithstanding the foregoing, VIVUS may elect to appoint other specialty distributors as qualified VIVUS customers for the purchase of Products for resale to physician practices.

(b) The Services shall be performed in accordance with the following agreed upon terms and conditions and in accordance with the implementation timing prescribed in this Agreement and as developed by the joint project team formed by the Parties. The services described in clause (i), (ii), (iii), and (iv) of Subparagraph 2(a) above are hereinafter referred to collectively as the "Services". ASD agrees to use its best efforts to provide the Services and undertake its other obligations under this Agreement.

(c) Samples. VIVUS will supply Samples at no charge to ASD as determined by a forecast developed by VIVUS based on a thirty (30) calendar days' forecasted utilization rate. ASD will warehouse and inventory Samples at ASD's current distribution



facility located at 1851 Monetary Lane, Carrollton, TX until its planned distribution facility to be located in Louisville, KY is opened and fully operational (the "ASD Facility"). Should ASD begin warehousing operations for VIVUS at the Carrollton facility, the specific timing of such relocation to the Louisville facility will be mutually agreed upon by the Parties, with the objective of minimizing disruption of the Services. ASD shall visually inspect each shipment of the Samples for external container or package damage or loss in transit (based upon records provided to ASD from VIVUS) and notify VIVUS when damage or loss has occurred promptly following discovery by ASD of such damage or loss. ASD will store all Samples in full compliance with VIVUS's storage and handling specifications, which are attached hereto as Exhibit B to this Agreement. Such requirements may be supplemented or amended from time to time by VIVUS with prior reasonable notice to ASD and ASD's prior approval.

(d) VIVUS shall pay all costs and expenses of delivery for the Samples to the ASD Facility. VIVUS shall retain title to all Sample inventory until the Samples are received by physicians selected to receive such Samples, at which time title shall rest in the party to which the Samples are shipped.

(e) Sample orders will be directed to ASD from VIVUS sales representatives via telephone, fax, or electronic media and from VIVUS-selected physicians contacted by ASD, at the direction of VIVUS, through outbound telemarketing or via mail, e.g. VIVUS developed Business Reply Cards. ASD will ship Samples after receiving any order that complies with the Requirement(s) of Law. Standard Operating Procedures ("SOPs") will be developed by ASD and approved by VIVUS relative to inventory storage and tracking, inventory handling, inventory variances, disposition of rejected or expired Samples, order acceptance, fulfillment, and reporting.

(f) ASD will assemble Sample orders on a daily basis rotating inventory on a First to Expire, First Out ("FEFO") basis. Sample orders will be shipped via next day air in compliance with SOPs and product handling requirements as set forth in the attached Exhibit B, to be received by the recipient within 48 hours of a lawful Sample order being received by ASD that complies with applicable SOPs. ASD will provide proof of delivery or freight claims processing in the event of lost or damaged shipments.

(g) ASD will provide inventory tracking through its information systems and will comply with all lot traceability, FEFO rotation, expired product disposition, and recalls. However, all costs and expenses incurred by ASD involving product recalls and disposition of Products or Samples because of a lapse or pending lapse of its expiration date will be for the exclusive account of VIVUS and billed by ASD as such costs and expenses are incurred. Additional systems reporting in both electronic and

hard-copy format will be developed by the Parties and will include, among other reports, territory activity tracking for both sampling and sales and any reporting necessary, access to ASD's information systems, however, such access shall be pursuant to procedures set forth, from time to time, in writing by ASD, and ASD's internal SOPs for financial and compliance reporting. ASD will provide VIVUS validation prior to commencement of Sample storage and fulfillment. ASD will provide VIVUS, on an ongoing basis, remote access, pursuant to procedures set forth, from time to time, in writing by ASD, into its information systems for review of VIVUS records and activity.

(h) Marketing Materials. VIVUS will ship all Marketing Materials at no charge to ASD for storage at the ASD Facility. VIVUS will provide ASD with sufficient notice of each quantity of Marketing Materials shipped to ASD. Under normal operating conditions, ASD shall visually inspect each external package of the Marketing Materials for external damage or loss in transit and notify VIVUS when damage or loss has occurred promptly following discovery by ASD of such damage or loss. ASD will store Marketing Materials in compliance with VIVUS's storage and handling specifications. Such requirements may be supplemented or amended from time to time by VIVUS with reasonable prior notice to ASD and its prior approval, which approval shall not be unreasonably withheld.

(i) VIVUS shall pay all costs and expenses of delivering the Marketing Materials to the ASD Facility. For those Marketing Materials directed to physicians, VIVUS shall retain title to Marketing Materials inventory until the Marketing Materials are shipped at VIVUS's direction, at which time title shall rest in the party to which the Marketing Materials are shipped.

(j) Marketing Materials orders will be directed to ASD by VIVUS sales representatives or other authorized VIVUS marketing personnel via telephone, fax, or electronic media. The bulk of the Marketing Materials will be distributed to VIVUS sales representatives in individualized monthly shipments. Other Marketing Materials will be shipped to physicians upon request by VIVUS or by the physicians contacted by ASD, at VIVUS's direction, through outbound telemarketing. Periodic special shipments will be made to supply convention requirements or other special marketing needs as specified by VIVUS. SOPs will be developed by ASD and approved by VIVUS relative to storage, fulfillment and reporting of Marketing Materials.

(k) VIVUS will provide ASD order fulfillment timing requirements and all reporting requirements. ASD will ship Marketing Materials utilizing ground transportation, unless otherwise directed by VIVUS. ASD will establish a separate manifest system for shipment of Marketing Materials. ASD will

perform proof of delivery or freight claims processing in the event of lost or damaged shipments of Marketing Materials.

(l) ASD will provide systems reporting including, among others, inventory tracking and territory activity tracking in a form as agreed to between VIVUS and ASD.

(m) Telemarketing. ASD will provide, at VIVUS's direction, outbound telemarketing services for Products: (i) to build pre-launch awareness and facilitate sales representative access to physicians upon Product Launch, (ii) to physician practices not called on by VIVUS's U.S. sales representatives, (a listing of such physicians to be provided in writing by VIVUS to ASD), (iii) to physicians in vacant VIVUS sales territories, (a list of such vacant territories and physicians within such territories to be provided in writing by VIVUS to ASD), (iv) to develop and at least semi-annually refresh physician profiles, and (v) to conduct market research. In the course of telemarketing activities, ASD will accept physician orders for Products provided the physician meets the customer criteria established by ASD.

(n) VIVUS will identify physicians to be telephoned by ASD and the frequency of such telephone calls, and develop the telescrip messages to which ASD will deliver regarding the Products. SOPs will be developed by ASD and approved by VIVUS. ASD will organize the telemarketing staff so that each telemarketing service representative ("TSR") has primary responsibility for specific VIVUS territories and physicians.

(o) ASD will provide a telemarketing software system to manage it telemarketing activities and to be linked with its customer service system. Systems reports will be developed by the Parties and will include, among others, activity reports for each physician and sales territory detailing the telemarketing calls and the resulting activities including Samples, Marketing Materials and Products shipped.

(p) Customer Service. ASD will develop a customer service organization to respond to all VIVUS sales representative and physician inquiries regarding the Products. A central feature of this customer service is a dedicated, VIVUS owned 1-800 number(s) with an automated response menu covering various options for inbound calls from physicians and VIVUS sales representatives. Call options will include, Marketing Materials ordering, Products ordering from ASD, sample inquiries, information requests, and options for other VIVUS services, not provided by ASD. Technical questions will be referred to VIVUS for response. VIVUS will provide ASD, at no cost or expense to ASD, a dedicated Customer Service line, and related telephone service which will be

operated by ASD from 7:00 a.m. to 7:00 p.m., Central Standard Time.

(q) Orders for Products to be shipped by ASD shall be accepted by ASD by phone, mail, or fax. SOPs will be developed by ASD and approved by VIVUS.

(r) Customer Service representatives will have primary responsibility for a geographic set of VIVUS sales territories and the physicians within those geographic territories. A database of VIVUS sales representatives and physicians will be established by ASD including sales representatives and physician profiles, physician mapping to sales territories, and relating all activities, namely Samples, Marketing Materials and Products. This database shall be linked with the telemarketing software. In establishing the physician profiles, ASD will utilize profile data provided by VIVUS as well as access current physician profiles maintained by[\*].

(s) A component of the customer services provided by ASD, in conjunction with [\*], is the development of a[\*] program for VIVUS targeted physician customers, including the development of a[\*]. Any orders of Products received by [\*] will be accepted by [\*] and coordinated for shipment with ASD, conversely, any orders for [\*] products and services received by ASD will be accepted by ASD and coordinated with [\*].

(t) During the first four (4) months immediately following Product Launch, ASD will provide on a weekly basis, and thereafter on a monthly basis, electronic and hard-copy reports to VIVUS related to, among others, customer service activities, physician orders, sales by VIVUS sales territory, nature and frequency of physician inquiries.

(u) Staffing for Services. ASD will recruit and staff the following positions to provide the Services:

(i) VIVUS Project Manager -- ASD will recruit applicants for the ASD Facility for a dedicated VIVUS Project Manager. VIVUS will participate in the interview process and provide input to the ASD selection decision. VIVUS will also provide training relative to Products, Samples, Marketing Materials, and Services to be provided. ASD will have primary responsibility for training. The hiring date will be mutually agreed upon by the parties and is expected to commence employment no later than July 31, 1996.

(ii) Customer Service Representatives ("CSRs") -- ASD will recruit[\*] CSRs for the ASD Facility. VIVUS will

participate in the interview process and provide input to the ASD selection decisions. VIVUS will provide training for the CSRs relative to Products, Samples, and Marketing Materials. ASD will have primary responsibility for Customer Service training. The hiring date will be mutually agreed upon by the Parties and is expected to be approximately[\*] prior to Product Launch.

(iii) Telephone Service Representatives ("TSRs") -- ASD will recruit[\*] dedicated TSRs for the ASD Facility for the Products. VIVUS will participate in the interview process and provide input to the ASD selection decisions. VIVUS will provide training of TSRs relative to Products, Samples, Marketing Materials, and telescripts. ASD will have primary responsibility for telemarketing training. The hiring date will be mutually agreed upon by the Parties and is expected to be[\*] prior to Product Launch.

Warehouse Supervisor: -- ASD will recruit and select one warehouse employee who will be knowledgeable about the SOPs relating to the storage and handling of all Products, Samples, and Marketing Materials. The hiring date will be mutually agreed upon by the Parties and is expected to be approximately [\*] prior to Product Launch.

3. Targeted Physician Supplier. (a) ASD will purchase Products from VIVUS for resale to physicians. ASD will develop physician marketing materials relative to its [\*] and its [\*] services provided in conjunction with [\*]. VIVUS will identify ASD on selected physician marketing materials as its targeted physician supplier provided that ASD represents a competitive, full service supply source for the Products. VIVUS will also communicate the [\*], full service capabilities of ASD and [\*] by delivering the[\*] developed by ASD and [\*] to its called on physicians provided that ASD represents a competitive, full service supply source for the Products. ASD shall provide VIVUS notice of ASD price changes on Products and special discount offers on Products at least [\*] prior to the effective date.

(b) ASD will purchase and take title to Products and will maintain an adequate amount of inventory. ASD will establish the criteria for physicians to whom it sells and will offer, based upon credit availability for such physicians, VISA/Master Card as a payment option. Returns will be accepted and processed according to VIVUS's returned goods policy published for specialty distributors and which is attached hereto as Exhibit C.

(c) VIVUS may enter into contracts with certain physician practices that meet volume and other specifications to be defined by VIVUS ("Key Account Contracts"). Should Key Account Contract customers wish to enter into a prime vendor arrangement, VIVUS will first offer ASD the opportunity to act as the Key Account

Contract's prime vendor. ASD will accept such prime vendor status with such Key Account Contract customer provided, VIVUS's Key Account Contract customer meets ASD's requirements to qualify as a new ASD customer. ASD may elect to act as the Key Account Contract prime vendor for Products and invoice such customer at VIVUS's Key Account Contract price. Key Account Contracts utilizing ASD as its prime vendor will be advised by VIVUS to order from ASD in economic shipping quantities (i.e. shelf cartons or case packs). [\*] ASD will submit to VIVUS a monthly or more frequent electronic report of all sales to Key Account Contracts. The report shall include at least the following information as to each sale made to a Key Account Contract:

- (i) Key Account Contract Name and DEA number
- (ii) VIVUS's contract number
- (iii) ASD's invoice number and date
- (iv) Product NDC
- (v) Units shipped or returned
- (vi) ASD's unit cost
- (vii) VIVUS's Key Account Contract price
- (viii) [\*]
- (ix) Extended chargeback amount
- (x) Total chargeback amount

(d) Upon receipt and approval of ASD's reports submitted, VIVUS shall issue a credit memo to ASD in the amount of the difference between [\*]. VIVUS will pay such invoiced amounts within [\*] from the date of invoice.

4. Performance Criteria. (a) The Parties will mutually agree in writing upon performance measurements and reporting criteria for each of the Service categories and for servicing of Products ordered. Subject to the terms of this Agreement, ASD will use its best efforts to meet such applicable performance criteria.

(b) To enhance the value of the Services, the Parties shall cause their respective representatives to meet routinely for performance review and strategic planning purposes.

5. Fees. As compensation for the Services, VIVUS shall pay ASD, when due, without notice, demand, counterclaim, setoff, deduction, diminution or reduction, the fees described below (the "Fees"):

(a) [\*]Fees -- Based on [\*] Product Launch, VIVUS will reimburse ASD for the [\*] costs incurred at the rate of[\*] per [\*]for the VIVUS Project Manager which is expected to be hired up to [\*] Product Launch and a rate of [\*] per [\*] for additional staffing (one warehouse person, [\*] CSRS and [\*] TSRs) expected to be hired [\*] Product Launch. Should the timing of hiring

decisions or the level of staffing requirements change, the [\*] fee will be prorated accordingly; and

(b) Monthly Service Fees -- Monthly service fees accruing as of the date of this Agreement at[\*] rate of [\*]; and additional staffing may be added at the discretion of VIVUS at the fully loaded rates of[\*] for each additional TSR and [\*] for each additional CSR);

(c) Samples -- A monthly fee (as compensation for all services related to Samples) at the rate of [\*] per [\*]. This fee is all inclusive, including outbound shipping materials and freight; and

(d) Marketing Materials -- Reimbursement for actual shipping charges for Marketing Materials shipped [\*]; and

(e) Custom Reporting --[\*] fee of [\*] for any custom reporting requested by VIVUS to be developed in accordance with SOP's developed by these Parties. In the event of custom reporting, ASD will provide an estimate of projected costs to VIVUS prior to the commencement of any work. Upon approval by VIVUS, work will commence.

6. Fees, expenses and other charges will be billed and paid according to the following schedule:

(a) [\*] Fees incurred up to [\*] will be billed before [\*] and all other [\*] Fees will be billed on Product Launch, all such [\*] Fees will be due and paid by VIVUS within [\*] from date of invoice.

(b) All other Fees will be pre-billed by ASD on the fifteenth (15th) of the month preceding the Services rendered and VIVUS will pay such fees within [\*] from date of invoice.

(c) Samples Fees will be billed by ASD on the fifteenth (15th) calendar day of the month for the Samples orders shipped during the preceding month. VIVUS will pay the Sample Fees within [\*] from date of invoice.

(d) All other fees, expenses, costs and charges payable by VIVUS to ASD not specifically referenced in Section 6 of this Agreement will be due and payable [\*] from the date ASD bills VIVUS.

(e) Any amounts payable by VIVUS pursuant to this Agreement and not paid when due will be assessed interest (to the extent not prohibited by applicable law) at the rate of 18% per annum from the date such amount is due until paid (or at such lesser rate as may be the maximum permitted by applicable law),

in each case computed on the basis of a 360-day year of twelve 30-day months. All Fee amounts will be reviewed by these parties upon the third anniversary of this Agreement for the purposes of adjusting such Fees to reflect increases in costs and expenses incurred or expected to be incurred by ASD.

7. Products Pricing and Terms. In addition to the fees provided in Section 6 above, and in consideration of the full value of the Services provided by ASD, VIVUS will sell Products to ASD at [\*] its list price to Specialty Distributors. Introductory payment terms (defined as payment terms during the first six months of Product sales) will be [\*] from date of VIVUS's invoice. Thereafter, VIVUS may elect to change payment terms to [\*] from date of VIVUS's invoice. All other sales terms and conditions will be governed by the VIVUS's terms and conditions set forth by VIVUS to the specialty distributor class of trade as set forth in the attached Exhibit D.

8. Term and Termination. (a) The initial term of the agreement (the "Initial Term") shall begin on the date of the agreement and continue until the second anniversary of the Product Launch, unless or until terminated sooner pursuant to the other provisions of this Section. After the Initial Term, this Agreement shall renew automatically for successive renewal terms of one year each unless notice of termination is given by any Party at least one hundred and twenty (120) days prior to the end of the term then in effect, in which case this Agreement shall terminate at the end of that term. Any reference in this Agreement to the "term of this Agreement" shall include the initial term and any such renewal terms.

(b) Either Party shall have the right to terminate this Agreement with or without cause upon one hundred and twenty (120) days prior written notice. In the event either party gives written notice of its intent to terminate this Agreement, VIVUS shall pay ASD, all amounts due and payable ASD and accrued up to and including the date selected for termination of this Agreement. Any payments to be made on a monthly basis shall be prorated on the basis of a 30-day month for any fractional portion of a calendar month included in the term of this Agreement at its commencement or termination.

(c) Either party may terminate this Agreement immediately upon written notice in the event of: (i) the commencement of a voluntary case or other proceeding seeking liquidation, reorganization or other relief with respect to either party or its debts under any bankruptcy, insolvency, corporation or other similar law now or hereafter in effect; or (ii) either party's making a general assignment for the benefit of creditors, or either party's becoming insolvent, or either party taking any corporate action to authorize any of the foregoing.



(d) All accrued payment obligations of the parties under this Agreement, Sections 9 through 15, inclusive and Sections 17 through 23, inclusive, of this Agreement shall survive the termination of this Agreement, and, except as provided elsewhere in this Agreement, no termination of this Agreement shall affect any obligations or liabilities arising, or based upon acts or omissions occurring, prior to the date of such termination.

(e) Upon termination of this Agreement, ASD shall return, at VIVUS's sole cost and expense, all Samples, Marketing Materials, VIVUS records (apart from ASD records), and other VIVUS owned materials which ASD has in its possession.

9. Audits. VIVUS shall have the right during normal business hours (i.e. 8:00 a.m. to 5:00 p.m. local time) at no more than once during any calendar quarter, upon reasonable prior notice, to: (a) review and audit ASD's records related to the Services provided, (b) conduct, together with representatives of ASD, an inventory of the Samples and Marketing Materials at the ASD Facility, and (c) conduct, together with representatives of ASD, a facility audit. Should material issues be discovered during such audits which necessitate ongoing corrective action by ASD or ongoing follow-up action by VIVUS (including the initiation of additional audits on a more frequent basis regarding such area(s) of concern) to ensure ASD's compliance with such corrective action, all such reasonable and directly related expenses will be the responsibility of ASD.

10. Compliance With Laws. During the term of this Agreement, each party shall conduct its activities in connection with this Agreement in compliance with all applicable laws. Specifically, ASD shall comply with all applicable Requirements of Law related to the storage, handling and distribution of Samples, and only the cGMP guidelines as set forth in Section 211.142(b), Section 211.150, Section 211.196 and the Section 211.204, except that ASD shall have no obligation to perform tests or conduct investigations, all of which will be the responsibility of VIVUS, of Part 211 (also known as 21 Code of Federal Regulations, Chapter 1, as such Guidelines and Requirements of Law are applicable to ASD's activities, and VIVUS shall comply with all applicable Requirements of Law related to the importation, manufacture, distribution, labeling, storage, sale and handling of the Products and Samples.

(b) VIVUS agrees and does hereby represent and warrant to ASD during the term of this Agreement that (1) all Samples and Products, and each shipment of each, or other delivery now and hereafter made by VIVUS to or on the order of ASD will not be, at the time of shipment or delivery, adulterated, misbranded or otherwise prohibited within the meaning of the Act or within the meaning of any applicable state or municipal law and (2) such

Samples and Product is not, at the time of shipment or delivery to ASD, merchandise which may not be introduced or delivered for introduction into interstate commerce under the provisions of Sections 404 or 405 of the Act, and (3) all such Samples and Products will be the subject of a duly approved NDA and may be legally transported or sold under applicable Requirements of Law and VIVUS guarantees that only those chemicals or sprays, and the amounts of such chemicals or sprays, approved by Governmental Authority, have been used in any of the Samples and Products, and (4) all Samples and Products have been duly approved by all Governmental Authority for commercial sale and shipment within the United States.

11. Corporate Authority. During the term of this Agreement, each party continually represents and warrants to the other that: (a) it has full power and authority to enter into this Agreement and perform and observe all obligations and conditions to be performed or observed by it under this Agreement without any restriction by any other agreement or otherwise, (b) the execution, delivery and performance of this Agreement has been duly authorized by all necessary corporate action of that Party, (c) this Agreement constitutes the legal, valid and binding obligation of that Party, (d) no approvals, consents, orders or authorizations of or designation, registration, declaration or filing with any Governmental Authority (within, as a part of, or constituting the United States of America) is required for the sale and distribution of the Samples or the Products, (e) there is no action, proceeding, or investigation pending or, so far as each party knows, threatened, which questions the validity of this Agreement, the patents and licenses related to and for the Samples or the Products, any actions taken or to be taken pursuant to this Agreement, and (f) the Samples and the Products, or any part thereof, has been materially adversely affected in any way as a result of any legislative or regulatory change, or any revocation of license or right to manufacture, distribute, handle, store, sell or market any of the Samples or the Products. EXCEPT FOR ANY EXPRESSED REPRESENTATIONS, WARRANTIES, OR COVENANTS SET FORTH IN THIS AGREEMENT, VIVUS MAKES NO OTHER WARRANTIES WITH RESPECT TO THE PRODUCTS, EXPRESS, IMPLIED, STATUTORY OR COMMUNICATION WITH VIVUS, AND VIVUS SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTY OF NONINFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

12. Taxes. VIVUS shall pay when due all Taxes, excluding any personal property tax associated with ASD's equipment used in connection with the Services, and other taxes or similar charges now or hereafter imposed upon or as a result of the Samples and/or the Marketing Materials, none of which have been included in the fees payable to ASD under this Agreement. ASD shall maintain its records for use by VIVUS to complete and file returns relating to such Taxes.

13. Trademarks/Data. Neither Party shall have the right to use the name of the other Party or the other Party's trademarks, service marks, logos, other similar marks or data and information in any manner except with the prior written approval of that Party. Data and information which shall be deemed to belong to VIVUS will be the data and information related to the Products, Samples and Marketing Materials. Data and information which shall be deemed to belong to ASD shall be the data and information related to all goods, products and services offered and sold by ASD (and not described in Exhibit A or Section 2 above) and all data and information relating to any of ASD's customers and their respective profiles.

14. Confidentiality. (a) Each Party acknowledges that as a result of this Agreement, that each Party shall learn Confidential Information of the other Party. Neither Party shall disclose any Confidential Information of the other Party to any person or entity, or use, or permit any person or entity to use, any of such confidential information, excepting only: (a) disclosures on a confidential basis to and use by the directors, officers, employees, and agents of that Party, or its affiliates, who have a reasonable need to know such information in connection with that Party's performance of this Agreement, and (b) disclosures which are required by law, or legal process, as reasonably determined by that Party or its legal counsel, or are made on a confidential basis to that Party's attorneys, accountants, and other professional advisors in connection with matters relating to this Agreement. The specific material terms of this Agreement shall be deemed to be Confidential Information of each Party.

(b) The obligation of confidentiality hereunder shall survive the termination of this Agreement for a period of three (3) years.

(c) Upon termination of this Agreement (for any reason) each Party shall promptly: (i) return to the other Party or destroy all documentation and other materials (including copies of original documentation or other materials) containing any Confidential Information of the other Party; or (ii) certify to the other Party, pursuant to a certificate in form and substance reasonably satisfactory to the other Party, as to the destruction of all such documentation and other materials.

15. Indemnification. (a) Each Party shall indemnify and hold harmless the other and their respective Related Parties from and against all claims, liabilities, losses, damages, costs and expenses (including without limitation reasonable attorneys' fees) arising directly or indirectly out of any act or omission of that Party or any failure of that Party to perform and observe fully all obligations and conditions to be performed or observed

by that Party pursuant to this Agreement or any breach of any warranty made by that Party in this Agreement. Further, VIVUS does hereby protect, indemnify and hold harmless ASD and its related parties from and against all claims, liabilities, losses, damages, costs and expenses (including without limitation, attorneys' fees and expenses) imposed upon or incurred by or asserted against ASD and/or its Related Parties related to or arising from (1) any claim of patent or copyright infringement and (2) any loss of or damage to property, accident, injury to or death of a person or persons occurring or arising from the storage, handling, use, non-use, demonstration, consumption, ingestion, digestion, manufacture, production and assembly, of the Samples and the Products and their transportation to ASD, excepting only for claims arising out of the negligence of ASD or its employees. Further, ASD does hereby agree to protect, indemnify and hold harmless VIVUS and its related parties from and against all claims, liabilities, losses, damages, costs and expenses (including without limitation, attorneys' fees and expenses) imposed upon or incurred by or asserted against VIVUS and/or its Related Parties related to or arising from any loss of or damage to property, accident, injury to or death of a person or persons occurring or arising from the negligence of ASD (or its employees) and the failure of ASD to substantially comply with written and mutually approved SOP's and VIVUS directives, excepting here from, any act, negligence or omission of VIVUS or its Related Parties. NOTWITHSTANDING THE FOREGOING OR ANY OTHER PROVISION TO THE CONTRARY CONTAINED IN THIS AGREEMENT, NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY FOR ANY LOST PROFITS, CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL, OR OTHER SIMILAR DAMAGES ARISING OUT OF OR IN CONNECTION WITH A BREACH OF THIS AGREEMENT OR ANY EXPENSES, CHARGES, COSTS OR LIABILITIES, WHETHER FORESEEN OR UNFORESEEN, ARISING FROM OR RELATED TO THE ACT OF TERMINATING THIS AGREEMENT.

(b) The obligations and liabilities of VIVUS or ASD with respect to ASD Indemnified Claims or VIVUS Indemnified Claims, respectively, (collectively, the "Indemnified Claims"), resulting from the assertion of liability by third parties (each, a "Third Party Claim") shall be subject to the following terms and conditions:

(i) The party claiming indemnification (the "Indemnified Person") shall give prompt written notice to the other party of any Third Party Claim which may give rise to a Third Party Claim against the other party (the "Indemnifying Person"), stating the nature and basis of said Third Party Claim and the amount thereof to the extent known. Each Notice of Claim shall be accompanied by copies of all relevant documentation with respect to such Third Party Claim, including, without limitation, any summons, complaint or other pleading which may have been served or written demand or other document or instrument.

(ii) If the Indemnifying Person shall acknowledge in a writing delivered to the Indemnified Persons that the Indemnifying Person shall be obligated under the terms of its indemnity hereunder in connection with such Third Party Claim, then the Indemnifying Person shall have the right to assume the defense of any Third Party Claim at its own expense and by its own counsel (reasonably satisfactory to the Indemnified Persons); provided, however, that the Indemnifying Person shall not have the right to assume the defense of any Third Party Claim, notwithstanding the giving of such written acknowledgment, if (aa) such Third Party Claim seeks an injunction, restraining order, declaratory relief or other nonmonetary relief and, if decided adversely, such Third Party Claim could have a material adverse effect on the financial condition, properties, assets, liabilities, business, operations or prospects of any of the Indemnified Persons or (bb) the named parties to any such action or proceeding (including any impleaded parties) include both the Indemnified Persons and the Indemnifying Person and the former shall have been advised by counsel that there are one or more legal or equitable defenses available to them which are different from or additional to those available to the Indemnifying Person, and, in the reasonable opinion of the Indemnified Persons, counsel for the Indemnifying Person could not adequately represent the interests of the Indemnified Persons because such interests could be in conflict with those of the Indemnifying Person (any Third Party Claim of the type referred to in (aa) or (bb) being a "Nonassumable Claim").

(iii) If, in accordance with the provisions of the preceding subparagraph (ii), the Indemnifying Person shall assume the defense of a Third Party Claim (other than a Nonassumable Claim), the Indemnifying Person shall not be responsible for any legal or other defense costs subsequently incurred by the Indemnified Persons in connection with the defense thereof. If the Indemnifying Person does not exercise its right to assume the defense of such a Third Party Claim by giving the written acknowledgment referred to in subparagraph (ii) above or may not assume such defense pursuant to such subparagraph (ii) above, then the Indemnified Persons may assume such defense and the costs, expenses and reasonable attorneys' fees incurred shall continue to constitute Losses hereunder.

(iv) Anything contained herein to the contrary notwithstanding, neither the Indemnifying Person nor the Indemnified Persons shall admit any liability with respect to, or settle, compromise or discharge, any Third Party Claim without the written consent of the other, which consent shall not be unreasonably withheld. In addition, each of the Indemnifying Person and the Indemnified Persons shall cooperate and act in a reasonable and good faith manner to minimize Losses relating to any Third Party Claim.

(v) The foregoing indemnities shall not extend to any claims arising out of one or more of: (aa) the incorrectness of any representation or warranty made by Indemnified Person pursuant to this Agreement; (bb) the failure by such Indemnified Person to perform or observe any agreement or covenant made by it in this Agreement; or (cc) the willful misconduct or gross negligence of such Indemnified Person.

16. Insurance. During the term of this Agreement: (a) each party will maintain product liability and commercial general liability insurance having a limit of not less than \$1 million, pursuant to one or more insurance policies with reputable insurance carriers; and (b) VIVUS shall maintain property damage insurance for the Samples and Marketing Materials located at the ASD Facility or in transit to or from the ASD Facility. Each party shall designate the other party as an "additional insured" under all insurance policies referenced in this paragraph. Prior to the Product Launch and the commencement of Services, each party shall deliver to the other certificates evidencing such insurance. Neither party shall cause or permit such insurance to be canceled or modified to materially reduce its scope or limits of coverage during the term of this Agreement. Except for any losses resulting from the negligence or intentional misconduct of ASD (in which case ASD shall be liable for any damage or loss), VIVUS shall bear all risk of loss or damage with respect to Samples or Marketing Materials, whether located at the ASD Facility or otherwise. ASD shall bear all risk of loss or damage with respect to Products purchased by ASD once said Products are in ASD's possession.

17. Notices. Any notice or other communication required or desired to be given to any Party under this Agreement shall be in writing and shall be deemed given when: (a) deposited in the United States mail, first-class postage prepaid, and addressed to that Party at the address for such Party set forth at the end of this Agreement; (b) delivered to an express delivery service for delivery to that Party at that address; or (c) sent by facsimile transmission, with electronic confirmation, to that Party at its facsimile numbers set forth at the end of this Agreement. Any Party may change its address or facsimile number for notices under this Agreement by giving the other Party notice of such change.

18. Arbitration. Subject to Section 19, below, any and all disagreements or controversies arising out of or with respect to this Agreement may, upon mutual agreement, be settled by binding arbitration to be held, and the award made, in a county located in California, pursuant to the then-applicable rules of the American Arbitration Association (to the extent not inconsistent with this Agreement). Each Party shall bear the costs and expenses of preparing and presenting its case at the arbitration.

All other costs and expenses of arbitration shall be borne by the Parties as determined in the Arbitration.

19. Remedies. With respect to the provisions of Section 14 of this Agreement, each Party acknowledges that in the event of any violation by that Party of any of the provisions of Section 14 of this Agreement, the other Party may suffer irreparable harm and its remedies at law may be inadequate. Accordingly, in the event of any violation or attempted violation of any such provisions of Section 14 by either Party, the other Party shall be entitled to petition for a temporary restraining order, temporary and permanent injunctions, specific performance, and other equitable relief. The rights and remedies of each Party under this Agreement shall be cumulative and in addition to any other rights or remedies available to such Party, whether under any other agreement, at law, or in equity.

20. Governing Law. All questions concerning the validity or meaning of this Agreement or relating to the rights and obligations of the Parties with respect to performance under this Agreement shall be construed and resolved under the laws of the State of California excluding the body of law relating to conflicts of laws.

21. Severability. The intention of the Parties is to comply fully with all laws and public policies, and this Agreement shall be construed consistently with all laws and public policies to the extent possible. If and to the extent that any court of competent jurisdiction determines that it is impossible to construe any provision of this Agreement consistently with any law or public policy and consequently holds that provision to be invalid, such holding shall in no way affect the validity of the other provisions of this Agreement, which shall remain in full force and effect.

