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

FORM 8-K

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

Date of Report (Date of earliest event reported)
March 16, 2009

VIVUS, INC.
(Exact name of registrant as specified in its charter)

Delaware	**001-33389**	**94-3136179**
(State or other jurisdiction of incorporation)	(Commission File Number)	(IRS Employer Identification No.)

1172 CASTRO STREET
MOUNTAIN VIEW, CA 94040
(Address of principal executive offices, including zip code)

(650) 934-5200
(Registrant's telephone number, including area code)

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

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

o Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

o Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

o Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

o Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Item 1.01. Entry into a Material Definitive Agreement.

On March 16, 2009, VIVUS, Inc., or the Company, entered into agreements with Deerfield ED Corporation, or ED, Deerfield Private Design Fund, L.P., Deerfield Private Design International, L.P. and Deerfield PDI Financing, L.P., amending the Funding and Royalty Agreement dated April 3, 2008 (referred to as the FARA) and amending and restating the Option and Put Agreement dated April 3, 2008 (referred to as the OPA).

Pursuant to the amendment to the FARA, ED will be able to satisfy its remaining funding obligations under the FARA through the sale of notes to Deerfield Private Design Fund, L.P. and Deerfield PDI Financing, L.P. pursuant to a Note Purchase Agreement attached to the amendment as Exhibit A. As a result of this amendment, the subscription agreements that ED had entered into with Deerfield Private Design Fund, L.P. and Deerfield Private Design International, L.P. to sell shares of ED to obtain funds to satisfy ED's funding obligations under the FARA will terminate and be replaced by the Note Purchase Agreement. A copy of the amendment to the FARA, including the Note Purchase Agreement, is attached as Exhibit 10.1 to this Current Report on Form 8-K and is hereby incorporated by reference.

The OPA has been amended and restated to account for the change in the manner by which ED obtains funds to satisfy its funding obligations under the FARA, including, among other things, the addition of Deerfield PDI Financing, L.P. as a party and the requirement that a portion of the aggregate consideration payable under the OPA be used to repay the notes sold by ED pursuant to the Note Purchase Agreement to satisfy ED's funding obligations under the FARA. A copy of the amended and restated OPA is attached as Exhibit 10.2 to this Current Report on Form 8-K and is hereby incorporated by reference.

Item 9.01. Financial Statements and Exhibits

(d) Exhibits.

Exhibit No.	Description
10.1	First Amendment to Funding and Royalty Agreement, dated March 16, 2009, by and between Deerfield ED Corporation and VIVUS, Inc.
10.2	Amended and Restated Option and Put Agreement, dated March 16, 2009, by and between Deerfield ED Corporation, Deerfield Private Design Fund LP, Deerfield Private Design International L.P., Deerfield PDI Financing L.P., and VIVUS, Inc.

SIGNATURES

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

VIVUS, INC.

By: /s/ Lee B. Perry
Lee B. Perry
Vice President and Chief Accounting Officer

Date: March 19, 2009

EXHIBIT INDEX

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FIRST AMENDMENT
TO
FUNDING AND ROYALTY AGREEMENT

THIS FIRST AMENDMENT TO FUNDING AND ROYALTY AGREEMENT (this "Amendment"), dated as of March 16, 2009, is made by and between Deerfield ED Corporation, a Delaware corporation ("ED") and VIVUS, Inc., a Delaware corporation ("VIVUS").

Background Statement

ED and VIVUS previously entered into a Funding and Royalty Agreement, dated as of April 3, 2008 (the "Funding and Royalty Agreement"). Defined terms used in this Amendment and not otherwise defined herein shall have the meaning given to them in the Funding and Royalty Agreement.

Pursuant to the Funding and Royalty Agreement, ED agreed to provide funds to VIVUS in consideration of the payment by VIVUS of a royalty on future sales of certain pharmaceutical products owned by VIVUS, all as more fully described in the Funding and Royalty Agreement.

Pursuant to the Funding and Royalty Agreement, ED entered into subscription agreements (the "Subscription Agreements") with Deerfield Private Design International, L.P., a British Virgin Islands limited partnership, and Deerfield Private Design Fund, L.P., a Delaware limited partnership ("Private Design Fund") to secure funding commitments sufficient to fulfill ED's obligations under the Funding and Royalty Agreement.

As of the date hereof, ED will terminate the Subscription Agreements and obtain alternative funding commitments, sufficient to enable it to fund its remaining obligations under the Funding and Royalty Agreement, pursuant to a Note Purchase Agreement (the "Note Purchase Agreement"), between ED, Deerfield PDI Financing, L.P., a British Virgin Islands limited partnership, Private Design Fund and Deerfield Management Company, L.P., a Delaware limited partnership, the form of which Note Purchase Agreement is attached as **Exhibit A** hereto.

ED and VIVUS are entering into this Amendment to provide for VIVUS's consent to the termination of the Subscription Agreements and for such changes to the Funding and Royalty Agreement as are set forth herein.

Amendment

The Parties hereby amends the Funding and Royalty Agreement, effective as of the date hereof, as follows:

ARTICLE I

AMENDMENTS TO THE FUNDING AND ROYALTY AGREEMENT

1.1 **Section 3(a)**. Section 3(a) of the Funding and Royalty Agreement is hereby replaced in its entirety with the following:

(a) Rate. In consideration of the Funding Payments made by ED, from the date hereof through the tenth (10th) anniversary of such date, VIVUS shall pay to ED a royalty of twenty percent (20%) of Net Sales of Royalty Products made on or after the date of this Agreement (the "Royalty"). The Royalty shall be determined for each Quarter for all Net Sales of Royalty Products made during such Quarter; provided, that (i) only Net Sales occurring on or after the date of this Agreement shall be considered in determining the Royalty for the initial Quarter for which the Royalty is due and (ii) only Net Sales occurring on or before the tenth (10th) anniversary of date of this Agreement shall be considered in determining the Royalty for the final Quarter for which the Royalty is due. In addition, notwithstanding anything herein to the contrary, the Royalty for each Quarter during which any Funding Payment hereunder is overdue shall cease to accrue during the period in which such Funding Payment is overdue. The Royalty payable for any Quarter to be prorated shall be calculated by multiplying twenty percent (20%) of the Net Sales of Royalty Products for such Quarter by the ratio of the number of days for which the Royalty has accrued in such Quarter to the total number of days in such Quarter.

1.2 **Section 8(d)**. of the Funding and Royalty Agreement is hereby replaced in its entirety with the following:

Note Purchase Agreement. ED has entered or will enter into a Note Purchase Agreement between ED, Deerfield PDI Financing, L.P., a British Virgin Islands limited partnership, Deerfield Private Design Fund, L.P., a Delaware limited partnership, and Deerfield Management Company, L.P., a Delaware limited partnership (the "Note Purchase Agreement"), whereby ED will receive an aggregate of $6,666,668 in financing for the purpose of satisfying ED's obligation to make Funding Payments under this Agreement. ED further warrants that VIVUS is a third party beneficiary under the Note Purchase Agreement with full rights of enforcement as if a party to the Note Purchase Agreement.

ARTICLE II

GENERAL PROVISIONS

2.1 **Termination of Subscription Agreements**. VIVUS hereby consents to the termination of the Subscription Agreements

2.2 **Conflicting Terms**. The Funding and Royalty Agreement remains in full force and effect except as amended hereby. If the terms of this Amendment and the Funding and Royalty Agreement conflict, the terms of this Amendment shall be deemed to supersede the conflicting terms of the Funding and Royalty Agreement.

2.3 **Counterparts**. This Amendment may be executed in any number of counterparts, each of which shall be an original, but which together shall constitute one and the same instrument. This Amendment may be executed on signature pages exchanged by facsimile,

in which event each Party shall promptly deliver to the other such number of original executed copies as the other Party may reasonably request.

2.4 **Governing Law**. This Amendment shall be governed by and construed in accordance with the laws of the state of Delaware.

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IN WITNESS WHEREOF, the Parties have caused this Amendment to be executed by their duly authorized representatives as of the date first written above.

DEERFIELD ED CORPORATION

By: /s/ Jeffrey R. Kaplan

Name: Jeffrey R. Kaplan

Title: Treasurer

VIVUS, INC.

By: /s/ Timothy E. Morris

Name: Timothy E. Morris

Title: Chief Financial Officer

[Signature page to First Amendment to Funding and Royalty Agreement]

Exhibit A

Form of Note Purchase Agreement

NOTE PURCHASE AGREEMENT

Dated as of March , 2009

between

DEERFIELD ED CORPORATION,
as Issuer,

and

DEERFIELD PDI FINANCING LP,
as initial Note Purchaser,

and

DEERFIELD PRIVATE DESIGN FUND LP
as initial Note Purchaser,

and

DEERFIELD MANAGEMENT COMPANY, L.P.
As Note Agent

NOTE PURCHASE AGREEMENT

This NOTE PURCHASE AGREEMENT, dated as of March , 2009 (this "**Agreement**"), is by and among:

DEERFIELD ED CORPORATION, a Delaware corporation (the "**Issuer**");

DEERFIELD PDI FINANCING LP, a British Virgin Islands limited partnership, as initial Note Purchaser; and

DEERFIELD DESIGN FUND LP, as initial Note Purchaser; and

DEERFIELD MANAGEMENT COMPANY, L.P., as Note Agent for the Note Purchasers (the "**Note Agent**").

PRELIMINARY STATEMENTS

In consideration of the premises and the mutual covenants herein contained, the parties hereto hereby agree as follows:

ARTICLE I
DEFINITIONS

Section 1.01. Defined Terms. Capitalized terms used and not defined in this Agreement shall have the respective meanings assigned thereto in the Agreement. In addition, as used in this Agreement, the following terms shall have the following respective meanings:

"**Accredited Investor**"**:** An "accredited investor" as defined under Rule 501 of Regulation D promulgated under the Securities Act of 1933, as amended (the "**Securities Act**").

"**Affiliates**": For any specified Person, any other Person who directly or indirectly controls, is controlled by, or is under common control with, such specified Person. For purposes of the preceding sentence, "control" of a Person means possession, directly or indirectly (through one or more intermediaries), of the power to direct or cause the direction of management and policies of such Person through ownership of voting securities (or other ownership interests), contract, voting trust or otherwise.

"**Assignment and Acceptance**": An assignment and acceptance in substantially the form of Exhibit A, pursuant to which a Note Purchaser assigns all or a portion of its rights and obligations under this Agreement in accordance with the terms of Section 4.01.