22. Non-waiver. No failure by either Party to insist upon strict compliance with any term of this Agreement, to exercise any option, to enforce any right, or to seek any remedy upon any default of the other Party shall affect, or constitute a waiver of, the first Party's right to insist upon strict compliance, to exercise that option, to enforce that right, or to seek that remedy with respect to that default or any prior, contemporaneous, or subsequent default. No custom or practice of the Parties at variance with any provision of this Agreement shall affect, or constitute a waiver of, that Party's right to demand strict compliance with all provisions of this Agreement.

23. Force Majeure. If the performance of any part of this Agreement by either Party shall be affected for any length of time by fire or other casualty, government restrictions, war, riots, strikes or labor disputes, lock out, transportation

delays, electronic disruptions, telecommunication failures, and acts of God, or any other causes which are beyond the control of the Parties (financial inability excepted), such Party shall not be responsible for delay or failure of performance of this Agreement for such length of time, provided, however, that the obligation of one Party to pay amounts due to any other Party shall not be subject to the provisions of this Section.

24. Captions. The captions of the various sections of this Agreement are not part of the context of this Agreement, and are only labels to assist in locating those sections, and shall be ignored in construing this Agreement.

25. Genders and Numbers. Where permitted by the context, each pronoun in this Agreement includes the same pronoun in the other genders or numbers and each noun used in this Agreement includes the same noun in other genders.

26. Complete Agreement. This Agreement contains the entire agreement between the Parties and supersedes all prior or contemporaneous discussions, negotiations, representations, warranties, or agreements relating to the subject matter of this Agreement. No changes to this Agreement shall be made or be binding on either Party unless made in writing and signed by both Parties. All schedules, Exhibits, Appendixes referred to in this Agreement are incorporated herein and made a part hereof as fully as if set forth herein.

27. Successors. Except as set forth in this Section, neither Party shall have the right to assign this Agreement or any of such Party's rights or obligations under this Agreement without the prior written consent of the other Party, which consent shall not be unreasonably withheld. After providing written notice to ASD, VIVUS may assign this Agreement to a party that succeeds to all or substantially all of VIVUS's business or assets relating to this Agreement whether by sale, merger, operation of law or otherwise.

28. Approvals. When this Agreement requires the approval of one or both of the parties to this Agreement, each and every such approval sought will not be unreasonably withheld by the party required to provide its approval.

29. Relationship of the Parties. The relationship of the Parties is and shall be that of independent contractors. This Agreement does not establish or create a partnership or joint venture among the Parties.

30. Interpretation. The parties have jointly negotiated this Agreement and, thus, neither this Agreement nor any provision hereof shall be interpreted for or against any party on



the basis the party or the party's attorney drafted the Agreement or the provision at issue.

This Agreement shall be binding upon, inure to the benefit of, and be enforceable by and against the respective successors and assigns of the Parties.

VIVUS, INC.

ALTERNATE SITE DISTRIBUTORS,  
INC.

By: /s/ LELAND F. WILSON

By: /s/ STEVEN H. COLLIS

-----  
Leland F. Wilson  
President and CEO

-----  
Steven H. Collis  
VP and General Manager

Address and facsimile number:

Address and facsimile number:

545 Middlefield Road,  
Suite 200  
Menlo Park, CA 94025  
Attn: President  
Facsimile (415) 325-5546

2340 Trinity Mills Road,  
Suite 250  
Carrollton, TX 75006  
Attn: General Manager  
Facsimile (214) 416-4848

"Act" means the Federal Food, Drug and Cosmetic Act, Title 21, United States Code, as amended, and the regulations thereunder.

"Agreement" means this Distribution and Services Agreement dated \_\_\_\_\_, 1996, by and between VIVUS, Inc., a California Corporation, and Alternate Site Distributors, Inc., a California Corporation, as may be amended from time to time pursuant to the terms providing for such amendments.

"cGMP" shall have the meaning of current good manufacturing practices and guidelines as published by the Federal Food & Drug Administration.

"Confidential Information" shall mean information, data considered confidential by the party owning such information, whether visual, oral or in written form, but does not include (1) information which is or becomes public without the fault or participation of the other party to this Agreement or which is responsive to legal process or obligation, (2) any information lawfully in the receiving party's possession prior to the date the receiving party receives the disclosing party's information, or (3) any information which either party receives from a third party who rightfully possesses and discloses such information.

"Drug" shall have the meaning as set forth in Section 321(g)(1) of the Act.

"Governmental Authority" shall mean any nation or government, any state or other political subdivision thereof, or any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government.

"Marketing Materials" shall mean brochures, booklets, letters and pamphlets intended to encourage the purchase and/or disbursing of the Products.

"MUSE" shall mean VIVUS's first products and application systems for the treatment of erectile dysfunction.

"NDA" means a New Drug Application as defined in and contemplated by the Act.

"Person" or "Persons" means any corporation, natural person, firm, joint venture, partnership, trust, unincorporated organization, government or any department or agency of any government.

"Pre-Launch" shall mean that period of time between the date of the Agreement and the date of Product Launch.

"Product Launch" shall mean the date selected by VIVUS after VIVUS obtains FDA approval of the Products and upon which ASD is notified by VIVUS that MUSE may be lawfully available for commercial sale and shipment.

"Product" or "Products" means the pharmaceutical and other products that are a part of, or added to from time to time, to Exhibit A attached hereto and which are intended for commercial sale.

"Related Parties" mean the successors, subsidiaries, parent corporations, affiliates, Directors, employees, agents, representatives, related entities and assigns of any Person.

"Requirement(s) of Law" means any law (including, without limitation, consumer law), treaty, rule or regulation or a final and binding determination of an arbitrator or a determination of a court or other Governmental Authority, in each case applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

"Sample" or "Samples" means a product (as opposed to the term "Product(s)") which is not intended to be sold and is labeled as such and is given free of charge to promote sales.

"SEC" means the Securities and Exchange Commission.

"Taxes" shall mean any and all liabilities, losses, expenses, and costs of any kind whatsoever that are, or are in the nature of taxes, fees, or other governmental charges, including interest, penalties, fines and additions to tax imposed by any Federal, state or local government or taxing authority in the United States on or with respect to: (a) the Agreement or any related agreements or any future amendment, supplement, waiver, or consent requested by VIVUS or any required by the Agreement with respect to the execution, delivery or performance of any thereof, or the issuance, acquisition or subsequent transfer thereof, (b) any interest in the Samples or the Marketing Materials, or any part thereof, (c) the return, acquisition, transfer of title, storage, removal, replacement, substitution, purchase, acceptance, possession, rejection, ownership, delivery, non-delivery, use, operation, sale, abandonment, redelivery or other disposition of any interest in the Samples or the Marketing Materials or any part thereof; (d) the receipts or earnings arising from any interest in the Samples or the Marketing Materials or any part thereof; (e) any payment made pursuant to this Agreement or to any of the Samples or the Marketing Materials; or (f) otherwise as a result of or by reason of the

transactions contemplated by this Agreement, excluding, however; taxes imposed upon ASD that are based upon or measured by gross or net income and any franchise Taxes of ASD or any personal property taxes for Products owned by ASD.

EXHIBIT A

List of Products

MUSE alprostadil product line

EXHIBIT B  
VIVUS'S STANDARD OPERATING PROCEDURES  
FOR HANDLING AND SHIPPING  
SAMPLES

Pursuant to Sections 2(c) and 2(f) of the Distribution and Services Agreement, Vivus is currently in the process of developing operating procedures for handling and shipping samples.

EXHIBIT C  
VIVUS RETURNED GOODS POLICY

Pursuant to Section 3(b) of the Distribution and Services Agreement, Vivus is currently in the process of developing returned goods policy.



EXHIBIT D  
VIVUS TERMS AND CONDITIONS  
FOR SPECIALTY DISTRIBUTOR CLASS  
OF TRADE

Pursuant to Section 7 of the Distribution and Services Agreement, Vivus is currently in the process of developing terms and conditions for specialty distributor class of trade.

MCCANDLESS - TRIAD

AND

VIVUS, INC.

LEASE

SUMMARY OF LEASE  
MCCANDLESS - TRIAD

1. DATE OF LEASE:
2. LANDLORD: McCandless - Triad  
3945 Freedom, Circle, Suite 640  
Santa Clara, California 95054
3. TENANT: Vivus, Inc.,  
a Delaware corporation
4. PREMISES: 535 Middlefield Road, Suite 230  
Menlo Park, California
5. SQUARE FEET: 1,809 square feet
6. PERMITTED USER: General office purposes
7. TERM: Three (3) years
  - (a) SCHEDULED COMMENCEMENT DATE: September 12, 1996
  - (b) SCHEDULED EXPIRATION DATE: September 11, 1999
5. RENT:
  - (a) BASIC RENT: \$3,798.50 per month
  - (b) ADJUSTMENTS TO BASIC RENT: None
  - (c) TENANT'S ESTIMATED SHARE OF DIRECT EXPENSES: \$1,175.85 per month
9. SECURITY DEPOSIT: \$4,974.75
10. PARKING SPACES PROVIDED: Seven (7) spaces
11. OTHER IMPORTANT PROVISIONS: Cross Default

THIS SUMMARY OF LEASE IS INTENDED TO SUMMARIZE CERTAIN KEY PROVISIONS IN THE ATTACHED LEASE. IN THE EVENT OF ANY CONFLICT OR INCONSISTENCY BETWEEN THE PROVISIONS OF THIS SUMMARY AND THE LEASE, THE PROVISIONS OF THE LEASE SHALL GOVERN.

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6.	RESTRICTION ON USE
7.	COMPLIANCE WITH LAWS
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45.	RECORDING
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49.	SIGNAGE
50.	SUBMISSION OF LEASE
51.	PREMISES TAKEN AS IS
52.	ADDITIONAL RENT
53.	CROSS DEFAULT

MENLO McCANDLESS  
OFFICE LEASE

THIS LEASE is made this 30th day of August 1996,  
by and between McCANDLESS-TRIAD, a California general partnership  
("Landlord"), and VIVUS, INC., a Delaware corporation ("Tenant").

W I T N E S S E T H :

Landlord leases to Tenant and Tenant leases from Landlord those certain premises outlined in red on Exhibit A (the "Premises") commonly known as 535 Middlefield Road, Suite 230, Menlo Park, California, which Landlord and Tenant hereby agree consists of approximately one thousand eight hundred nine (1,809) square feet in Menlo McCandless Office Center (the "Project"). As used herein the term Project shall mean and include all of the land shown on Exhibit B and all the buildings, improvements, fixtures and equipment now or hereafter situated on said land.

Tenant covenants, as a material part of the consideration of this lease, to perform and observe each and all of the terms, covenants and conditions set forth below, and this lease is made upon the condition of such performance and observance.

1. USE

Subject to the restrictions contained in Paragraph 6, Tenant shall use the Premises for general office purposes and shall not use or permit the Premises to be used for any other purpose.

2. TERM

The term shall be for three (3) years (unless sooner terminated as hereinafter provided) and shall commence on September 12, 1996 and end on September 11, 1999.

3. POSSESSION

(a) If Landlord for any reason cannot deliver possession of the Premises to Tenant by the scheduled commencement date set forth in paragraph 2, this lease shall not be void or voidable, Landlord shall not be liable to Tenant for any loss or damage on account thereof and Tenant shall not be liable for rent until Landlord delivers possession of the Premises to Tenant. If the term commences on a date other than specified in paragraph 2 above,

then the parties shall immediately execute an amendment to this lease stating the actual date of commencement and the revised expiration date. The expiration date of the term shall be extended by the same number of days that Tenant's possession of the Premises was delayed from that set forth in paragraph 2.

(b) Tenant's inability or failure to take possession of the Premises when delivery is tendered by Landlord shall not delay the commencement of the term of this lease or Tenant's obligation to pay rent. Tenant acknowledges that Landlord shall incur significant expenses upon the execution of this lease, even if Tenant never takes possession of the Premises, including without limitation brokerage commissions and fees, legal fees and other professional fees. Tenant acknowledges that all of said expenses shall be included in measuring Landlord's damages should Tenant breach the terms of this lease.

#### 4. MONTHLY RENT

(a) Basic Rent. Tenant shall pay to Landlord as basic rent for the Premises, in advance and subject to adjustment as provided in paragraph 5, the sum of Three Thousand Seven-Hundred Ninety-Eight and 90/100 Dollars (\$3,798.90) on or before the first day of the first full calendar month of the term and on the first day of each and every successive calendar month. Basic rent for any partial month shall be payable in advance and shall be prorated at the rate of 1/30th of the monthly basic rent per day.

(b) Direct Expenses. In addition to the above basic rent and as additional rent, Tenant shall pay to Landlord, subject to adjustment and reconciliation as provided in paragraph 5(b) of this lease, the sum of One Thousand One Hundred Seventy-Five and 85/100 Dollars (\$1,175.85) on or before the first day of the first full calendar month of the term and on the first day of each and every successive calendar month, said sum representing Tenant's estimated payment of its proportionate share of direct expenses as provided for in paragraph 5(b) of this lease. Payment for direct expenses for any partial month shall be payable in advance and shall be prorated at the rate of 1/30th of the monthly payment for direct expenses per day.

(c) Manner and Place of Payment. All payments of basic rent and direct expenses shall be paid to Landlord, without deduction or offset, in lawful money of the United States of America, at the office of Landlord at 3945 Freedom Circle, Suite 640, Santa Clara, California 95054, or to such other person or place as Landlord may from time to time designate in writing.

(d) First Month's Rent. Concurrently with Tenant's execution of this lease, Tenant shall deposit with Landlord the sum Four Thousand Nine Hundred Seventy-Four and 75/100 Dollars (\$4,974.75) to be applied against the basic rent and direct expenses for the first lease month of the term.

(e) Security Deposit. Concurrently with Tenant's execution of this lease, Tenant shall deposit with Landlord the sum of Four Thousand Nine Hundred Seventy-Four and 75/100 Dollars (\$4,974.75), which sum shall be held by Landlord as a security deposit for the faithful performance by Tenant of all of the terms, covenants and conditions of this lease to be kept and performed by Tenant. If Tenant defaults with respect to any provision of this lease, including but not limited to the provisions relating to the payment of basic rent and direct expenses, Landlord may (but shall not be required to) use, apply or retain all or any part of this security deposit for the payment of any amount which Landlord may spend by reason of Tenant's default or to compensate Landlord for any other loss or damage which Landlord may suffer by reason of Tenant's default. If any portion of said deposit is so used, Tenant shall, within ten (10) days after written demand therefor, deposit cash with Landlord in the amount sufficient to restore the security deposit to its original amount; Tenant's failure to do so shall be a material breach of this lease. Landlord shall not be required to keep this security deposit separate from its general funds and Tenant shall not be entitled to interest on such deposit. If Tenant is not in default at the expiration or termination of this lease, the security deposit or any balance thereof shall be returned to Tenant after Tenant has vacated the Premises. In the event of termination of Landlord's interest in this lease, Landlord shall transfer said deposit to Landlord's successor in interest, and Tenant agrees that Landlord shall thereupon be released from liability for the return of such deposit or any accounting therefor.

#### 5. ADJUSTMENT OF BASIC RENT AND DIRECT EXPENSES

(a) Adjustments to Basic Rent. The basic rent provided for in paragraph 4(a) shall be adjusted periodically and the monthly basic rent for each period shall be as set forth below:

There shall be no adjustments to basic rent during the initial three (3) year lease term.

(b) Adjustments to Direct Expenses. Tenant's proportionate share of direct expenses shall be one and ninety-five one hundredths percent (1.95%) of all direct expenses as defined below.

Tenant shall be required to pay to Landlord, as additional rent in accordance with paragraph 4(b) of this lease, Tenant's proportionate share of direct expenses for each calendar year (or portion thereof) during the term of this lease. Tenant's estimated share of the monthly direct expenses payable by Tenant during the calendar year in which the term commences is set forth in paragraph 4(b) of this lease. A written estimate of Tenant's monthly share of direct expenses for each succeeding calendar year

shall be delivered to Tenant prior to the commencement of each such succeeding calendar year (or as soon as practicable thereafter). Tenant shall pay to Landlord in accordance with paragraph 4(b) of this lease its monthly share of direct expenses as estimated by Landlord. Landlord reserves the right to revise such written estimate during a calendar year if Landlord's actual or projected direct expenses shows an increase or decrease in excess of ten percent (10%) from that of an earlier written estimate delivered to Tenant, and if Landlord elects to revise the earlier estimate, Landlord shall deliver the revised estimate to Tenant, together with an explanation of the reasons therefor, and Tenant shall revise its payments accordingly. Statements of the actual direct expenses for the calendar year in which the term commences and for each succeeding calendar year (herein called "statement of actual direct expenses") shall be delivered to Tenant within one hundred twenty (120) days following the expiration of each such calendar year (or as soon as practicable thereafter). If the statement of actual direct expenses for any such calendar year shows that Tenant's proportionate share of actual direct expenses for the year is in excess of the aggregate amount Tenant has paid as direct expenses for that calendar year, Tenant shall pay such excess to Landlord within ten (10) days after receipt of the statement of actual direct expenses. If Tenant fails to pay such excess amount due within said ten (10) day period, Tenant shall pay an additional ten percent (10%) of the amount due as a penalty. In the event that any statement of actual direct expenses shall show that Tenant has paid Landlord an aggregate amount in excess of the actual direct expenses for the preceding calendar year and Tenant is not in default in the performance or observance of any of the terms, covenants or conditions of this lease at the time such statement of actual direct expenses is delivered, Landlord shall, at its option, promptly either refund such excess to Tenant or credit the amount thereof to the monthly direct expenses next becoming due from Tenant. The respective obligations of Landlord and Tenant under this paragraph shall survive the expiration or other termination of this lease.

As used in this lease, "direct expenses" shall include, but not be limited to, (i) real property taxes, assessments, and other costs identified as direct expenses in paragraph 13; (ii) insurance premiums and other costs identified as direct expenses in paragraph 11; (iii) the cost of all utilities and services including water, gas and sewer charges, electricity, heat air conditioning, refuse collection, and janitorial services identified as direct expenses in paragraph 12; (iv) the costs of operating and maintaining the Common Area identified as direct expenses in paragraph 15, including, but not limited to, the landscaping, elevators, parking lots, paving, sidewalks, showers, and security and exterminator services; (v) the costs and expenses of maintaining and repairing the Project identified as direct expenses in paragraph 9, including, but not limited to, mechanical, electrical, plumbing and sewage systems, windows, glazing, gutters, downspouts, heating and ventilating and air conditioning systems,



walls, floorcoverings, roofs, structural elements, exterior walls and the cost of maintenance contracts and supplies, materials, equipment and tools used in connection therewith; (vi) the cost of certain alterations identified as direct expenses in paragraph 8; (vii) amortization of such capital improvements having a useful life greater than one year as Landlord may have installed for the purpose of reducing operating costs and/or to comply with all laws, rules and regulations of federal, state, county, municipal and other governmental authorities now or hereinafter in effect (Tenant's share of such capital improvement shall equal Tenant's proportionate share of the fraction of the cost of such capital improvement equal to the remaining term of the lease over the useful life of such capital improvement); (viii) wages, salaries, employee benefits (including union benefits) and related expenses of all on-site and off-site personnel engaged in the operation, management and maintenance of the Project (or the building in which the Premises are located) and payroll taxes applicable thereto and all costs incurred to maintain a management office in or near the Premises (including, without limitation, rental payments therefor or the reasonable rental value of the space so occupied); (ix) supplies, materials, equipment and tools used or required in connection with the operation and maintenance of the Project; (x) licenses, permits and inspection fees; (xi) a reasonable reserve for repairs and replacement of equipment used in the maintenance and operation of the Project; (xii) all other operating costs incurred by Landlord in maintaining and operating the Project; and (xiii) a management cost recovery as determined by Landlord equal to five percent (5%) of the sum of the basic rent and the aggregate of all other direct expenses for the Project as compensation for Landlord's accounting, administrative and processing services.

#### 6. RESTRICTION ON USE

Tenant shall not do or permit to be done in or about the Premises or the Project, nor bring or keep or permit to be brought or kept in or about the Premises or Project, anything which is prohibited by or will in any way increase the existing rate of, or otherwise affect, fire or any other insurance covering the Project or any part thereof, or any of its contents, or will cause a cancellation of any insurance covering the Project or any part thereof, or any of its contents. Tenant shall not do or permit to be done anything in or about the Premises or the Project which will constitute waste or which will in any way obstruct or interfere with the rights of other tenants or occupants of the Project or injure or annoy them, or use or allow the Premises to be used for any unlawful purpose, nor shall Tenant cause, maintain or permit any nuisance in or about the Premises or the Project. No loudspeaker or other device, system or apparatus which can be heard outside the Premises shall be used in or at the Premises without the prior written consent of Landlord. Tenant shall not use the Premises for sleeping, washing clothes, cooking or in any manner that will cause or emit any objectionable odor, noise or light into the adjoining premises or Common Area. Tenant shall not do

anything on the Premises that will cause damage to the Project and Tenant shall not overload the floor capacity of the Premises or the Project. No machinery, apparatus or other appliance shall be used or operated in or on the Premises that will in any manner injure, vibrate or shake the Premises. Landlord shall be the sole judge of whether such odor, noise, light or vibration is such as to violate the provisions of this paragraph. No waste materials or refuse shall be dumped upon or permitted to remain upon any part of the Premises or the Project except in trash containers placed inside exterior enclosures designated for that purpose by Landlord, or where otherwise designated by Landlord; and no toxic or hazardous materials shall be disposed of through the plumbing or sewage system. No materials, supplies, equipment, finished products or semi-finished products, raw materials or articles of any nature shall be stored or permitted to remain outside of the building proper. No retail sales shall be made on the Premises.

#### 7. COMPLIANCE WITH LAWS

Tenant shall, in connection with its use and occupation of the Premises, at its sole cost and expense, promptly observe and comply with (i) all laws, statutes, ordinances and governmental rules, regulations and requirements of federal, state, county, municipal and other governmental authorities, now or hereafter in effect, which shall impose any duty upon Landlord or Tenant with respect to the use, occupancy or alteration of the Premises, (ii) with the requirements of any board of fire underwriters or other similar body now or hereafter constituted and (iii) with any direction or occupancy certificate issued pursuant to law by any public authority; provided, however, that no such failure shall be deemed a breach of these provisions if Tenant, immediately upon notification, commences to remedy or rectify said failure. The judgment of any court of competent jurisdiction or the admission of Tenant in any action against Tenant (whether or not Landlord is a party thereto) that Tenant has violated any such law, statute, ordinance or governmental rule, regulation, requirement, direction or provision, shall be conclusive of that fact as between Landlord and Tenant. This lease shall remain in full force and effect notwithstanding any loss of use or other effect on Tenant's enjoyment of the Premises by reason of any governmental laws, statutes, ordinances, rules, regulations and requirements now or hereafter in effect.

#### 8. ALTERATIONS

Tenant shall not make or suffer to be made any alteration, addition or improvement to or of the Premises or any part thereof (collectively referred to herein as "alterations") without (i) the prior written consent of Landlord, which consent shall not be unreasonably withheld, (ii) a valid building permit issued by the appropriate governmental authority and (iii) otherwise complying with all applicable laws, regulations and requirements of governmental agencies having jurisdiction and with

the rules, regulations and requirements of any board of fire underwriters or similar body. Landlord's consent to any requested alteration shall not create on the part of Landlord or cause Landlord to incur any responsibility or liability for such alteration's compliance with all laws, rules and regulations of federal, state, county, municipal and other governmental authorities. Any alteration made by Tenant (excluding moveable furniture and trade fixtures not attached to the Premises) shall at once become a part of the Premises and belong to Landlord. Without limiting the foregoing, all heating, lighting, electrical (including all wiring, conduit, outlets, drops, buss ducts, main and subpanels), air conditioning, partitioning, drapery, window covering and carpet installations made by Tenant, regardless of how attached to the Premises, together with all other alterations that have become an integral part of the Project in which the Premises are a part, shall upon installation be and become part of the Premises and belong to Landlord and shall not be deemed trade fixtures. All such alterations shall remain upon and be surrendered with the Premises at the termination of the lease.

If Landlord consents to the making of any alteration by Tenant, the same shall be made by Tenant at its sole risk, cost and expense and only after Landlord's written approval of any contractor or person selected by Tenant for that purpose, and the same shall be made at such time and in such manner as Landlord may from time to time designate. Tenant shall, if required by Landlord, secure at Tenant's costs a completion and lien indemnity bond for such work. Upon the expiration or sooner termination of the term, Landlord may, at its sole option,, require Tenant, at Tenant's sole cost and expense, to promptly both remove any such alteration made by Tenant and designated by Landlord to be removed and repair any damage to the Premises caused by such removal. Any moveable furniture and equipment or trade fixtures remaining on the Premises at the expiration or other termination of the term shall become the property of the Landlord unless promptly removed by Tenant.

If during the term any alteration, addition or change of the Premises is required by law, regulation, ordinance or order of any public authority, Tenant, at its sole cost and expense, shall promptly make the same. If during the term any alterations, additions or changes to the Common Area or to the Project in which the Premises is located is required by law, regulation, ordinance or order of any public or quasi-public authority, and it is impractical, in Landlord's judgment, for the affected tenants to individually make such alterations, additions or changes, Landlord shall make such alterations, additions or changes and the cost thereof shall be a direct expense and Tenant shall pay its percentage share of such cost to Landlord as provided in paragraphs 4 and 5.

## 9. REPAIR AND MAINTENANCE

Subject to paragraph 16, Landlord shall maintain and keep in good repair the Common Area and the mechanical, electrical, plumbing and sewage systems, windows, window frames, plate glass glazing, elevators, gutters and downspouts, the roof, exterior walls, structural elements and the heating, ventilating and air conditioning systems (excepting special air conditioning of Tenant's computer room(s) as set forth below) of the Premises and the Project; provided, however, that Landlord shall not be required to perform repairs made necessary by the negligence or abuse of such improvements or property by Tenant or its employees, agents, subtenants or permittees. The cost of all maintenance and repairs made by Landlord pursuant to this paragraph 9, including without limitation maintenance contracts and supplies, materials, equipment and tools used in such repairs and maintenance, shall be direct expenses and Tenant shall pay its percentage share of such costs to Landlord as provided in paragraphs 4 and 5.

By entry hereunder Tenant accepts the Premises as being in good and sanitary order, condition and repair. Subject to paragraphs 16 and 21, and excepting repairs and maintenance required by this paragraph 9 to be made by Landlord, Tenant at its cost shall keep the Premises and every part thereof in good and sanitary order, condition and repair, and Tenant shall be solely responsible for the cost and maintenance of, and electricity supplied to, any special air conditioning for Tenant's computer facilities. Further, Tenant shall repair (or, at the option of Landlord, reimburse Landlord if Landlord elects to repair) damage to improvements or other property located on or about the Project where such repairs are made necessary by the negligence of or abuse of such improvement or other property by Tenant or its employees, agents, subtenants or permittees. Tenant waives all rights and benefits under California Civil Code Sections 1932(1), 1941, and 1942 and under any similar law, statute or ordinance now or hereafter in effect.

## 10. LIENS

Tenant shall keep the Premises and the Project free from any liens arising out of any work performed, materials furnished or obligations incurred by Tenant, its agents, employees or contractors. Upon Tenant's receipt of a preliminary twenty (20) day notice filed by a claimant pursuant to California Civil Code Section 3097, Tenant shall immediately provide Landlord with a copy of such notice. Should any lien be recorded against the Project, Tenant shall give immediate notice of such lien to Landlord. In the event that Tenant shall not, within ten (10) days following the imposition of such lien, cause the same to be released of record, Landlord shall have, in addition to all other remedies provided herein and by law, the right, but no obligation, to cause the same to be released by such means as it shall deem proper, including payment of the claim giving rise to such lien. All sums paid by

Landlord for such purpose, and all expenses (including attorney's fees) incurred by it in connection therewith, shall be payable to Landlord by Tenant on demand with interest at the rate of twelve percent (12%) per annum or the maximum rate permitted by law, whichever is less. Landlord shall have the right at all times to post and keep posted on the Premises any notices permitted or required by law, or which Landlord shall deem proper for the protection of Landlord, the Premises and the Project and any other party having an interest therein, from mechanics' and materialmen's liens and like liens. Tenant shall give Landlord at least fifteen (15) days' prior written notice of the date of commencement of any construction on the Premises in order to permit the posting of such notices. In the event Tenant is required to post an improvement bond with a public agency in connection with any work performed by Tenant on or to the Premises, Tenant shall include Landlord as an additional obligee.

#### 11. INSURANCE

Tenant, at its sole cost and expense, shall keep in force during the term (i) commercial general liability and property damage insurance with a combined single limit of at least \$2,000,000 per occurrence insuring against personal or bodily injury to or death of persons occurring in, on or about the Premises or Project and any and all liability of the insureds with respect to the Premises or arising out of Tenant's maintenance, use or occupancy of the Premises and all areas appurtenant thereto, (ii) direct physical loss-special insurance covering the leasehold improvements in the Premises and all of Tenant's equipment, trade fixtures, appliances, furniture, furnishings, and personal property from time to time located in, on or about the Premises, with coverage in the amount of the full replacement cost thereof, and (iii) Worker's Compensation Insurance as required by law, together with employer's liability coverage with a limit of not less than \$1,000,000 for bodily injury for each accident and for bodily injury by disease for each employee. Tenant's commercial general liability and property damage insurance and Tenant's Workers Compensation Insurance shall be endorsed to provide that said insurance shall not be cancelled or reduced except upon at least thirty (30) days prior written notice to Landlord. Further, Tenant's commercial general liability and property damage insurance shall be primary and shall be endorsed to provide that Landlord and McCandless Management Corporation, and their respective partners, officers, directors and employees and such other persons or entities as directed from time to time by Landlord shall be named as additional insureds for all liability using ISO Bureau Form CG20111185 (or a successor form) or such other endorsement form reasonably acceptable to Landlord; shall contain a severability of interest clause and a cross-liability endorsement; shall be endorsed to provide that the limits and aggregates apply per location using ISO Bureau Form CG25041185 (or a successor form) or such other endorsement form reasonably acceptable to Landlord; and shall be issued by an insurance company admitted to transact

business in the State of California and rated A+VIII or better in Best's Insurance Reports (or successor report). The deductibles for all insurance required to be maintained by Tenant hereunder shall be satisfactory to Landlord. The commercial general liability insurance carried by Tenant shall specifically insure the performance by Tenant of the indemnification provisions set forth in paragraph 17 of this lease provided, however, nothing contained in this paragraph 11 shall be construed to limit the liability of Tenant under the indemnification provisions set forth in said paragraph 17. If Landlord or any of the additional insureds named on any of Tenant's insurance, have other insurance which is applicable to the covered loss on a contributing, excess or contingent basis, the amount of the Tenant's insurance company's liability under the policy of insurance maintained by Tenant shall not be reduced by the existence of such other insurance. Any insurance carried by Landlord or any of the additional insureds named on Tenant's insurance policies shall be excess and non-contributing with the insurance so provided by Tenant.

Tenant shall, prior to the commencement of the term and at least thirty (30) days prior to any renewal date of any insurance policy required to be maintained by Tenant pursuant to this paragraph, provide Landlord with a completed Certificate of Insurance, using a form acceptable in Landlord's reasonable judgment, attaching thereto copies of all endorsements required to be provided by Tenant under this lease. Tenant agrees to increase the coverage or otherwise comply with changes in connection with said commercial general liability, property damage, direct physical loss and Worker's Compensation Insurance as Landlord or Landlord's lender may from time to time require.

Landlord shall obtain and keep in force a policy or policies of insurance covering loss or damage to the Premises and Project, in the amount of the full replacement value thereof, providing protection against those perils included within the classification of "all risk" insurance, with increased cost of reconstruction and contingent liability (including demolition), plus a policy of rental income insurance in the amount of one hundred percent (100%) of twelve (12) months' rent (including sums paid as additional rent) and such other insurance as Landlord or Landlord's lender may from time to time require. Landlord may, but shall not be obligated to, obtain flood and/or earthquake insurance. Landlord shall have no liability to Tenant if Landlord elects not to obtain flood and/or earthquake insurance. The cost of all such insurance purchased by Landlord, plus any charges for deferred payment of premiums and the amount of any deductible incurred upon any covered loss within the Project, shall be direct expenses and Tenant shall pay to Landlord its percentage share of such costs as provided in paragraphs 4 (b) and 5 (b). If the cost of insurance is increased due to Tenant's use of the Premises, then Tenant shall pay to Landlord upon demand the full cost of such increase.