"**Business Day**": A day on which commercial banks and foreign exchange markets settle payments in each of New York City, New York, and the British Virgin Islands and any other city in which the office of the Note Agent is located and, in the case of the final payment of principal of any Note, the place of presentation of such Note.

"**Closing Date**": March , 2009.

"**Code**": The Internal Revenue Code of 1986, as amended.

"**Debt/Equity Ratio**": Means the ratio as of the date of measurement of (i) the aggregate Outstanding Principal Amount for all Series of Notes for all Note Purchasers plus all accrued interest thereon, to (ii) the excess of (1) the aggregate capital contributions to the Issuer over (2) distributions made by the Issuer in redemption of its shares out of amounts other than earnings and profits.

"**Default Interest**": Interest accrued at the per annum rate of [14]%, compounded annually on each December 31st.

"**Eligible Assignee**": Any Person which delivers to the Note Agent and the Issuer an Assignment and Acceptance and such other documentation as they may reasonably request evidencing that such Person is an Accredited Investor and a Qualified Purchaser, that such Person is acquiring Notes in a transaction complying with applicable securities law restrictions, and that such Person has become a party to this Agreement.

"**Event of Default**": The meaning set forth in Section 7.01.

"**Excess Interest**": The meaning set forth in Section 2.04(d).

"**Indemnified Amounts**": The meaning set forth in Section 8.11.

"**Indemnified Parties**": The meaning set forth in Section 8.11.

"**Interest Rate**": 10% per year.

"**Issuer**": The meaning assigned to such term in the preamble hereto.

"**Issuers Account**": The bank account for receipt of funds from Note Purchasers, as identified in a notice from the Issuer from time to time.

"**Majority Note Purchaser Vote**"**:** As of any date, the vote of Note Purchasers holding greater than 50% of the Outstanding Principal Amount of the Notes of all Series.

"**Maturity Date**": The meaning set forth in Section 2.01.

"**Maximum Rate**": The meaning set forth in Section 2.04(d).

"**Note**": Any of the Issuer's notes issued under this Note Purchase Agreement.

"**Note Agent**": The meaning assigned to such term in the preamble hereto.

"**Note Purchase Conditions**" The meaning set forth in Section 2.02(a).

"**Note Purchaser**": Deerfield PDI Financing LP, a Cayman Islands exempted limited partnership and Deerfield private Design Fund LP, and any successors and permitted assigns pursuant to Section 4.01.

"**Note Purchase Request**": The meaning set forth in Section 2.02(b).

"**Other Taxes**": The meaning set forth in Section 2.05(b).

"**Outstanding Principal Amount**": As to any Note Purchaser at any time, the sum of the aggregate outstanding principal amount of under the Notes registered in the name of such Note Purchaser on the Register.

"**Person**": Any individual, corporation, partnership, limited partnership, limited liability limited partnership, limited liability partnership, limited liability company, trust, estate, unincorporated organization, association, governmental entity or other entity, and the heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so admits.

"**Proceeding**": Any suit in equity, action at law or other judicial or administrative proceeding.

"**Qualified Purchaser**": A "qualified purchaser" or a company beneficially owned exclusively by one or more "qualified purchasers" and/or "knowledgeable employees" as such terms are defined in the Investment Company Act of 1940, as amended.

"**Register**": The meaning set forth in Section 4.01(b).

"**Series**" or "**Note Series**" or "**Series of Notes**": The meaning set forth in Section 2.01.

"**Subsequent Tax Certificate**": The meaning set forth in Section 2.05(d).

"**Taxes**": The meaning set forth in Section 2.05(a).

"**Third Party Claim**": The meaning set froth in Section 8.11.

Section 1.02. Rules of Interpretation. The headings, subheadings, and table of contents herein are solely for convenience of reference and shall not affect the meaning, construction or effect of any provision hereof. Except as otherwise expressly provided, references herein to articles, sections, paragraphs, clauses, annexes, exhibits and schedules are references to articles, sections, paragraphs, clauses, annexes, exhibits and schedules in or to this Agreement. All definitions set forth herein shall apply to the singular as well as the plural form of the applicable defined term, and all references to the masculine gender shall include reference to the feminine or neuter gender, and vice versa, as the context may require. The word "including" and all variations thereof shall mean including without limiting the generality of any description preceding such term. All references to any agreement or document shall mean such agreement or document as amended, supplemented, restated or otherwise modified from time to time.

ARTICLE II
PURCHASE AND SALE OF THE NOTES

Section 2.01. Closing Date Note Purchase; Interest Rate and Tenor of Notes. At or prior to 1:00 p.m. (New York City time) on the Closing Date, the initial Note Purchasers shall purchase $2,553,334 and $4,113,334, respectively, in principal amount of Notes. Such Notes shall be the first series of Notes. Each Note series (a "**Series**") shall have interest fixed upon the issuance date at the Interest Rate and have a maturity date (the "**Maturity Date**") of the earliest to occur of (a) April 29, 2018, (b) the occurrence of the Option Closing and (c) the occurrence of the Put Closing , as such terms are defined in the Amended and Restated Option and Put Agreement, dated as of the date of this Agreement, by and among VIVUS, Inc., the Issuer, Deerfield Private Design Fund LP and Deerfield Private Design International LP, except as provided in this Agreement.

Section 2.02. Additional Note Series.

(a) On the terms and subject to the conditions set forth in this Agreement, and in reliance on the covenants, representations and agreements set forth herein, from time to time during the period from and including the Closing Date, the Issuer may request Note Purchasers to purchase, and the Note Purchasers in their discretion may choose to agree to purchase, an additional Series of Notes. Each aggregate purchase of an additional Series shall be made by the Note Purchasers in whatever proportion they may individually agree upon with the Issuer. Without limiting any other provision of this Agreement, each Note Purchaser's agreement to purchase additional Notes shall be subject to the satisfaction of the conditions precedent set forth in Article III, as applicable (the "**Note Purchase Conditions**").

(b) The Issuer shall give the Note Agent notice of the issuance of each additional Note Series (each, a "**Note Purchase Request**") no later than 1:00 p.m. (New York City time) five Business Days before the date of the proposed Note issuance date (which notice period may be waived by any Note Purchaser). The Note Agent shall give notice to each Note Purchaser no later than 2:00 p.m. (New York City time) nine Business Days before the proposed Note issuance date (unless such period has been waived by such Note Purchaser). Any Note Purchase Request given to the Note Agent pursuant to this Section 2.02(b) shall be transmitted by facsimile or email, shall be substantially in the form of Exhibit B, and shall specify (1) the proposed Series issuance date (which shall be a Business Day), (2) the principal amount of such proposed Series, (3) the proposed principal amount for each Note Purchaser, and (4) the Interest Rate for such Series. The Note Agent shall promptly notify each Note Purchaser of its applicable portion of such Series.

(c) Subject to the provisions hereof and upon the satisfaction of the conditions precedent set forth in Article III, each Note Purchaser purchasing a Note shall, before 3:00 p.m. (New York City time) on the applicable Note Series issuance date, make available to the Issuer, in immediately available funds, such Note Purchaser's applicable portion (if any) of such Series by depositing such funds into the Issuer's Account.

Section 2.03. The Notes; Payment.

(a) On each date that (i) any Outstanding Principal Amount of a Note Purchaser's Notes is assigned pursuant to the terms hereof, or (ii) the principal amount of any Series is reduced, a duly authorized officer, employee or agent of the Note Agent shall make appropriate notations in the Register and the allocation thereof among the Note Purchasers. The Issuer and each Note Purchaser authorizes each duly authorized officer, employee and agent of the Note Agent to make such notations in the Register as aforesaid and every such notation made in accordance with the foregoing authority shall be prima facie evidence of the accuracy of the information so recorded and shall be binding on the Issuer and each Note Purchaser absent manifest error.

(b) Notwithstanding any other provisions herein or in the Agreement, the Issuer agrees that all payments to each Note Purchaser for interest, principal and other amounts shall be made directly to the Note Purchaser at the account specified therefor from time to time to the Issuer by such Note Purchaser.

(c) The Issuer may prepay any Series of Notes without penalty upon three Business Days' prior written notice to the Note Agent (which shall promptly notify each affected Note Purchaser upon receipt of such notice). The Notes of any Series being prepaid shall be paid pro rata and pari passu, based upon their respective Outstanding Principal Amounts.

(d) The Issuer's obligation to repay the principal and interest of any Note at its Maturity Date shall be subject to the related Note Purchaser's surrender of the Note to the Issuer at its principal place of business. All Notes surrendered for payment and registration of transfer shall be surrendered to Issuer and shall promptly be canceled by it and may not be reissued or resold.

(e) If (i) any mutilated or defaced Note is surrendered to the Issuer, or if there shall be delivered to the Issuer evidence to its reasonable satisfaction of the destruction, loss or theft of any Note, and (ii there is delivered to the Issuer such security or indemnity as may reasonably be required by them to save each of them harmless then, in the absence of notice to the Issuer that such Note has been acquired by a bona fide purchaser, the Issuer shall execute and deliver, in lieu of any such mutilated, defaced, destroyed, lost or stolen Note, a new Note as such mutilated, defaced, destroyed, lost or stolen Note, of like tenor and Series (including the same date of issuance) and equal principal amount, registered in the same manner, dated the date of its execution, bearing interest from the date to which interest has been paid on the mutilated, defaced, destroyed, lost or stolen Note and bearing a number not contemporaneously outstanding.

Section 2.04. Calculation and Payment of Interest. (a) With any notice of prepayment of principal, with each payment of interest, the Note Agent shall calculate for the applicable period and for each affected Series of Notes the amount of interest accrued on such Series of Notes at the Interest Rate for such Series plus applicable Default Interest through but not including such payment date.

(b) Any prepayment of the principal of any Series of Notes shall be accompanied by the payment of all interest accrued on that Series through, but not including, that date of payment.

(c) Upon the occurrence and doing the continuance of an Event of Default, Default Interest shall accrue on each Series of Notes in addition to interest at the Interest Rate. All references to the calculation and payment of "interest" in this Agreement shall include Default Interest to the extent it has accrued.