Landlord and Tenant hereby mutually waive any and all rights of recovery against one another for real or personal property loss or damage occurring to the Premises or the Project, or any part thereof, or to any personal property therein, from perils insured against under fire and extended insurance and any other property insurance policies existing for the benefit of the respective parties so long as such insurance permits waiver of liability and contains a waiver of subrogation without additional premiums.

If Tenant does not take out and maintain insurance as required pursuant to this paragraph 11, Landlord may, but shall not be obligated to, take out the necessary insurance and pay the premium therefor, and Tenant shall repay to Landlord promptly on demand, as additional rent, the amount so paid. In addition, Landlord may recover from Tenant and Tenant agrees to pay, as additional rent, any and all reasonable expenses (including attorney fees) and damages which Landlord may sustain by reason of the failure of Tenant to obtain and maintain such insurance, it being expressly declared that the expenses and damages of Landlord shall not be limited to the amount of the premiums thereon.

## 12. UTILITIES AND SERVICE

Landlord shall furnish to the Premises and to the Project, during reasonable hours of generally recognized business days, to be determined by Landlord, and subject to the rules and regulations of the Project, reasonable quantities of water, gas and electricity suitable for the intended use of the Premises and the Project, heat and air conditioning required in Landlord's judgment for the comfortable use and occupation of the Premises and the Project, refuse collection and janitorial services. Tenant agrees that at all times it will cooperate fully with Landlord and abide by all regulations and requirements that Landlord may prescribe for the proper functioning and protection of the heating, ventilating and air conditioning systems. The cost of all utilities and services furnished by Landlord to the Premises and to the Project pursuant to this paragraph 12 shall be direct expenses and Tenant shall pay its percentage share of such costs to Landlord as provided in paragraphs 4 and 5.

Landlord shall not be liable for, and Tenant shall not be entitled to any abatement or reduction of rent by reason of, Landlord's failure to furnish any of the foregoing services when such failure is caused by accident, breakage, repairs, strikes, lockouts or other labor disturbances or labor disputes of any character, governmental moratoriums, regulations or other governmental actions, or by any other cause, similar or dissimilar, beyond the reasonable control of Landlord. In addition Tenant shall not be relieved from the performance of any covenant or agreement in this lease because of any such failure, and no eviction of Tenant shall result from such failure.

Tenant will not, without the written consent of Landlord, use any apparatus or device in the Premises (including, without limitation, electronic data processing machines, punch card machines or machines using current in excess of 110 volts) which will in any way increase the amount of electricity, water or air conditioning usually furnished or supplied to the Premises in the Project being used as general office space, or connect with electric current (except through existing electrical outlets in the Premises) or with water pipes any apparatus or device for the purpose of using electric current or water. If Tenant shall require water or electric current in excess of that usually furnished or supplied to the Premises in the Project being used as general office space, then Tenant shall first obtain the written consent of Landlord, which consent shall not be unreasonably withheld, and Tenant shall pay to Landlord promptly on demand, as additional rent, the full cost of such excess use. Landlord may cause an electric current or water meter to be installed in the Premises in order to measure the amount of electric current or water consumed for any such excess use. The cost of any such meter and of the installation, maintenance and repair thereof, and all charges for such excess water and electric current consumed (as shown by meters and at the rates then charged by the furnishing public utility) plus any additional expense incurred by Landlord in keeping account of electric current or water so consumed, shall be paid by Tenant, and Tenant agrees to pay Landlord therefor promptly upon demand by Landlord. Whenever heat generating machines or equipment are used in the Premises by Tenant which affect the temperature otherwise maintained by the air conditioning system, Landlord shall have the right to install supplementary air conditioning units in the Premises and the cost thereof, including the cost of installation and the cost of operation and maintenance thereof, shall be paid by Tenant to Landlord, as additional rent, upon demand by Landlord.

### 13. TAXES AND OTHER CHARGES

All real estate taxes and assessments and other taxes, fees and charges of every kind or nature, foreseen or unforeseen, which are levied, assessed or imposed upon Landlord and/or against the Premises, building, Common Area or Project or any part thereof by any federal, state, county, regional, municipal or other governmental or quasi-governmental authority, together with any increases therein whether resulting from increased rate and/or valuation, shall be a direct expense and Tenant shall pay its percentage share of such costs to Landlord as provided in paragraphs 4 and 5. By way of illustration and not limitation, "other taxes, fees and charges" as used herein include any and all taxes payable by Landlord (other than state and federal personal or corporate income taxes measured by the net income of Landlord from all sources, premium taxes, and Landlord's franchise, estate, inheritance and gift taxes), whether or not now customary or within the contemplation of the parties hereto, (i) upon, allocable to, or measured by the rent payable hereunder, including, without



limitation, any gross income or excise tax levied by the local, state or federal government with respect to the receipt of such rent, (ii) upon or with respect to the possession, leasing, operation, management, maintenance, alteration, repair, use or occupancy by Tenant of the Premises or any part thereof, (iii) upon or measured by the value of Tenant's personal property or leasehold improvements located in the Premises, (iv) upon this transaction or any document to which Tenant is a party creating or transferring an interest or estate in the Premises, (v) upon or with respect to vehicles, parking or the number of persons employed in or about the Project, and (vi) any tax, license, franchise fee or other imposition upon Landlord which is otherwise measured by or based in whole or in part upon the Project or any portion thereof. If Landlord contests any such tax, fee or charge, the cost and expense incurred by Landlord thereby (including, but not limited to, costs of attorneys and experts) shall also be direct expenses and Tenant shall pay its percentage share of such costs to Landlord as provided in paragraphs 4 and 5. In the event the Premises and any improvements installed therein by Tenant or Landlord are valued by the assessor disproportionately higher than those of other tenants in the building or Project or in the event alterations or improvements are made to the Premises, Tenant's percentage share of such taxes, assessments, fees and/or charges shall be readjusted upward accordingly and Tenant agrees to pay such readjusted share. Such determination shall be made by Landlord from the respective valuations assigned in the assessor's work sheet or such other information as may be reasonably available and Landlord's determination thereof shall be conclusive.

Tenant agrees to pay, before delinquency, any and all taxes levied or assessed during the term hereof upon Tenant's equipment, furniture, fixtures and other personal property located in the Premises, including carpeting and other property installed by Tenant notwithstanding that such carpeting or other property has become a part of the Premises. If any of Tenant's personal property shall be assessed with the Project, Tenant shall pay to Landlord, as additional rent, the amounts attributable to Tenant's personal property within ten (10) days after receipt of a written statement from Landlord setting forth the amount of such taxes, assessments and public charges attributable to Tenant's personal property.

#### 14. ENTRY BY LANDLORD

Landlord reserves, and shall at all reasonable times have, the right to enter the Premises (i) to inspect the Premises, (ii) to supply services to be provided by Landlord hereunder, (iii) to show the Premises to prospective purchasers, lenders or tenants and to put 'for sale' or 'for lease' signs thereon, (iv) to post notices required or allowed by this lease or by law, (v) to alter, improve or repair the Premises and any portion of the Project, and (vi) to erect scaffolding and other necessary structures in or through the Premises or the Project where reasonably required by

the character of the work to be performed. Landlord shall not be liable in any manner for any inconvenience, disturbance, loss of business, nuisance or other damage arising from Landlord's entry and acts pursuant to this paragraph 14 and Tenant shall not be entitled to an abatement or reduction of rent if Landlord exercises any rights reserved in this paragraph 14. For each of the foregoing purposes, Landlord shall at all times have and retain a key with which to unlock all of the doors in, on and about the Premises (excluding Tenant's vaults, safes and similar areas designated in writing by Tenant in advance), and Landlord shall have the right to use any and all means which Landlord may deem proper to open said doors in an emergency in order to obtain entry to the Premises. Any entry by Landlord to the Premises pursuant to this paragraph 14 shall not under any circumstances be construed or deemed to be a forcible or unlawful entry into or a detainer of the Premises or an eviction, actual or constructive, of Tenant from the Premises or any portion thereof.

#### 15. COMMON AREA; PARKING

Subject to the terms and conditions of this lease and such rules and regulations as Landlord may from time to time prescribe, Tenant and Tenant's employees and invitees shall, in common with other occupants of the Project, and their respective employees and invitees and others entitled to the use thereof, have the nonexclusive right to use those areas of the Common Area provided and designated by Landlord for the general use and convenience of the occupants of the Project (which areas and facilities shall include, but not be limited to, common lobbies, corridors, restrooms and showers; telephone, electrical, janitorial and mechanical rooms; elevators, stairwells, vertical duct shafts; sidewalks; parking, refuse, landscape and plaza areas, roofs, building exteriors, electrical, mechanical, plumbing and HVAC systems; and storage areas), which areas and facilities are referred to herein as "Common Area". This right shall terminate upon the termination of this lease.

Landlord reserves the right from time to time to make changes in the shape, size, location, amount and extent of the Common Area. Landlord shall also have the right at any time to change the name, number or designation by which the Project is commonly known. Landlord further reserves the right to promulgate such rules and regulations relating to the use of the Common Area, and any part thereof, as Landlord may deem appropriate for the best interests of the occupants of the Project. The rules and regulations shall be binding upon Tenant upon delivery of a copy of them to Tenant and Tenant shall abide by them and cooperate in their observance. Such rules and regulations may be amended by Landlord from time to time, with or without advance notice.

Tenant shall have the nonexclusive use of seven (7) parking spaces in the Common Area as designated from time to time by Landlord. Landlord reserves the right at its sole option to

assign and label parking spaces, but it is specifically agreed that Landlord is not responsible for policing any such parking spaces. Tenant shall not at any time park or permit the parking of Tenant's trucks or other vehicles, or the trucks or other vehicles of others, adjacent to loading areas so as to interfere in any way with the use of such areas; nor shall Tenant at any time park or permit the parking of Tenant's vehicles or trucks, or the vehicles or trucks of Tenant's suppliers or others, in any portion of the Common Area not designated by Landlord for such use by Tenant. Tenant shall not park or permit any inoperative vehicle or equipment to be parked on any portion of the Common Area.

Landlord shall operate, manage and maintain the Common Area. The manner in which the Common Area shall be operated, managed and maintained and the expenditures for such operation, management and maintenance shall be at the sole discretion of Landlord. The cost of such maintenance, operation and management of the Common Area, together with the costs of security and exterminator services and salaries and employee benefits (including union benefits) of on-site and accounting personnel engaged in such maintenance and operations management, shall be a direct expense and Tenant shall pay to Landlord its percentage share of such costs as provided in paragraphs 4 and 5.

#### 16. DAMAGE BY FIRE; CASUALTY

In the event the Premises are damaged by any casualty which is covered under an insurance policy required to be maintained by Landlord pursuant to paragraph 11, Landlord shall be entitled to the use of all insurance proceeds and shall repair such damage as soon as reasonably possible and this lease shall continue in full force and effect.

In the event the Premises are damaged by any casualty not covered under an insurance policy required to be maintained pursuant to paragraph 11, Landlord may, at Landlord's option, either (i) repair such damage, at Landlord's expense, as soon as reasonably possible, in which event this lease shall continue in full force and effect, or (ii) give written notice to Tenant within thirty (30) days after the date of the occurrence of such damages of Landlord's intention to cancel and terminate this lease as of the date of the occurrence of the damages; provided, however, that if such damage is caused by an act or omission of Tenant or its agent, servants or employees, then Tenant shall repair such damage promptly at its sole cost and expense. In the event Landlord elects to terminate this lease pursuant hereto, Tenant shall have the right within ten (10) days after receipt of the required notice to notify Landlord in writing of Tenant's intention to repair such damage at Tenant's expense, without reimbursement from Landlord, in which event this lease shall continue in full force and effect and Tenant shall proceed to make such repairs as soon as reasonably possible. If Tenant does not give such notice within the ten (10) day period, this lease shall be cancelled and terminated as of the

date of the occurrence of such damage. Under no circumstances shall Landlord be required to repair any injury or damage to (by fire or other cause), or to make any restoration or replacement of, any of Tenant's personal property, trade fixtures or property leased from third parties, whether or not the same is attached to the Premises.

If the Premises are totally destroyed during the term from any cause (including any destruction required by any authorized public authority), whether or not covered by the insurance required under paragraph 11, this lease shall automatically terminate as of the date of such total destruction; provided, however, that if the Premises can reasonably and lawfully be repaired or restored within twelve (12) months of the date of destruction to substantially the condition existing prior to such destruction and if the proceeds of the insurance payable to the Landlord by reason of such destruction are sufficient to pay the cost of such repair or restoration, then the said insurance proceeds shall be so applied, Landlord shall promptly repair and restore the Premises and this lease shall continue, without interruption, in full force and effect. If the Premises are totally destroyed during the last twelve (12) months of the term, Landlord may at Landlord's option cancel and terminate this lease as of the date of occurrence of such damage by giving written notice to Tenant of Landlord's election to do so within thirty (30) days after the occurrence of such damage.

Notwithstanding anything contained in this paragraph 16 to the contrary, in the event thirty percent (30%) or more of the total square footage of the Premises is rendered untenantable by fire or other casualty not resulting from Tenant's, its agents, servants, employees, contractors or invitees acts or omissions and Landlord does not repair and restore such damaged portion of the Premises to a tenantable condition within sixty (60) days after the date of the occurrence of such damage, then Tenant may, at Tenant's option, give written notice to Landlord within the first thirty (30) days after such sixty (60) day period of Tenant's election to terminate this lease effective as of the sixtieth (60th) day after the date of occurrence of such damage. If Tenant does not give written notice to Landlord of Tenant's election to terminate this lease within such thirty (30) day period, this lease shall remain in full force and effect and Tenant's right to terminate this lease pursuant to the foregoing sentence shall lapse and be of no further force or effect.

If the Premises are partially or totally destroyed or damaged and Landlord or Tenant repair them pursuant to this lease, the rent payable hereunder for the period during which such damage and repair continues shall be abated only in proportion to the square footage of the Premises rendered untenantable to Tenant by such damage or destruction. Tenant shall have no claim against Landlord for any damage, loss or expense suffered by reason of any such damage, destruction, repair or restoration. The parties waive

the provisions of California Civil Code Sections 1932(2) and 1933(4) (which provisions permit the termination of a lease upon destruction of the leased premises) , and hereby agree that the provisions of this paragraph 16 shall govern in the event of such destruction.

17. INDEMNIFICATION

Landlord shall not be liable to Tenant and Tenant hereby waives all claims against Landlord for any injury to or death of any person or damage to or destruction of property in or about the Premises or the Project by or from any cause whatsoever except the failure of Landlord to perform its obligations under this lease where such failure has persisted for an unreasonable period of time after notice of such failure. Without limiting the foregoing, Landlord shall not be liable to Tenant for any injury to or death of any person or damages to or destruction of property by reason of, or arising from, any latent defect in the Premises or Project or the act or negligence of any other tenant of the Project. Tenant shall immediately notify Landlord of any defect in the Premises or Project.

Except as to injury to persons or damage to property the principal cause of which is the failure by Landlord to observe any of the terms and conditions of this lease, Tenant shall hold Landlord harmless from and indemnify and defend Landlord against any claim, liability, loss, damage or expense (including attorney fees) arising out of any injury to or death of any person or damage to or destruction of property occurring in, on or about the Premises from any cause whatsoever or on account of the use, condition, occupational safety or occupancy of the Premises. Tenant shall further hold Landlord harmless from and indemnify and defend Landlord against any claim, liability, loss, damage or expense (including attorney fees) arising (i) from Tenant's use of the Premises or from the conduct of its business or from any activity or work done, permitted or suffered by Tenant or its agents or employees in or about the Premises or Project, (ii) out of the failure of Tenant to observe or comply with Tenant's obligation to observe and comply with laws or other requirements as set forth in paragraph 7, (iii) by reason of Tenant's use, handling, storage, or disposal of toxic or hazardous materials or waste, (iv) by reason of any labor or service performed for, or materials used by or furnished to, Tenant or any contractor engaged by Tenant with respect to the Premises, or (v) from any other act, neglect, fault or omission of Tenant or its agents or employees.

The provisions of this paragraph 17 shall survive the expiration or earlier termination of this lease.

18. ASSIGNMENT AND SUBLETTING

Tenant shall not voluntarily assign, encumber or otherwise transfer its interest in this lease or in the Premises,

or sublease all or any part of the Premises, or allow any other person or entity to occupy or use all or any part of the Premises, without first obtaining Landlord's written consent, which consent shall not be unreasonably withheld, and otherwise complying with the requirements of this paragraph 18. Any assignment, encumbrance or sublease without Landlord's consent, shall constitute a default.

If Tenant desires to sublet or assign all or any portion of the Premises, Tenant shall give Landlord written notice thereof, specifying the projected commencement date of the proposed sublet or assignment (which date shall be not less than thirty (30) days or more than ninety (90) days after the date of Landlord's receipt of such notice), the portions of the Premises proposed to be sublet or assigned, the terms and conditions of the proposed assignment or sublease (including the rent to be paid by the proposed assignee or subtenant) and the name, address and telephone number of the proposed assignee or subtenant. Tenant shall further provide Landlord with such other information concerning the proposed assignee or subtenant as requested by Landlord. For a period of thirty (30) days after Landlord's receipt of Tenant's written notice, Landlord shall have the option, exercisable by delivering written notice to Tenant, to terminate this lease as of the date specified in Landlord's written notice to Tenant, which date shall not be less than thirty (30) days nor more than ninety (90) days after the date of Landlord's written notice to Tenant. If Landlord exercises its option to terminate this lease as provided in the foregoing sentence, Landlord may, if it so elects, enter into a new lease for the Premises or any portion thereof with the proposed assignee or subtenant or any other third party on such terms as Landlord and such proposed assignee or subtenant or other third party may agree; in such event, Tenant shall not be entitled to any portion of the profit, if any, which Landlord may realize on account of such termination and reletting.

If Landlord does not elect to terminate this lease as provided hereinabove in this paragraph 18 and if Landlord consents in writing to the proposed assignment or sublet, Tenant shall be free to assign or sublet all or a portion of the Premises subject to the following conditions: (i) any sublease shall be on the same terms set forth in the notice given to Landlord; (ii) no sublease shall be valid and no subtenant shall take possession of the sublet premises until an executed counterpart of such sublease has been delivered to Landlord; (iii) no subtenant shall have a further right to sublet; (iv) any sums or other economic consideration received by Tenant as a result of such assignment or sublet (except rental or other payments received which are attributable to the amortization over the term of this lease of the cost of leasehold improvements constructed for such assignees or subtenant, and brokerage fees) whether denominated rentals or otherwise, which exceed, in the aggregate, the total sums which Tenant is obligated to pay Landlord under this lease (prorated to reflect obligations allocable to that portion of the Premises subject to such sublease), shall be payable to Landlord as additional rent under

this lease without affecting or reducing any other obligation of Tenant hereunder; (v) no sublet or assignment shall release Tenant of Tenant's obligation or alter the primary liability of Tenant to pay the rent and to perform all other obligations to be performed by Tenant hereunder; and (vi) any assignee or subtenant must expressly agree to assume and perform all of the covenants and conditions of Tenant under this lease. Tenant shall pay to Landlord promptly upon demand, as additional rent, Landlord's actual attorneys' fees and other costs incurred for reviewing, processing or documenting any requested assignment or sublease, whether or not Landlord's consent is granted. Tenant shall not be entitled to assign this lease or sublease all or any part of the Premises (and any attempt to do so shall be voidable by Landlord) during any period in which Tenant is in default under this lease.

If Tenant is a partnership, a withdrawal or change, voluntary or involuntary or by operation of law, of any general partner or the dissolution of the partnership shall be deemed an assignment of this lease subject to all the conditions of this paragraph 18. If Tenant is a corporation, any dissolution, merger, consolidation or other reorganization of Tenant, or the sale or other transfer of a controlling percentage of the capital stock of Tenant, or the sale of more than fifty percent (50%) of the value of Tenant's assets, shall be an assignment of this lease subject to all the conditions of this paragraph 18. The term "controlling percentage" means the ownership of, and the right to vote, stock possessing more than 50% of the total combined voting power of all classes of Tenant's capital stock issued, outstanding and entitled to vote. This paragraph 18 shall not apply if Tenant is a corporation the stock of which is traded through an exchange.

The acceptance of rent by Landlord from any other person shall not be deemed to be a waiver by Landlord of any provision hereof. Consent to one assignment or sublet shall not be deemed consent to any subsequent assignment or sublet. In the event of default by any assignee of Tenant or any successor of Tenant in the performance of any of the terms hereof, Landlord may proceed directly against Tenant without the necessity of exhausting remedies against such assignee or successor. Landlord may consent to subsequent assignments or sublets of this lease or amendments or modifications to this lease with assignees of Tenant, without notifying Tenant, or any successor of Tenant, and without obtaining its or their consent thereto and such action shall not relieve Tenant of liability under this lease.

No interest of Tenant in this lease shall be assignable by operation of law (including, without limitation, the transfer of this lease by testacy or intestacy). Each of the following acts shall be considered an involuntary assignment: (i) if Tenant is or becomes bankrupt or insolvent, makes an assignment for the benefit of creditors or institutes a proceeding under the Bankruptcy Act in which Tenant is the bankrupt; or, if Tenant is a partnership or consists of more than one person or entity, if any partner of the

partnership or other person or entity is or becomes bankrupt or insolvent, or makes an assignment for the benefit of creditors; (ii) if a writ of attachment or execution is levied on this lease; or (iii) if, in any proceeding or action to which Tenant is a party, a receiver is appointed with authority to take possession of the Premises. An involuntary assignment shall constitute a default by Tenant and Landlord shall have the right to elect to terminate this lease, in which case this lease shall not be treated as an asset of Tenant.

Tenant immediately and irrevocably assigns to Landlord, as security for Tenant's obligations under this lease, all rent from any subletting of all or a part of the Premises as permitted by this lease, and Landlord, as assignee and as attorney-in-fact for Tenant, or a receiver of Tenant appointed on Landlord's application, may collect such rent and apply it toward Tenant's obligations under this lease; except that, until the occurrence of an act of default by Tenant, Tenant shall have the right to collect such rent, subject to promptly forwarding to Landlord any portion thereof to which Landlord is entitled pursuant to this paragraph 18.

#### 19. DEFAULT

The occurrence of any of the following shall constitute a default by Tenant: (i) failure of Tenant to pay any rent or other sum payable hereunder within three (3) days of when due; (ii) abandonment of the Premises (Tenant's failure to occupy and conduct business in the Premises for fourteen (14) consecutive days shall be deemed an abandonment of the Premises); or (iii) failure of Tenant to perform any other term, covenant or condition of this lease if the failure to perform is not cured within thirty (30) days after notice thereof has been given to Tenant (provided that if such default cannot reasonably be cured within thirty (30) days, Tenant shall not be in default if Tenant commences to cure such failure to perform within the thirty (30) day period and diligently and in good faith continues to cure the failure to perform). The notice referred to in clause (iii) above shall specify the failure to perform and the applicable lease provision and shall demand that Tenant perform the provisions of this lease within the applicable period of time. No notice shall be deemed a forfeiture or termination of this lease unless Landlord so elects in the notice. No notice shall be required in the event of abandonment or vacation of the Premises.

In addition to the above, the occurrence of any of the following events shall also constitute a default by Tenant: (i) Tenant fails to pay its debts as they become due or admits in writing its inability to pay its debts, or makes a general assignment for the benefit of creditors (for purposes of determining whether Tenant is not paying its debts as they become due, a debt shall be deemed overdue upon the earliest to occur of the following: thirty (30) days from the date a statement therefor



has been rendered; the date on which any action or proceeding therefor is commenced; or the date on which a formal notice of default or demand has been sent); (ii) Tenant fails to furnish to Landlord a schedule of Tenant's aged accounts payable within ten (10) days after Landlord's written request; (iii) any financial statements given to Landlord by Tenant, any assignee of Tenant, subtenant of Tenant, any guarantor of Tenant, or successor in interest of Tenant (including, without limitation, any schedule of Tenant's aged accounts payable) are materially false; or (iv) any financial statement or other financial information furnished by Tenant pursuant to the provisions of this lease or at the request of Landlord evidences that either Tenant's net worth or its net assets are at least twenty-five percent (25%) less than the net worth or net assets shown in either the immediately prior financial statement or the financial statement of Tenant furnished at the time of execution of this lease, and Tenant fails to furnish promptly to Landlord, after notice from Landlord to Tenant, an additional security deposit in cash equivalent to the aggregate of the basic rent and direct expenses (without regard to any rent abatement) payable hereunder for the twelve (12) full calendar months immediately preceding such notice. At any time during the term of this lease Landlord, at Landlord's option, shall have the right to receive from Tenant, upon Landlord's request, a current annual balance sheet for Landlord's review. If the balance sheet shows a negative net worth, Landlord may terminate this lease by giving Tenant sixty (60) days prior written notice.

In the event of a default by Tenant, then Landlord, in addition to any other rights and remedies of Landlord at law or in equity, shall have the right either to terminate Tenant's right to possession of the Premises (and thereby terminate this lease) or, from time to time and without termination of this lease, to relet the Premises or any part thereof for the account and in the name of Tenant for such term and on such terms and conditions as Landlord in its sole discretion may deem advisable, with the right to make alterations and repairs to the Premises.

Should Landlord elect to keep this lease in full force and effect, Landlord shall have the right to enforce all of Landlord's rights and remedies under this lease, including but not limited to the right to recover and to relet the Premises and such other rights and remedies as Landlord may have under California Civil Code Section 1951.4 (or a successor Code section) or any other California statute. If Landlord relets the Premises, then Tenant shall pay to Landlord, as soon as ascertained, the costs and expenses incurred by Landlord in such reletting and in making alterations and repairs. Rentals received by Landlord from such reletting shall be applied (i) to the payment of any indebtedness due hereunder, other than basic rent and direct expenses, from Tenant to Landlord; (ii) to the payment of the cost of any repairs necessary to restore the Premises to good condition normal wear and tear excepted, including the cost of alterations and the cost of storing any of Tenant's property left on the Premises at the time

of reletting; and (iii) to the payment of basic rent or direct expenses due and unpaid hereunder. The residue, if any, shall be held by Landlord and applied in payment of future rent or damages in the event of termination as the same may become due and payable hereunder and the balance, if any at the end of the term of this lease, shall be paid to Tenant. Should the basic rent and direct expenses received from time to time from such reletting during any month be less than that agreed to be paid during that month by Tenant hereunder, Tenant shall pay such deficiency to Landlord. Such deficiency shall be calculated and paid monthly. No such reletting of the Premises by Landlord shall be construed as an election on its part to terminate this lease unless a notice of such intention is given to Tenant or unless the termination hereof is decreed by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Landlord may at any time thereafter elect to terminate this lease for such previous breach, provided it has not been cured.

Should Landlord at any time terminate this lease for any breach, in addition to any other remedy it may have, it shall have the immediate right of entry and may remove all persons and property from the Premises and shall have all the rights and remedies of a landlord provided by California Civil Code Section 1951.2 or any successor code section. Upon such termination, in addition to all its other rights and remedies, Landlord shall be entitled to recover from Tenant all damages it may incur by reason of such breach, including the cost of recovering the Premises and including (i) the worth at the time of award of the unpaid rent which had been earned at the time of termination; (ii) the worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that Tenant proves could have been reasonably avoided; (iii) the worth at the time of the award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that Tenant proves could be reasonably avoided; (iv) any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform its obligations under this lease or which in the ordinary course of events would be likely to result therefrom. The "worth at the time of award" of the amounts referred to in (i) and (ii) above is computed by allowing interest at the rate of twelve percent (12%) per annum. The "worth at the time of award" of the amount referred to in (iii) above shall be computed by discounting such amount at the discount rate of the federal reserve bank of San Francisco at the time of award plus one percent (1%). Tenant waives the provisions of Section 1179 of the California Code of Civil Procedure (which Section allows Tenant to petition a court of competent jurisdiction for relief against forfeiture of this lease). Property removed from the Premises may be stored in a public or private warehouse or elsewhere at the sole cost and expense of Tenant. In the event that Tenant shall not immediately pay the cost of storage of such property after the same has been stored for a period of thirty (30)

days or more, Landlord may sell any or all thereof at a public or private sale in such manner and at such times and places that Landlord, in its sole discretion, may deem proper, without notice to or demand upon Tenant.

20. LANDLORD'S RIGHT TO CURE TENANT'S DEFAULT

Landlord, at any time after Tenant commits a default, may, but shall not be obligated to, cure the default at Tenant's cost. If Landlord at any time, by reason of Tenant's default, pays any sum or does any act that requires the payment of any sum, the sum paid by Landlord shall be due immediately from Tenant to Landlord and shall bear interest at the rate of twelve percent (12%) per annum or the maximum rate permitted by law, whichever is less, from the date the sum is paid by Landlord until Landlord is reimbursed by Tenant. Amounts due Landlord hereunder shall be additional rent.

21. EMINENT DOMAIN

If all or any part of the Premises shall be taken by any public or quasi-public authority under the power of eminent-domain or conveyance in lieu thereof, this lease shall terminate as to any portion of the Premises so taken or conveyed on the date when title vests in the condemnor, and Landlord shall be entitled to any and all payments, income, rent, award or any interest therein whatsoever which may be paid or made in connection with such taking or conveyance. Tenant shall have no claim against Landlord or otherwise for the value of any unexpired term of this lease. Notwithstanding the foregoing, Tenant shall be entitled to any compensation for depreciation to and cost of removal of Tenant's equipment and fixtures and any compensation for its relocation expenses necessitated by such taking, but in each case only to the extent the condemning authority makes a separate award therefor or specifically identifies a portion of the award as being therefor. Each party waives the provisions of Section 1265.130 of the California Code of Civil Procedure (which section allows either party to petition the Superior Court to terminate this lease in the event of a partial taking of the Premises).

If any action or proceeding is commenced for such taking of the Premises or any portion thereof or of any other space in the Project, or if Landlord is advised in writing by any entity or body having the right or power of condemnation of its intention to condemn the Premises or any portion thereof or of any other space in the Project, and Landlord shall decide to discontinue the use and operation of the Project or decide to demolish, alter or rebuild the Project, then Landlord shall have the right to terminate this lease by giving Tenant written notice thereof within sixty (60) days of the earlier of the date of Landlord's receipt of such notice of intention to condemn or the commencement of said action or proceeding. Such termination shall be effective as of the last day of the calendar month next following the month in

which such notice is given or the date on which title shall vest in the condemnor, whichever occurs first.

In the event of a partial taking, or conveyance in lieu thereof, of the Premises and fifty percent (50%) or more of the number of square feet in the Premises are taken then Tenant may terminate this lease. Any election by Tenant to so terminate shall be by written notice given to Landlord within sixty (60) days from the date of such taking or conveyance and shall be effective on the last day of the calendar month next following the month in which such notice is given or the date on which title shall vest in the condemnor, whichever occurs first.

If a portion of the Premises is taken by power of eminent domain or conveyance in lieu thereof and neither Landlord nor Tenant terminates this lease as provided above, then this lease shall continue in full force and effect as to the part of the Premises not so taken or conveyed and all payments of rent shall be apportioned as of the date of such taking or conveyance so that thereafter the amounts to be paid by Tenant shall be in the ratio that the area of the portion of the Premises not so taken bears to the total area of the Premises prior to such taking.

## 22. NOTICE AND COVENANT TO SURRENDER

On the last day of the term or on the effective date of any earlier termination, Tenant shall surrender to Landlord the Premises in its condition existing as of the commencement of the term and, except as otherwise provided by Landlord pursuant to the terms of paragraph 8 of this lease, all of the improvements and alterations made to the Premises in their condition existing as of the date of completion of construction and/or installation (normal wear and tear excepted), with all originally painted interior walls washed or repainted if marked or damaged, interior vinyl covered walls cleaned and repaired or replaced if marked or damaged, all carpets shampooed and cleaned, and all floors cleaned and waxed; all to the reasonable satisfaction of Landlord. On or prior to the last day of the term or the effective date of any earlier termination, Tenant shall remove all of Tenant's personal property and trade fixtures, together with improvements or alterations that Tenant is obligated to remove pursuant to the provisions of paragraph 8 of this lease, from the Premises, and all such property not removed shall be deemed abandoned. In addition, on or prior to the expiration or earlier termination of this lease, Tenant shall remove, at Tenant's sole cost and expense, all telephone, other communication, computer and any other cabling and wiring of any sort installed in the space above the suspended ceiling of the Premises or anywhere else in the Premises and shall promptly repair any damage to the suspended ceiling, lights, light fixtures, walls and any other part of the Premises resulting from such removal.

If the Premises are not surrendered as required in this paragraph 22, Tenant shall indemnify Landlord against all loss,

liability and expense (including, but not limited to, attorney fees) resulting from the failure by Tenant in so surrendering the Premises, including, without limitation, any claims made by any succeeding tenants. It is agreed between Landlord and Tenant that the provisions of this paragraph 22 shall survive termination of this lease.

### 23. TENANT'S QUITCLAIM

At the expiration or earlier termination of this lease, Tenant shall execute, acknowledge and deliver to Landlord, within ten (10) days after written demand from Landlord to Tenant, any quitclaim deed or other document required to remove the cloud or encumbrance created by this lease from the real property of which the Premises are a part. This obligation shall survive said expiration or termination.

### 24. HOLDING OVER

Any holding over after the expiration or termination of this lease with the written consent of Landlord shall be construed to be a tenancy from month to month at the monthly rent, as adjusted, in effect on the date of such expiration or termination. All provisions of this lease, except those pertaining to the term and any option to extend, shall apply to the month to month tenancy. The provisions of this paragraph 24 are in addition to, and do not affect, Landlord's right of re-entry or other rights hereunder or provided by law.

If Tenant shall retain possession of the Premises or any part thereof without Landlord's consent following the expiration or sooner termination of this lease for any reason, then Tenant shall pay to Landlord for each day of such retention double the amount of the daily rental in effect during the last month prior to the date of such expiration or termination. Tenant shall also indemnify and hold Landlord harmless from any loss, liability and expense (including, but not limited to, attorney's fees) resulting from delay by Tenant in surrendering the Premises, including without limitation any claims made by any succeeding tenant founded on such delay. Acceptance of rent by Landlord following expiration or termination shall not constitute a renewal of this lease, and nothing contained in this paragraph 24 shall waive Landlord's right of re-entry or any other right. Tenant shall be only a Tenant at sufferance, whether or not Landlord accepts any rent from Tenant, while Tenant is holding over without Landlord's written consent.

### 25. SUBORDINATION

In the event Landlord's title or leasehold interest is now or hereafter encumbered in order to secure a loan to Landlord, Tenant shall, at the request of Landlord or the lender, execute in writing an agreement subordinating its rights under this lease to the lien of such encumbrance, or, if so requested, agreeing that

the lien of lender's encumbrance shall be or remain subject and subordinate to the rights of Tenant under this lease. Tenant hereby irrevocably appoints Landlord the attorney in fact of Tenant to execute, deliver and record any such instrument or instruments for and in the name and on behalf of Tenant. Notwithstanding any such subordination, Tenant's possession under this lease shall not be disturbed if Tenant is not in default and so long as Tenant shall pay all amounts due hereunder and otherwise observe and perform all provisions of this lease. In addition, if in connection with any such loan the lender shall request reasonable modifications in the lease as a condition to such financing, Tenant will not unreasonably withhold, delay or defer its consent thereof, provided that such modifications do not increase the obligations of Tenant hereunder or materially adversely affect the leasehold interest hereby created or Tenant's rights hereunder.

#### 26. CERTIFICATE OF ESTOPPEL

Each party shall, within five (5) calendar days after request therefor, execute and deliver to the other party, in recordable form, a certificate stating that the lease is unmodified and in full force and effect, or in full force and effect as modified and stating the modifications. The certificate shall also state the amount of the monthly rent, the date to which monthly rent has been paid in advance, the amount of the security deposit and/or prepaid monthly rent, and, if the request is made by Landlord, shall include such other items as Landlord or Landlord's lender may reasonably request. Failure to deliver such certificate within such time shall constitute a conclusive acknowledgement by the party failing to deliver the certificate that the lease is in full force and effect and has not been modified except as may be represented by the party requesting the certificate. Any such certificate requested by Landlord may be conclusively relied upon by any prospective purchaser or encumbrancer of the Premises or Project. Further, within five (5) calendar days following written request made from time to time by Landlord, Tenant shall furnish to Landlord current financial statements of Tenant.

#### 27. SALE BY LANDLORD

In the event the original Landlord hereunder, or any successor owner of the Project or Premises, shall sell or convey the Project or Premises, all liabilities and obligations on the part of the original Landlord, or such successor owner, under this lease accruing thereafter shall terminate, and thereupon all such liabilities and obligations shall be binding upon the new owner. Tenant agrees to attorn to such new owner and to look solely to such new owner for performance of any and all such liabilities and obligations.

## 28. ATTORNMENT TO LENDER OR THIRD PARTY

In the event the interest of Landlord in the land and buildings in which the Premises are located (whether such interest of Landlord is a fee title interest or a leasehold interest) is encumbered by deed of trust, and such interest is acquired by a lender or any other third party through judicial foreclosure or by exercise of a power of sale at private trustee's foreclosure sale, Tenant hereby agrees to release Landlord of any obligation arising on or after any such foreclosure sale and to attorn to the purchaser at any such foreclosure sale and to recognize such purchaser as the Landlord under this lease.

## 29. DEFAULT BY LANDLORD

Landlord shall not be in default unless Landlord fails to perform obligations required of Landlord within a reasonable time, but in no event earlier than thirty (30) days after written notice by Tenant to Landlord and to the holder of any first mortgage or deed of trust covering the Premises specifying wherein Landlord has failed to perform such obligations; provided, however, that if the nature of Landlord's obligations is such that more than thirty (30) days are required for performance, then Landlord shall not be in default if Landlord commences performance within such thirty (30) day period and thereafter diligently prosecutes the same to completion.

If Landlord is in default of this lease, Tenant's sole remedy shall be to institute suit against Landlord in a court of competent jurisdiction, and Tenant shall have no right to offset any sums expended by Tenant as a result of Landlord's default against future rent and other sums due and payable pursuant to this lease. If Landlord is in default of this lease, and as a consequence Tenant recovers a money judgment against Landlord, the judgment shall be satisfied only out of the proceeds of sale received on execution of the judgment and levy against the right, title and interest of Landlord in the Project of which the Premises are a part, and out of rent or other income from such real property receivable by Landlord or out of the consideration received by Landlord from the sale or other disposition of all or any part of Landlord's right, title and interest in the Project of which the Premises are a part. Neither Landlord nor any of the partners comprising the partnership designated as Landlord shall be personally liable for any deficiency.

## 30. CONSTRUCTION CHANGES

It is understood that the description of the Premises and the location of ductwork, plumbing and other facilities therein are subject to such changes as Landlord or Landlord's architect determines to be desirable in the course of construction of the Premises and/or the improvements constructed or being constructed therein, and no such changes or any changes in plans for any other

portions of the Project, shall affect this lease or entitle Tenant to any reduction of rent hereunder or result in any liability of Landlord to Tenant.

31. MEASUREMENT OF PREMISES

Tenant understands and agrees that any reference to square footage of the Premises is approximate only and includes all interior partitions and columns, one-half of exterior walls, and one-half of the partitions separating the Premises from the rest of the Project. Tenant waives any claim against Landlord regarding the accuracy of any such measurement and agrees that there shall not be any adjustment in basic rent or direct expenses or other amounts payable hereunder by reason of inaccuracies in such measurement.

32. ATTORNEY FEES

If either party commences an action against the other party arising out of or in connection with this lease, the prevailing party shall be entitled to have and recover from the losing party all expenses of litigation, including, without limitation, travel expenses, attorney fees, expert witness fees, trial and appellate court costs, and deposition and transcript expenses. If either party becomes a party to any litigation concerning this lease or concerning the Premises or the Project, by reason of any act or omission of the other party or its authorized representatives, the party that causes the other party to become involved in the litigation shall be liable to the other party for all expenses of litigation, including, without limitation, travel expenses, attorney fees, expert witness fees, trial and appellate court costs, and deposition and transcript expenses.

33. SURRENDER

The voluntary or other surrender of this lease or the Premises by Tenant, or a mutual cancellation of this lease, shall not work a merger, and at the option of Landlord shall either terminate all or any existing subleases or subtenancies or operate as an assignment to Landlord of all or any such subleases or subtenancies.

34. WAIVER

No delay or omission in the exercise of any right or remedy of Landlord on any default by Tenant shall impair such right or remedy or be construed as a waiver. The receipt and acceptance by Landlord of delinquent rent or other payments shall not constitute a waiver of any other default and acceptance of partial payments shall not be construed as a waiver of the balance of such payment due. No act or conduct of Landlord, including, without limitation, the acceptance of keys to the Premises, shall constitute an acceptance of the surrender of the Premises by Tenant.



before the expiration of the term. Only a written notice from Landlord to Tenant shall constitute acceptance of the surrender of the Premises and accomplish a termination of this lease. Landlord's consent to or approval of any act by Tenant requiring Landlord's consent or approval shall not be deemed to waive or render unnecessary Landlord's consent to or approval of any subsequent act by Tenant. Any waiver by Landlord of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of this lease.

### 35. EASEMENTS; AIRSPACE RIGHTS

Landlord reserves the right to alter the boundaries of the Project and grant easements and dedicate for public use portions of the Project without Tenant's consent, provided that no such grant or dedication shall interfere with Tenant's use of the Premises or otherwise cause Tenant to incur cost or expense. From time to time, and upon Landlord's demand, Tenant shall execute, acknowledge and deliver to Landlord, in accordance with Landlord's instructions, any and all documents, instruments, maps or plats necessary to effectuate Tenant's covenants hereunder.

This lease confers no rights either with regard to the subsurface of or airspace above the land on which the Project is located or with regard to airspace above the building of which the Premises are a part. Tenant agrees that no diminution or shutting off of light or view by a structure which is or may be erected (whether or not by Landlord) on property adjacent to the building of which the Premises are a part or to property adjacent thereto, shall in any way affect this lease, or entitle Tenant to any reduction of rent, or result in any liability of Landlord to Tenant.

### 36. RULES AND REGULATIONS

Landlord shall have the right from time to time to promulgate rules and regulations for the safety, care and cleanliness of the Premises, the Project and the Common Area, or for the preservation of good order. On delivery of a copy of such rules and regulations to Tenant, Tenant shall comply with the rules and regulations, and a violation of any of them shall constitute a default by Tenant under this lease. If there is a conflict between the rules and regulations and any of the provisions of this lease, the provisions of this lease shall prevail. Such rules and regulations may be amended by Landlord from time to time with or without advance notice.

### 37. NOTICES

All notices, demands, requests, consents and other communications which may be given or are required to be given by either party to the other shall be in writing and shall be sufficiently made and delivered if personally served or if sent by

United States first class mail, postage prepaid. Prior to the commencement of the term, all such communications shall be served or addressed to Tenant at 545 Middlefield Road, Suite 200, Menlo Park, California 94025; on or after the commencement date all such communications from Landlord to Tenant shall be addressed to Tenant at the Premises. All such communications by Tenant to Landlord shall be sent to Landlord at its offices at 3945 Freedom Circle, Suite 640, Santa Clara, California 95054. Either party may change its address by notifying the other of such change. Each such communication shall be deemed received on the date of the personal service or mailing thereof in the manner herein provided, as the case may be.

38. NAME

Tenant shall not use the name of the Project for any purpose other than as the address of the business conducted by Tenant in the Premises without the prior written consent of Landlord.

39. GOVERNING LAW; SEVERABILITY

This lease shall in all respects be governed by and construed in accordance with the laws of the State of California. If any provision of this lease shall be held or rendered invalid, unenforceable or ineffective for any reason whatsoever, all other provisions hereof shall be and remain in full force and effect.

40. DEFINITIONS

As used in this lease, the following words and phrases shall have the following meanings:

AUTHORIZED REPRESENTATIVE: any officer, agent, employee or independent contractor retained or employed by either party, acting within authority given him by that party.

ENCUMBRANCE: any deed of trust, mortgage or other written security device or agreement affecting the Premises or the Project that constitutes security for the payment of a debt or performance of an obligation, and the note or obligation secured by such deed of trust, mortgage or other written security device or agreement.

LEASE MONTH: the period of time determined by reference to the day of the month in which the term commences and continuing to one day short of the same numbered day in the next succeeding month; e.g., the tenth day of one month to and including the ninth day in the next succeeding month.

LENDER: the beneficiary, mortgagee or other holder of an encumbrance, as defined above.

LIEN: a charge imposed on the Premises by someone other than Landlord, by which the Premises are made security for the performance of an act. Most of the liens referred to in this lease are mechanic's liens.

MAINTENANCE: repairs, replacement, repainting and cleaning.

MONTHLY RENT: the sum of the monthly payments of basic rent and direct expenses.

PERSON: one or more human beings, or legal entities or other artificial persons, including, without limitation, partnerships, corporations, trusts, estates, associations and any combination of human being and legal entities.

PROVISION: any term, agreement, covenant, condition, clause, qualification, restriction, reservation or other stipulation in the lease that defines or otherwise controls, establishes or limits the performance required or permitted by either party.

RENT: basic rent, direct expenses, additional rent, and all other amounts payable by Tenant to Landlord required by this lease or arising by subsequent actions of the parties made pursuant to this lease.

Words used in any gender include other genders. If there be more than one Tenant, the obligations of Tenant hereunder are joint and several. All provisions whether covenants or conditions, on the part of Tenant shall be deemed to be both covenants and conditions. The paragraph headings are for convenience of reference only and shall have no effect upon the construction or interpretation of any provision hereof.

#### 41. TIME

Time is of the essence of this lease and of each and all of its provisions.

#### 42. INTEREST ON PAST DUE OBLIGATIONS; LATE CHARGE

Any amount due from Tenant to Landlord hereunder which is not paid when due shall bear interest at the rate of ten percent (10%) per annum from when due until paid, unless otherwise specifically provided herein, but the payment of such interest shall not excuse or cure any default by Tenant under this lease. In addition, Tenant acknowledges that late payment by Tenant to Landlord of basic rent or direct expenses or of any other amount due Landlord from Tenant, will cause Landlord to incur costs not contemplated by this lease, the exact amount of such costs being extremely difficult and impractical to fix. Such costs include, without limitation, processing and accounting charges, and late

charges that may be imposed on Landlord, e.g., by the terms of any encumbrance and note secured by any encumbrance covering the Premises. Therefore, if any such payment due from Tenant is not received by Landlord when due, Tenant shall pay to Landlord an additional sum of five percent (5%) of the overdue payment as a late charge. The parties agree that this late charge represents a fair and reasonable estimate of the costs that Landlord will incur by reason of late payment by Tenant. Acceptance of any late charge shall not constitute a waiver of Tenant's default with respect to the overdue amount, nor prevent Landlord from exercising any of the other rights and remedies available to Landlord. No notice to Tenant of failure to pay shall be required prior to the imposition of such interest and/or late charge, and any notice period provided for in paragraph 20 shall not affect the imposition of such interest and/or late charge. Any interest and late charge imposed pursuant to this paragraph shall be and constitute additional rent payable by Tenant to Landlord.

43. ENTIRE AGREEMENT

This lease, including any exhibits and attachments, constitutes the entire agreement between Landlord and Tenant relative to the Premises and this lease and the exhibits and attachments may be altered, amended or revoked only by an instrument in writing signed by both Landlord and Tenant. Landlord and Tenant agree hereby that all prior or contemporaneous oral agreements between and among themselves or their agents or representatives relative to the leasing of the Premises are merged in or revoked by this lease.

44. CORPORATE AUTHORITY

If Tenant is a corporation, each individual executing this lease on behalf of the corporation represents and warrants that he is duly authorized to execute and deliver this lease on behalf of the corporation in accordance with a duly adopted resolution of the Board of Directors of said corporation and that this lease is binding upon said corporation in accordance with its terms. If Tenant is a corporation, Tenant shall deliver to Landlord, within ten (10) days of the execution of this lease, a copy of the resolution of the Board of Directors of Tenant authorizing the execution of this lease and naming the officers that are authorized to execute this lease on behalf of Tenant, which copy shall be certified by Tenant's president or secretary as correct and in full force and effect.

45. RECORDING

Neither Landlord nor Tenant shall record this lease or a short form memorandum hereof without the consent of the other.

## 46. REAL ESTATE BROKERS

Each party represents and warrants to the other party that it has not had dealings in any manner with any real estate broker, finder or other person with respect to the Premises and the negotiation and execution of this lease. Each party shall indemnify and hold harmless the other party from all damage, loss, liability and expense (including attorneys' fees and related costs) arising out of or resulting from any claims for commissions or fees that may or have been asserted against the other party by any broker, finder or other person with whom Tenant or Landlord has or purportedly has dealt with in connection with the Premises and the negotiation and execution of this lease. Landlord and Tenant agree that Landlord shall not be obligated to pay any broker leasing commissions, consulting fees, finder fees or any other fees or commissions arising out of or relating to any extended term of this lease or to any expansion or relocation of the Premises at any time.

## 47. EXHIBITS AND ATTACHMENTS

All exhibits and attachments to this lease are a part hereof.

## 48. ENVIRONMENTAL MATTERS

## A. Tenant's Covenants Regarding Hazardous Materials.

(1) HAZARDOUS MATERIALS HANDLING. Tenant, its agents, invitees, employees, contractors, sublessees, assigns and/or successors shall not use, store, dispose, release or otherwise cause to be present or permit the use, storage, disposal, release or presence of Hazardous Materials (as defined below) on or about the Premises or Project. As used herein "Hazardous Materials" shall mean any petroleum or petroleum by-products, flammable explosives, asbestos, urea formaldehyde, radioactive materials or waste and any "hazardous substance", "hazardous waste", "hazardous materials", "toxic substance" or "toxic waste" as those terms are defined under the provisions of the California Health and Safety Code and/or the provisions of the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. Section 9601 et seq.), as amended by the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C. Section 9601 et seq.), or any other hazardous or toxic substance, material or waste which is or becomes regulated by any local governmental authority, the State of California or any agency thereof, or the United States Government or any agency thereof.

(2) NOTICES. Tenant shall immediately notify Landlord in writing of: (i) any enforcement, cleanup, removal or other governmental or regulatory action instituted, completed or threatened pursuant to any law, regulation or ordinance relating to the industrial hygiene, environmental protection or the use,

analysis, generation, manufacture, storage, presence, disposal or transportation of any Hazardous Materials (collectively "Hazardous Materials Laws"); (ii) any claim made or threatened by any person against Tenant, the Premises, Project or buildings within the Project relating to damage, contribution, cost recovery, compensation, loss or injury resulting from or claimed to result from any Hazardous Materials; and (iii) any reports made to any environmental agency arising out of or in connection with any Hazardous Materials in, on or removed from the Premises, Project or buildings within the Project, including any complaints, notices, warnings, reports or asserted violations in connection therewith. Tenant shall also supply to Landlord as promptly as possible, and in any event within five (5) business days after Tenant first receives or sends the same, with copies of all claims, reports, complaints, notices, warnings or asserted violations relating in any way to the Premises, Project or buildings within the Project or Tenant's use thereof. Tenant shall promptly deliver to Landlord copies of hazardous waste manifests reflecting the legal and proper disposal of all Hazardous Materials removed from the Premises.

B. INDEMNIFICATION OF LANDLORD. Tenant shall indemnify, defend (by counsel acceptable to Landlord), protect, and hold Landlord, and each of Landlord's partners, employees, agents, attorneys, successors and assigns, free and harmless from and against any and all claims, liabilities, penalties, forfeitures, losses or expenses (including attorneys' fees) for death of or injury to any person or damage to any property whatsoever (including water tables and atmosphere), arising from or caused in whole or in part, directly or indirectly, by (i) the presence in, on, under or about the Premises, Project or buildings within the Project or discharge in or from the Premises, Project or buildings within the Project of any Hazardous Materials or Tenant's use, analysis, storage, transportation, disposal, release, threatened release, discharge or generation of Hazardous Materials to, in, on, under, about or from the Premises, Project or buildings within the Project, or (ii) Tenant's failure to comply with any Hazardous Materials Laws whether knowingly, unknowingly, intentionally or unintentionally. Tenant's obligations hereunder shall include, without limitation, and whether foreseeable or unforeseeable, all costs of any required or necessary repair, cleanup or detoxification or decontamination of the Premises, Project or buildings within the Project, and the preparation and implementation of any closure, remedial action or other required plans in connection therewith. In addition, Tenant shall reimburse Landlord for (i) losses in or reductions to rental income resulting from Tenant's use, storage or disposal of Hazardous Materials, (ii) all costs of refitting or other alterations to the Premises, Project or buildings within the Project required as a result of Tenant's use, storage, or disposal of Hazardous Materials including, without limitation, alterations required to accommodate an alternate use of the Premises, Project or buildings within the Project, and (iii) any diminution in the fair market value of the Premises, Project or buildings within the Project caused by

Tenant's use, storage, or disposal of Hazardous Materials. For purposes of this paragraph 48, any acts or omissions of Tenant, or by employees, agents, assignees, contractors or subcontractors of Tenant or others acting for or on behalf of Tenant (whether or not they are negligent, intentional, willful or unlawful) shall be strictly attributable to Tenant.

C. SURVIVAL. The provisions of this paragraph 48 shall survive the expiration or earlier termination of the term of this lease.

49. SIGNAGE

Tenant shall not, without obtaining the prior written consent of Landlord, install or attach any sign or advertising material on any part of the outside of the Premises, or on any part of the inside of the Premises which is visible from the outside of the Premises, or in the halls, lobbies, windows or elevators of the building in which the Premises are located or on or about any other portion of the Common Area or Project. If Landlord consents to the installation of any sign or other advertising material, the location, size, design, color and other physical aspects thereof shall be subject to Landlord's prior written approval and shall be in accordance with any sign program applicable to the Project. In addition to any other requirements of this paragraph 49, the installation of any sign or other advertising material by or for Tenant must comply with all applicable laws, statutes, requirements, rules, ordinances and any C.C. & R.'s or other similar requirements. With respect to any permitted sign installed by or for Tenant, Tenant shall maintain such sign or other advertising material in good condition and repair and shall remove such sign or other advertising material on the expiration or earlier termination of the term of this lease. The cost of any permitted sign or advertising material and all costs associated with the installation, maintenance and removal thereof shall be paid for solely by Tenant. If Tenant fails to properly maintain or remove any permitted sign or other advertising material, Landlord may do so at Tenant's expense. Any cost incurred by Landlord in connection with such maintenance or removal shall be deemed additional rent and shall be paid by Tenant to Landlord within ten (10) days following notice from Landlord. Landlord may remove any unpermitted sign or advertising material without notice to Tenant and the cost of such removal shall be additional rent and shall be paid by Tenant within ten (10) days following notice from Landlord. Landlord shall not be liable to Tenant for any damage, loss or expense resulting from Landlord's removal of any sign or advertising material in accordance with this paragraph 49. The provisions of this paragraph 49 shall survive the expiration or earlier termination of this lease.

## 50. SUBMISSION OF LEASE

The submission of this lease to Tenant for examination or signature by Tenant is not an offer to lease the Premises to Tenant, nor an agreement by Landlord to reserve the Premises for Tenant. Landlord will not be bound to Tenant until this lease has been duly executed and delivered by both Landlord and Tenant.

## 51. PREMISES TAKEN AS IS

Tenant is leasing the Premises from Landlord "AS IS" in its condition existing as of the date hereof. Landlord shall have no obligation to alter or improve the Premises except that Landlord shall, at Landlord's cost, clean the carpet and paint the interior walls of the Premises (building standard materials).

## 52. ADDITIONAL RENT

All costs, charges, fees, penalties interest and any other payments (including Tenant's reimbursement to Landlord of costs incurred by Landlord) which Tenant is required to make to Landlord pursuant to the terms and conditions of this lease and any amendments to this lease shall be and constitute additional rent payable by Tenant to Landlord when due as specified in this lease and any amendments to this lease.

## 54. CROSS DEFAULT

Tenant currently leases from Landlord certain premises located at 545 Middlefield Road, Suites 160, 180, 200 and 250, Menlo Park, California, pursuant to that certain Office Lease dated November 23, 1992, as amended by that certain First Amendment to Lease dated October 25, 1993, that certain Second Amendment to Lease dated June 22, 1995, that certain Third Amendment to Lease dated December 19, 1995, that certain Assignment, Assumption and Consent Agreement dated June 17, 1996, and that certain Fourth Amendment to Lease to be executed concurrently herewith (the "Building 545 Lease"). Any default under this lease shall constitute a default under the Building 545 Lease, and any default under the Building 545 Lease shall constitute a default under this lease. As such, this provision supplements paragraph 19 of this lease and amends the Building 545 Lease.

[SIGNATURES AN NEXT PAGE]



IN WITNESS WHEREOF, Landlord and Tenant have executed and delivered this lease on the date first above written.

Landlord:  
McCANDLESS - TRIAD, a  
California general partnership

Tenant:  
VIVUS, INC.,  
a California corporation

By: /s/ Birk S. McCandless

-----  
Birk S. McCandless, as  
Trustee under the Birk  
S. McCandless and Mary  
McCandless Inter Vivos  
Trust Agreement Dated  
February 17, 1982,  
General Partner

Date:

-----  
(Date)

By: /s/ David C. Yntema

-----  
Name: David C. Yntema

Title: VP, Finance & CFO

-----  
Date: August 30, 1996

By:

Name:

Title:

Date:





MENLO McCANDLESS BUSINESS CENTER  
MASTER SIGN PROGRAM

1. Property Signs:

A. Two (2) large Project Directories

B. Building Directories

- One (1) directory located at 525 Middlefield Road side of building.

- One (1) directory located under staircase between 535 and 545 Middlefield Road buildings. Both buildings share one (1) directory.

C. Suite door signs
- II. Color codes:

A. All Suite door signs are the same ivory background with rust color lettering (building standard).

B. Project Directory and Building Directory strips are white with black vinyl lettering.
111. Costs:

A. Landlord, at Landlord's expense, shall supply the frame for the suite door sign. All other purchases are at Tenant's expense:

Small Building Directory Strip	20.00
Large Building Directory Strips	88.71 (Two strips)
Suite Door Signs	
One (1) line (16 characters)	63.50
Two (2) lines	78.50

Please contact the Management Office at (415) 326-0524 to provide specific signage information and coordination.

August 28, 1996

Mr. David C. Yntema  
Vice President & CFO  
Vivus, Inc.  
545 Middlefield Road, Suite 200  
Menlo Park, CA 94025

RE: Equipment Lease

Dear David:

This letter sets forth our understanding of the terms upon which Vivus, Inc. will lease from Plant Research Technologies, Inc. certain equipment, fixtures and improvements (collectively, the "Leased Equipment") which are located in, on or about that certain premises located at 525 Del Rey Avenue, Units C & D, Sunnyvale, which premises are being subleased by Vivus, Inc. from Plant Research Technologies, Inc. pursuant to a sublease to be entered into concurrently with this letter (the "Sublease").

1. Inventory. Promptly upon execution of the Sublease, representatives from Plant Research Technologies, Inc. and Vivus, Inc. will agree that the Leased Equipment shall remain on the leased premises and be leased by Vivus, Inc. during the term of the Sublease. The Leased Equipment will include Plant Research Technologies, Inc.'s laboratory benches, two (2) fume hoods, DI water system compressor, plumbing and other mechanical improvements.

2. Rent. Commencing on the date rent commences under the Sublease, Vivus, Inc. shall pay to Plant Research Technologies, Inc. as separate rent for the Leased Equipment the sum of \$0.75 per square foot of leased premises per month. Such rent totaling Four Thousand Six Hundred Seventy-One Dollars (\$4,671.00) shall be paid in advance on the first day of each calendar month during the term of the Sublease without deduction or offset.

3. Security Deposit. Concurrently with delivery of Plant Research Technologies, Inc.'s signature on a copy of this letter as indicated below, Vivus, Inc. shall deliver to Plant Research Technologies, Inc. a security deposit in the amount of Four

Thousand Six Hundred Seventy-One Dollars (\$4,671.00) (the "Security Deposit") as security for the full and faithful performance of Vivus, Inc.'s obligations under this letter agreement. In the event of a default of Vivus, Inc.'s obligation to make rental payments for the Leased Equipment, Plant Research Technologies, Inc. may apply all or part of the Security Deposit to such defaulted payment. In such event, Vivus, Inc. shall on demand restore the Security Deposit to its original amount. Upon expiration or earlier termination of the Sublease, the Security Deposit shall be returned to Vivus, Inc., reduced by such amounts as may be required by Plant Research Technologies, Inc. to remedy defaults on the part of Vivus, Inc. in the payment of rent or defaults in Vivus, Inc.'s obligations to maintain and repair the Leased Equipment. Any portion of the Security Deposit not so required shall be paid over to Vivus, Inc. after the expiration or earlier termination of the Sublease.

4. Repair and Maintenance. During the term of the Sublease, Vivus, Inc. shall be responsible at its sole cost and expense for the maintenance and repair (but not replacement) of the Leased Equipment.

If the foregoing accurately sets forth your understanding of the terms of Vivus, Inc.'s lease of the Leased Equipment, please so indicate by signing and dating the enclosed copy of this letter and returning it to me.

Sincerely,

/s/ B. A. Burke

- - - - -

Basil A. Burke, PhD.  
President  
Plant Research Technologies, Inc.

AGREED AND ACCEPTED:

Sublessee: Vivus, Inc.

/s/ David C. Yntema

Date: 8/28/96

- - - - -

David C. Yntema  
Vice President & Chief Financial Officer

[CORNISH &amp; CAREY LOGO]

O N C O R   I N T E R N A T I O N A L

## S U B L E A S E

Sublandlord: Plant Research  
Technologies, Inc.

Subject Property: 525 Del Rey Avenue,  
Units C & D,  
Sunnyvale, CA

Subtenant: Vivus, Inc.

Date: August 28, 1996

## 1. PARTIES:

This Sublease is made and entered into as of August 28, 1996, by and between Plant Research Technologies, Inc. ("Sublandlord"), and Vivus, Inc. ("Subtenant"), under the Master Lease dated July 29, 1994, between Harris Family Trust, as "Lessor" and Sublandlord under this Sublease as "Lessee." A copy of the Master Lease is attached hereto as Exhibit A and incorporated herein by this reference.

## 2. PROVISIONS CONSTITUTING SUBLEASE:

2.1 This Sublease is subject to all of the terms and conditions of the Master Lease. Subtenant hereby assumes and agrees to perform all of the obligations of "Lessee" under the Master Lease to the extent said obligations apply to the Subleased Premises and Subtenant's use of the Common Areas, except as specifically set forth herein. Sublandlord hereby agrees to cause Lessor under the Master Lease to perform all of the obligations of Lessor thereunder to the extent said obligations apply to the Subleased Premises and Subtenant's use of the Common Areas. Subtenant shall not commit or permit to be committed on the Subleased Premises or on any other portion of the Project any act or omission which violates any term or condition of the Master Lease. Except to the extent waived or consented to in writing by the other party or parties hereto who are affected thereby, neither of the parties hereto will, by renegotiation of the Master Lease, assignment, subletting, default or any other voluntary action, avoid or seek to avoid the observance or performance of the terms to be observed or performed hereunder by such party, but will at all times in good faith assist in carrying out all the terms of this Sublease and in taking all such action as may be necessary or appropriate to protect the rights of the other party or parties hereto who are affected thereby against impairment. Nothing contained in this Section 2.1 or elsewhere in this Sublease shall prevent or prohibit Sublandlord (a) from exercising its right to terminate the Master Lease pursuant to the terms thereof or (b) from assigning its interest in this Sublease.

2.2 All of the terms and conditions contained in the Master Lease are incorporated herein, except as specifically provided below, and the terms and conditions specifically set forth in this Sublease, shall constitute the complete terms and conditions of this Sublease, except the following paragraphs of the Master Lease which shall solely be the obligation of Sublandlord: 1.3, 1.5, 1.7, 1.10, 49, 50, 51, 53, 54.

## 3. SUBLEASED PREMISES AND RENT:

245 LYTTON AVENUE, SUITE 150, PALO ALTO, CA 94301 - (415) 322-2600  
FAX (415) 321-0719

## S U B L E A S E

## 3.1 Subleased Premises:

Sublandlord leases to Subtenant and Subtenant leases from Sublandlord the Subleased Premises upon all of the terms, covenants and conditions contained in this Sublease. The Subleased Premises consist of approximately six thousand two hundred twenty-eight (6,228)+/- square feet, located at 525 Del Rev Avenue, Units C & D, Sunnyvale. See attached Exhibit B.

## 3.2 Rent:

Subtenant shall pay to Sublandlord as Rent for the Subleased Premises the rental schedule as follows per month, without deductions, offset, prior notice or demand.

Months/Dates -----	Square Feet -----	Rental Rate/Amount Due/Month -----
09/15/96 - 08/31/97	6,228	\$0.90/square feet/month, Gross (\$5,605.20)
09/01/97 - 08/31/98	6,228	\$0.95/square feet/month, Gross (\$5,916.60)
09/01/98 - 08/31/99	6,228	\$1.00/square feet/month, Gross (\$6,228.00)

Rent shall be payable by Subtenant to Sublandlord in consecutive monthly installments on or before the first day of each calendar month during the Sublease Term. If the Sublease commencement date or the termination date of the Sublease occurs on a date other than the first day or the last day, respectively, of a calendar month, then the Rent for such partial month shall be prorated and the prorated Rent shall be payable on the Sublease commencement date or on the first day of the calendar month in which the Sublease termination date occurs, respectively.