(d) Notwithstanding any provision to the contrary contained in this Agreement, the Issuer shall not be required to pay, and the Note Purchasers shall not be permitted to collect, any amount of interest in excess of the maximum amount of interest permitted by law ("**Excess Interest**"). If any Excess Interest is provided for or determined by a court of competent jurisdiction to have been provided for in this Agreement, then in such event: (i) the provisions of this paragraph shall control; (ii) the Issuer shall not be obligated to pay any Excess Interest; (iii) any Excess Interest that a Note Purchaser may have received hereunder shall be, at the Note Purchaser's option, (A) applied as a credit against the Outstanding Principal Amount of the Note (without any prepayment penalty therefor) or for accrued and unpaid interest thereunder (not to exceed the maximum amount permitted by law), (B) refunded to the Issuer, or (C) any combination of the foregoing; (iv) the Interest Rate shall be automatically reduced to the maximum lawful rate allowed from time to time under applicable law (the "**Maximum Rate**"), and this Agreement and the Note shall be deemed to have been and shall be, reformed and modified to reflect such reduction; and (v) the Issuer shall not have any action against the Note Purchaser for any damages arising out of the payment or collection of any Excess Interest. Notwithstanding the foregoing, if for any period of time interest on any Note due and owing to the Note Purchaser is calculated at the Maximum Rate rather than the applicable rate under this Agreement, and thereafter such applicable rate becomes less than the Maximum Rate, the rate of interest payable on such Note due and owing to the Note Purchaser shall, to the extent permitted by law, remain at the Maximum Rate until the Note Purchaser shall have received the amount of interest which the Note Purchaser would have received during such period on the Note due and owing to the Note Purchaser had the rate of interest not been limited to the Maximum Rate during such period.

Section 2.05. Taxes.

(a) Except to the extent required under applicable law, any and all payments and deposits required to be made hereunder by the Issuer to or for the benefit of any Note Purchaser shall be made free and clear of and without deduction for any and all present or future taxes, levies, imposts, deductions, charges or withholdings, and all liabilities with respect thereto (all such amounts being hereinafter referred to as "**Taxes**") that are imposed on the Note Purchaser by the United States or any State thereof. If the Issuer shall be required by law to deduct any Taxes from or in respect of any sum required to be paid or deposited hereunder or under any instrument delivered hereunder to or for the benefit of a Note Purchaser, then the Issuer shall make such required deductions and shall pay the full amount of such deductions to the relevant taxation authority or other authority in accordance with applicable law.

(b) The Issuer shall pay any present or future stamp or documentary taxes or any other excise or property taxes, charges or similar levies imposed by the United States or any State thereof which arise from any payment made hereunder or from the execution, delivery or registration of, or otherwise with respect to, the Notes ("**Other Taxes**").

(c) Each Note Purchaser shall indemnify the Issuer for the full amount of Taxes (excluding Other Taxes) and any liability (including penalties, interest and expenses) arising therefrom or required to be paid with respect thereto. The Issuer shall promptly notify the Note Agent and each affected Note Purchaser of any payment of Taxes made by it and, if practicable, any request, demand or notice received in respect thereof prior to such

payment. A certificate as to the amount of such indemnification submitted to any Note Purchaser and the Note Agent by the Issuer, setting forth the calculation thereof, shall (absent manifest error) be conclusive and binding for all purposes.

(d) Each Note Purchaser that is not a United States Person hereby agrees to complete, execute and deliver to the Issuer and the Note Agent, on or prior to the 30th day after the later of (x) the Closing Date, and (y) the date such Note Purchaser first becomes a Note Purchaser (but in any event not later than the 10th Business Day before any payment is due or any deposit is required to be made hereunder or in connection herewith for the benefit of such Note Purchaser), two accurate and complete original signed copies of Internal Revenue Service Form W-8ECI, W-8BEN, W-8EXP or W-8IMY (with accurate and complete original signed copies of such forms properly completed and attached for all indirect investors), as applicable (or any successor form), certifying to such Note Purchaser's entitlement to a complete exemption from United States withholding tax and backup withholding tax with respect to any sum required to be paid or deposited hereunder or under any instrument delivered hereunder to or for the benefit of such Note Purchaser, together with a Portfolio Interest Exemption Certificate in the form annexed hereto as Exhibit C, if the Note purchaser is relying on the exemption from the United States withholding tax provided in Section 881(c) of the Code. In addition, each of the Note Agent and each Note Purchaser agrees that from time to time thereafter, when a lapse in time or change in circumstances renders a previous certification obsolete or inaccurate in any material respect, it will deliver to the Note Agent or the Note Agent, as applicable, two new accurate and complete original signed copies of Internal Revenue Service Form W-8ECI, W-8BEN, W-8EXP or W-8IMY (with accurate and complete original signed copies of such forms properly completed and attached for all indirect investors), as applicable, or such other forms or certificates as may be required in order to confirm or establish such Note Purchaser's entitlement to a continued exemption from United States withholding tax and backup withholding tax with respect to any sum required to be paid or deposited hereunder or under any instrument delivered hereunder to or for the benefit of such Note Purchaser (collectively, for any Note Purchaser, the "**Subsequent Tax Certificates**"), or it shall promptly notify the Note Agent and the Issuer of its inability to deliver any such Subsequent Tax Certificate. Notwithstanding anything in this Section to the contrary, to the extent the Issuer is required to do so by applicable law, the Issuer shall be entitled to deduct or withhold any applicable Taxes from or in respect of any sum required to be paid or deposited hereunder or under any instrument delivered hereunder to or for the benefit of such Note Purchaser. The Issuer shall have no obligation to make any additional payment in respect of such deducted or withheld amounts and the Issuer shall not be required to indemnify against Taxes paid by a Note Purchaser.

(e) The Issuer and the Note Agent may each request, and each Note Purchaser agrees to provide, such information as the Issuer and the Note Agent may reasonably request and which tax counsel to the Issuer shall deem reasonably appropriate for the purpose of determining the obligation of the Issuer to deduct any U.S. federal withholding tax from any payment made to or on behalf of a Note Purchaser.

ARTICLE III
CONDITIONS PRECEDENT TO PURCHASE

Section 3.01. Conditions Precedent to Initial Purchase. The purchase of the Notes on the Closing Date is subject to the following conditions precedent:

(i) each of the following statements shall be true, and the Note Agent and each initial Note Purchaser shall have received a certificate, dated the Closing Date, of an appropriate officer of the Issuer in which such officer shall state that, to the best knowledge of such officer:

(A) no Event of Default has occurred and is continuing;

(B) this Agreement is in full force and effect;

(C) the Debt Equity Ratio is not greater than 1:5:1 after giving effect to the issuance of the Notes;

(D) all conditions precedent to the issuance and purchase of the Notes set forth in this Agreement have been satisfied (or waived pursuant to the terms hereof or thereof); and

(ii) the Notes shall have been duly executed by the Issuer and delivered to the applicable initial Note Purchaser.

Section 3.02. Conditions Precedent to Issuance of Additional Series. Except to the extent any of the following conditions are waived in writing by each affected Note Purchaser, the purchase of any additional Series of Notes shall be subject to the following conditions precedent after giving effect to the issuance; and

(i) at the time of and immediately after giving effect to such issuance, no Event of Default shall have occurred and be continuing;

(ii) the Note Agent and the Note Purchasers shall have received a Note Purchase Request in accordance with Section 2.02; and

(iii) all representations and warranties made by the Issuer in this Agreement are true and correct in all material respects, as if repeated on the date of such issuance with respect to the facts and circumstances then existing (except to the extent that any such representation or warranty refers to a prior specific date).

ARTICLE IV
ASSIGNMENTS

Section 4.01. Assignment.

(a) At any time and from time to time, any Note Purchaser may assign all or any portion of its interest in the Notes (together with the related right, title and interest and obligations of such Note Purchaser hereunder), and the assignor and assignee thereof shall evidence and effect such assignment by executing and delivering to the Note Agent an Assignment and Acceptance; provided, that (i) each such assignment shall be made to an Eligible Assignee approved by the Note Agent, and (ii) the Issuer's written consent will be required for any assignment that is not to an Affiliate of the Note Agent.

(b) The Note Agent shall maintain at its address referred to in Section 8.02 a copy of each Assignment and Acceptance delivered to it and a register for the recordation of the names and addresses of the Note Purchasers and the Outstanding Principal Amount owing to each Note Purchaser from time to time (the "**Register**"). The entries in the Register shall be conclusive and binding for all purposes, absent manifest error, and the Issuer, the Note Agent and the Note Purchasers may treat each Person whose name is recorded in the Register as a Note Purchaser hereunder for all purposes of this Agreement. A Note Purchaser's interest in the Notes may be assigned in whole or in part only by registration of such assignment in the Register. Any assignment of a Note Purchaser's interest in the Notes shall be registered in the Register only upon delivery to the Note Agent of the Assignment and Acceptance duly executed by the assignor thereof. No assignment of a Note Purchaser's interest in the Notes shall be effective unless such assignment shall have been recorded in the Register by the Note Agent as provided in this Section 4.01. The Register shall be available for inspection by the Issuer or any Note Purchaser at any reasonable time and from time to time upon reasonable prior notice.

Section 4.02. Rights of Assignee. Upon any assignment in accordance with this Article IV, (a) the assignee receiving such assignment shall have all of the rights of such assignor hereunder with respect to the applicable Note and rights associated therewith being assigned, and (b) all references to such assignor in the Agreement shall be deemed to apply to such assignee to the extent of the interest assigned thereby.

Section 4.03. Notice of Assignment. Each assignor shall provide notice to the Note Agent and the Issuer of any assignment of any interest in its related Note or rights or obligations associated therewith by such assignor to any assignee.

ARTICLE V
REPRESENTATIONS AND WARRANTIES

Section 5.01. Representations and Warranties of Note Purchasers. Each Note Purchaser hereby represents and warrants that as of each date it shall acquire any Note (including the date that such Note Purchaser shall become a party hereto pursuant to an Assignment and Acceptance):

(a) Transaction Documents. The Note Purchaser has received all relevant information as it shall have deemed necessary or desirable in order to make its investment decision.

(b) Securities Law: Limitations on Resale. The Note Purchaser understands that such Note is being offered only in a transaction not involving any public offering in the United States within the meaning of the Securities Act, such Note has not been and will not be registered under the Securities Act, and, if in the future the Note Purchaser decides to offer, resell, pledge or otherwise transfer the Note, such Note may be offered, resold, pledged or otherwise transferred in accordance with the Agreement and the applicable legend on such Note.

(c) Accredited Investor and Qualified Purchaser Status. The Note Purchaser (1) is an Accredited Investor and a Qualified Purchaser, (2) is acquiring its interest in such Note for its own account and (3) in acquiring such Note, is not a bank lending funds in the ordinary course of its trade or business. The Note Purchaser has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of its investment in such Note, and the Note Purchaser is able to bear the economic risk of such investment.