## 3.3 Security Deposit:

In addition to the Rent specified above, Subtenant shall pay to Sublandlord an equivalent of the last month's rent as a non-interest bearing Security Deposit. In the event Subtenant has performed all of the terms and conditions of this Sublease during the term hereof, Sublandlord shall return to Subtenant, within ten days after Subtenant has vacated the Subleased Premises, the Security Deposit less any sums due and owing to Sublandlord.

## 4. RIGHTS OF ACCESS AND USE:

## 4.1 Use:

Subtenant shall use the Subleased Premises for those purposes permitted in the Master Lease, including laboratory research and development, and manufacturing unless Sublandlord and Master Landlord consent in writing to other uses prior to the commencement thereof.

## 5. SUBLEASE TERM:

## 5.1 Sublease Term:

The Sublease Term shall be for the period commencing on September 15, 1996, and continuing

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FAX (415) 321-0719



## S U B L E A S E

through August 31, 1999. In no event shall the Sublease Term extend beyond the Term of the Master Lease.

## 5.2 Inability to Deliver Possession:

In the event Sublandlord is unable to deliver possession of the Subleased Premises at the commencement of the term, Sublandlord shall not be liable for any damage caused thereby, nor shall this Sublease be void or voidable but Subtenant shall not be liable for Rent until such time as Sublandlord offers to deliver possession of the Subleased Premises to Subtenant, but the term hereof shall not be extended by such delay. If Subtenant, with Sublandlord's consent, takes possession prior to commencement of the term, Subtenant shall do so subject to all the covenants and conditions hereof and shall pay Rent for the period ending with the commencement of the term at the same rental as that prescribed for the first month of the term prorated at the rate of 1/30th thereof per day. In the event Sublandlord has been unable to deliver possession of the Subleased Premises within 30 days from the commencement date, Subtenant, at Subtenant's option, may terminate this Sublease.

## 6. IMPROVEMENTS TO PREMISES

Sublandlord, at Sublandlord's sole cost and expense shall warrant that all electrical, HVAC, and plumbing shall be in working order for a period of thirty (30) days after occupancy. Laboratory equipment including benches, vented fume hoods, DI water system and existing utility services shall remain in place. Subtenant will assume space in an otherwise "as is" condition.

If Subtenant, at any time or times during the term of this Sublease, shall desire to make any alterations, or improvements on the Premises, or any part or parts thereof, the same shall be constructed without cost or expense to Sublandlord, in accordance with the requirements of all laws, ordinances, codes, orders, rules, and regulations of all governmental authorities having jurisdiction over the Premises. In particular, Subtenant shall have the right to modify the building interiors, provided Subtenant has requested in writing and received written approval from Sublandlord. Such approval shall not be unreasonably withheld. Should any modifications require a building permit, such work shall be done by a licensed contractor. Any additions or improvements to the Premises, except Subtenant's fume hoods, benches, shelving, and equipment, shall become a part of the Premises upon termination of this Sublease and be surrendered to Sublandlord. Subtenant shall have the obligation to restore the Premises to their original condition on occupancy when the Sublease expires or terminates. Premises shall be returned to Sublandlord in "clean" condition.

## 7. OPERATING EXPENSES

Subtenant shall be responsible for their pro-rata share of the common area maintenance expenses to the Premises and be responsible for all utilities and interior maintenance to the Premises. Subtenant is responsible for their personal liability insurance for the coverage amounts required in the Master Lease. Sublandlord and Landlord shall be named as additionally insured.

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FAX (415) 321-0719

## S U B L E A S E

## 8. AIR CONDITIONING MAINTENANCE

Subtenant shall maintain an HVAC service contract and be responsible for periodic maintenance costs.

## 9. NOTICES:

All notices, demands, consents and approvals which may or are required to be given by either party to the other hereunder shall be given in the manner provided in the Master Lease, at the addresses shown on the signature page hereof. Sublandlord shall notify Subtenant of any Event of Default under the Master Lease, or of any other event of which Sublandlord has actual knowledge which will impair Subtenant's ability to conduct its normal business at the Subleased Premises, as soon as reasonably practicable following Sublandlord's receipt of notice from the Landlord of an Event of Default or actual knowledge of such impairment. If Sublandlord elects to terminate the Master Lease, Sublandlord shall so notify Subtenant by giving at least 30 days notice prior to the effective date of such termination.

## 10. BROKER FEE:

Upon execution of the Sublease, Sublandlord shall pay Cornish & Carey Commercial, a licensed real estate broker, fees set forth in a separate agreement between Sublandlord and Broker for brokerage services rendered by Broker to Sublandlord in this transaction.

## 11. COMPLIANCE WITH AMERICANS WITH DISABILITIES ACT:

Subtenant shall be responsible for the installation and cost of any and all improvements, alterations or other work required on or to the Subleased Premises or to any other portion of the property and/or building of which the Subleased Premises are a part, required or reasonably necessary because of: (1) Subtenant's use of the Subleased Premises or any portion thereof; (2) the use by a subtenant by reason of assignment or sublease; or (3) both, including any improvements, alterations or other work required under the Americans With Disabilities Act of 1990. Compliance with the provisions of this Section 8 shall be a condition of Sublandlord granting its consent to any assignment or Sublease of all or a portion of this Sublease and the Subleased Premises described in this Sublease.

## 12. COMPLIANCE WITH NONDISCRIMINATION REGULATIONS:

It is understood that it is illegal for Sublandlord to refuse to display or sublease the Subleased Premises, or to assign, surrender or sell the Master Lease, to any person because of race, color, religion, national origin, sex, sexual orientation, marital status or disability.

## 13. HAZARDOUS MATERIALS INDEMNIFICATION:

Sublandlord and Subtenant as Corporations, shall indemnify, defend and hold each other, its agents, employees and lenders, harmless from and against any and all losses, costs, claims, damages, liabilities and causes of action including attorney's fees and costs and consultants' fees arising out of or in any way connected with any Hazardous Substance located on the Premises as of Commencement Date or any subsequent presence of Hazardous Substances on or about the Premises, including the soils and groundwaters thereof, not caused or permitted by each other. These obligations under this provision shall survive the expiration or early termination of the Sublease.

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FAX (415) 321-0719

## S U B L E A S E

## 14. SUBTENANT'S RESPONSIBILITY AT THE CONCLUSION OF SUBLEASE:

Promptly upon the expiration or sooner termination of this Lease, Subtenant shall represent to Sublandlord in writing that (i) Subtenant has made a diligent effort to determine whether any Hazardous Materials are on, under or about the Premises as a result of any acts or omissions of Subtenant or Subtenant's agents and (ii) no such Hazardous Materials exist on, under or about the Premises other than as specifically identified to Sublandlord by Subtenant in writing. If Subtenant discloses the existence of Hazardous Materials on, under or about the Premises, or if Sublandlord at any time discovers that Subtenant or Subtenant Agents caused or permitted the release of a Hazardous Material on, under, from about the Premises, Subtenant shall, at Sublandlord's request, immediately prepare and submit to Sublandlord within thirty (30) days after such request a comprehensive plan, subject to Sublandlord's approval, specifying the action to be taken by Subtenant to return the Premises to the condition existing prior to the introduction of such Hazardous Materials. Upon Sublandlord's approval of such clean up plan, Subtenant shall, at Subtenant's sole cost and expense, without limitation on any rights and remedies of Sublandlord under this Sublease or at law or in equity, immediately implement such plan and proceed to clean up such Hazardous Materials in accordance with all Applicable Laws and as required by such plan and this Lease. Subtenant shall be required to complete a proper Premises closure plan consistent with all rules and regulations required by the State's and local governing authorities.

Subtenant shall not be responsible for any Hazardous Materials contamination of the Premises occurring prior to the Commencement Date and not otherwise caused by the acts or omissions of Subtenant or Subtenant's Agents.

## 15. TOXIC CONTAMINATION DISCLOSURE:

Sublandlord and Subtenant each acknowledge that they have been advised that numerous federal, state, and/or local laws, ordinances and regulations ("Laws") affect the existence and removal, storage, disposal, leakage of and contamination by materials designated as hazardous or toxic ("Toxics"). Many materials, some utilized in everyday business activities and property maintenance, are designated as hazardous or toxic.

Some of the Laws require that Toxics be removed or cleaned up by landowners, future landowners or former landowners without regard to whether the party required to pay for "clean up" caused the contamination, owned the property at the time the contamination occurred or even knew about the contamination. Some items, such as asbestos or PCBs, which were legal when installed, now are classified as Toxics, and are subject to removal requirements. Civil lawsuits for damages resulting from Toxics may be filed by third parties in certain circumstances.

Sublandlord and Subtenant each acknowledge that Broker has no specific expertise with respect to environmental assessment or physical condition of the Subleased Premises, including, but not limited to, matters relating to: (i) problems which may be posed by the presence or disposal of hazardous or toxic substances on or from the Subleased Premises, (ii) problems which may be posed by the Subleased Premises being within the Special Studies Zone as designated under the Alquist-Priolo Special Studies

## S U B L E A S E

Zone Act (Earthquake Zones), Section 2621-2630, inclusive of California Public Resources Code, and (iii) problems which may be posed by the Subleased Premises being within a HUD Flood Zone as set forth in the U.S. Department of Housing and Urban Development "Special Flood Zone Area Maps," as applicable.

Sublandlord and Subtenant each acknowledge that Broker has not made an independent investigation or determination of the physical or environmental condition of the Subleased Premises, including, but not limited to, the existence or nonexistence of any underground tanks, sumps, piping, toxic or hazardous substances on the Subleased Premises. Subtenant agrees that it will rely solely upon its own investigation and/or the investigation of professionals retained by it or Sublandlord, and neither Sublandlord nor Subtenant shall rely upon Broker to determine the physical and environmental condition of the Subleased Premises or to determine whether, to what extent or in what manner, such condition must be disclosed to potential sublessees, assignees, purchasers or other interested parties.

16. RENT ABATEMENT AND DAMAGES TO PERSONAL PROPERTY:

In the event Sublandlord, pursuant to the terms of the Master Lease, is entitled to and receives rent abatement, then to the extent such rent abatement affects the subleased premises, Subtenant shall be entitled to rent abatement in an amount that the net rentable area of the subleased premises bears to the total net rentable area of the Master Lease, and only to the extent any such abatement applies to the sublease term. In addition, any amounts paid or credited to Sublandlord under the terms of the Master Lease for damage to personal property shall be credited to Subtenant, subject to the same limitations set forth above.

Sublandlord: PLANT RESEARCH TECHNOLOGIES, INC.  
2050 Fortune Avenue  
San Jose, CA 95131

By: /s/ B.A. Burke Date: 8/28/96

-----  
Basil A. Burke, PhD., President

Subtenant: VIVUS, INC.  
545 Middlefield Road, Suite 200  
Menlo Park, CA 95024

By: /s/ David C. Yntema Date: 8/28/96

-----  
David Yntema, CFO

NOTICE TO SUBLANDLORD AND SUBTENANT: CORNISH & CAREY COMMERCIAL, IS NOT AUTHORIZED TO GIVE LEGAL OR TAX ADVICE; NOTHING CONTAINED IN THIS SUBLEASE OR ANY DISCUSSIONS BETWEEN CORNISH & CAREY AND SUBLANDLORD AND SUBTENANT SHALL BE DEEMED TO BE A REPRESENTATION OR RECOMMENDATION BY CORNISH & CAREY COMMERCIAL, OR ITS AGENTS OR EMPLOYEES AS TO THE LEGAL EFFECT OR TAX CONSEQUENCES OF THIS DOCUMENT OR ANY

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FAX (415) 321-0719

[CORNISH & CAREY LOGO]

S U B L E A S E

TRANSACTION RELATING THERETO. ALL PARTIES ARE ENCOURAGED TO CONSULT WITH THEIR INDEPENDENT FINANCIAL CONSULTANTS AND/OR ATTORNEYS REGARDING THE TRANSACTION CONTEMPLATED BY THIS PROPOSAL.

Exhibit A Master Lease  
Exhibit B Facility Plan

MASTER LANDLORD CONSENT

The undersigned, Lessor under the Master Lease attached as Attachment I, hereby consents to the subletting of the Subleased Premises described herein on the terms and conditions contained in this Sublease. This Consent shall apply only to this Sublease and shall not be deemed to be a consent to any other Sublease.

Landlord: HARRIS FAMILY TRUST

By: [Signature Illegible]

Date: 9-3-96

245 LYTTON AVENUE, SUITE 150, PALO ALTO, CA 94301 - (415) 322-2600  
FAX (415) 321-0719

FACILITY MAP

Plant Research Technologies, Inc.  
525 Del Rey Avenue, Unit C, Sunnyvale, CA 94086  
January 1, 1996

[MAP OF FACILITY]

STANDARD INDUSTRIAL/COMMERCIAL MULTI-TENANT LEASE -- GROSS  
AMERICAN INDUSTRIAL REAL ESTATE ASSOCIATION

1. BASIC PROVISIONS ("BASIC PROVISIONS").

1.1 PARTIES: This Lease ("Lease"), dated for reference purposes only, July 29, 1994, is made by and between Harris Family Trust ("Lessor") and Plant Research Technologies Inc., a California Corporation ("Lessee"), (collectively the "Parties," or individually a "Party").

1.2(a) PREMISES: That certain portion of the Building, including all improvements therein or to be provided by Lessor under the terms of this Lease, commonly known by the street address of 525 Del Rey/Units C & D, located in the City of Sunnyvale, County of Santa Clara, State of California, with zip code 94086, as outlined on Exhibit A attached hereto ("Premises"). The "Building" is that certain building containing the Premises and generally described as (describe briefly the nature of the Building): Approximately 6,228 square feet of light industrial/office/R&D space of a larger building. In addition to Lessee's rights to use and occupy the Premises as hereinafter specified, Lessee shall have non-exclusive rights to the Common Areas (as defined in Paragraph 2.7 below) as hereinafter specified, but shall not have any rights to the roof, exterior walls or utility raceways of the Building or to any other buildings in the Industrial Center. The Premises, the Building, the Common Areas, the land upon which they are located, along with all other buildings and improvements thereon, are herein collectively referred to as the "Industrial Center." (Also see Paragraph 2.)

1.2(b) PARKING: 21 unreserved vehicle parking spaces ("Unreserved Parking Spaces"); and none reserved vehicle parking spaces ("Reserved Parking Spaces"). (Also see Paragraph 2.6.)

1.3 TERM: 5 years and 0 months ("Original Term") commencing September 1, 1994 ("Commencement Date") and ending August 31, 1999 ("Expiration Date"). (Also see Paragraph 3.)

1.4 EARLY POSSESSION: August 15, 1994 ("Early Possession Date"). (Also see Paragraphs 3.2 and 3.3.)

1.5 BASE RENT: \$4,484.16 per month ("Base Rent"), payable on the 1st day of each month commencing September 1994 (Also see Paragraph 4.)

[X] If this box is checked, this Lease provides for the Base Rent to be adjusted per paragraph 51 attached hereto.

1.6(a) BASE RENT PAID UPON EXECUTION: \$4,484.16 as Base Rent for the period September 1, 1994.

1.6(b) LESSEE'S SHARE OF COMMON AREA OPERATING EXPENSES: Twenty Eight percent (28%) ("Lessee's Share") as determined by

[X] prorata square footage of the Premises as compared to the total square footage of the Building or [ ] other criteria as described in Addendum \_\_\_\_.

1.7 SECURITY DEPOSIT: \$5,293.80 ("Security Deposit"). (Also see Paragraph 5.)

1.8 PERMITTED USE: Sales, Laboratory Research and Development for the agriculture, chemical and pharmaceutical, industries and legally related uses.

("Permitted Use") (Also see Paragraph 6.)

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1.9 INSURING PARTY. Lessor in the "Insuring Party." (Also see Paragraph 8.)

1.10(a) REAL ESTATE BROKERS. The following real estate broker(s) (collectively, the "Brokers") and brokerage relationships exist in this transaction and are consented to by the Parties (check applicable boxes):

[X] Tom Sweeney-Wayne Mascia Associates represents Lessor exclusively ("Lessor's Broker");

[X] Mike Filice-Wayne Mascia Associates represents Lessee exclusively ("Lessee's Broker"); or

[X] Wayne Mascia Associates represents both Lessor and Lessee ("Dual Agency"). (Also see Paragraph 15.)

1.10(b) PAYMENT TO BROKERS. Upon the execution of this Lease by both Parties, Lessor shall pay to said Broker(s) jointly, or in such separate shares as they may mutually designate in writing, a fee as set forth in a separate written agreement between Lessor and said Broker(s) (or in the event there is no separate written agreement between Lessor and said Broker(s), the sum of \$15,821.80 for brokerage services rendered by said Broker(s) in connection with this transaction.

1.11 GUARANTOR. The obligations of the Lessee under this Lease are to be guaranteed by Basil Burke, Ph.D and Scott Korney ("Guarantor"). (Also see Paragraph 37.)

1.12 ADDENDA AND EXHIBITS. Attached hereto is an Addendum or Addenda consisting of Paragraphs 49 through 54, and Exhibits 0 through 1, all of which constitute a part of this Lease.

2. PREMISES, PARKING AND COMMON AREAS.

2.1 LETTING. Lessor hereby leases to Lessee, and Lessee hereby leases from Lessor, the Premises, for the term, at the rental, and upon all of the terms, covenants and conditions set forth in this Lease. Unless otherwise provided herein, any statement of square footage set forth in this Lease, or that may have been used in calculating rental and/or Common Area Operating Expenses, is an approximation which Lessor and Lessee agree is reasonable and the rental and Lessee's Share (as defined in Paragraph 1.6(b)) based thereon is not subject to revision whether or not the actual square footage is more or less.

2.2 CONDITION. Lessor shall deliver the Premises to Lessee clean and free of debris on the Commencement Date and warrants to Lessee that the existing plumbing, electrical systems, fire sprinkler system, lightning, air conditioning and heating systems and loading doors, if any. In the Premises, other than those constructed by Lessee, shall be in good operating condition on the Commencement Date. If a non-compliance with said warranty exists as of the Commencement Date, Lessor shall, except as otherwise provided in this Lease, promptly after receipt of written notice from Lessee setting forth with specifically the nature and extent of such non-compliance, rectify same at Lessor's expense. If Lessee does not give Lessor written notice of a non-compliance with this warranty within thirty (30) days after the Commencement Date, correction of that non-compliance shall be the obligation of Lessee at Lessee's sole cost and expenses.

2.3 COMPLIANCE WITH COVENANTS, RESTRICTIONS AND BUILDING CODE. Lessor warrants that any improvements (other than those constructed by Lessee or at Lessee's direction) on or in the Premises which have been constructed or installed by Lessor or with Lessor's consent or at Lessor's direction shall comply with all applicable covenants or restrictions of record and applicable building codes, regulations and ordinances in effect on the Commencement Date. Lessor further warrants to Lessee that Lessor has no knowledge of any claim having been made by any governmental agency that a violation or violations of applicable building codes, regulations, or ordinances exist with regard to the Premises as of the Commencement Date. Said warranties shall not apply to any Alterations or Utility installments (defined in Paragraph 7.3(a)) made or to be made by Lessee. If the Premises do not comply with said warranties, Lessor shall, except as otherwise provided in this Lease, promptly after receipt of written notice from Lessee given within six (6) months following the Commencement Date and setting forth with specificity the nature and extent of such non-compliance, take such action, at Lessor's expense, as may be reasonable or appropriate to rectify the non-compliance. Lessor makes no warranty that the Permitted Use in Paragraph 1.8 is permitted for the Premises under Applicable Laws (as defined in Paragraph 2.4)

2.4 ACCEPTANCE OF PREMISES. Lessee hereby acknowledges: (a) that it has been advised by the Broker(s) to satisfy itself with respect to the condition of the Premises (including but not limited to the electrical and fire sprinkler systems, security, environmental aspects, seismic and earthquake requirements, and compliance with the Americans with Disabilities Act and applicable zoning, municipal, county, state and federal laws, ordinances and regulations and any covenants or restrictions of record (collectively, "Applicable Laws") and the present and future suitability of the Premises for Lessee's intended use; (b) that Lessee has made such investigation as it deems necessary with reference to such matters, is satisfied with reference thereto, and assumes all responsibility therefor as the same relate to Lessee's occupancy of the Premises and/or the terms of this Lease; and (c) that neither Lessor, nor any of Lessor's agents, has made any oral or written representations or warranties with respect to said matters other than as set forth in this Lease.

2.5 LESSEE AS PRIOR OWNER/OCCUPANT. The warranties made by Lessor in this Paragraph 2 shall be of no force or effect if immediately prior to the date set forth in Paragraph 1.1 Lessee was the owner or occupant of the Premises. In such event, Lessee shall, at Lessee's sole cost and expense, correct any non-compliance of the Premises with said warranties.

Initials: BAB, PH  
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NH  
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2.6 VEHICLE PARKING. Lessee shall be entitled to use the number of Unreserved Parking Spaces and Reserved Parking Spaces specified in Paragraph 1.2(b) on those portions of the Common Areas designated from time to time by Lessor for parking. Lessee shall not use more parking spaces than said number. Said parking spaces shall be used for parking by vehicles no larger than full-size passenger automobiles or pick-up trucks, herein called "Permitted Size Vehicles." Vehicles other than Permitted Size Vehicles shall be parked and loaded or unloaded as directed by Lessor in the Rules and Regulations (as defined in Paragraph 40) Issued by Lessor. (Also see paragraph 2.9.)

(a) Lessee shall not permit or allow any vehicles that belong to or are controlled by Lessee or Lessee's employees, suppliers, shippers, customers, contractors or invitees to be loaded, unloaded, or parked in areas other than those designated by Lessor for such activities.

(b) If Lessee permits or allows any of the prohibited activities described in this Paragraph 2.6, then Lessor shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove or tow away the vehicle involved and charge the cost to Lessee, which cost shall be immediately payable upon demand by Lessor.

(c) Lessor shall at the Commencement Date of this Lease, provide the parking facilities required by Applicable Law.

2.7 COMMON AREAS - DEFINITION. The term "Common Areas" is defined as all areas and facilities outside the Premises and within the exterior boundary line of the Industrial Center and interior utility raceways within the Premises that are provided and designated by the Lessor from time to time for the general non-exclusive use of Lessor, Lessee and other lessees of the Industrial Center and their respective employees, suppliers, shippers, customers, contractors and invitees, including parking areas, loading and unloading areas, trash areas, roadways, sidewalks, walkways, parkways, driveways and landscaped areas.

2.8 COMMON AREAS - LESSEE'S RIGHTS. Lessor hereby grants to Lessee, for the benefit of Lessee and its employees, suppliers, shippers, contractors, customers and invitees, during the term of this Lease, the non-exclusive right to use, in common with others entitled to such use, the Common Areas as they exist from time to time, subject to any rights, powers, and privileges reserved by Lessor under the terms hereof or under the terms of any rules and regulations or restrictions governing the use of the Industrial Center. Under no circumstances shall the right herein granted to use the Common Areas be deemed to include the right to store any property, temporarily or permanently, in the Common Areas. Any such storage shall be permitted only by the prior written consent of Lessor or Lessor's designated agent, which consent may be revoked at anytime. In the event that any unauthorized storage shall occur then Lessor shall have the right, without notice, in addition to such other rights and remedies that it may have, to remove the property and charge the cost to Lessee, which cost shall be immediately payable upon demand by Lessor.

2.9 COMMON AREA - RULES AND REGULATIONS. Lessor or such other person(s) as Lessor may appoint shall have the exclusive control and management of the Common Areas and shall have the right, from time to time, to establish, modify, amend and enforce reasonable Rules and Regulations with respect thereto in accordance with Paragraph 40. Lessee agrees to abide by and conform to all such Rules and Regulations, and to cause its employees, suppliers, shippers, customers, contractors and invitees to so abide and conform. Lessor shall not be responsible to Lessee for the non-compliance with said rules and regulations by other lessees of the Industrial Center.

2.10 COMMON AREAS - CHANGES. Lessor shall have the right, in Lessor's sole discretion, from time to time:

(a) To make changes to the Common Areas, including, without limitation, changes in the location, size, shape and number of driveways, entrances, parking spaces, parking areas, loading and unloading areas, ingress, egress, direction of traffic, landscaped areas, walkways and utility raceways;

(b) To close temporarily any of the Common Areas for maintenance purposes so long as reasonable access to the Premises remains available;

(c) To designate other land outside the boundaries of the Industrial Center to be a part of the Common Areas;

(d) To add additional buildings and improvements to the Common Areas;

(e) To use the Common Areas while engaged in making additional improvements, repairs or alternatives to the Industrial Center, or any portion thereof; and

(f) To do and perform such other acts and make such other changes in, to or with respect to the Common Areas and Industrial Center as Lessor may, in the exercise of sound business judgment, deem to be appropriate.

3. TERM.

3.1 TERM. The commencement Date, Expiration Date and Original Term of this Lease are as specified in Paragraph 1.3.

3.2 EARLY POSSESSION. If any Early Possession Date is specified in Paragraph 1.4 and if Lessee totally or partially occupies the Premises after the Early Possession Date but prior to the Commencement Date, the obligations to pay Base Rent shall be abated for the period of such early occupancy. All other terms of this Lease, however, (including but not limited to the obligations to pay Lessee's Share of Common Area Operating Expenses and to carry the Insurance required by Paragraph 8) shall be in effect during such period. Any such early possession shall not affect nor advance the Expiration Date of the Original Term.

3.3 DELAY IN POSSESSION. If for any reason Lessor cannot deliver possession of the Premises to Lessee by the Early Possession Date. If one is specified in Paragraph 1.4, or if no Early Possession Date is specified, by the Commencement Date, Lessor shall not be subject to any liability therefor, nor shall such failure effect the validity of this Lease, or the obligations of Lessee hereunder, or extend the term hereof, but in such case, Lessee shall not, except as otherwise provided herein, be obligated to pay rent or perform any other obligation of Lessee under the terms of this Lease until Lessor delivers possession of the Premises to Lessee. If possession of the Premises is not delivered to Lessee within sixty (60) days after the Commencement Date, Lessee may, at its option, by notice in writing to Lessor within (10) days after the end of said sixty (60) day period, cancel this Lease, in which event the parties shall be discharged from all obligations hereunder; provided further, however, that if such written notice of Lessee is not received by Lessor within said ten (10) day period, Lessee's right to cancel this Lease thereunder shall terminate and be of no further force or effect. Except as may be otherwise provided, and regardless of when the Original Term actually commences. If possession is not tendered to Lessee when required by this Lease and Lessee does not terminate this Lease, as aforesaid, the period free of the obligation to pay Base Rent if any, that Lessee would otherwise have enjoyed shall run from the date of delivery of possession and continue for a period equal to the period during which the Lessee would have otherwise enjoyed under the terms hereof, but minus any days of delay caused by the acts, changes or omissions of Lessee.

4. RENT.

4.1 BASE RENT. Lessee shall pay Base Rent and other rent or charges, as the same may be adjusted from time to time, to Lessor in lawful money of the United States, without offset or deduction on or before the day on which it is due under the terms of this Lease. Base Rent and all other rent and charges for any period during the term hereof which is for less than one full month shall be prorated based upon the actual number of days of the month involved. Payment of Base Rent and other charges shall be made to Lessor at the address stated herein or to such other persons or at such other addresses as Lessor may from time to time designate in writing to Lessee.

4.2 COMMON AREA OPERATING EXPENSES. Lessee shall pay to Lessor during the term hereof, in addition to the Base Rent, Lessee's Share (as specified in Paragraph 1.6(b)) of all Common Area Operation Expenses, as hereinafter defined, during each calendar year of the term of this Lease. In accordance with the following provisions:

(a) "Common Area Operation Expenses" are defined, for purposes of this Lease, as all costs incurred by Lessor relating to the ownership and operations of the Industrial Center, including, but not limited to, the following:

(i) The operation, repair and maintenance, in neat, clean, good order and condition, of the following:

(aa) The Common Areas, including parking areas, loading and unloading areas, trash areas, roadways, sidewalks, walkways, parkways, driveways, landscaped areas, striping, bumpers, irrigation systems, Common Area lighting facilities, fences and gates, elevators and roof.

(bb) Exterior signs and any tenant directories.

(cc) Fire detection and sprinkler systems.

(ii) The cost of water, gas, electricity and telephone to service the Common Areas.

(iii) Trash disposal, property management and security services and the costs of any environmental inspections.

(iv) Reserves set aside for maintenance and repair of Common Areas.

(v) Any increase above the Base Real Property Taxes as defined in Paragraph 10.2(b)) for the Building and the Common Areas.

(vi) Any "Insurance Cost Increase" (as defined in Paragraph 8.1).

(vii) The cost of Insurance carried by Lessor with respect to the Common Areas.

(viii) Any deductible portion of any insured loss concerning the Building or the Common Areas.

(ix) Any other services to be provided by Lessor that are stated elsewhere in this Lease to be a Common Area Operating Expense.

(b) Any Common Area Operating Expenses and Real Property Taxes that are specifically attributable to the Building or to any other building in the Industrial Center or to the operation, repair and maintenance thereof, shall be allocated entirely to the Building or to such other building. However, any Common Area Operating Expenses and Real Property Taxes that are not specifically attributable to the Building or to any other building or to the operation, repair and maintenance thereof, shall be equitably allocated by Lessor to all buildings in the Industrial Center.

(c) The Inclusion of the Improvements, facilities and services set forth in Subparagraph 4.2(a) shall not be deemed to impose an obligation upon Lessor to either have said improvements or facilities or to provide these services unless the Industrial Center already has the same, Lessor already provides the services, or Lessor has agreed elsewhere in this Lease to provide the same or some of them.

(d) Lessee's Share of Common Area Operating Expenses shall be payable by Lessee within ten (10) days after a reasonably detailed statement of actual expenses is presented to Lessee by Lessor. At Lessors option, however, an amount may be estimated by Lessor from time to time of Lessee's Share of annual Common Area Operating Expenses and the same shall be payable monthly or quarterly, as Lessor shall designate, during each 12-month period of the Lease term, on the same day as the Base Rent is due hereunder. Lessor shall deliver to Lessee within sixty (60) days after the expiration of each calendar year a reasonably detailed statement showing Lessee's Share of the actual Common Area Operating Expenses incurred during the preceding year. If Lessee's payments under the Paragraph 4.2(d) during said preceding year exceed Lessee's Share as indicated on said statement, Lessor shall be credited the amount of such over-

payment against Lessee's Share of Common Area Operating Expenses next becoming due. If Lessee's payments under this Paragraph 4.2(d) during said preceding year were less than Lessee's Share as indicated on said statement, Lessee shall pay to Lessor the amount of the deficiency within ten (10) days after delivery by Lessor to Lessee of said statement.

5. Security Deposit. Lessee shall deposit with Lessor upon Lessee's execution hereof the Security Deposit set forth in Paragraph 1.7 as security for Lessee's faithful performance of Lessee's obligations under this Lease. If Lessee fails to pay Base Rent or other rent or charges due hereunder, or otherwise Defaults under this Lease (as defined in Paragraph 13.1), Lessor may use, apply or retain all or any portion of said Security Deposit for the payment of any amount due Lessor or to reimburse or compensate Lessor for any liability, cost, expense, loss or damage (including attorneys' fees) which Lessor may suffer or incur by reason thereof. If Lessor uses or applies all or any portion of said Security Deposit, Lessee shall within ten (10) days after written request therefore deposit monies with Lessor sufficient to restore said Security Deposit to the full amount required by this Lease. Any time the Base Rent increases during the term of this Lease, Lessee shall, upon written request from Lessor, deposit additional monies with Lessor as an addition to the Security Deposit so that the total amount of the Security Deposit shall at all times bear the same proportion to the then current Base Rent as the initial Security Deposit bears to the initial Base Rent set forth in Paragraph 1.5. Lessor shall not be required to keep all or any part of the Security Deposit separate from its general accounts. Lessor shall, at the expiration or earlier termination of the term hereof and after Lessee has vacated the Premises, return to Lessee (or, at Lessor's option, to the last assignee, if any, of Lessee's interest herein), that portion of the Security Deposit not used or applied by Lessor. Unless otherwise expressly agreed in writing by Lessor, no part of the Security Deposit shall be considered to be held in trust, to bear interest or other increment for its use, or to be prepayment for any monies to be paid by Lessee under this Lease.

6. Use.

#### 6.1 Permitted Use.

(a) Lessee shall use and occupy the Premises only for the Permitted Use set forth in Paragraph 1.8, or any other legal use which is reasonably comparable thereto, and for no other purpose. Lessee shall not use or permit the use of the Premises in a manner that is unlawful, creates waste or a nuisance, or that disturbs owners and/or occupants of, or causes damage to the Premises or neighboring premises or properties.

(b) Lessor hereby agrees to not unreasonably withhold or delay its consent to any written request by Lessee, Lessee's assignees or subtenants, and by prospective assignees and subtenants of Lessee, its assignees and subtenants, for a modification of said Permitted Use, so long as the same will not impair the structural integrity of the improvements on the Premises or in the Building or the mechanical or electrical systems therein, does not conflict with uses by other lessees, is not significantly more burdensome to the Premises or the Building and the improvements thereon, and is otherwise permissible pursuant to this Paragraph 6. If Lessor elects to withhold such consent, Lessor shall within five (5) business days after such request give a written notification of same, which notice shall include an explanation of Lessor's reasonable objections to the change in use.

#### 6.2 Hazardous Substances.

(a) Reportable Uses Require Consent. The term "Hazardous Substances" as used in this Lease shall mean any product, substance, chemical, material or waste whose presence, nature, quantity and/or intensity of existence, use, manufacture, disposal, transportation, spill, release or effect, either by itself or in combination with other materials expected to be on the Premises, is either; (i) potentially injurious to the public health, safety or welfare, the environment, or the Premises; (ii) regulated or monitored by any governmental authority; or (iii) a basis for potential liability of Lessor to any governmental agency or third party under any applicable statute or common law theory. Hazardous Substance shall include, but not be limited to, hydrocarbons, petroleum, gasoline, crude oil or any products or by-products thereof. Lessee shall not engage in any activity in or about the Premises which constitutes a Reportable Use (as hereinafter defined) of Hazardous Substances without the express prior written consent of Lessor and compliance in a timely manner (at Lessee's sole cost and expense) with all Applicable Requirements (as defined in Paragraph 6.3). "Reportable Use" shall mean (i) the installation or use of any above or below ground storage tank, (ii) the generation, possession, storage, use, transportation, or disposal of a Hazardous Substance that requires a permit from, or with respect to which a report, notice, registration or business plan is required to be filed with, any governmental authority, and (iii) the presence in, on or about the Premises of a Hazardous Substance with respect to which any Applicable Laws require that a notice be given to persons entering or occupying the Premises or neighboring properties. Notwithstanding the foregoing, Lessee may, without Lessor's prior consent, but upon notice to Lessor and in compliance with all Applicable Requirements, use any ordinary and customary materials reasonably required to be used by Lessee in the normal course of the Permitted Use, so long as such use is not a Reportable Use and does not expose the Premises or neighboring properties to any meaningful risk of contamination or damage or expose Lessor

to any liability therefor. In addition, Lessor may (but without any obligation to do so) condition its consent to any Reportable Use of any Hazardous Substance by Lessee upon Lessee's giving Lessor such additional assurances as Lessor, in its reasonable discretion, deems necessary to protect itself, the public, the Premises and the environment against damage, contamination or injury and/or liability therefor, including but not limited to the installation (and, at Lessor's option, removal on or before Lease expiration or earlier termination) of reasonably necessary protective modifications to the Premises (such as concrete encasements) and/or the deposit of an additional Security Deposit under Paragraph 5 hereof.

(b) Duty to inform Lessor. If Lessee knows, or has reasonable cause to believe, that a Hazardous Substance has come to be located in, on, under or about the Premises or the Building, other than as previously consented to by Lessor, Lessee shall immediately give Lessor written notice thereof, together with a copy of any statement, report, notice, registration, application, permit, business plan, license, claim, action or proceeding given to, or received from, any governmental authority or private party concerning the presence, spill, release, discharge of, or exposure to, such Hazardous Substance including but not limited to all such documents as may be involved in any Reportable Use Involving the Premises. Lessee shall not cause or permit any Hazardous Substance to be spilled or released in, on, under or about the Premises (including, without limitation, through the plumbing or sanitary sewer system).

(c) Indemnification. Leases shall indemnify, protect, defend and hold Lessor, its agents, employees, lenders and ground lessor, if any, and the Premises, harmless from and against any and all damages, liabilities, judgments, costs, claims, liens, expenses, penalties, loss of permits and attorneys' and consultants' fees arising out of or involving any Hazardous Substance brought onto the Premises by or for Lessee or by anyone under Lessee's control. Lessee's obligations under this Paragraph 6.2(c) shall include, but not be limited to, the effects of any contamination or injury to person, property or the environment created or suffered by Lessees, and the cost of investigation (including consultants' and attorneys' fees and testing), removal, remediation, restoration and/or abatement thereof, or of any contamination therein involved, and shall survive the expiration or earlier termination of this Lease. No termination, cancellation or release agreement entered into by Lessor and Lessee shall release Lessee from its obligations under this Lease with respect to Hazardous Substances, unless specifically so agreed by Lessor in writing at the time of such agreement.

6.3 Lessee's Compliance with Requirements. Lessee shall, at Lessee's sole cost and expense, fully, diligently and in a timely manner, comply with all "Applicable Requirements," which term is used in this Lease to mean all laws, rules, regulations, ordinances, directives, covenants, easements and restrictions of record, permits, the requirements of any applicable fire insurance underwriter or rating bureau, and the recommendations or Lessor's engineers and/or consultants, relating in any manner to the Premises (including but not limited to matters pertaining to (i) industrial hygiene, (ii) environmental conditions on, in, under or about the Premises, including soil and groundwater conditions, and (iii) the use, generation, manufacture, production, installation, maintenance, removal, transportation, storage, spill, or release of any Hazardous Substance), now in effect or which may hereafter come into effect. Lessee shall, within five (5) days after receipt of Lessor's written request, provide Lessor with copies of all documents and information, including but not limited to permits, registrations, manifests, applications, reports and certificates, evidencing Lessee's compliance with any Applicable Requirements specified by Lessor, and shall immediately upon receipt, notify Lessor in writing (with copies of any documents involved) of any threatened or actual claim, notice, citation, warning, complaint or report pertaining to or involving failure by Lessee or the Premises to comply with any Applicable Requirements.

6.4 Inspection; Compliance with Law. Lessor, Lessor's agents, employees, contractors and designated representatives, and the holders of any mortgages, deeds of trust or ground leases on the Premises ("Lenders") shall have the right to enter the Premises at any time in the case of an emergency, and otherwise at reasonable times, for the purpose of inspecting the condition of the Premises and for verifying compliance by Lessee with this Lease and all Applicable Requirements (as defined in Paragraph 6.3), and Lessor shall be entitled to employ experts and/or consultants in connection therewith to advise Lessor with respect to Lessee's activities, including but not limited to Lessee's installation, operation, use, monitoring, maintenance, or removal of any Hazardous Substance on or from the Premises. The costs and expenses of any such inspections shall be paid by the party requesting same, unless a Default or Breach of this Lease by Lessee or a violation of Applicable Requirements or a contamination, caused or materially contributed to by Lessee, is found to exist or to be imminent, or unless the inspection is requested or ordered by a governmental authority as the result of any such existing or imminent violation or contamination. In such case, Lessee shall upon request reimburse Lessor or Lessor's Lender, as the case may be, for the costs and expenses of such inspections.

## 7. Maintenance, Repairs, Utility Installations, Trade Fixtures and Alterations.

### 7.1 Lessee's Obligations.

(a) Subject to the provisions of Paragraphs 2.2 (Condition), 2.3 (Compliance with Covenants, Restrictions and Building Code), 7.2 (Lessor's

Obligations), 9 (Damage or Destruction), and 14 (Condemnation). Lessee shall, at Lessee's sole cost and expense and at all times, keep the Premises and every part thereof in good order, condition and repair (whether or not such portion of the Premises requiring repair, or the means of repairing the same, are reasonably or readily accessible to Lessee, and whether or not the need for such repairs occurs as a result of Lessee's use, any prior use, the elements or the age of such portion of the Premises), including, without limiting the generality of the foregoing, all equipment or facilities specifically serving the Premises, such as plumbing, heating, air conditioning, ventilating, electrical, lighting facilities, boilers, fired or unfired pressure vessels, fire hose connections if within the Premises, fixtures, interior walls, interior surfaces of exterior walls, ceilings, floors, windows, doors, plate glass, and skylights, but excluding any items which are the responsibility of Lessor pursuant to Paragraph 7.2 below. Lessee, in keeping the Premises in good order, condition and repair, shall exercise and perform good maintenance practices. Lessee's obligations shall include restorations, replacements or renewals when necessary to keep the Premises and all improvements thereon or a part thereof in good order, condition and state of repair.

(b) Lessee shall, at Lessee's sole cost and expenses, procure and maintain a contract, with copies to Lessor, in customary form and substance for and with a contractor specializing and experienced in the inspection, maintenance and service of the heating, air conditioning and ventilation system for the Premises. However, Lessor reserves the right, upon notice to Lessee, to procure and maintain the contract for the heating, air conditioning and ventilating systems, and if Lessor so elects, Lessee shall reimburse Lessor, upon demand, for the cost thereof.

(c) If Lessee fails to perform Lessee's obligations under this Paragraph 7.1, Lessor may enter upon the Premises after ten (10) days' prior written notice to Lessee (except in the case of an emergency, in which case no notice shall be required), perform such obligations on Lessee's behalf, and put the Premises in good order, condition and repair, in accordance with Paragraph 13.2 below.

7.2 Lessor's Obligations. Subject to the provisions of Paragraphs 2.2 (Condition), 2.3 (Compliance with Covenants, Restrictions and Building Code), 4.2 (Common Area Operating Expenses), 6 (Use), 7.1 (Lessee's Obligations), 8 (Damage or Destruction) and 14 (Condemnation), Lessor, subject to reimbursement pursuant to Paragraph 4.2, shall keep in good order, condition and repair the foundations, exterior walls, structural condition of interior bearing walls, exterior roof, fire sprinkler and/or standpipe and hose (if located in the Common Areas) or other automatic fire extinguishing system including fire alarm and/or smoke detection

systems and equipment, fire hydrants, parking lots, walkways, parkways, driveways, landscaping, fences, signs and utility systems serving the Common Areas and all parts thereof, as well as providing the services for which there is a Common Area Operating Expense pursuant to Paragraph 4.2. Lessor shall not be obligated to paint the exterior or interior surfaces of exterior walls nor shall Lessor be obligated to maintain, repair or replace windows, doors or plate glass of the Premises. Lessee expressly waives the benefit of any statute now or hereafter in effect which would otherwise afford Lessee the right to make repairs at Lessor's expense or to terminate this Lease because of Lessor's failure to keep the Building, Industrial Center or Common Areas in good order, condition and repair.

### 7.3 Utility Installations, Trade Fixtures, Alterations.

(a) Definitions; Consent Required. The term "Utility Installations" is used in this Lease to refer to all air lines, power panels, electrical distribution, security, fire protection systems, communications systems, lighting fixtures, heating, ventilating and air conditioning equipment, plumbing, and fencing in, on or about the Premises. The term "Trade Fixtures" shall mean Lessee's machinery and equipment which can be removed without doing material damage to the Premises. The term "Alterations" shall mean any modification of the improvements on the Premises which are provided by Lessor under the terms of this Lease, other than Utility Installations or Trade Fixtures. "Lessee-Owned Alterations and/or Utility Installations" are defined as Alterations and/or Utility Installations made by Lessee that are not yet owned by Lessor pursuant to Paragraph 7.4(a). Lessee shall not make nor cause to be made any Alterations or Utility Installations in, on, under or about the Premises without Lessor's prior written consent. Lessee may, however, make non-structural Utility Installations to the Interior of the Premises (excluding the roof) without Lessor's consent but upon notice to Lessor, so long as they are not visible from the outside of the Premises, do not involve puncturing, relocating or removing the roof or any existing walls, or changing or interfering with the fire sprinkler or fire detection systems and the cumulative cost thereof during the term of this Lease as extended does not exceed \$2,500.00.

(b) Consent. Any Alterations or Utility Installations that Lessee shall desire to make and which require the consent of the Lessor shall be presented to Lessor in written form with detailed plans. All consents given by Lessor, whether by virtue of Paragraph 7.3(a) or by subsequent specific consent, shall be deemed conditioned upon: (i) Lessee's acquiring all applicable permits required by governmental authorities; (ii) the furnishing of copies of such permits together with a copy of the plans and specifications for the Alteration or Utility Installation to Lessor prior to commencement of the work thereon; and (iii) the compliance by Lessee with all conditions of said permits in a prompt and expeditious manner. Any Alterations or Utility Installations by Lessee during the term of this Lease shall be done in a good and workmanlike manner, with good and sufficient materials, and be in compliance with all Applicable Requirements. Lessee shall promptly upon completion thereof furnish Lessor with as-built plans and specifications therefor. Lessor may, (But without obligation to do so) condition its consent to any requested Alteration or Utility Installation that costs \$2,500.00 or more upon Lessee's providing Lessor with a lien and completion bond in an amount equal to one and one-half times the estimated cost of such Alteration or Utility Installation.

(c) Lien Protection. Lessee shall pay when due all claims for labor or materials furnished or alleged to have been furnished to or for Lessee at or for use on the Premises, which claims are or may be secured by any mechanic's or materialmen's lien against the Premises or any interest therein. Lessee shall give Lessor not less than ten (10) days' notice prior to the commencement of any work in, on, or about the Premises, and Lessor shall have the right to post notices of non-responsibility in or on the Premises as provided by law. If Lessee shall, in good faith, contest the validity of any such lien, claim or demand, then Lessee shall, at its sole expense, defend and protect itself, Lessor and the Premises against the same and shall pay and satisfy any such adverse judgment that may be rendered thereon before the enforcement thereof against the Lessor or the Premises. If Lessor shall require, Lessee shall furnish to Lessor a surety bond satisfactory to Lessor in an amount equal to one and one-half times the amount of such contested lien claim or demand, indemnifying Lessor against liability for the same, as required by law for the holding of the Premises free from the effect of such lien or claim. In addition, Lessor may require Lessee to pay Lessor's attorneys' fees and costs in participating in such action if Lessor shall decide it is to its best interest to do so.

### 7.4 Ownership, Removal, Surrender, and Restoration.

(a) Ownership. Subject to Lessor's right to require their removal and to cause Lessee to become the owner thereof as hereinafter provided in this Paragraph 7.4, all Alterations and Utility Installations made to the Premises by Lessee shall be the property of and owned by Lessee, but considered a part of the Premises. Lessor may, at any time and at its option, elect in writing to Lessee to be the owner of all or any specified part of the Lessee-Owned Alterations and Utility Installations. Unless otherwise instructed per Subparagraph 7.4(b) hereof, all Lessee-Owned Alterations and Utility Installations shall, at the expiration or earlier termination of this Lease, become the property of Lessor and remain upon the Premises and be surrendered

with the Premises by Lessee.

(b) Removal. Unless otherwise agreed in writing, Lessor may require that any or all Lessee-Owned Alterations or Utility Installations be removed by the expiration or earlier termination of this Lease, notwithstanding that their Installation may have been consented to by Lessor. Lessor may require the removal at any time of all or any part of any Alterations or Utility Installations made without the required consent of Lessor.

(c) Surrender/Restoration. Lessee shall surrender the Premises by the end of the last day of the Lease term or any earlier termination date, clean and free of debris and in good operating order, condition and state of repair, ordinary wear and tear excepted. Ordinary wear and tear shall not include any damage or deterioration that would have been prevented by good maintenance practice or by Lessee performing all of its obligations under this Lease. Except as otherwise agreed or specified herein, the Premises, as surrendered, shall include the Alterations and Utility Installations. The obligation of Lessee shall include the repair of any damage occasioned by the installation, maintenance or removal of Lessee's Trade Fixtures, furnishings, equipment, and Lessee-Owned Alterations and Utility Installations, as well as the removal of any storage tank installed by or for Lessee, and the removal, replacement, or remediation of any soil, material or ground water contaminated by Lessee, all as may then be required by Applicable Requirements and/or good practice. Lessee's Trade Fixtures shall remain the property of Lessee and shall be removed by Lessee subject to its obligation to repair and restore the Premises per this Lease.

## 8. Insurance; Indemnity.

### 8.1 Payment of Premium Increases.

(a) As used herein, the term "Insurance Cost Increase" is defined as any increase in the actual cost of the insurance applicable to the Building and required to be carried by Lessor pursuant to Paragraphs 8.2(b), 8.3(a) and 8.3(b), ("Required Insurance"), over and above the Base Premium, as hereinafter defined, calculated on an annual basis. "Insurance Cost Increase" shall include, but not be limited to, requirements of the holder of a mortgage or deed of trust covering the Premises, increased valuation of the Premises, and/or a general premium rate increase. The Term "Insurance Cost Increase" shall not, however, include any premium increases resulting from the nature of the occupancy of any other lessee of the Building. If the parties insert a dollar amount in Paragraph 1.9, such amount shall be considered the "Base Premium." If a dollar amount has not been inserted in Paragraph 1.9 and if the Building has been previously occupied during the twelve (12) month period immediately preceding the Commencement Date, the "Base Premium" shall be the annual premium applicable to such twelve (12) month period. If the Building was not fully occupied during such twelve (12) month period, the "Base Premium" shall be the lowest annual premium reasonably obtainable for the Required Insurance as of the Commencement Date, assuming the most nominal use possible of the Building. In no event, however, shall Lessee be responsible for any portion of the premium cost attributable to liability insurance coverage in excess of \$1,000,000 procured under Paragraph 6.2(b).

(b) Lessee shall pay any Insurance Cost Increase to Lessor pursuant to Paragraph 4.2. Premiums for policy periods commencing prior to, or extending beyond, the term of this Lease shall be prorated to coincide with the corresponding Commencement Date or Expiration Date.

### 8.2 Liability Insurance.

(a) Carried by Lessee. Lessee shall obtain and keep in force during the term of this Lease a Commercial General Liability policy of insurance protecting Lessee, Lessor and any Lender(s) whose names have been provided to Lessee in writing (as additional insureds) against claims for bodily injury, personal injury and property damage based upon, involving or arising out of the ownership, use, occupancy or maintenance of the Premises and all areas appurtenant thereto. Such Insurance shall be on an occurrence basis providing single limit coverage in an amount not less than \$1,000,000 per occurrence with an "Additional Insured-Managers or Lessors of Premises" endorsement and contain the "Amendment of the Pollution Exclusion" endorsement for damage caused by heat, smoke or fumes from a hostile fire. The policy shall not contain any intra-insured exclusions as between insured persons or organizations, but shall include coverage for liability assumed under this Lease as an "insured contract" for the performance of Lessee's indemnity obligations under this Lease. The limits of said insurance required by this Lease or as carried by Lessee shall not, however, limit the liability of Lessee nor relieve Lessee of any obligation hereunder. All insurance to be carried by Lessee shall be primary to and not contributory with any similar insurance carried by Lessor, whose insurance shall be considered excess insurance only.

(b) Carried by Lessor. Lessor shall also maintain liability insurance described in Paragraph 8.2(a) above, in addition to and not in lieu of, the insurance required to be maintained by Lessee. Lessee shall not be named as an additional insured therein.

### 8.3 Property Insurance - Building, Improvements and Rental Value.

(a) Building and Improvements. Lessor shall obtain and keep in force during the term of this Lease a policy or policies in the name of Lessor, with loss payable to Lessor and to any Lender(s), insuring against loss or



damage to the Premises. Such insurance shall be for full replacement cost, as the same shall exist from time to time, or the amount required by any Lender(s), but in no event more than the commercially reasonable and available insurable value thereof if, by reason of the unique nature or age of the improvements involved, such latter amount is less than full replacement cost. Lessee-Owned Alterations and Utility Installations, Trade Fixtures and Lessee's personal property shall be insured by Lessee pursuant to Paragraph 8.4. If the coverage is available and commercially appropriate, Lessor's policy or policies shall insure against all risks of direct physical loss or damage (except the perils of flood and/or earthquake unless required by a Lender or included in the Base Premium), including coverage for any additional costs resulting from debris removal and reasonable amounts of coverage for the enforcement of any ordinance or law regulating the reconstruction or replacement of any undamaged sections of the Building, required to be demolished or removed by reason of the enforcement of any building, zoning, safety or land use laws as the result of a covered loss, but not including plate glass insurance. Said policy or policies shall also contain an agreed valuation provision in lieu of any co-insurance clause, waiver or subrogation, and inflation guard protection causing an increase in the annual property insurance coverage amount by a factor of not less than the adjusted U.S. Department of Labor Consumer Price Index for All Urban Consumers for the city nearest to where the Premises are located.

(b) Rental Value. Lessor shall also obtain and keep in force during the term of this Lease a policy or policies in the name of Lessor, with loss payable to Lessor and any Lender(s), insuring the loss of the full rental and other charges payable by all lessees of the Building to Lessor for one year (including all Real Property Taxes, insurance costs, all Common Area Operating Expenses and any scheduled rental increases). Said insurance may provide that in the event the Lease is terminated by reason of an insured loss, the period of indemnity for such coverage shall be extended beyond the date of the completion of repairs or replacement of the Premises, to provide for one full year's loss of rental revenues from the date of any such loss. Said insurance shall contain an agreed valuation provision in lieu of any co-insurance clause, and the amount of coverage shall be adjusted annually to reflect the projected rental income, Real Property Taxes, insurance premium costs and other expenses, if any, otherwise payable, for the next 12-month period. Common Area Operating Expenses shall include any deductible amount in the event of such loss.

(C) Adjacent Premises. Lessee shall pay for any increase in the premiums for the property insurance of the Building and for the Common Areas or other buildings in the Industrial Center if said increase is caused by Lessee's acts, omissions, use or occupancy of the Premises.

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(d) Lessee's Improvements. Since Lessor is the Insuring Party, Lessor shall not be required to insure Lessee-Owned Alterations and Utility Installations unless the item in question has become the property of Lessor under the terms of this Lease.

8.4 Lessee's Property Insurance. Subject to the requirements of Paragraph 8.5, Lessee at its cost shall either by separate policy or, at Lessor's option by endorsement to a policy already carried, maintain insurance coverage on all of Lessee's personal property, Trade Fixtures and Lessee-Owned Alterations and Utility Installations in, on or about the Premises similar in coverage to that carried by Lessor as the Insuring Party under Paragraph 8.3(a). Such insurance shall be full replacement cost coverage with a deductible not to exceed \$1,000 per occurrence. The proceeds from any such insurance shall be used by Lessee of the replacement of personal property and the restoration of trade Fixtures and Lessee-Owned Alterations and Utility Installations. Upon request from Lessor, Lessee shall provide Lessor with written evidence that such insurance is in force.

8.5 Insurance Policies. Insurance required hereunder shall be in companies duly licensed to transact business in the state where the Premises are located, and maintaining during the policy term a "General Policyholders Rating" of at least B+, V, or such other rating as may be required by Lender, as set forth in the most current issue of "Best's Insurance Guide." Lessee shall not do or permit to be done anything which shall invalidate the insurance policies referred to in this Paragraph 8. Lessee shall cause to be delivered to Lessor, within seven (7) days after the earlier of the Early Possession Date or the Commencement Date, certified copies of, or certificates evidencing the existence and amounts of, the insurance required under Paragraph 8.2(a) and 8.4. No such policy shall be cancellable or subject to modification except after thirty (30) days' prior written notice to Lessor. Lessee shall at least thirty (30) days prior to the expiration of such policies, furnish Lessor with evidence renewals or "Insurance binders" evidencing renewal thereof, or Lessor may order such insurance and charge of the cost thereof to Lessee, which amount shall be payable by Lessee to Lessor upon demand.

8.6 Waiver of Subrogation. Without affecting any other rights or remedies, Lessee and Lessor each hereby release and relieve the other, and waive their entire right to recover damages (whether in contract or in tort) against the other, for loss or damage to their property arising out of or incident to the perils required to be insured against under Paragraph 8. The effect of such releases and waivers of the right to recover damages shall not be limited by the amount of insurance carried or required, or by any deductible applicable thereto. Lessor and Lessee agree to have their respective insurance companies issuing property damage insurance waive any right to subrogation that such companies may have against Lessor or Lessee, as the case may be, so long as the insurance is not invalidated thereby.

8.7 Indemnity. Except for Lessor's negligence and/or breach of express warranties, Lessee shall indemnify, protect, defend and hold harmless the Premises, Lessor and its agents, Lessor's master or ground lessor, partners and Lenders, from and against any and all claims, loss of rents and/or damages, costs, liens, judgments, penalties, loss of permits, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with, the occupancy of the Premises by Lessee, the conduct of Lessee's business, any act, omission or neglect of Lessee, its agents, contractors, employees or invitees, and out of any Default or Breach by Lessee in the performance in a timely manner of any obligation on Lessee's part to be performed under this Lease. The foregoing shall include, but not be limited to, the defense or pursuit of any claim or any action or proceeding involved therein, and whether or not (in the case of claims made against Lessor) litigated and/or reduced to judgment. In case any action or proceeding be brought against Lessor by reason of any of the foregoing matters, Lessee upon notice from Lessor shall defend the same at Lessee's expense by counsel reasonably satisfactory to Lessor and Lessor shall cooperate with Lessee in such defense. Lessor need not have first paid any such claim in order to be so indemnified.

8.8 Exemption of Lessor from Liability. Lessor shall not be liable for injury or damage to the person or goods, wares, merchandise or other property of Lessee, Lessee's employees, contractors, invitees, customers, or any other person in or about the Premises, whether such damage or injury is caused by or results from fire, steam, electricity, gas, water or rain, or from the breakage, leakage, obstruction or other defects of pipes, fire sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures, or from any other cause, whether said injury or damage results from conditions arising upon the Premises or upon other portions of the Building of which the Premises are a part, from other sources or places, and regardless of whether the cause of such damage or injury or the means of repairing the same is accessible or not. Lessor shall not be liable for any damages arising from any act or neglect of any other lessee of Lessor nor from the failure by Lessor to enforce the provision of any other lease in the Industrial Center. Notwithstanding Lessor's negligence or breach of this Lease, Lessor shall under no circumstances be liable for injury to Lessee's business or for any loss of income or profit therefrom.

## 9. Damage or Destruction.

### 9.1 Definitions.

(a) "Premises Partial Damage" shall mean damage or destruction to the Premises, other than Lessee-Owned Alterations and Utility Installations, the repair cost of which damage or destruction is less than fifty percent (50%) of the then Replacement Cost (as defined in Paragraph 9.1(d)) of the Premises (excluding Lessee-Owned Alterations and Utility Installations and Trade Fixtures) immediately prior to such damage or destruction.

(b) "Premises Total Destruction" shall mean damage or destruction to the Premises, other than Lessee-Owned Alterations and Utility Installations, the repair costs of which damage or destruction is fifty percent (50%) or more of the then Replacement Cost of the Premises (excluding Lessee-Owned Alterations and Utility Installations and Trade Fixtures) immediately prior to such damage or destruction. In addition, damage or destruction to the Building, other than Lessee-Owned Alterations and Utility Installations and Trade Fixtures of any lessees of the Building, the cost of which damage or destruction is fifty percent (50%) or more of the then Replacement Cost (excluding Lessee-Owned Alterations and Utility Installations and Trade Fixtures of any lessees of the Building) of the Building shall, at the option of Lessor, be deemed to be Premises Total Destruction.

(c) "Insured Loss" shall mean damage or destruction to the Premises, other than Lessee-Owned Alterations and Utility Installations and Trade Fixtures, which caused by an event required to be covered by the insurance described in Paragraph 8.3(a) irrespective of any deductible amounts or coverage limits involved.

(d) "Replacement Cost" shall mean the cost to repair or rebuild the improvements owned by Lessor at the time of the occurrence to their condition existing immediately prior thereto, including demolition, debris removal and upgrading required by the operation of applicable building codes, ordinances or laws, and without deduction for depreciation.

(e) "Hazardous Substance Condition" shall mean the occurrence or discovery of a condition involving the presence of, or a contamination by, a Hazardous Substance as defined in Paragraph 8.2(a), in, on, or under the Premises.

9.2 Premises Partial Damage - Insured Loss. If Premises Partial Damage that is an Insured Loss occurs, then Lessor shall, at Lessor's expense, repair such damage (but not Lessee's Trade Fixtures or Lessee-Owned Alterations and Utility Installations) as soon as reasonably possible and this Lease shall continue in full force and effect. In the event, however, that there is a shortage of insurance proceeds and such shortage is due to the fact that, by reason of the unique nature of the improvements in the Premises, full replacement cost insurance coverage was not commercially reasonable and available, Lessor shall have no obligation to pay for the shortage in insurance proceeds or to fully restore the unique aspects of the Premises unless Lessee provides Lessor with the funds to cover same, or adequate assurance thereof, within ten (10) days following receipt of written notice of such shortage and request therefor. If Lessor receives said funds or adequate assurance thereof within said ten (10) day period, Lessor shall complete them as soon as reasonably possible and this Lease shall remain in full force and effect. If Lessor does not receive such funds or assurance within said period, Lessor may nevertheless elect by written notice to Lessee within ten (10) days thereafter to make such restoration and repair as is commercially reasonable with Lessor paying any shortage in proceeds, in which case this Lease shall remain in full force and effect. If Lessor does not receive such funds or assurance within such ten (10) day period, and if Lessor does not so elect to restore and repair, then this Lease shall terminate sixty (60) days following the occurrence of the damage or destruction. Unless otherwise agreed, Lessee shall in no event have any right to reimbursement from Lessor for any funds contributed by Lessee to repair any such damage or destruction. Premises Partial Damage due to flood or earthquake shall be subject to Paragraph 9.3 rather than Paragraph 9.2, notwithstanding that there may be some insurance coverage, but the net proceeds of any such insurance shall be made available for the repairs if made by either Party.

9.3 Partial Damage - Uninsured loss. If Premises Partial Damage that is not an Insured Loss occurs, unless caused by a negligent or willful act of Lessee (in which event Lessee shall make the repairs at Lessee's expense and this Lease shall continue in full force and effect). Lessor may at Lessor's option, either (i) repair such damage as soon as reasonably possible at Lessor's expense. In which event this Lease shall continue in full force and effect, or (ii) give written notice to Lessee within thirty (30) days after receipt by Lessor of knowledge of the occurrence of such damage of Lessor's desire to terminate this Lease as of the date sixty (60) days following the date of such notice. In the event Lessor elects to give such notice of Lessor's intention to terminate this Lease, Lessee shall have the right within ten (10) days after the receipt of such notice to give written notice to Lessor of Lessee's commitment to pay for the repair of such damage totally at Lessee's expense and without reimbursement from Lessor, Lessee shall provide Lessor with the required funds or satisfactory assurance thereof within thirty (30) days following such commitment from Lessee. In such event this Lease shall continue in full force and effect, and Lessor shall proceed to make such repairs as soon as reasonably possible after the required funds are available. If Lessee does not give such notice and provide the funds or assurance thereof within the times specified above, this Lease shall terminate as of the date specified in Lessor's notice of termination.

9.4 Total Destruction. Notwithstanding any other provision hereof, if

Premises Total Destruction occurs (including any destruction required by any authorized public authority), this Lease shall terminate sixty (60) days following the date of such Premises Total Destruction, whether or not the damage or destruction is an insured Loss or was caused by a negligent or willful act of Lessee. In the event, however, that the damage or destruction was caused by Lessee, Lessor shall have the right to recover Lessor's damages from Lessee except as released and waived in Paragraph 9.7.

9.5 Damage Near End of Term. If at any time during the last six (6) months of the term of this Lease there is damage for which the cost to repair exceeds one month's Base Rent, whether or not an Insured Loss, Lessor may, at Lessor's option, terminate this Lease effective sixty (60) days following the date of occurrence of such damage by giving written notice to Lessee of Lessor's election to do so within thirty (30) days after the date of occurrence of such damage. Provided however, if Lessee at that time has an exercisable option to extend this Lease or to purchase the Premises, then Lessee may preserve the Lease by (a) exercising such option, and (b) providing Lessor with any shortage in insurance proceeds (or adequate assurance thereof) needed to make the repairs on or before the earlier of (i) the date which is ten (10) days after Lessee's receipt of Lessor's written notice purporting to terminate this Lease, or (ii) the day prior to the date upon which such option expires. If Lessee duly exercises such option during such period and provides Lessor with funds (or adequate assurance thereof) to cover any shortage in insurance proceeds, Lessor shall, at Lessor's expense repair such damage as soon as reasonably possible and this lease shall continue in full force and effect. If Lessee fails to exercise such option and provide such funds or assurance during such period, then this Lease shall terminate as of the date set forth in the first sentences of this Paragraph 9.5

9.6 Abatement of Rent; Lessee's Remedies.

(a) In the event of (i) Premises Partial Damage or (ii) Hazardous Substance Condition for which Lessee is not legally responsible, the Base Rent, Common Area Operating Expenses and other charges, if any, payable by Lessee hereunder for the period during which such damage or condition, as repair, remediation or restoration continues, shall be abated in proportion to the degree to which Lessee's use of the Premises is impaired, but not in excess of proceeds from insurance required to be carried under Paragraph 8.3(b). Except for abatement of Base Rent, Common Area Operating Expenses and other charges. If any, as aforesaid, all other obligation of Lessee hereunder shall be performed by Lessee, and Lessee shall have to claim against Lessor for any damage suffered by reason of any such damage, destruction, repair, remediation or restoration.