(d) Investment Intent: Access to Information. The Note Purchaser is not purchasing such Note with a view to the resale, distribution or other disposition thereof in violation of the Securities Act. The Note Purchaser understands that an investment in such Note involves certain risks, including the risk of loss of all or a substantial part of its investment under certain circumstances. The Note Purchaser has had access to such financial and other information concerning the Issuer and such Note as it deemed necessary or appropriate in order to make an informed investment decision with respect to its purchase of its interest in such Note, including an opportunity to ask questions of and request information from the Note Agent and the Issuer.

Section 5.02. Representations and Warranties of the Issuer. The Issuer represents and warrants to the Note Agent and each Note Purchaser as follows:

(a) Organization. The Issuer is a corporation duly organized and validly existing and in good standing under the laws of Delaware.

(b) Authorization. The Issuer has the power to execute and deliver this Agreement and to perform its obligations under this Agreement and has taken all necessary action to authorize such execution, delivery and performance.

(c) No Conflict. The execution, delivery and performance of this Agreement by the Issuer do not violate or conflict with any law applicable to the Issuer, any provision of the organizational documents of the Issuer, any order or judgment of any court or other governmental authority applicable to the Issuer or any of the Issuer's assets or any contractual restriction binding on or affecting the Issuer or any of such assets.

(d) Consents. All governmental and other third-party consents that are required to have been obtained by the Issuer with respect to the execution, delivery and

performance of this Agreement have been obtained and are in full force and effect and all conditions of any such consents have been complied with.

(e) Enforceability. This Agreement constitute legal, valid and binding obligations of the Issuer, enforceable against the Issuer in accordance with their respective terms, subject to applicable bankruptcy, reorganization, insolvency, moratorium or similar laws affecting creditors' rights

generally and subject, as to enforceability, to equitable principles of general application (regardless of whether enforcement is sought in a proceeding in equity or at law).

ARTICLE VI
THE NOTE AGENT

Section 6.01. Authorization. Each Note Purchaser appoints and authorizes Deerfield Management Company, L.P., as the Note Agent, to take such action as agent on its behalf and to exercise such powers under this Agreement as are delegated to the Note Agent by the terms hereof, together with such powers as are reasonably incidental thereto. The Issuer appoints the Note Agent as its agent for maintenance of the Register. As to any matters not expressly provided for by this Agreement, the Note Agent shall not be required to exercise any discretion or take any action, but shall be required to act or to refrain from acting (and shall be fully protected in so acting or refraining from acting) upon the instructions of the Majority Note Purchaser Vote, and such instructions shall be binding upon all Note Purchasers; provided, that the Note Agent shall not be required to take any action that exposes the Note Agent to personal liability or that is contrary to the terms of this Agreement or contrary to applicable law.

Section 6.02. Reliance, Etc. None of the Note Agent nor any of its respective directors, officers, agents, parties, attorneys or employees shall be liable to any Note Purchaser for any action taken or omitted to be taken by it or them under or in connection with this Agreement, except for its or their own gross negligence or willful misconduct. Without limiting the generality of the foregoing, the Note Agent (i) may consult with independent legal counsel (including counsel for the Issuer), independent certified public accountants and other experts selected by it and shall not be liable for any action taken or omitted to be taken in good faith by it in accordance with the advice of such counsel, accountants or experts, (ii) makes no representation or warranty to any Note Purchaser and shall not be responsible to any Note Purchaser for any statements, representations or warranties made in or in connection with this Agreement, (iii) shall not have any duty to ascertain or to inquire as to the performance or observance of any of the terms, covenants or conditions of this Agreement on the part of the Issuer, (iv) shall not be responsible to any Note Purchaser for the due execution, legality, validity, enforceability, genuineness, sufficiency or value of this Agreement (except for the execution by the Note Agent of, and the legality, validity and enforceability against the Note Agent of its obligations under, this Agreement), and (v) shall incur no liability under or in respect of this Agreement by acting upon any notice (including notice by telephone), consent, certificate or other instrument or writing (which may be by facsimile or telex) believed by it to be genuine and signed or sent by the proper party or parties; except in each case for its gross negligence or willful misconduct.

Section 6.03. Agents and Affiliates. The Note Agent and its Affiliates may generally engage in any kind of business with the Issuer, any of their respective Affiliates and any Person who may do business with or own securities of the Issuer or any of its respective Affiliates, all as if the Note Agent were not the Note Agent, and without any duty to account therefor to any Note Purchaser.

Section 6.04. Credit Decision by Note Purchasers. Each Note Purchaser acknowledges that it has, independently and without reliance upon the Note Agent or any other Note Purchaser and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Note Purchaser also acknowledges that it will, independently and without reliance upon the Note Agent or any other Note Purchaser and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under this Agreement. Each Note Purchaser confirms that the undertakings being entered into by such Note Purchaser herein have been duly approved by it (through its regular approval process or otherwise) and it is duly authorized to execute and deliver this Agreement as a result of such approval. Each Note Purchaser further acknowledges that to the best knowledge, information and belief of its officers, there is no regulatory or legal impediment to its entering into this Agreement.

Section 6.05. Indemnification. The Note Purchasers agree to indemnify the Note Agent ratably according to the ratio their respective Outstanding Principal Amounts bear to the aggregate Outstanding Principal Amounts of all Series of Notes, from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever which may be imposed on, incurred by, or asserted against the Note Agent in any way relating to or arising out of this Agreement or any action taken or omitted by the Note Agent under this Agreement; provided, that no Note Purchaser shall be liable for any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements resulting from the Note Agent's gross negligence or willful misconduct. Without limitation of the foregoing, each Note Purchaser agrees to reimburse the Note Agent promptly upon demand for its ratable share of any out-of-pocket expenses (including reasonable counsel fees) incurred by the Note Agent in connection with the administration or enforcement (whether through negotiations, legal proceedings or otherwise) of, or legal advice in respect of, rights or responsibilities under, this Agreement, to the extent that the Note Agent is not reimbursed for such expenses by the Issuer.

Section 6.06. Successor Note Agent. The Note Agent (i) may resign at any time by giving written notice thereof to the Note Purchasers and the Issuer, and (ii) may be removed at any time upon a material default by the Note Agent by the Majority Note Purchaser Vote by written notice to the Note Agent, the Note Purchasers and the Issuer, setting forth a brief description of the grounds upon which such removal is based; provided, that no such resignation or removal shall be effective until a successor Note Agent shall have been appointed and accepted such appointment pursuant to the terms of this Section 6.06. Upon any such resignation or removal, the Majority Note Purchaser Vote shall have the right to appoint a successor Note Agent. If no successor Note Agent shall have been so appointed by the Majority Note Purchaser Vote, and shall have accepted such appointment, within 30 days after the retiring Note Agent's giving of notice of resignation or the Majority Note Purchaser Vote' removal of the retiring Note

Agent, then the retiring Note Agent shall appoint a successor Note Agent. Any such successor Note Agent shall be a commercial bank having a combined capital and surplus of at least $500,000,000. Upon the acceptance of any appointment as Note Agent hereunder by a successor Note Agent, such successor Note Agent shall execute and deliver to the Note Purchasers and the Issuer an agreement accepting and agreeing to perform the duties of the Note Agent under this Agreement, and shall thereupon succeed to and become vested with all the rights, powers, privileges and duties of the retiring Note Agent, and the retiring Note Agent shall be discharged from its duties and obligations under this Agreement. After any retiring Note Agent's resignation or removal hereunder as Note Agent, the provisions of this Article VI shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Note Agent under this Agreement.

ARTICLE VII
EVENTS OF DEFAULT

Section 7.01. **"Event of Default"**, wherever used herein, means any one or more of the following events (whatever the reason for such Event of Default and whether it shall be voluntary or involuntary or be effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or regulation of any administrative or governmental body):

(a) a default in the payment of interest on any Note when the same becomes due and payable, in each case which default continues for a period of five Business Days;

(b) a default in the payment of principal of any Note when the same becomes due and payable on the Maturity Date;

(c) the Issuer becomes an investment company required to be registered under the Investment Company Act;

(d) a default in the performance, or breach, of any other material covenant or other agreement of the Issuer under this Agreement or any representation or warranty of the Issuer made in this Agreement that proves to be incorrect in any material respect when made, and the continuation of such default or breach for a period of 60 days after notice thereof to the Issuer by the Note Agent or by the holders of at least 25% in aggregate Outstanding Principal Amount of all Series of Notes;

(e) an involuntary proceeding shall be commenced or an involuntary petition shall be filed seeking (i) winding up, liquidation, reorganization or other relief in respect of the Issuer or its debts, or of a substantial part of its assets, under any bankruptcy, insolvency, receivership or similar law now or hereafter in effect or (ii) the appointment of a receiver, Note Agent, custodian, sequestrator, conservator or similar official for the Issuer or for a substantial part of its assets, and, in any such case, such proceeding or petition shall continue undismissed for 60 days; or an order or decree approving or ordering any of the foregoing shall be entered;

(f) the Issuer shall (i) voluntarily commence any proceeding or file any petition seeking winding up, liquidation, reorganization or other relief under any bankruptcy, insolvency, receivership or similar law now or hereafter in effect, (ii) consent to the institution

of, or fail to contest in a timely and appropriate manner, any proceeding or petition described in Section 7.01(e), (iii) apply for or consent to the appointment of a receiver, trustee, custodian, sequestrator, conservator or similar official for itself or for a substantial part of its assets, (iv) file an answer admitting the material allegations of a petition filed against it in any such proceeding, (v) make a general assignment for the benefit of creditors or (vi) take any action for the purpose of effecting any of the foregoing; and

(g) the Issuer shall issue any debt having priority of payment senior to or pari passu with the Notes.

Section 7.02. Acceleration of Maturity; Recession and Annulment.

(a) If an Event of Default occurs and is continuing (other than an Event of Default specified in Section 7.01(e) or (f)), (i) the Note Agent acting at the direction of a Majority Note Purchaser Vote shall declare the principal of all of the Notes to be immediately due and payable, and upon any such declaration such principal, together with all accrued and unpaid interest thereon, and other amounts payable hereunder in accordance with the priority of payments, shall become immediately due and payable. If an Event of Default specified in Section 7.01(e) or (f) occurs, all unpaid principal, together with all accrued and unpaid interest thereon, of all the Notes, and other amounts payable hereunder shall automatically become due and payable without any declaration or other act on the part of the Note Agent or any Note Purchaser.

(b) At any time after such a declaration of acceleration of maturity has been made and before a judgment or decree for payment of the cash due has been obtained by the Note Agent as hereinafter provided, the Note Purchasers may by a Majority Note Purchaser Vote, by written notice to the Issuer and the Note Agent, rescind and annul such declaration and its consequences or waive the relevant Event of Default as provided in Section 7.11. No such rescission and annulment shall affect any subsequent Event of Default or impair any right consequent thereon.