(b) If Lessor shall be obligated to repair or restore the Premises under the provisions of this Paragraph 9 and shall not commence, in a substantial and meaningful way, the repair or restoration of the Premises within ninety (90) days after such obligation shall accrue, Lessee may, at any time prior to the commencement of such repair or restoration, give written notice to Lessor and to any Lenders of which Lessee has actual notice of Lessee's election to terminate this Lease on a date not less than sixty (60) days following the giving of such notice. If Lessee gives such notice to Lessor and such Lenders and such repair or restoration is not commenced within thirty (30) days after receipt of such notice, this Lease shall terminate as of the date specified in said notice. If Lessor or a Lender commences the repair or restoration of the Premises within thirty (30) days after the receipt of such notice, this Lease shall continue in full force and effect. "Commence" as used in this Paragraph 9.6 shall mean either the unconditional authorization of the preparation of the required plans, or the beginning of the actual work on the Premises, whichever occurs first.

9.7 HAZARDOUS SUBSTANCE CONDITIONS. If a Hazardous Substance Condition occurs, unless Lessee is legally responsible therefor (in which case Lessee shall make the investigation and remediation thereof required by Applicable Requirements and this Lease shall continue in full force and effect, but subject to Lessor's rights under Paragraph 6.2(c) and Paragraph 13), Lessor may at Lessor's option either (i) investigate and remediate such Hazardous Substance Condition, if required, as soon as reasonably possible at Lessor's expense, in which event this Lease shall continue in full force and effect, or (ii) if the estimated cost to investigate and remediate such condition exceeds twelve (12) times the then monthly Base Rent or \$100,000 whichever is greater, give written notice to Lessee within thirty (30) days after receipt by Lessor of knowledge of the occurrence of such Hazardous Substance Condition of Lessor's desire to terminate this Lease as of the date sixty (60) days following the date of such notice. In the event Lessor elects to give such notice of Lessor's intention to terminate this Lease, Lessee shall have the right within ten (10) days after the receipt of such notice to give written notice to Lessor of Lessee's commitment to pay for the excess costs of (a) investigation and remediation of such Hazardous Substance Condition to the extent required by Applicable Requirements, over (b) an amount equal to twelve (12) times the then monthly Base Rent or \$100,000, whichever is greater. Lessee shall provide Lessor with the funds required of Lessee or satisfactory assurance thereof within thirty (30) days following said commitment by Lessee. In such event this Lease shall continue in full force and effect, and Lessor shall proceed to make such investigation and remediation as soon as reasonably possible after the required funds are available. If Lessee does not give such notice and provide the required funds or assurance thereof within the time period specified above, this Lease shall terminate as of the date specified in Lessor's notice of termination.

9.8 TERMINATION--ADVANCE PAYMENTS. Upon termination of this Lease pursuant to this Paragraph 9, Lessor shall return to Lessee any advance payment made by Lessee to Lessor and so much of Lessee's Security Deposit as has not been, or is not then required to be, used by Lessor under the terms of this Lease.

9.9 WAIVER OF STATUTES. Lessor and Lessee agree that the terms of this Lease shall govern the effect of any damage to or destruction of the Premises and the Building with respect to the termination of this Lease and hereby waive the provisions of any present or future statute to the extent it is inconsistent herewith.

#### 10. REAL PROPERTY TAXES.

10.1 PAYMENT OF TAXES. Lessor shall pay the Real Property Taxes, as defined in Paragraph 10.2(a), applicable to the Industrial Center, and except as otherwise provided in Paragraph 10.3, any increases in such amounts over the Base Real Property Taxes shall be included in the calculation of Common Area Operating Expenses in accordance with the provisions of Paragraph 4.2.

#### 10.2 REAL PROPERTY TAX DEFINITIONS.

(a) As used herein, the term "Real Property Taxes" shall include any form of real estate tax or assessment, general, special, ordinary or extraordinary, and any license fee, commercial rental tax, improvement bond or bonds, levy or tax (other than inheritance, personal income or estate taxes) imposed upon the Industrial Center by any authority having the direct or indirect power to tax, including any city, state or federal government, or any school, agricultural, sanitary, fire, street, drainage, or other improvement district thereof, levied against any legal or equitable interest of Lessor in the Industrial Center or any portion thereof, Lessor's right to rent or other income therefrom, and/or Lessor's business of leasing the Premises. The term "Real Property Taxes" shall also include any tax, fee, levy, assessment or charge, or any increase therein, imposed by reason of events occurring, or changes in Applicable Law taking effect, during the term of this Lease, including but not limited to a change in the ownership of the Industrial Center or in the improvements thereon, the execution of this Lease, or any modification, amendment or transfer thereof, and whether or not contemplated by the Parties.

(b) As used herein, the term "Base Real Property Taxes" shall be the amount of Real Property Taxes, which are assessed against the Premises,

Building or Common Areas in the calendar year during which the Lease is executed. In calculating Real Property Taxes for any calendar year, the Real Property Taxes for any real estate tax year shall be included in the calculation of Real Property Taxes for such calendar year based upon the number of days which such calendar year and tax year have in common.

10.3 ADDITIONAL IMPROVEMENTS. Common Area Operating Expenses shall not include Real Property Taxes specified in the tax assessor's records and work sheets as being caused by additional improvements placed upon the Industrial Center by other lessees or by Lessor for the exclusive enjoyment of such other lessees. Notwithstanding Paragraph 10.1 hereof, Lessee shall, however, pay to Lessor at the time Common Area Operating Expenses are payable under Paragraph 4.2, the entirety of any increase in Real Property Taxes if assessed solely by reason of Alterations, Trade Fixtures or Utility Installations placed upon the Premises by Lessee or at Lessee's request.

10.4 JOINT ASSESSMENT. If the Building is not separately assessed, Real Property Taxes allocated to the Building shall be an equitable proportion of the Real Property Taxes for all of the land and improvements included within the tax parcel assessed, such proportion to be determined by Lessor from the respective valuations assigned in the assessor's work sheets or such other information as may be reasonably available. Lessor's reasonable determination thereof, in good faith, shall be conclusive.

10.5 LESSEE'S PROPERTY TAXES. Lessee shall pay prior to delinquency all taxes assessed against and levied upon Lessee-Owned Alterations and Utility Installations, Trade Fixtures, furnishings, equipment and all personal property of Lessee contained in the Premises or stored within the Industrial Center. When possible, Lessee shall cause its Lessee-Owned Alterations and Utility Installations, Trade Fixtures, furnishings, equipment and all other personal property to be assessed and billed separately from the real property of Lessor. If any of Lessee's said property shall be assessed with Lessor's real property, Lessee shall pay Lessor the taxes attributable to Lessee's property within ten (10) days after receipt of a written statement setting forth the taxes applicable to Lessee's property.

11. UTILITIES. Lessee shall pay directly for all utilities and services supplied to the Premises, including but not limited to electricity, telephone, security, gas and cleaning of the Premises, together with any taxes thereon. If any such utilities or services are not separately metered to the Premises or separately billed to the Premises, Lessee shall pay to Lessor a reasonable proportion to be determined by Lessor of all such charges jointly metered or billed with other premises in the Building, in the manner and within the time periods set forth in Paragraph 4.2(d).

12. ASSIGNMENT AND SUBLETTING.

12.1 LESSOR'S CONSENT REQUIRED.

(a) Lessee shall not voluntarily or by operation of law assign, transfer, mortgage or otherwise transfer or encumber (collectively, "assign") or sublet all or any part of Lessee's Interest in this Lease or in the Premises without Lessor's prior written consent given under and subject to the terms of Paragraph 36.

(b) A change in the control of Lessee shall constitute an assignment requiring Lessor's consent. The transfer, on a cumulative basis, of twenty-five percent (25%) or more of the voting control of Lessee shall constitute a change in control for this purpose.

(c) The involvement of Lessee or its assets in any transaction, or series of transactions (by way of merger, sale, acquisition, financing, refinancing, transfer, leveraged buy-out or otherwise), whether or not a formal assignment or hypothecation of this Lease or Lessee's assets occurs, which results or will result in a reduction of the Net Worth of Lessee, as hereinafter defined, by an amount equal to or greater than twenty-five percent (25%) of such Net Worth of Lessee as it was represented to Lessor at the time of full execution and delivery of this Lease or at the time of the most recent assignment to which Lessor has consented, or as it exists immediately prior to said transaction or transactions constituting such reduction, at whichever time said Net Worth of Lessee was or is greater, shall be considered an assignment of this Lease by Lessee to which Lessor may reasonably withhold its consent. "Net Worth of Lessee" for purposes of this Lease shall be the net worth of Lessee (excluding any Guarantors) established under generally accepted accounting principles consistently applied.

(d) An assignment or subletting of Lessee's Interest in this Lease without Lessor's specific prior written consent shall, at Lessor's option, be a Default curable after notice per Paragraph 13.1, or a non-curable Breach without the necessity of any notice and grace period. If Lessor elects to treat such unconsented to assignment or subletting as a non-curable Breach, Lessor shall have the right to either: (i) terminate this Lease, or (ii) upon thirty (30) days' written notice ("Lessor's Notice"), increase the monthly Base Rent for the Premises to the greater of the then fair market rental value of the Premises, as reasonably determined by Lessor, or one hundred ten percent (110%) of the Base Rent then in effect. Pending determination of the new fair market value, if disputed by Lessee, Lessee shall pay the amount set forth in Lessor's Notice, with any overpayment credited against the next installment(s) of Base Rent coming due, and any underpayment for the period retroactively to

the effective date of the adjustment being due and payable immediately upon the determination thereof. Further, in the event of such Breach and rental adjustment, (i) the purchase price of any option to purchase the Premises held by Lessee shall be subject to similar adjustment to the then fair market value as reasonably determined by Lessor (without the Lease being considered an encumbrance or any deduction for depreciation or obsolescence, and considering the Premises at its highest and best use and in good condition) or one hundred ten percent (110%) of the price previously in effect, (ii) any index-oriented rental or price adjustment formulas contained in this Lease shall be adjusted to require that the base index be determined with reference to the index applicable to the time of such adjustment, and (iii) any fixed rental adjustments scheduled during the remainder of the Lease term shall be increased in the same ratio as the new rental bears to the Base Rent in effect immediately prior to the adjustment specified in Lessor's Notice.

(e) Lessee's remedy for any breach of this Paragraph 12.1 by Lessor shall be limited to compensatory damages and/or injunctive relief.

#### 12.2 TERMS AND CONDITIONS APPLICABLE TO ASSIGNMENT AND SUBLETTING.

(a) Regardless of Lessor's consent, any assignment or subletting shall not (i) be effective without the express written assumption by such assignee or sublessee of the obligations of Lessee under this Lease, (ii) release Lessee of any obligations hereunder, nor (iii) alter the primary liability of Lessee for the payment of Base Rent and other sums due Lessor hereunder or for the performance of any other obligations to be performed by Lessee under this Lease.

(b) Lessor may accept any rent or performance of Lessee's obligations from any person other than Lessee pending approval or disapproval of an assignment. Neither a delay in the approval or disapproval of such assignment nor the acceptance of any rent for performance shall constitute a waiver or estoppel of Lessor's right to exercise its remedies for the Default or Breach by Lessee of any of the terms, covenants or conditions of this Lease.

(c) The consent of Lessor to any assignment or subletting shall not constitute a consent to any subsequent assignment or subletting by Lessee or to any subsequent or successive assignment or subletting by the assignee or sublessee. However, Lessor may consent to subsequent sublettings and assignments of the sublease or any amendments or modifications thereto without notifying Lessee or anyone else liable under this Lease or the sublease and without obtaining their consent, and such action shall not relieve such persons from liability under this Lease or the sublease.

(d) In the event of any Default or Breach of Lessee's obligation under this Lease, Lessor may proceed directly against Lessee, any Guarantors or anyone else responsible for the performance of the Lessee's obligations under this Lease, including any sublessee, without first exhausting Lessor's remedies against any other person or entity responsible therefor to Lessor, or any security held by Lessor.

(e) Each request for consent to an assignment or subletting shall be in writing, accompanied by information relevant to Lessor's determination as to the financial and operational responsibility and appropriateness of the proposed assignee or sublessee, including but not limited to the intended use and/or required modification of the Premises, if any, together with a non-refundable deposit of \$1,000 or ten percent (10%) of the monthly Base Rent applicable to the portion of the Premises which is the subject of the proposed assignment or sublease, whichever is greater, as reasonable consideration for Lessor's considering and processing the request for consent. Lessee agrees to provide Lessor with such other or additional information and/or documentation as may be reasonably requested by Lessor.

(f) Any assignee of, or sublessee under, this Lease shall, by reason of accepting such assignment or entering into such sublease, be deemed, for the benefit of Lessor, to have assumed and agreed to conform and comply with each and every term, covenant, condition and obligation herein to be observed or performed by Lessee during the term of said assignment or sublease, other than such obligations as are contrary to or inconsistent with provisions of an assignment or sublease to which Lessor has specifically consented in writing.

(g) The occurrence of a transaction described in Paragraph 12.2(c) shall give Lessor the right (but not the obligation) to require that the Security Deposit be increased by an amount equal to six (6) times the then monthly Base Rent, and Lessor may make the actual receipt by Lessor of the Security Deposit increase a condition to Lessor's consent to such transaction.

(h) Lessor, as a condition to giving its consent to any assignment or subletting, may require that the amount and adjustment schedule of the rent payable under this Lease be adjusted to what is then the market value and/or adjustment schedule for property similar to the Premises as then constituted, as determined by Lessor.

12.3 Additional Terms and Conditions Applicable to Subletting. The following terms and conditions shall apply to any subletting by Lessee of all or any part of the Premises and shall be deemed included in all subleases under this Lease whether or not expressly incorporated therein:

(a) Lessee hereby assigns and transfers to Lessor all of Lessee's interest in all rentals and income arising from any sublease of all or a portion of the Premises heretofore or hereafter made by Lessee, and Lessor may collect such rent and income and apply same toward Lessee's obligations under this Lease; provided, however, that until a Breach (as defined in Paragraph 13.1) shall occur in the performance of Lessee's obligations under this Lease, Lessee may, except as otherwise provided in this Lease, receive, collect and enjoy the rents accruing under such sublease. Lessor shall not, by reason of the foregoing provision or any other assignment of such sublease to Lessor, nor by reason of the collection of the rents from a sublease, be deemed liable to the sublessee for any failure of Lessee to perform and comply with any of Lessee's obligations to such sublessee under such Sublease. Lessee hereby irrevocably authorizes and direct any such sublessee, upon receipt of a written notice from Lessor stating that a Breach exists in the performance of Lessee's obligations under this Lease, to pay to Lessor the rents and other charges due and to become due under the sublease. Subleases shall rely upon any such statement and request from Lessor and shall pay such rents and other charges to Lessor without any obligation or right to inquire as to whether such Breach exists and notwithstanding any notice from or claim from Lessee to the contrary. Lessee shall have no right or claim against such sublessee, or, until the Breach has been cured, against Lessor, for any such rents and other charges so paid by said sublessee to Lessor.

(b) In the event of a Breach by Lessee in the performance of its obligations under this Lease, Lessor, at its option and without any obligation to do so, may require any sublessee to attorn to Lessor, in which event Lessor shall undertake the obligations of the sublessor under such sublease from the time of the exercise of said option to the expiration of such sublease; provided, however, Lessor shall not be liable for any prepaid rents or security deposit paid by such sublessee to such sublessor or for any other prior defaults or breaches of such sublessor under such sublease.

(c) Any matter or thing requiring the consent of the sublessor under a sublease shall also require the consent of Lessor herein.

(d) No sublessee under a sublease approved by Lessor shall further assign or sublet all or any part of the Premises without Lessor's prior written consent.

(e) Lessor shall deliver a copy of any notice of Default or Breach by Lessee to the sublessee, who shall have the right to cure the Default of Lessee within the grace period, if any, specified in such notice. The sublessee shall have a right of reimbursement and offset from and against Lessee for any such Defaults cured by the sublessee.



### 13. Default; Breach; Remedies.

13.1 Default; Breach. Lessor and Lessee agree that if an attorney is consulted by Lessor in connection with a Lessee Default or Breach (as hereinafter defined), \$350.00 is a reasonable minimum sum per such occurrence for legal services and costs in the preparation and service of a notice of Default, and that Lessor may include the cost of such services and costs in said notice as rent due and payable to cure said default. A "Default" by Lessee is defined as a failure by Lessee to observe, comply with or perform any of the terms, covenants, conditions or rules applicable to Lessee under this Lease. A "Breach" by Lessee is defined as the occurrence of any one or more of the following Defaults, and, where a grace period for cure after notice is specified herein, the failure by Lessee to cure such Default prior to the expiration of the applicable grace period, and shall entitle Lessor to pursue the remedies set forth in Paragraphs 13.2 and/or 13.3:

(a) The vacating of the Premises without the intention to reoccupy same, or the abandonment of the Premises.

(b) Except as expressly otherwise provided in this Lease, the failure by Lessee to make any payment of Base Rent, Lessee's Share of Common Area Operating Expenses, or any other monetary payment required to be made by Lessee hereunder as and when due, the failure by Lessee to provide Lessor with reasonable evidence of insurance or surety bond required under this Lease, or the failure of Lessee to fulfill any obligation under this Lease which endangers or threatens life or property, where such failure continues for a period of three (3) days following written notice thereof by or on behalf of Lessor to Lessee.

(c) Except as expressly otherwise provided in this Lease, the failure by Lessee to provide Lessor with reasonable written evidence (in duly executed original form, if applicable) of (i) compliance with Applicable Requirements per Paragraph 6.3, (ii) the inspection, maintenance and service contracts required under Paragraph 7.1(b), (iii) the rescission of an unauthorized assignment or subletting per Paragraph 12.1, (iv) a Tenancy Statement per Paragraphs 16 or 37, (v) the subordination or non-subordination of this Lease per Paragraph 30, (vi) the guaranty of the performance of Lessee's obligations under this Lease if required under Paragraphs 1.11 and 37, (vii) the execution of any document requested under Paragraph 42 (easements), or (viii) any other documentation or information which Lessor may reasonably require of Lessee under the terms of this lease, where any such failure continues for a period of ten (10) days following written notice by or on behalf of Lessor to Lessee.

(d) A Default by Lessee as to the terms, covenants, conditions or provisions of this Lease, or of the rules adopted under Paragraph 40 hereof that are to be observed, compiled with or performed by Lessee, other than those described in Subparagraphs 13.1(a), (b) or (c), above, where such Default continues for a period of thirty (30) days after written notice thereof by or on behalf of Lessor to Lessee; provided, however, that if the nature of Lessee's Default is such that more than thirty (30) days are reasonably required for its cure, then it shall not be deemed to be a Breach of this Lease by Lessee if Lessee commences such cure within said thirty (30) day period and thereafter diligently prosecutes such cure to completion.

(e) The occurrence of any of the following events: (i) the making by Lessee of any general arrangement or assignment for the benefit of creditors; (ii) Lessee's becoming a "debtor" as defined in 11 U.S. Code Section 101 or any successor statute thereto (unless, in the case of a petition filed against Lessee, the same is dismissed within sixty (60) days); (iii) the appointment of a trustee or receiver to take possession of substantially all of Lessee's assets located at the Premises or of Lessee's interest in this Lease, where possession is not restored to Lessee within thirty (30) days; or (iv) the attachment, execution or other judicial seizure of substantially all of Lessee's assets located at the Premises or of Lessee's interest in this Lease, where such seizure is not discharged within thirty (30) days; provided, however, in the event that any provision of this Subparagraph 13.1(e) is contrary to any applicable law, such provision shall be of no force or effect, and shall not affect the validity of the remaining provisions.

(f) The discovery by Lessor that any financial statement of Lessee or of any Guarantor, given to Lessor by Lessee or any Guarantor, was materially false.

(g) If the performance of Lessee's obligations under this Lease is guaranteed: (i) the death of a Guarantor, (ii) the termination of a Guarantor's liability with respect to this Lease other than in accordance with the terms of such guaranty, (iii) a Guarantor's becoming insolvent or the subject of a bankruptcy filing, (iv) Guarantor's refusal to honor the guaranty, or (v) a Guarantor's breach of its guaranty obligation on an anticipatory breach basis, and Lessee's failure, within sixty (60) days following written notice by or on behalf of Lessor to Lessee of any such event, to provide Lessor with written alternative assurances of security, which, when coupled with the then existing resources of Lessee, equals or exceeds the combined financial resources of Lessee and the Guarantors that existed at the time of execution of this Lease.

13.2 Remedies. If Lessee fails to perform any affirmative duty or obligation of Lessee under this Lease, within ten (10) days after written notice to Lessee or in case of an emergency, without notice), Lessor may at its

option (but without obligation to do so), perform such duty or obligation on Lessee's behalf, including but not limited to the obtaining of reasonably required bonds, insurance policies, or governmental licenses, permits or approvals. The costs and expenses of any such performance by Lessor shall be due and payable by Lessee to Lessor upon invoice therefor. If any check given to Lessor by Lessee shall not be honored by the bank upon which it is drawn, Lessor, at its own option, may required all future payments to be made under this Lease by Lessee to be made only by cashier's check. In the event of a Breach of this Lease by Lessee (as defined in Paragraph 13.1), with or without further notice or demand, and without limiting Lessor in the exercise of any right or remedy which Lessor may have by reason of such Breach, Lessor may:

(a) Terminate Lessee's right to possession of the Premises by any lawful means, in which case the Lease and the term hereof shall terminate and Lessee shall immediately surrender possession of the Premises to Lessor. In such event Lessor shall be entitled to recover from Lessee: (i) the worth at the time of the award of the unpaid rent which had been earned at the time of termination; (ii) the worth at the time of award of the amount by which the unpaid rent which would have been earned after termination until the time of award exceeds the amount of such rental loss that the Lessee proves could have been reasonably voided; (iii) the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the Lessee proves could be reasonably avoided; and (iv) any other amount necessary to compensate Lessor for all the detriment proximately caused by the Lessee's failure to perform its obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including but not limited to the cost of recovering possession of the Premises, expenses of reletting, including necessary renovation and alternation of the Premises, reasonable attorney's fees, and that portion of any leasing commission paid by Lessor in connection with this Lease applicable in the unexpired term of this Lease. The worth at the time of award of the amount referred to in provision (m) of the immediately preceding sentence shall be computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco or the Federal Reserve Bank District in which the Premises are located at the time of award plus one percent (1%). Efforts by Lessor to mitigate damages caused by Lessee's Default or Breach of this Lease shall not waive Lessor's right to recover damages under this Paragraph 13.2. If termination of this Lease is obtained through the provisional remedy of unlawful detainer, Lessor shall have the right to recover in such pro-

ceeding the unpaid rent and damages as are recoverable therein, or Lessor may reserve the right to recover all or any part thereof in a separate suit for such rent and/or damages. If a notice and grace period required under Subparagraph 13.1(b), (c) or (d) was not previously given, a notice to pay rent or quit, or to perform or quit, as the case may be, given to Lessee under any statute authorizing the forfeiture of leases for unlawful detainer shall also constitute the applicable notice for grace period purposes required by Subparagraph 13.1(b), (c) or (d). In such case, the applicable grace period under the unlawful detainer status shall run concurrently after the one such statutory notice, and the failure of Lessee to cure the Default within the greater of the two (2) such grace periods shall constitute both an unlawful detainer and a Breach of this Lease entitling Lessor to the remedies provided for in this Lease and/or by said statute.

(b) Continue the Lease and Lessee's right to possession in effect (in California under California Civil Code Section 1951.4) after Lessee's Breach and recover the rent as it becomes due, provided Lessee has the right to sublet or assign, subject only to reasonable limitations. Lessor and Lessee agree that the limitations on assignment and subletting in this Lease are reasonable. Acts of maintenance or preservation, efforts to relet the Premises, or the appointment of a receiver to protect the Lessor's interest under this Lease, shall not constitute a termination of the Lessee's right to possession.

(c) Pursue any other remedy now or hereafter available to Lessor under the laws or judicial decisions of the state wherein the Premises are located.

(d) The expiration or termination of this Lease and/or the termination of Lessee's right to possession shall not relieve Lessee from liability under any indemnity provisions of this Lease as to matters occurring or accruing during the term hereof or by reason of Lessee's occupancy of the Premises.

13.3 Inducement Recapture in Event of Breach. Any agreement by Lessor for free or abated rent or other charges applicable to the Premises, or for the giving or paying by Lessor to or for Lessee of any cash or other bonus, inducement or consideration for Lessee's entering into this Lease, all of which concessions are hereinafter referred to as "Inducement Provisions" shall be deemed conditioned upon Lessee's full and faithful performance of all of the terms, covenants and conditions of this Lease to be performed or observed by Lessee during the term hereof as the same may be extended. Upon the occurrence of a Breach (as defined in Paragraph 13.1) of this Lease by Lessee, any such Inducement Provision shall automatically be deemed deleted from this Lease and of no further force or effect, and any rent, other charge, bonus, inducement or consideration theretofore abated, given or paid by Lessor under such an Inducement Provision shall be immediately due and payable by Lessee to Lessor, and recoverable by Lessor, as additional rent due under this Lease, notwithstanding any subsequent cure of said Breach by Lessee. The acceptance by Lessor of rent or the cure of the Breach which initiated the operation of this Paragraph 13.3 shall not be deemed a waiver by Lessor of the provisions of this Paragraph 13.3 unless specifically so stated in writing by Lessor at the time of such acceptance.

13.4 Late Charges. Lessee hereby acknowledges that late payment by Lessee to Lessor of rent and other sums due hereunder will cause Lessor to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges, and late charges which may be imposed upon Lessor by the terms of any ground lease, mortgage or deed of trust covering the Premises. Accordingly, if any installment of rent or other sum due from Lessee shall not be received by Lessor or Lessor's designee within ten (10) days after such amount shall be due, then, without any requirement for notice to Lessee, Lessee shall pay to Lessor a late charge equal to six percent (6%) of such overdue amount. The parties hereby agree that such late charge represents a fair and reasonable estimate of the costs Lessor will incur by reason of late payment by Lessee. Acceptance of such late charge by Lessor shall in no event constitute a waiver of Lessee's Default or Breach with respect to such overdue amount, nor prevent Lessor from exercising any of the other rights and remedies granted hereunder. In the event that a late charge is payable hereunder, whether or not collected, for three (3) consecutive installments of Base Rent, then notwithstanding Paragraph 4.1 or any other provision of this Lease to the contrary, Base Rent shall, at Lessor's option, become due and payable quarterly in advance.

13.5 Breach by Lessor. Lessor shall not be deemed in breach of this Lease unless Lessor fails within a reasonable time to perform an obligation required to be performed by Lessor. For purposes of this Paragraph 13.5, a reasonable time shall in no event be less than thirty (30) days after receipt by Lessor, and by any Lender(s) whose name and address shall have been furnished to Lessee in writing for such purpose, of written notice specifying wherein such obligation of Lessor has not been performed; provided, however, that if the nature of Lessor's obligation is such that more than thirty (30) days after such notice are reasonably required for its performance, then Lessor shall not be in breach of this Lease if performance is commenced within such thirty (30) day period and thereafter diligently pursued to completion.

14. Condemnation. If the Premises or any portion thereof are taken under

the power of eminent domain or sold under the threat of the exercise of said power (all of which are herein called "condemnation"), this Lease shall terminate as to the part so taken as of the date the condemning authority takes title or possession, whichever first occurs. If more than ten percent (10%) of the floor area of the Premises, or more than twenty-five percent (25%) of the portion of the Common Areas designated for Lessee's parking, is taken by condemnation, Lessee may, at Lessee's option, to be exercised in writing within ten (10) days after Lessor shall have given Lessee written notice of such taking (or in the absence of such notice, within ten (10) days after the condemning authority shall have taken possession) terminate this Lease as of the date the condemning authority takes such possession. If Lessee does not terminate this Lease in accordance with the foregoing, this Lease shall remain in full force and effect as to the portion of the Premises remaining, except that the Base Rent shall be reduced in the same proportion as the rentable floor area of the Premises taken bears to the total rentable floor area of the Premises. No reduction of Base Rent shall occur if the condemnation does not apply to any portion of the Premises. Any award for the taking of all or any part of the Premises under the power of eminent domain or any payment made under threat of the exercise of such power shall be the property of Lessor, whether such award shall be made as compensation for diminution of value of the leasehold or for the taking of the fee, or as severance damages; provided, however, that Lessee shall be entitled to any compensation, separately awarded to Lessee for Lessee's relocation expenses and/or loss of Lessee's Trade Fixtures. In the event that this Lease is not terminated by reason of such condemnation, Lessor shall to the extent of its net severance damages received, over and above Lessee's Share of the legal and other expenses incurred by Lessor in the condemnation matter, repair any damage to the Premises caused by such condemnation authority. Lessee shall be responsible for the payment of any amount in excess of such net severance damages required to complete such repair.

#### 15. Brokers' Fees.

15.1 Procuring Cause. The Broker(s) named in Paragraph 1.10 is/are the procuring cause of this Lease.

15.2 Additional Terms. Unless Lessor and Broker(s) have otherwise agreed in writing, Lessor agrees that: (a) if Lessee exercises any Option (as defined in Paragraph 39.1) granted under this Lease or any Option subsequently granted, or (b) if Lessee acquires any rights to the Premises or other premises in which Lessor has an interest, or (c) if Lessee remains in possession of the Premises with the consent of Lessor after the expiration of the term of this Lease after having failed to exercise an Option, or (d) if said Brokers are the procuring cause of any other lease or sale entered into between the Parties pertaining to the Premises and/or any adjacent property in which Lessor has an interest, or (e) if Base Rent is increased, whether by agreement or operation of an escalation clause herein, then as to any of said transactions, Lessor shall pay said Broker(s) a fee in accordance with the schedule of said Broker(s) in effect at the time of the execution of this Lease.

15.3 Assumption of Obligations. Any buyer or transferee of Lessor's interest in this Lease, whether such transfer is by agreement or by operation of law, shall be deemed to have assumed Lessor's obligation under this Paragraph 15. Each Broker shall be an intended third party beneficiary of the provisions of Paragraph 1.10 and of this Paragraph 15 to the extent of its interest in any commission arising from this Lease and may enforce that right directly against Lessor and its successors.

15.4 Representations and Warranties. Lessee and Lessor each represent and warrant to the other that it has had no dealings with any person, firm broker or finder other than as named in Paragraph 1.10(a) in connection with the negotiation of this Lease and/or the consummation of the transaction contemplated hereby, and that no broker or other person, firm or entity other than said named Broker(s) is entitled to any commission or finder's fee in connection with said transaction, Lessee and Lessor do each hereby agree to indemnify, protect, defend and hold the other harmless from and against liability for compensation or charges which may be claimed by any such unnamed broker, finder or other similar party by reason of any dealings or actions of the Indemnifying Party, including any costs, expenses, and/or attorneys' fees reasonably incurred with respect thereto.

#### 16. Tenancy and Financial Statements.

16.1 Tenancy Statement. Each Party (as "Responding Party") shall within ten (10) days after written notice from the other Party (the "Requesting Party") execute, acknowledge and deliver to the Requesting Party a statement in writing in a form similar to the then most current "Tenancy Statement" form published by the American Industrial Real Estate Association, plus such additional information, confirmation and/or statements as may be reasonably requested by the Requesting Party.

16.2 Financial Statement. If Lessor desires to finance, refinance, or sell the Premises or the Building, or any part thereof, Lessee and all Guarantors shall deliver to any potential lender or purchaser designated by Lessor such financial statements of Lessee and such Guarantors as may be reasonably required by such lender or purchaser, including but not limited to Lessee's financial statements for the past three (3) years. All such financial statements shall be received by Lessor and such lender or purchaser in confidence and shall be used only for the purposes herein set forth.