Section 7.03. Collection of Indebtedness and Suits for Enforcement by Note Agent. If an Event of Default shall occur in respect of the payment of any principal of or interest on any Note, the Issuer will upon demand of the Note Agent or any affected Note Purchaser, pay to the Note Purchaser the whole amount, if any, then due and payable on such Note for principal and interest with interest upon the overdue principal and, to the extent that payments of such interest shall be legally enforceable, upon overdue installments of interest at the applicable Interest Rate and, in addition thereto, such further amount as shall be sufficient to cover the costs and expenses of collection, including the reasonable compensation, expenses, disbursements and advances of such Note Purchaser and its respective agents and counsel.

If the Issuer fails to pay such amounts forthwith upon such demand, the Note Agent, in its own name and as Note Agent of an express trust, may institute a Proceeding for the collection of the sums so due and unpaid, and shall, upon the direction by a Majority Note Purchaser Vote, prosecute such Proceeding to judgment or final decree, and may enforce the same against the Issuer and collect the cash from the Issuer adjudged or decreed to be payable in the manner provided by law.

If an Event of Default occurs and is continuing, the Note Agent shall, upon written direction by a Majority Note Purchaser Vote, proceed to protect and enforce any such rights, whether for the specific enforcement of any agreement in this Agreement or in aid of the exercise of any power granted herein, or to enforce any other proper remedy or legal or equitable right vested in the Note Agent by this Agreement or by law as directed by such Majority Note Purchaser Vote.

In case there shall be pending Proceedings relative to the Issuer under the United States Bankruptcy Code or any other applicable bankruptcy, insolvency or other similar law, or in case a receiver, assignee or trustee in bankruptcy or reorganization, liquidator, sequestrator or similar official shall have

been appointed for or taken possession of the Issuer or its property, the Note Agent, regardless of whether the principal of any Notes shall then be due and payable as therein expressed or by declaration or otherwise and regardless of whether the Note Agent shall have made any demand pursuant to the provisions of this Section 7.03, shall be entitled and empowered, by intervention in such Proceedings or otherwise:

(i) to file and prove a claim or claims for the whole amount of principal and interest owing and unpaid in respect of the Notes upon direction by a Majority Note Purchaser Vote, and to file such other papers or documents as may be necessary or advisable in order to have the claims of the Note Agent (including any claim for reasonable compensation to the Note Agent and each predecessor Note Agent, and their respective agents, attorneys and counsel, and for reimbursement of all expenses and liabilities incurred, and all advances made, by the Note Agent and each predecessor Note Agent) and of the Note Purchasers allowed in any Proceedings relative to the Issuer or to the property of the Issuer;

(ii) unless prohibited by applicable law and regulations, to vote on behalf of the Note Purchasers upon their direction by a Majority Note Purchaser Vote in any election of a trustee or a standby trustee in arrangement, reorganization, liquidation or other bankruptcy or insolvency Proceedings or person performing similar functions in comparable Proceedings; and

(iii) to collect and receive any cash or other property payable to or deliverable on any such claims, and to distribute all amounts received with respect to the claims of the Note Purchasers and of the Note Agent on behalf of the Note Purchasers and the Note Agent; and any trustee, receiver or liquidator, custodian or other similar official is hereby authorized by each of the Note Purchasers to make payments to the Note Agent, and, if of the Note Agent shall consent to the making of payments directly to the Note Purchasers, to pay to the Note Agent such amounts as shall be sufficient to cover reasonable compensation to the Note Agent, each predecessor Note Agent and their respective agents, attorneys and counsel, and all other reasonable expenses and liabilities incurred, and all advances made, by the Note Agent and each predecessor Note Agent except as a result of negligence or bad faith.

Nothing herein contained shall be deemed to authorize the Note Agent to authorize or consent to or vote for or accept or adopt on behalf of any Note Purchaser, any plan of reorganization, arrangement, adjustment or composition affecting the Notes or the rights of any Note Purchaser, or to authorize the Note Agent to vote in respect of the claim of any Note Purchaser in any such Proceeding except, as aforesaid, to vote for the election of a Note Agent in a bankruptcy or similar proceeding.

All rights of action and of asserting claims under this Agreement, or under any of the Notes, may be enforced by the Note Agent without the possession of any of the Notes or the

production thereof in any trial or other Proceedings relative thereto, and any action or Proceedings instituted by the Note Agent shall be brought in the name of the Note Purchasers, and any recovery of judgment, subject to the payment of the reasonable expenses, disbursements and compensation of the Note Agent, each predecessor Note Agent and their respective agents and attorneys and counsel, shall be for the benefit of the Note Purchasers and payable to the Note Purchasers as set forth in Section 7.05.

Section 7.04. Remedies.

(a) If an Event of Default shall have occurred and be continuing, and the Notes have been declared due and payable and such declaration and its consequences have not been rescinded and annulled, the Issuer agrees that the Note Agent shall, upon direction by a Majority Note Purchaser Vote, to the extent permitted by applicable law, exercise one or more of the following rights, privileges and remedies:

(i) institute Proceedings for the collection of all amounts then payable on the Notes or otherwise payable under this Agreement, whether by declaration or otherwise, enforce any judgment obtained, and collect from the Issuer's assets any cash adjudged due;

(ii) subject to Section 7.05 hereof, sell all or a portion of the Issuer's assets or rights of interest therein, at one or more public or private sales called and conducted in any manner permitted by law; and

(iii) exercise any other rights and remedies that may be available at law or in equity.

The Note Agent may, but need not, obtain and rely upon an opinion of an independent investment banking firm of national reputation as to the feasibility of any action proposed to be taken in accordance with this Section 7.04 and as to the sufficiency of the proceeds and other amounts receivable with respect to the Collateral to make the required payments of principal of and interest on the Notes, which opinion shall be conclusive evidence as to such feasibility or sufficiency.

(b) If an Event of Default as described in Section 7.01(d) shall have occurred and be continuing, the Note Agent shall, at the direction of a Majority Note Purchaser Vote, institute a Proceeding solely to compel performance of the covenant or agreement or to cure the representation or warranty, the breach of which gave rise to the Event of Default under such Section, and enforce any equitable decree or order arising from such proceeding.

(c) Notwithstanding any other provision of this Agreement, neither the Note Agent nor any Note Purchaser may, prior to the date which is one year and one day, or if longer the applicable preference period then in effect, after the payment in full of all Notes, institute against, or join any other Person in instituting against, the Issuer any bankruptcy, reorganization, arrangement, insolvency, moratorium or liquidation proceedings, or other proceedings under Federal or state bankruptcy or similar laws. Nothing in this Section 7.04 shall preclude, or be deemed to stop, the Note Agent (i) from taking any action prior to the expiration of the aforementioned one year and one day period, or if longer the applicable preference period then in

effect, in (A) any case or proceeding voluntarily filed or commenced by the Issuer or (B) any involuntary insolvency proceeding filed or commenced by a Person other than the Note Agent, or (ii) from commencing against the Issuer or any of its properties any legal action which is not a bankruptcy, reorganization, arrangement, insolvency, moratorium, liquidation or similar proceeding.

Section 7.05. Application of Cash Collected. Any cash collected by the Note Agent with respect to the Notes pursuant to this Article VII and any cash that may then be held or thereafter received by the Note Agent with respect to the Notes hereunder shall be applied in payment of the indemnities and costs owed to the Note Agent and the Note Purchasers hereunder and to the Outstanding Principal Amount and all interest accrued thereon of all Series of Notes. Payments shall first be applied first to indemnities and other costs of the Note Agent provided for under this Agreement, then to indemnities and other costs of the Note Purchasers provided for under this Agreement (pro rata in proportion to the amounts owed each Note Purchaser). Remaining amounts collected by the Note Agent shall be allocated between the Series of Notes pro rata in accordance with the sum of the accrued interest and Outstanding Principal Amount of the Notes of the respective Series. Payments made with respect to any Series of Notes shall be made pro rata among the Note Purchasers holding the Notes of such Series in accordance the Outstanding Principal Amount of their Notes. Payments with respect to each Note shall be applied first to accrued interest and then to principal. No cash shall be released to the Issuer until payment in full of all amounts dues under this Agreement.

Section 7.06. Limitation on Suits. No holder of any Note shall have any right to institute any Proceedings, judicial or otherwise, with respect to this Agreement, or for the appointment of a receiver or Note Agent, or for any other remedy hereunder, unless:

(i) such Note Purchaser has previously given to the Note Agent written notice of an Event of Default;

(ii) there has been a Majority Note Purchaser Vote directing the Note Agent to institute Proceedings in respect of such Event of Default in the name of the Note Purchasers;

(iii) such Note Purchaser has provided to the Note Agent reasonable indemnity against the costs, expenses and liabilities to be incurred in compliance with such request;

(iv) the Note Agent for 60 days after its receipt of such notice, request and provision of indemnity has failed to institute any such Proceeding; and

(v) no direction inconsistent with such written request has been given to the Note Agent during such 60-day period by Majority Note Purchaser Vote;

it being understood and intended that no one or more Note Purchasers shall have any right in any manner whatever by virtue of, or by availing of, any provision of this Agreement to affect, disturb or prejudice the rights of any other Note Purchasers or to obtain or to seek to obtain priority or preference over any other Note Purchasers or to enforce any right under this Agreement, except in the manner herein provided and for the equal and ratable benefit of all the Note Purchasers.

Section 7.07. Restoration of Rights and Remedies. If the Note Agent or any Note Purchaser has instituted any Proceeding to enforce any right or remedy under this

Agreement and such Proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the Note Agent or to such Note Purchaser, then and in every such case the Issuer, the Note Agent and the Note Purchaser shall, subject to any determination in such Proceeding, be restored severally and respectively to their former positions hereunder, and thereafter all rights and remedies of the Note Purchasers shall continue as though no such Proceeding had been instituted.

Section 7.08. Rights and Remedies Cumulative. No right or remedy herein conferred upon or reserved to the Note Agent or to the Note Purchasers is intended to be exclusive of any other right or remedy, and every right and remedy shall, to the extent permitted by law, be cumulative and in addition to every other right and remedy given hereunder or now or hereafter existing by law or in equity or otherwise. The assertion or employment of any right or remedy hereunder, or otherwise, shall not prevent the concurrent assertion or employment of any other appropriate right or remedy.