#### 17. Lessor's Liability. The term "Lessor" as used herein shall mean

the owner or owners at the time in question of the fee title to the Premises, in the event of a transfer of Lessor's title or interest in the Premises or in this Lease, Lessor shall deliver to the transferee or assignee (in cash or by credit) any unused Security Deposit held by Lessor at the time of such transfer or assignment. Except as provided in Paragraph 15.3, upon such transfer or assignment and delivery of the Security Deposit, as aforesaid, the prior Lessor shall be relieved of all liability with respect to the obligations and/or covenants under this Lease thereafter to be performed by the Lessor. Subject to the foregoing, the obligations and/or covenants in this Lease to be performed by the Lessor shall be binding only upon the Lessor as hereinabove defined.

18. Severability. The invalidity of any provision of this Lease, as determined by a court of competent jurisdiction, shall in no way affect the validity of any other provision hereof.

19. Interest on Past-Due Obligations. Any monetary payment due Lessor hereunder, other than late charges, not received by Lessor within ten (10) days following the date on which it was due, shall bear interest from the date due at the prime rate charged by the largest state chartered bank in the state in which the Premises are located plus four percent (4%) per annum, but not exceeding the maximum rate allowed by law, in addition to the potential late charge provided for in Paragraph 13.4

20. Time of Essence. Time is of the essence with respect to the performance of all obligations to be performed or observed by the Parties under this Lease.

21. Rent Defined. All monetary obligations of Lessee to Lessor under the terms of this Lease are deemed to be rent.

22. No Prior or other Agreements; Broker Disclaimer. This Lease contains all agreements between the Parties with respect to any matter mentioned herein, and no other prior or contemporaneous agreement or understanding shall be effective. Lessor and Lessee each represents and warrants to the Brokers that it has made, and is relying solely upon, its own investigation as to the nature, quality, character and financial responsibility of the other Party to this Lease and as to the nature, quality and character of the Premises. Brokers have no responsibility with respect thereto or with respect to any default or breach hereof by either Party. Each Broker shall be an intended third party beneficiary of the provisions of this Paragraph 22.

## 23. NOTICES.

23.1 Notice Requirements. All notices required or permitted by this Lease shall be in writing and may be delivered in person (by hand or by messenger or courier service) or may be sent by regular, certified or registered mail or U.S. Postal Service Express Mail, with postage prepaid, or by facsimile transmission during normal business hours, and shall be deemed sufficiently given if served in a manner specified in this Paragraph 23. The addresses noted adjacent to a Party's Signature on this Lease shall be that Party's address for delivery or mailing of notice purposes. Either Party may by written notice to the other specify a different address for notice purposes, except that upon Lessee's taking possession of the Premises, the Premises shall constitute Lessee's address for the purpose of mailing or delivering notices to Lessee. A copy of all notices required or permitted to be given to Lessor hereunder shall be concurrently transmitted to such party or parties at such addresses as Lessor may from time to time hereafter designate by written notice to Lessee.

23.2 Date of Notice. Any notice sent by registered or certified mail, return receipt requested, shall be deemed given on the date of delivery shown on the receipt card, or if no delivery date is shown, the postmark thereon. If sent by regular mail, the notice shall be deemed given forty-eight (48) hours after the same is addressed as required herein and mailed with postage prepaid. Notices delivered by United States Express Mail or overnight courier that guarantees next day delivery shall be deemed given twenty-four (24) hours after delivery of the same to the United States Postal Service or courier. If any notice is transmitted by facsimile transmission or similar means, the same shall be deemed served or delivered upon telephone or facsimile confirmation of receipt of the transmission thereof, provided a copy is also delivered via delivery or mail. If notice is received on a Saturday or a Sunday or a legal holiday, it shall be deemed received on the next business day.

24. Waivers. No waiver by Lessor of the Default or Breach of any form, covenant or condition hereof by Lessee, shall be deemed a waiver of any other term, covenant or condition hereof, or of any subsequent Default or Breach by Lessee of the same or any other term, covenant or condition hereof. Lessor's consent to, or approval of, any such act shall not be deemed to render unnecessary the obtaining of Lessor's consent to, or approval of, any subsequent or similar act by Lessee, or be construed as the basis of an estoppel to enforce the provision or provisions of this Lease requiring such consent. Regardless of Lessor's knowledge of a Default or Breach at the time of accepting rent, the acceptance of rent by Lessor shall not be a waiver of any Default or Breach by Lessee of any provision thereof. Any payment given Lessor by Lessee may be accepted by Lessor on account of moneys or damages due Lessor, notwithstanding any qualifying statements or conditions made by Lessee in connection therewith, which such statements and/or conditions shall be of no force or effect whatsoever unless specifically agreed to in writing by Lessor at or before the time of deposit of such payment.

25. Recording. Either Lessor or Lessee shall, upon request of the other, execute, acknowledge and deliver to the other a short form memorandum of this Lease or recording purposes. The Party requesting recordation shall be responsible for payment of any fees or taxes applicable thereto.

26. No Right To Holdover. Lessee has no right to retain possession of the Premises or any part thereof beyond the expiration or earlier termination of this Lease. In the event that Lessee holds over in violation of this Paragraph 26 then the Base Rent payable from and after the time of the expiration or earlier termination of this Lease shall be increased to two hundred percent (200%) of the Base Rent applicable during the month immediately preceding such expiration or earlier termination. Nothing contained herein shall be construed as a consent by Lessor to any holding over by Lessee.

27. Cumulative Remedies. No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.

28. Covenants and Conditions. All provisions of this Lease to be observed or performed by Lessee are both covenants and conditions.

29. Binding Effect; Choice of Law. This Lease shall be binding upon the Parties, their personal representatives, successors and assigns and be governed by the laws of the State in which the Premises are located. Any litigation between the Parties hereto concerning this Lease shall be initiated in the county in which the Premises are located.

30. Subordination; Attornment; Non-Disturbance.

30.1 Subordination. This Lease and any Option granted hereby shall be subject and subordinate to any ground lease, mortgage, deed of trust, or other hypothecation or security device (collectively, "Security Device"), now or hereafter placed by Lessor upon the real property of which the Premises are a part, to any and all advances made on the security thereof, and to all renewals, modifications, consolidations, replacements and extensions thereof. Lessee agrees that the Lenders holding any such Security Device shall have no duty, liability or obligation to perform any of the obligations of Lessor under this Lease, but that in the event of Lessor's default with respect to any such obligation, Lessee will give any Lender whose name and address have been furnished Lessee in writing for such purpose notice of Lessor's default

pursuant to Paragraph 13.5. If any Lender shall elect to have this Lease and/or any Option granted hereby superior to the lien of this Security Device and shall give written notice thereof to Lessee, this Lease and such Options shall be deemed prior to such Security Device, notwithstanding the relative dates of the documentation or recordation thereof.

30.2 Attornment. Subject to the non-disturbance provisions of Paragraph 30.3, Lessee agrees to attorn to a Lender or any other party who acquires ownership of the Premises by reason of a foreclosure of a Security Device, and that in the event of such foreclosure, such new owner shall not: (i) be liable for any act of omission of any prior lessor or with respect to events occurring prior to acquisition of ownership, (ii) be subject to any offsets or defenses which Lessee might have against any prior lessor, or (iii) be bound by prepayment of more than one month's rent.

30.3 Non-Disturbance. With respect to Security Devices entered into by Lessor after the execution of this lease, Lessee's subordination of this Lease shall be subject to receiving assurance (a "non-disturbance agreement") from the Lender that Lessee's possession and this Lease, including any options to extend the term hereof, will not be disturbed so long as Lessee is not in Breach hereof and attorns to the record owner of the Premises.

30.4 Self-Executing. The agreements contained in this Paragraph 30 shall be effective without the execution of any further documents; provided, however, that upon written request from Lessor or a Lender in connection with a sale, financing or refinancing of Premises, Lessee and Lessor shall execute such further writings as may be reasonably required to separately document any such subordination or non-subordination, attornment and/or non-disturbance agreement as is provided for herein.

31. Attorneys' Fees. If any Party or Broker brings an action or proceeding to enforce the terms hereof or declare rights hereunder, the Prevailing Party (as hereafter defined) in any such proceeding, action, or appeal thereon, shall be entitled to reasonable attorneys' fees. Such fees may be awarded in the same suit or recovered in a separate suit, whether or not such action or proceeding is pursued to decision or judgment. The term "Prevailing Party" shall include, without limitation, a Party or Broker who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, judgment, or the abandonment by the other Party or Broker of its claim or defense. The attorneys' fee award shall not be computed in accordance with any court fee schedule, but shall be such as to fully reimburse all attorneys' fees reasonably incurred. Lessor shall be entitled to attorneys' fees, costs and expenses incurred in preparation and service of notices of Default and consultation in connection therewith, whether or not a legal action is subsequently commenced in connection with such Default or resulting Breach. Broker(s) shall be intended third party beneficiaries of this Paragraph 31.

32. Lessor's Access; Showing Premises; Repairs. Lessor and Lessor's agents shall have the right to enter the Premises at any time, in the case of an emergency, and otherwise at reasonable times for the purpose of showing the same to prospective purchasers, lenders, or lessees, and making such alterations, repairs, improvements or additions to the Premises or to the Building, as Lessor may reasonably deem necessary. Lessor may at any time place on or about the Premises or Building any ordinary "For Sale" signs and Lessor may at any time during the last one hundred eighty (180) days of the term hereof place on or about the Premises any ordinary "For Lease" signs. All such activities of Lessor shall be without abatement of rent or liability to Lessee.

33. Auctions. Lessee shall not conduct, nor permit to be conducted, either voluntarily or involuntarily, any auction upon the Premises without first having obtained Lessor's prior written consent. Notwithstanding anything to the contrary in this Lease, Lessor shall not be obligated to exercise any standard of reasonableness in determining whether to grant such consent.

34. Signs. Lessee shall not place any sign upon the exterior of the Premises or the Building, except that Lessee may, with Lessor's prior written consent, install (but not on the roof) such signs as are reasonably required to advertise Lessee's own business so long as such signs are in a location designated by Lessor and comply with Applicable Requirements and the signage criteria established for the Industrial Center by Lessor. The installation of any sign on the Premises by or for Lessee shall be subject to the provisions of Paragraph 7 (Maintenance, Repairs, Utility Installations, Trade Fixtures and Alterations). Unless otherwise expressly agreed herein, Lessor reserves all right to the use of the roof of the Building, and the right to install advertising signs on the Building, including the roof, which do not unreasonably interfere with the conduct of Lessee's business: Lessor shall be entitled to all revenues from such advertising signs.

35. Termination; Merger. Unless specifically stated otherwise in writing by Lessor, the voluntary or other surrender of this Lease by Lessee, the mutual termination or cancellation hereof, or a termination hereof by Lessor for Breach by Lessee, shall automatically terminate any sublease or lesser estate in the Premises; provided, however, Lessor shall, in the event of any such surrender, termination or cancellation, have the option to continue any one or all of any existing subtenancies. Lessor's failure within ten (10) days following any such event to make a written election to the contrary by written notice to the holder of any such lesser interest, shall constitute Lessor's election to have such event constitute the termination of such interest.

36. Consents.

(a) Except for Paragraph 33 hereof (Auctions) or as otherwise provided herein, wherever in this Lease the consent of a Party is required to an act by or for the other Party, such consent shall not be unreasonably withheld, or delayed. Lessor's actual reasonable costs and expenses (including but not limited to architects', attorneys', engineers' and other consultants' fees) incurred in the consideration of, or response to, a request by Lessee for any Lessor consent pertaining to this Lease or the Premises, including but not limited to consents to an assignment a subletting or the presence or use of a Hazardous Substance, shall be paid by Lessee to Lessor upon receipt of an invoice and supporting documentation therefor. In addition to the deposit described in Paragraph 12.2(e), Lessor may, as a condition to considering any such request by Lessee, require that Lessee deposit with Lessor an amount of money (in addition to the Security Deposit held under Paragraph 5) reasonably calculated by Lessor to represent the cost Lessor will incur in considering and responding to Lessee's request. Any unused portion of said deposit shall be refunded to Lessee without interest. Lessor's consent to any act, assignment of this Lease or subletting of the Premises by Lessee shall not constitute an acknowledgment that no Default or Breach by Lessee of this Lease exists, nor shall such consent be deemed a waiver of any then existing Default or Breach, except as may be otherwise specifically stated in writing by Lessor at the time of such consent.

(b) All conditions to Lessor's consent authorized by this Lease are acknowledged by Lessee as being reasonable. The failure to specify herein any particular condition to Lessor's consent shall not preclude the impositions by Lessor at the time of consent of such further or other conditions as are then reasonable with reference to the particular matter for which consent is being given.

37. Guarantor.

37.1 Form of Guaranty. If there are to be any Guarantors of this Lease per Paragraph 1.11, the form of the guaranty to be executed by each such Guarantor shall be in the form most recently published by the American Industrial Real Estate Association, and each such Guarantor shall have the same obligations as Lessee under this lease, including but not limited to the obligation to provide the Tenancy Statement and information required in Paragraph 16.

Initials: /s/ Signature

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/s/ Signature

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37.2 ADDITIONAL OBLIGATIONS OF GUARANTOR. It shall constitute a Default of the Lessee under this Lease if any such Guarantor fails or refuses, upon reasonable request by Lessor to give: (a) evidence of the due execution of the guaranty called for by this Lease, including the authority of the Guarantor (and of the party signing on Guarantor's behalf) to obligate such Guarantor on said guaranty, and resolution of its board of directors authorizing the making of such guaranty, together with a certificate of incumbency showing the signatures of the persons authorized to sign on its behalf, (b) current financial statements of Guarantor as may from time to time be requested by Lessor, (c) a Tenancy Statement, or (d) written confirmation that the guaranty is still in effect.

38. OUTLET POSSESSION. Upon payment by Lessee of the rent for the Premises and the performances of all of the covenants, conditions and provisions on Lessee's part to be observed and performed under this Lease, Lessee shall have quiet possession of the Premises for the entire term hereof subject to all of the provisions of this Lease.

39. OPTIONS.

39.1 DEFINITION. As used in this Lease, the word "Option" has the following meaning: (a) the right to extend the term of this Lease or to renew this Lease or to extend or renew any lease that Lessee has on other property of Lessor; (b) the right of first refusal to lease the Premises or the right of first offer to lease the Premises or the right of first refusal to lease other property of Lessor or the right of first offer to lease other property of Lessor; (c) the right to purchase the Premises, or the right of first refusal to purchase the Premises, or the right of first offer to purchase the Premises, or the right to purchase other property of Lessor, or the right of first refusal to purchase other property of Lessor, or the right of first offer to purchase other property of Lessor.

39.2 OPTIONS PERSONAL TO ORIGINAL LESSEE. Each Option granted to Lessee in this Lease is personal to the original Lessee named in Paragraph 1.1 hereof, and cannot be voluntarily or involuntarily assigned or exercised by any person or entity other than said original Lessee while the original Lessee is in full and actual possession of this Premises and without the intention of thereafter assigning or subletting. The Options, if any, herein granted to Lessee are not assignable, either as a part of an assignment of this Lease or separately or apart therefrom, and no Option may be separated from this Lease in any manner, by reservation or otherwise.

39.3 MULTIPLE OPTIONS. In the event that Lessee has any multiple Options to extend or renew this Lease, a later option cannot be exercised unless the prior Options to extend or renew this Lease have been validly exercised.

39.4 EFFECT OF DEFAULT ON OPTIONS.

(a) Lessee shall have no right to exercise an Option, notwithstanding any provision in the grant of Option to the contrary: (i) during the period commencing with the giving of any notice of Default under Paragraph 13.1 and continuing until the noticed Default is cured, (ii) during the period of time any monetary obligation due Lessor from Lessee is unpaid (without regard to whether notice thereof is given Lessee), or (iii) during the time Lessee is in Breach of this Lease, or (iv) in the event that Lessor has given to Lessee three (3) or more notices of separate Defaults under Paragraph 13.1 during the twelve (12) month period immediately preceding the exercise of the Option, whether or not the Defaults are cured.

(b) The period of time within which an Option may be exercised shall not be extended or enlarged by reason of Lessee's inability to exercise an Option because of the provisions of Paragraph 39.4(a).

(c) All rights of Lessee under the provisions of an Option shall terminate and be of no further force or effect, notwithstanding Lessee's due and timely exercise of the Option, if, after such exercise and during the term of this Lease, (i) Lessee fails to pay to Lessor a monetary obligation of Lessee for a period of thirty (30) days after such obligation becomes due (without any necessity of Lessor to give notice thereof to Lessee), or (ii) Lessor gives to Lessee three (3) or more notices of separate Defaults under Paragraph 13.1 during any twelve (12) month period, whether or not the Defaults are cured, or (iii) if Lessee commits a Breach of this Lease.

40. RULES AND REGULATIONS. Lessee agrees that it will abide by, and keep and observe all reasonable rules and regulations ("Rules and Regulations") which Lessor may make from time to time for the management, safety, care, and cleanliness of the grounds, the parking and unloading of vehicles and the preservation of good order, as well as for the convenience of other occupants of tenants of the Building and the Industrial Center and their invitees.

41. SECURITY MEASURES. Lessee hereby acknowledges that the rental payable to Lessor hereunder does not include the cost of guard service or other security measures, and that Lessor shall have no obligation whatsoever to provide same. Lessee assumes all responsibility for the protection of the Premises, Lessee, its agents and invitees and their property from the acts of third parties.

42. RESERVATIONS. Lessor reserves the right, from time to time, to grant, without the consent or joinder of Lessee, such easements, rights of way, utility raceways, and dedications that Lessor deems necessary, and to cause the recordation of parcel maps and restrictions, so long as such assignments, rights of way, utility raceways, dedications, maps and restrictions do not reasonably interfere with the use of the Premises by Lessee. Lessee agrees to sign any documents reasonably requested by Lessor to effectuate any such easement rights, dedication, map or restrictions.

43. PERFORMANCE UNDER PROTEST. If at any time a dispute shall arise as to any amount or sum of money to be paid by one Party to the other under the provisions hereof, the Party against whom the obligation to pay the money is asserted shall have the right to make payment "under protest" and such payment shall not be regarded as a voluntary payment and there shall survive the right on the part of said Party to institute suit for recovery of such sum. If it shall be adjudged that there was no legal obligation on the part of said Party to pay such sum or any part thereof, said Party shall be entitled to recover such sum or so much thereof as it was not legally required to pay under the provisions of this Lease.

44. AUTHORITY. If either Party hereto is a corporation, trust, or general or limited partnership, each individual executing this Lease on behalf of such entity represents and warrants that he or she is duly authorized to execute and deliver this Lease on its behalf. If Lessee is a corporation, trust or partnership, Lessee shall, within thirty (30) days after request by Lessor, deliver to Lessor evidence satisfactory to Lessor of such authority.

45. CONFLICT. Any conflict between the printed provisions of this Lease and the typewritten or handwritten provisions shall be controlled by the typewritten or handwritten provisions.

46. OFFER. Preparation of this Lease by either Lessor or Lessee or Lessor's agent or Lessee's agent and submission of same to Lessee or Lessor shall not be deemed an offer to lease. This Lease is not intended to be binding until executed and delivered by all Parties hereto.

47. AMENDMENTS. This Lease may be modified only in writing, signed by the parties in interest at the time of the modification. The Parties shall amend this Lease from time to time to reflect any adjustments that are made to the Base Rent or other rent payable under this Lease. As long as they do not materially change Lessee's obligations hereunder, Lessee agrees to make such reasonable non-monetary modifications to this Lease as may be reasonably required by an institutional insurance company or pension plan Lender in connection with the obtaining of normal financing or refinancing of the property of which the Premises are a part.

48. MULTIPLE PARTIES. Except as otherwise expressly provided herein, if more than one person or entity is named herein as either Lessor or Lessee, the obligations of such multiple parties shall be the joint and several responsibility of all persons or entities named herein as such Lessor or Lessee.

49. Lessor shall complete the following items prior to August 14, 1994.

1. Steam clean carpeting.
2. Touch-up paint where needed.
3. Replace damaged and/or stained ceiling tiles and light lenses.
4. Wax floors.
5. Clean Premises throughout.
6. Replace or repair and damaged floor tiles.
7. Secure all doors which demise space from larger portion of building.

50. HVAC and Electrical Systems. Lessor shall insure that all HVAC & Electrical Systems are in proper working order and warranties such items for Ninety (90) days. HVAC System ducting cleaned by a professional HVAC company.

51. Rent Schedule.	MONTHS	DOLLAR PER MONTH
	-----	-----
	1-12	\$4,484.16
	13-24	\$4,671.00
	25-36	\$4,982.40
	37-48	\$5,169.24
	49-60	\$5,293.80

52. Lessee is granted full use of compressor area located at rear of building throughout term of Lease.

53. Lessor hereby grants Lessee the first right of refusal to lease the adjacent approximately 3,060 sq. ft. known as 525 Del Rey Ave., Unit E. After it has been leased once and that current Lessee does not extend its lease. Lessee shall have five (5) business days to exercise said Right of Refusal once presented in writing by Lessor.

54. Lessor hereby grants to Lessee an option to extend the term of this lease for one (1) additional five (5) year period commencing August 31, 1999 and ending July 31, 2004, provided that:

54. Continued.

- A. Lessee is not in default of any terms or conditions of this Lease on the date this option is exercised or on the date this option period commences;
- B. Lessee shall give Lessor not less than Ninety (90) days prior written notice of Lessee's intention to exercise this option;
- C. The monthly rental rate for this option period shall be a "Fair Market" rate to be agreed upon by Lessor and Lessee.
- D. This option is not transferable.
- E. Lessee's security deposit shall be increased to an amount equal to the base monthly rate during the last month of this option period.

[GUARANTY OF LEASE LOGO]  
AMERICAN INDUSTRIAL REAL ESTATE ASSOCIATION

WHEREAS, HARRIS FAMILY TRUST hereinafter, referred to as "Lessor", and PLANT RESEARCH TECHNOLOGIES INC., A CALIFORNIA CORPORATION hereinafter referred to as "Lessee" are about to execute a document entitled "Lease" dated July 29, 1994 concerning the premises commonly known as 525 Del Rey Avenue, Units C&D, Sunnyvale, California wherein Lessor will lease the premises to Lessee and

WHEREAS, BASIL BURKE PH.D and SCOTT KORNEY hereinafter referred to as "Guarantors" have a financial interest in Lessee, and

WHEREAS, Lessor would not execute the Lease if Guarantors did not execute and deliver to Lessor this Guarantee of Lease

NOW THEREFORE for and in consideration of the execution of the foregoing Lease by Lessor and as a material inducement to Lessor to execute said Lease. Guarantors hereby jointly severally unconditionally and irrevocably guarantee the prompt payment by Lessee of all rentals and all other sums payable by Lessee under said Lease and the faithful and prompt performance by Lessee of each and every one of the terms, conditions and covenants of said Lease to be kept and performed by Lessee

It is specifically agreed and understood that the terms of the foregoing Lease may be altered, affected, modified or changed by agreement between Lessor and Lessee, or by a course of conduct and said Lease may be assigned by Lessor or any assignee of Lessor without consent or notice to Guarantors and that this Guaranty shall thereupon and thereafter guarantee the performance of said Lease as so changed, modified, altered or assigned

This Guaranty shall not be released, modified or affected by failure or delay on the part of Lessor to enforce any of the rights or remedies of the Lessor under said Lease, whether pursuant to the terms thereof or at law or in equity

No notice of default need be given to Guarantors, if being specifically agreed and understood that the guarantee of the undersigned is a continuing guarantee under which Lessor may proceed forthwith and immediately against Lessee or against Guarantors following any breach or default by Lessee or for the enforcement of any rights which Lessor may have as against Lessee pursuant to or under the terms of the within Lease or at law or in equity.

Lessor shall have the right to proceed against Guarantors hereunder following any breach or default by Lessee without first proceeding against Lessee and without previous notice to or demand upon either Lessee or Guarantors.

Guarantors hereby waive (a) notice of acceptance of this Guaranty, (b) demand of payment, presentation and protest, (c) all right to assert or plead any statute of limitations as to or relating to this Guaranty and the Lease, (d) any right to require the Lessor to proceed against the Lessee or any other Guarantor or any other person or entity liable to Lessor, (e) any right to require Lessor to apply to any default any security deposit or other security it may hold under the Lease, (f) any right to require Lessor to proceed under any other remedy Lessor may have before proceeding against Guarantors, (g) any right of subrogation.

Guarantors do hereby subrogate all existing or future indebtedness of Lessee to Guarantors to the obligations owed to Lessor under the Lease and this Guaranty

Any married woman who signs this Guaranty expressly agrees that recourse may be had against her separate property for all of her obligations hereunder

The obligations of Lessee under the Lease to execute and deliver estoppel statements and financial statements, as therein provided, shall be deemed to also require the Guarantors hereunder to do and provide the same relative to Guarantors

The term "Lessor" whenever hereinabove used refers to and means the Lessor in the foregoing Lease specifically named and also any assignee of said Lessor, whether by outright assignment or by assignment for security, and also any successor to the interest of said Lessor or of any assignee in such Lease or any part thereof, whether by assignment or otherwise So long as the Lessor's interest in or to the leased premises or the rents, issues and profits therefrom, or in, to or under said Lease, are subject to any mortgage or deed of trust or assignment for security, no acquisition by Guarantors of the Lessor's interest in the leased premises or under said Lease shall affect the continuing obligation of Guarantors under this Guaranty which shall nevertheless continue in full force and effect for the benefit of the mortgagee, beneficiary, trustee or assignee under such mortgage, deed or trust or assignment, of any purchase at sale by judicial foreclosure or under private power of sale, and of the successors and assigns of any such mortgagee, beneficiary, trustee, assignee or purchaser

The term "Lessee" whenever hereinabove used refers to and means the Lessee in the foregoing Lease specifically named and also any assignee or sublessee of said Lease and also any successor to the interests of said Lessee assignee or sublessee of such Lease or any part thereof whether by assignment, sublease or

otherwise

In the event any action be brought by said Lessor against Guarantors hereunder to enforce the obligation of Guarantor's hereunder, the unsuccessful party in such action shall pay to the prevailing party therein a reasonable attorney's fee which shall be fixed by the court.

If this Form has been filled in it has been prepared for submission to your attorney for his approval. No representation or recommendation is made by the real estate broker or its agents or employees as to the legal sufficiency, legal effect, or tax consequences of this Form or the transaction relating thereto.

Executed at	/s/ BASIL BURKE
-----	-----
	BASIL BURKE, PH.D
on	/s/ SCOTT KORNEY
-----	-----
	SCOTT KORNEY
Address	
-----	-----
- -----	"GUARANTORS"

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NOTE: These forms are often modified to meet changing requirements of law and needs of the industry. Always write or call to make sure you are utilizing the most current form. AMERICAN INDUSTRIAL REAL ESTATE ASSOCIATION, 345 So. Figueroa St. M-1, Los Angeles, CA 90071 (213) 687-8777

LESSOR AND LESSEE HAVE CAREFULLY READ AND REVIEWED THIS LEASE AND EACH TERM AND PROVISION CONTAINED HEREIN, AND BY THE EXECUTION OF THIS LEASE SHOW THEIR INFORMED AND VOLUNTARY CONSENT THERETO. THE PARTIES HEREBY AGREE THAT, AT THE TIME THIS LEASE IS EXECUTED, THE TERMS OF THIS LEASE ARE COMMERCIALY REASONABLE AND EFFECTUATE THE INTENT AND PURPOSE OF LESSOR AND LESSEE WITH RESPECT TO THE PREMISES.

IF THIS LEASE HAS BEEN FILLED IN, IT HAS BEEN PREPARED FOR YOUR ATTORNEY'S REVIEW AND APPROVAL. FURTHER, EXPERTS SHOULD BE CONSULTED TO EVALUATE THE CONDITION OF THE PROPERTY FOR THE POSSIBLE PRESENCE OF ASBESTOS, UNDERGROUND STORAGE TANKS OR HAZARDOUS SUBSTANCES. NO REPRESENTATION OR RECOMMENDATION IS MADE BY THE AMERICAN INDUSTRIAL REAL ESTATE ASSOCIATION OR BY THE REAL ESTATE BROKERS OR THEIR CONTRACTORS, AGENTS OR EMPLOYEES AS TO THE LEGAL SUFFICIENCY, LEGAL EFFECT, OR TAX CONSEQUENCES OF THIS LEASE OR THE TRANSACTION TO WHICH IT RELATES; THE PARTIES SHALL RELY SOLELY UPON THE ADVICE OF THEIR OWN COUNSEL AS TO THE LEGAL AND TAX CONSEQUENCES OF THIS LEASE. IF THE SUBJECT PROPERTY IS IN A STATE OTHER THAN CALIFORNIA, AN ATTORNEY FROM THE STATE WHERE THE PROPERTY IS LOCATED SHOULD BE CONSULTED.

THE PARTIES HERETO HAVE EXECUTED THIS LEASE AT THE PLACE AND ON THE DATES SPECIFIED ABOVE THEIR RESPECTIVE SIGNATURES.

EXECUTED AT: San Mateo

EXECUTED AT:

ON: 8-3-94

ON:

BY LESSOR:  
Harris Family Trust

BY LESSEE:  
Plant Research Technologies Inc.

BY: /s/ Norman Harris

BY: /s/ B.A. Burke

NAME PRINTED: Norman Harris

NAME PRINTED: Basil Burke, PH.D

TITLE: Lessor

TITLE: President

BY:

BY: /s/ Scott Korney

NAME PRINTED:

NAME PRINTED: Scott Korney

TITLE:

TITLE: Vice President

ADDRESS: 2121 S. El Camino Real, Suite 700

ADDRESS: 2020 Lundy Avenue

San Mateo, California 94403

San Jose, California 95131

TELEPHONE: (415) 578-8080

TELEPHONE: (408) 433-9815

FACSIMILE: (415) 578-0148

FACSIMILE: (408) 452-5084

BROKER:

BROKER:

EXECUTED AT:

EXECUTED AT:

ON:

ON:

BY:

BY:

NAME PRINTED: Tom Sweeney

NAME PRINTED: Mike Filice

TITLE: Senior Sales Consultant

TITLE: Senior Sales Consultant

ADDRESS: 3945 Freedom Circle, Suite 350

ADDRESS: 3945 Freedom Circle, Suite 350

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Santa Clara, California 95054  
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Santa Clara, California 95054  
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TELEPHONE: (408) 970-9400 X 123  
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TELEPHONE: (408) 970-9400 X 131  
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FACSIMILE: (408) 970-0648  
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FACSIMILE: (408) 970-0648  
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NOTE: THESE FORMS ARE OFTEN MODIFIED TO MEET CHANGING REQUIREMENTS OF LAW AND  
NEEDS OF THE INDUSTRY. ALWAYS WRITE OR CALL TO MAKE SURE YOU ARE  
UTILIZING THE MOST CURRENT FORM; AMERICAN INDUSTRIAL REAL ESTATE  
ASSOCIATION, 345 SO. FIGUEROA ST., M-1, LOS ANGELES, CA 90071. (213)  
687-8777.

INITIALS: BAB  
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MULTI-TENANT--GROSS  
(C) AMERICAN INDUSTRIAL REAL ESTATE ASSOCIATION 1993  
-11-

NH  
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## VIVUS, INC.

## COMPUTATION OF NET INCOME (LOSS) PER SHARE

	Three Months Ended September 30,		Nine Months Ended September 30,	
	1996	1995	1996	1995
	----	----	----	----
Net Income (Loss) .....	\$ 2,662,000	\$ (4,873,000)	\$ (7,317,000)	\$(16,743,000)
	=====	=====	=====	=====
Weighted average common shares outstanding .....	16,131,578	13,440,014	14,481,014	12,714,050
Weighted average common share options and warrants outstanding..	1,267,368	--	--	--
Common shares, options, and warrants granted (using the treasury stock method assuming an initial public offering price of \$14.00) since January 1, 1993 included pursuant to Securities and Exchange Commission Rules .....	419,552	574,889	419,552	574,889
	-----	-----	-----	-----
Weighted average common and equivalent shares .....	17,818,498	14,014,903	14,900,566	13,288,939
	=====	=====	=====	=====
Net income (loss) per common and equivalent share .....	\$ .15	\$ (.35)	\$ (.49)	\$ (1.26)
	=====	=====	=====	=====



5  
1,000  
U.S. DOLLARS

9-MOS			
	DEC-31-1996		
	JAN-01-1996		
	SEP-30-1996		
	1		
		10,284	
		56,638	
		1,222	
		0	
		0	
	68,454		
		7,130	
	(1,860)		
	102,144		
3,858			
		0	
0			
		0	
		16	
	98,270		
102,144			
		0	
	20,000		
		0	
	29,508		
	0		
	0		
	(7,317)		
		0	
(7,317)			
	0		
	0		
		0	
	(7,317)		
	(.49)		
	0		