Section 7.09. Delay or Omission Not Waiver. No delay or omission of the Note Agent or of any Note Purchaser to exercise any right or remedy accruing upon any Event of Default shall impair any such right or remedy or constitute a waiver of any such Event of Default or an acquiescence therein. Every right and remedy given by this Article VII or by law to the Note Agent or to the Note Purchasers may be exercised from time to time, and as often as may be deemed expedient, by the Note Agent or by the Note Purchasers, as the case may be.

Section 7.10. Control by Note Purchasers. Notwithstanding any other provision of this Agreement, the Note Purchasers by a Majority Note Purchaser Vote shall have the right to cause the institution of and direct the time, method and place of conducting any Proceeding for any remedy available to the Note Agent or for exercising any trust, right, remedy or power conferred on the Note Agent; provided that:

(i) such direction shall not conflict with any rule of law or with this Agreement;

(ii) the Note Agent may take any other action deemed proper by the Note Agent that is not inconsistent with such direction; provided that the Note Agent need not take any action that it determines might involve it in liability (unless the Note Agent has received satisfactory indemnity against such liability as set forth below); and

(iii) the Note Agent shall have been provided with indemnity satisfactory to it.

Section 7.11. Waiver of Past Defaults. Prior to the time a judgment or decree for payment of the cash due has been obtained by the Note Agent, as provided in this Article VII, the Note Purchasers by Majority Note Purchaser Vote may on behalf of all the Note Purchasers waive any past Event of Default and its consequences, except an Event of Default under Section 7.01(e) or (f) .

In the case of any such waiver, (i) the Issuer, the Note Agent and the Note Purchasers shall be restored to their former positions and rights hereunder, respectively, but no such waiver shall extend to any subsequent or other Event of Default or impair any right consequent thereto, and (ii) the Note Agent shall promptly give written notice of any such waiver to each Note Purchaser.

Upon any such waiver, such Event of Default shall cease to exist, and any Event of Default arising therefrom shall be deemed to have been cured for every purpose of this Agreement, but no such waiver shall extend to any subsequent or other Event of Default or impair any right consequent thereto.

Section 7.12. Undertaking for Costs. All parties to this Agreement agree that any court may in its discretion require, in any suit for the enforcement of any right or remedy under this Agreement, or in any suit against the Note Agent for any action taken, or omitted by it as Note Agent, the filing by any party litigant in such suit of an undertaking to pay the costs of such suit, and that such court may in its discretion assess reasonable costs, including reasonable attorneys' fees, against any party litigant in such suit, having due regard to the merits and good faith of the claims or defenses made by such party litigant.

Section 7.13. Action on the Notes. The Note Agent's right to seek and recover judgment on the Notes on behalf of the Note Purchasers shall not be affected by the seeking or obtaining of or application for any other relief under or with respect to this Agreement. No rights or remedies of the Note Purchasers shall be impaired by the recovery of any judgment by the Note Agent against the Issuer or by the levy of any execution under such judgment upon any portion of the assets of the Issuer.

ARTICLE VIII
MISCELLANEOUS

Section 8.01. Amendments, Etc.

(a) No amendment of any provision of this Agreement shall in any event be effective unless the same shall be in writing and signed by each of the parties hereto. Any waiver or consent shall be effective only if signed by the party waiving any right, in the specific instance and for the specific purpose for which given.

Section 8.02. Notices, Etc. All notices and other communications provided for hereunder shall, unless otherwise stated herein, be in writing (including facsimile communication) and shall be personally delivered or sent by certified mail, postage prepaid, or overnight courier or facsimile, to the intended party at the address or facsimile number of such party set forth below, or at such other address or facsimile number as shall be designated by such party in a written notice to the other parties hereto.

If to the Issuer:

780 Third Avenue
New York, New York 10017
Attention: James E. Flynn

If to the Note Agent and Deerfield Private Design Fund LP:

780 Third Avenue
New York, New York 10017
Attention: James E. Flynn

If to Deerfield PDI Financing LP:

c/o Citi Hedge Fund Services, Ltd.
Hemisphere House
9 Church Street
Hamilton HM 11
Bermuda

All such notices and communications shall be deemed effective: (i) if in writing and delivered in person or by overnight courier service, on the date it is delivered; (ii) if sent by facsimile transmission, on the date that transmission is received by the recipient in legible form (it being agreed that the burden of proving receipt will be on the sender and will not be met by a transmission report generated by the sender's facsimile machine); and (iii) if sent by mail, on the date that mail is delivered or its delivery is attempted; in each case, unless the date of that delivery (or attempted delivery) or that receipt, as applicable, is not a Business Day or that communication is delivered (or attempted) or received, as applicable, after the close of business on a Business Day, in which case that communication shall be deemed given and effective on the first following day that is a Business Day.

Section 8.03. No Waiver, Remedies. No failure on the part of the Note Agent or any Note Purchaser to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof; nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

Section 8.04. Binding Effect; Survival.

(a) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Nothing in this Agreement, express or implied, shall be construed to confer upon any Person (other than the parties hereto, their respective successors and assigns) any legal or equitable right, remedy or claim under or by reason of this Agreement; provided, however, that VIVUS, Inc. shall be a third party beneficiary of the obligations of the Note Purchasers under Articles II and III of this Agreement. This Agreement shall create and constitute the continuing obligation of the parties hereto in accordance with its terms.

(b) The Issuer may not assign or delegate any of its rights or obligations under this Agreement without the prior consent of each Note Purchaser and the Note Agent.

Section 8.05. Captions and Cross References. The various captions in this Agreement are provided solely for convenience of reference and shall not affect the meaning or interpretation of any provision of this Agreement.

Section 8.06. Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW

YORK APPLICABLE TO CONTRACTS MADE AND TO BE PERFORMED IN SUCH STATE.

Section 8.07. Submission to Jurisdiction. Each of the parties hereto hereby irrevocably and unconditionally submits to the nonexclusive jurisdiction of any New York State court or federal court of the United States of America sitting in New York City, and any appellate court from any thereof, in any action or proceeding arising out of or relating to this Agreement, and each of the parties hereto hereby irrevocably and unconditionally (i) agrees that all claims in respect of any such action or proceeding may be heard and determined in such New York State or, to the extent permitted by law, such federal court and (ii) waives the defense of an inconvenient forum. Each of the parties hereto agrees that a final non-appealable judgment in any such action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law.

Section 8.08. Consent to Service of Process. Each party to this Agreement irrevocably consents to service of process by personal delivery, certified mail, postage prepaid or overnight courier. Nothing in this Agreement will affect the right of any party to this Agreement to serve process in any other manner permitted by law.

Section 8.09. Waiver of Jury Trial. EACH PARTY HERETO WAIVES ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING TO ENFORCE OR DEFEND ANY RIGHTS UNDER OR RELATING TO THIS AGREEMENT.

Section 8.10. Execution in Counterparts. This Agreement may be executed in any number of counterparts and by the different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which when taken together shall constitute one and the same Agreement.

Section 8.11. Indemnities by Issuer. Without limiting any other rights that the Note Purchasers, the Note Agent and any successors and permitted assigns and their respective officers, directors, employees, counsel and agents (collectively, the "**Indemnified Parties**") may have hereunder or under applicable law, the Issuer hereby agrees to indemnify each Indemnified Party from and against any and all damages, losses, claims, liabilities, reasonable costs and expenses, including, without limitation, reasonable attorney's fees and disbursements (all of the foregoing being collectively referred to as "**Indemnified Amounts**") awarded against or incurred by any of them in any action or proceeding between the Issuer and any of the Indemnified Parties as a result of the inaccuracy of any representation or warranty made by the Issuer under this Agreement or the failure of the Issuer to comply with any term or provision of this Agreement, excluding, however, Indemnified Amounts to the extent resulting from gross negligence or willful misconduct on the part of an Indemnified Party.

In order for an Indemnified Party to be entitled to any indemnification provided for under this Agreement in respect of, arising out of, or involving a claim made by any Person against the Indemnified Party (a "**Third Party Claim**"), such Indemnified Party must notify the Issuer in writing of the Third Party Claim within fifteen days of receipt of a summons, complaint or other notice of the commencement of litigation and within thirty days after receipt by such Indemnified Party of any other written notice of the Third Party Claim. Thereafter, the

Indemnified Party shall deliver to the Issuer within a reasonable time after the Indemnified Party's receipt thereof, copies of all notices and documents (including court papers) received by the Indemnified Party relating to the Third Party Claim.

If a Third Party Claim is made against an Indemnified Party, the Issuer will be entitled (x) to participate in the defense thereof and, (y) if it so chooses, to assume the defense thereof with counsel selected by the Issuer provided that in connection with such assumption such counsel is not reasonably objected to by the Indemnified Party. Should the Issuer so elect to assume the defense of a Third Party Claim, the Issuer will not be liable to the Indemnified Party for any legal expenses subsequently incurred by the Indemnified Party in connection with such defense thereof. If the Issuer elects to assume the defense of a Third Party Claim, the Indemnified Party will (i) cooperate in all reasonable respects with the Issuer in connection with such defense and (ii) not admit any liability with respect to, or settle, compromise or discharge, such Third Party Claim without the Issuer's prior written consent, as the case may be. If the Issuer shall assume the defense of any Third Party Claim, the Indemnified Party shall be entitled to participate in (but not control) such defense with its own counsel at its own expense. If the Issuer does not assume the defense of any such Third Party Claim, the Indemnified Party may defend the same in such manner as it may deem appropriate, including settling such claim or litigation after giving notice to the Issuer of such terms and the Issuer will promptly reimburse the Indemnified Party upon written request. Anything contained in this Agreement to the contrary notwithstanding, the Issuer shall not be entitled to assume the defense of any part of a Third Party Claim that seeks an order, injunction or other equitable relief or relief for other than money damages against the Indemnified Party.

[Remainder of page intentionally blank.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their respective officers thereunto duly authorized as of the date first above written.

DEERFIELD ED CORPORATION, as Issuer

By: _____
Name:
Title:

DEERFIELD MANAGEMENT COMPANY, L.P., as Note Agent

By: _____
Name: James Flynn
Title: General Partner

DEERFIELD PDI FINANCING LP, as initial Note Purchaser

By: DEERFIELD CAPITAL, L.P., its general partner

By: _____
Name:
Title:

DEERFIELD PRIVATE DESIGN FUND LP, as initial Note Purchaser

By: _____
Name:
Title:

EXHIBIT A

FORM OF ASSIGNMENT AND ACCEPTANCE

Reference is hereby made to the Note Purchase Agreement, dated as of March , 2009, as it may be amended or otherwise modified from time to time (as so amended or modified, the "**Agreement**"), by an among Deerfield ED Corporation, Deerfield PDI Financing LP, as initial Note Purchaser, Deerfield Private Design Fund LP and Deerfield Management Company, L.P., as Note Agent. Terms defined in the Agreement are used herein with the same meaning.

[ ], in its capacity as Note Purchaser under the Agreement (the "**Assignor**") and [ ] (the "Assignee") agree as follows:

1. Assignor hereby sells and assigns, without recourse, to Assignee, and Assignee hereby purchases and assumes, without recourse to or representation or warranty of any kind (except as set forth below) from Assignor, effective as of the Effective Date (as defined below), a % interest (the "**Assigned Interest**") in all of Assignor's rights and obligations under the Agreement, and all of Assignor's interest in $ original principal amount of the Note Series, together with the rights of Assignor to payment in respect of outstanding principal and accrued and unpaid interest relating to such Assigned Interest, and the amount of any accrued and unpaid fees payable to Assignor under the Agreement.

2. The Assignor (i) represents and warrants that it is the legal and beneficial owner of the interest being assigned by it hereunder and that such interest is free and clear of any lien created by it; (ii) makes no representation or warranty and assumes no responsibility with respect to any statements, warranties or representations made in or in connection with the Agreement or any other instrument or document furnished pursuant thereto or the execution, legality, validity, enforceability, genuineness, sufficiency or value of the Agreement, the Notes or any other instrument or document furnished pursuant thereto; and (iii) makes no representation or warranty and assumes no responsibility with respect to the financial condition of the Issuer or the performance or observance by the Issuer of any of its obligations under the Agreement or any instrument or document furnished pursuant thereto.

3. The Assignee (i) confirms that it has received a copy of the Agreement and such other documents and information as it has deemed appropriate to make its own credit analysis and decision to enter into this Assignment and Acceptance and purchase such interest in the Assignor's rights and obligations under the Agreement; (ii) agrees that it will, independently and without reliance upon the Note Agent or any of its Affiliates, the Assignor or any other Note Purchaser and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under the Agreement; (iii) appoints and authorizes the Note Agent to take such action as agent on its behalf and to exercise such power under the Agreement as are delegated to the Note Agent by the terms thereof, together with such powers as are reasonably incidental thereto; (iv) appoints the Note Agent to enforce its respective rights and interests in and under the Agreement in accordance with the Agreement; (v) agrees that it will perform in accordance with their terms all of the obligations which by the terms of the Agreement are required to be performed by it as a Note Purchaser; (vi) specifies as its address for notices and its account for payments the office and

account set forth beneath its name on the signature pages hereof; (vii) represents that it is an Eligible Assignee; and (viii) attaches the forms prescribed by the Internal Revenue Service of the United States of America certifying as to the Assignee's status for purposes of determining its complete exemption from United States withholding taxes with respect to all payments to be made to the Assignee under the Agreement.

4. The effective date for this Assignment and Acceptance shall be the date on which the Note Agent receives this Assignment and Acceptance executed by the parties hereto, and consents to and acknowledges this Assignment and Acceptance (the "**Effective Date**"). Following the execution of this Assignment and Acceptance, this Assignment and Acceptance will be delivered to the Note Agent for acceptance and registration.

5. Upon such acceptance and recording, from and after the Effective Date, (i) Assignee shall be a party to and be bound by the provisions of the Agreement and, to the extent of the interests assigned pursuant to this Assignment and Acceptance, have the rights and obligations of a Note Purchaser thereunder, and (ii) to the extent of the interests assigned by this Assignment and Acceptance, Assignor shall relinquish its rights and be released from its obligations under the Agreement.

6. Assignor and Assignee shall make all appropriate adjustments in payments under the Agreement and the Assigned Interests for periods prior to the Effective Date directly between themselves.

7. THIS AGREEMENT, INCLUDING THE RIGHTS AND DUTIES OF THE PARTIES HERETO, SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND TO BE PERFORMED IN SUCH STATE.

8. This agreement contains the final and complete integration of all prior expressions by the parties hereto with respect to the subject matter hereof and shall constitute the entire agreement among the parties hereto with respect to the subject matter hereof superseding all prior oral or written understandings.

9. If any one or more of the covenants, agreements, provisions or terms of this agreement shall for any reason whatsoever be held invalid, then such covenants, agreements, provisions, or terms shall be deemed severable from the remaining covenants, agreements, provisions, or terms of this agreement and shall in no way affect the validity or enforceability of the other provisions of this agreement.

10. This agreement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which when taken together shall constitute one and the same agreement. Delivery by facsimile of an executed signature page of this agreement shall be effective as delivery of an executed counterpart hereof.

11. This agreement shall be binding on the parties hereto and their respective successors and assigns.

[Remainder of page intentionally left blank.]

IN WITNESS WHEREOF, the parties hereto have caused this Assignment and Acceptance to be executed by their respective officers thereunto duly authorized as of the day of , .

[ASSIGNOR]

By: _____
Name:
Title:

[ASSIGNEE]

By: _____
Name:
Title:

Address for notices and account for payments of Assignee:

[NAME]

Attn:
Telephone:
Facsimile:

Account for Payments:

NAME

ABA Number:
Account Number:
Attn:
Re:

Consented to and Accepted this **[ ]** day of
[ ], 20**[ ]**

DEERFIELD ED CORPORATION, as Issuer

By: _____

Name:
Title:

EXHIBIT B

FORM OF NOTE PURCHASE REQUEST

[Date]

Deerfield Management Company, L.P., as Note Agent

Ladies and Gentlemen:

Deerfield ED Corporation (the "Issuer") hereby provides a Note Purchase Request pursuant to Section 2.02(b) of the Note Purchase Agreement, dated as of March , 2009 (the "Agreement") by and among the Issuer, Deerfield PDI Financing L.P. as initial Note Purchaser, Deerfield Private Design fund LP, as initial Note Purchaser and Deerfield Management Company, L.P. as Note Agent. Terms used herein but not otherwise defined herein shall have the meanings assigned to such terms in the Agreement.

1. Issuer hereby confirms: (i) The amount of Notes to be purchased under the Agreement is $[ ]; (ii) the Series designation of the Notes is [ ]; the Interest Rate for the Series is [ ]; and the date of the requested purchase is [ ], 20 .

2. The Issuer hereby certifies that each of the conditions precedent set forth in Article III of the Agreement applicable to the issuance of the Series have been satisfied as of the date of the issuance.

The foregoing is provided to the Note Agent with respect to the Note Purchasers under the Agreement.

Very truly yours,

Deerfield ED Corporation

By: _____
Name:
Title:

EXHIBIT C

FORM OF CERTIFICATE RE PORTFOLIO INTEREST EXEMPTION
PORTFOLIO INTEREST EXEMPTION CERTIFICATE

Reference is hereby made to the Note Purchase Agreement, dated as of March_, 2009, between, among others, Deerfield ED Corporation, as Issuer and the undersigned, as a Note Purchaser. Pursuant to the provisions of Section 2.05(d) of the Note Purchase Agreement, the undersigned hereby certifies that: it is not a United States Person; it is classified as a partnership for U.S. federal income tax purposes; and no Person which is a partner in the undersigned is (i) a "bank" as such term is used in Section 881(c)(3)(A) of the Internal Revenue Code of 1986, as amended ("Code"), (ii) a 10% shareholder of the Issuer within the meaning of Section 881(c)(3)(B) of the Code, or (iii) a controlled foreign corporation described in Section 881(c)(3)(C) of the Code.

DEERFIELD PDI FINANCING LP

By Deerfield Capital, L.P., its general partner

By: _____

Name:
Title:
Date:

AMENDED AND RESTATED OPTION AND PUT AGREEMENT

This AMENDED AND RESTATED OPTION AND PUT AGREEMENT (this "Agreement"), dated as of March 16, 2009, is by and among VIVUS, Inc., a Delaware corporation (the "Company"), Deerfield ED Corporation, a Delaware corporation ("ED"), DEERFIELD PRIVATE DESIGN FUND LP, a Delaware limited partnership ("Design Fund") and DEERFIELD PRIVATE DESIGN INTERNATIONAL L.P. ("International"), a British Virgin Islands limited partnership (Design Fund and International each a "Stockholder" and together the "Stockholders") and DEERFIELD PDI FINANCING L.P., a British Virgin Islands limited partnership ("BVI Fund").

W I T N E S S E T H:

WHEREAS, the Stockholders own all of the issued and outstanding capital stock of ED;

WHEREAS, the Company and ED are parties to a Funding and Royalty Agreement (the "Funding and Royalty Agreement") dated as of April 3, 2008, as amended to date, pursuant to which ED has agreed to provide the Company with funding for the development of certain products and the Company has granted ED the right to receive a Royalty with respect to sales of MUSE and Avanafil; and

WHEREAS, pursuant to an Option and Put Agreement, dated as of April 3, 2008 (the "Option and Put Agreement") the Stockholders have granted the Company an option to purchase from the Stockholders all of the outstanding shares of common stock of ED on the terms and conditions set forth therein, and the Company has granted to the Stockholders an option to require the Company to purchase from the Stockholders all of the outstanding shares of common stock of ED on the terms and conditions set forth therein.

WHEREAS, concurrently with the execution of this Agreement, ED is (i) entering into ED Loan Agreements with the Design Fund and the BVI Fund, respectively, in order to obtain funding to satisfy ED's obligations under the Funding and Royalty Agreement and (ii) terminating subscription agreements with the Stockholders.

WHEREAS, the parties are desirous of amending and restating the Option and Put Agreement.

NOW, THEREFORE, in consideration of mutual agreements herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto hereby amend and restate the Option and Put Agreement so that as amended and restated the Option and Put Agreement shall provide as follows:

DEFINITIONS

1.1 Definitions.

"Avanafil" has the meaning set forth in the Funding and Royalty Agreement.

"Arrangement Fee" shall have the meaning set forth in Section 4.8.

"Base Option Price" means $25,000,000 if the Option Closing Date occurs on or prior to April 3, 2011 and $28,000,000 if the Option Closing Date occurs subsequent to April 3, 2011.

"Base Put Price" means (x) $23,000,000 in the case of a Put Closing that occurs on or prior to April 3, 2011 pursuant to a Major Transaction Notice, (y) $26,000,000 in the case of a Put Closing that occurs subsequent to April 3, 2011 pursuant to a Major Transaction Notice and (z) $17,000,000 in all other cases.

"Business Day" means a day other than a Saturday, Sunday or day on which banks in the City of New York are authorized or required to be closed.

"BVI Fund" has the meaning set forth in the first paragraph of this Agreement.

"BVI Fund Loan Agreement" mean the Loan Agreement, dated as of the date hereof, between the BVI Fund and ED.

"BVI Fund Loan Balance" means the outstanding balance, including accrued interest, of all outstanding notes and other obligations of ED under the BVI Fund Loan Agreement as of the Option Closing Date or the Put Closing Date, as the case may be.

"Cash" and "Cash Equivalents" means (a) unrestricted funds in bank accounts; (b) marketable direct obligations issued by, or unconditionally guaranteed by, the United States Government or issued by any agency thereof and backed by the full faith and credit of the United States, in each case maturing within one year from the date of acquisition; (c) certificates of deposit, time deposits, eurodollar time deposits or overnight bank deposits; (d) securities with maturities of one year or less issued or fully guaranteed by any state, commonwealth or territory of the United States, by any political subdivision or taxing authority of such state, commonwealth or territory or by any foreign government, the securities of which state, commonwealth, territory, political subdivision, taxing authority or foreign government (as the case may be) are rated at least A by Standard & Poor's Rating Service ("S&P") or A by Moody's Investors Service, Inc. ("Moody's"); (e) money market mutual or similar funds that invest exclusively in assets satisfying the requirements of clauses (a) through (d) of this definition; (f) money market funds that (i) comply with the criteria set forth in SEC Rule 2a-7 under the Investment Company Act of 1940, as amended, and (ii) are rated AAA by S&P and Aaa by Moody's or (g) available for sale securities which are rated AAA by S&P and Aaa by Moody's.

"Cash Adjustment" means the amount of Cash Assets held by ED as of the Option Closing Date or the Put Closing Date, as the case may be.

"Cash and Cash Equivalent Notice" has the meaning set forth in Section 3.3(b).

"Cash Assets" means (a) unrestricted funds in bank accounts with no individual account exceeding $250,000; (b) marketable direct obligations issued by the United States Treasury, in each case maturing within one year from the date of acquisition; or (c) money market funds that (i) comply with the criteria set forth in SEC Rule 2a-7 under the Investment Company Act of 1940, as amended, and (ii) are rated AAA by S&P and Aaa by Moody's and (iii) invest exclusively in direct obligations of the United States Treasury.

"Closing" shall have the meaning set forth in Section 8.2.

"Company Documents" has the meaning set forth in Section 6.2.

"Code" means the Internal Revenue Code of 1986, as amended.

"Contract" means any note, bond, mortgage, indenture, contract, agreement, guaranty, lien, pledge, lease, purchase order, sales order, arrangement or other commitment, obligation or understanding, written or oral, to which a Person is a party or by which a Person or its assets or properties are bound.

"Damages" means any loss, liability, claim, damage or expense (including reasonable attorneys' fees).

"Design Fund Loan Agreement" means the Loan Agreement, dated as of the date hereof, between Design Fund and ED.

"Design Fund Loan Balance" means the outstanding balance, including accrued interest, of all outstanding notes and other obligations of ED under the Design Fund Loan Agreement as of the Option Closing Date or the Put Closing Date, as the case may be.

"ED Loan Agreements" means the Design Fund Loan Agreement and the BVI Fund Loan Agreement.

"ED Loan Balance" means the total of the BVI Fund Loan Balance and the Design Fund Loan Balance.

"Encumbrance" means any security interest, mortgage, lien, pledge, charging order, warrant, option, conversion right, purchase right or other encumbrance of any sort.

"Funding Adjustment" means the amount of any Funding Payments that have not been made under the Funding and Royalty Agreement.

"Funding and Royalty Agreement" has the meaning set forth in the Recitals to this Agreement.

"Funding Payment" has the meaning set forth in the Funding and Royalty Agreement.

"GAAP" means generally accepted accounting principles as recognized by the American Institute of Certified Public Accountants.

"Governmental Authority" means any nation or government, any state or other political subdivision thereof, any municipal, local, city or county government, and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government.

"Governmental Authorization" means any approval, consent, license, permit, waiver or other authorization issued, granted or given by or under the authority of any Governmental Authority.

"Indemnified Party" has the meaning set forth in Section 9.4(a).

"Indemnifying Party" has the meaning set forth in Section 9.4(a).

"Law" means any foreign, federal, national, supranational, state, provincial, local or similar statute, law, ordinance, regulation, rule, code, Order, requirement or rule of law (including common law), as amended and in effect from time to time.

"Legal Requirement" means any federal, state, local or foreign statute, law, treaty, rule, regulation, Order, decree, writ, injunction or determination of any arbitrator, court or Governmental Authority and, with respect to any Person, includes all such Legal Requirements applicable or binding upon such Person, its business or the ownership or use of any of its assets.

"Liabilities" means any and all debts, liabilities and obligations of any sort, whether accrued or fixed, absolute or contingent, matured or unmatured, determined or determinable, including, without limitation, those arising under the ED Loan Agreements, any Legal Requirement or Contract or otherwise or any liability of ED for Taxes.

"Major Transaction" means (A) a consolidation, merger, exchange of shares, recapitalization, reorganization, business combination or similar event (1) following which the holders of common stock of the Company immediately preceding a consolidation, merger, exchange of shares, recapitalization, reorganization, business combination or similar event either (a) no longer hold a majority of the shares of the common stock of the Company or (b) no longer have the ability to elect a majority of the board of directors of the Company or (2) as a result of which shares of common stock of the Company are changed into (or the shares of common stock become entitled to receive) the same or a different number of shares of the same or another class or classes of stock or securities of the Company or another entity (collectively, a "Change in Control Transaction"), (B) a sale or transfer of assets of the Company in one transaction or a series of related transactions where the consideration to be payable at and within thirty (30) days of closing of such transaction or transactions has a value of more than $350,000,000, or a sale, transfer or license of all or substantially all assets or proprietary rights of the Company that relate specifically to MUSE or Avanafil, or (C) a purchase, tender or exchange offer made to the holders of outstanding shares of the Company's common stock, such that following such purchase, tender or exchange offer a Change in Control Transaction shall have occurred; or (D) an issuance or series of issuances by the Company in related transactions of an aggregate number of shares of common stock in excess of twenty percent (20%) of the Company's outstanding

common stock as of April 3, 2008 if, immediately prior to such issuance or series of issuances, the Market Capitalization of the Company is less than $300,000,000.

"Major Transaction Notice" has the meaning set forth in Section 3.3.

"Market Capitalization of the Company" means the aggregate of the value of all of the Company's outstanding shares of common stock based on the volume weighted average price of such shares on the NASDAQ Global Market as reported by Bloomberg Financial Markets or an equivalent reliable reporting source ("Bloomberg") or if NASDAQ is not the principal trading market for such shares, the volume weighted average price of such shares on the principal securities exchange or the trading market whose such shares are listed or traded as reported by Bloomberg.

"MUSE" has the meaning set forth in the Funding and Royalty Agreement.

"Net Sales" shall have the meaning ascribed to that term in the Funding and Royalty Agreement.

"Option" has the meaning set forth in Section 2.1.

"Option Closing" has the meaning set forth in Section 2.5.

"Option Closing Date" has the meaning set forth in Section 2.4, as modified, if applicable, in accordance with Section 3.1B(a) hereof.

"Option Period" has the meaning set forth in Section 2.4.

"Option Premium" has the meaning set forth in Section 2.2.

"Option Purchase Price" has the meaning set forth in Section 2.3.

"Order" means any binding order, judgment, ruling, subpoena or verdict rendered by any Governmental Authority or by any arbitrator.

"Party" means the Company, ED and the Stockholders, and "Parties" means all such Persons.

"Permitted Encumbrances" means (i) all Encumbrances approved in writing by the Company; (ii) mechanics', materialmen's, carriers', workmen's, warehousemen's, repairmen's and landlords' liens or other like Encumbrances arising or incurred in the ordinary course of business for amounts which are not material and not yet due and payable; (iii) Encumbrances for Taxes and other governmental charges that are not due and payable or delinquent or which are being contested in good faith through appropriate Proceedings and (iv) Encumbrances arising under Contracts with third parties entered into in the ordinary course of business in respect of amounts still owing.

"Person" means any corporation, association, joint venture, partnership, limited liability company, organization, business, individual, trust, Governmental Authority or other legal entity.

"Proceeding" means any action, arbitration, audit, hearing, investigation, litigation or suit (whether civil, criminal or administrative) commenced, conducted, or heard by or before any Governmental Authority or arbitrator.

"Put Closing" has the meaning set forth in Section 3.6.

"Put Closing Date" means the date on which the Shares are sold to the Company pursuant to the Put Right, as modified, if applicable, in accordance with Section 3.1B(a) hereof.

"Put Exercise Notice" has the meaning set forth in Section 3.5.

"Put Period" has the meaning set forth in Section 3.2.

"Put Purchase Price" has the meaning set forth in Section 3.4.

"Put Right" has the meaning set forth in Section 3.1.

"Royalty" has the meaning set forth in the Funding and Royalty Agreement.

"Royalty Adjustment" means the amount of accrued and unpaid Royalties for all periods of time ending on the Option Closing Date or the Put Closing Date, as the case may be. For purposes of determining the amount of Royalties payable with respect to the quarterly period during which an Option Closing or Put Closing occurs, it shall be assumed that Net Sales of MUSE were made at the same rate as Net Sales in the comparable period of the prior year and that Net Sales of PDE-5I were made at the same rate as Net Sales in the immediately preceding quarter.

"Royalty Default Notice" shall have the meaning set forth in Section 3.2.

"Securities Act" means the Securities Act of 1933, as amended.

"Security Agreement" has the meaning set forth in Section 3.1A.

"Shares" shall have the meaning set forth in Section 4.2.

"Stockholder Documents" has the meaning set forth in Section 5.2.

"Stockholders" has the meaning set forth in the first paragraph of the Agreement.

"Straddle Period" means any Taxable Period that begins on or before, and ends after, the Option Closing Date or the Put Closing Date, as applicable.

"Tax Adjustment" means the amount of Taxes of ED due and payable by ED or in the case of the Straddle Period that includes the applicable Closing, accrued by ED for all Taxable Periods (including Straddle Periods) up to the Option Closing or the Put Closing, as the case may be, in each case to the extent such Taxes have not been paid by ED as of the applicable Closing.

"Taxable Period" shall mean any taxable year or any other period that is treated as a taxable year (or other period, or portion thereof, in the case of a Tax imposed with respect to

such other period; e.g., a quarter) with respect to which any Tax may be imposed under any applicable statute, rule, or regulation.

"Taxes" means any and all U.S. federal, state and local taxes, assessments and other governmental charges, duties, impositions, levies and liabilities, including, without limitation, taxes based upon or measured by gross receipts, income profits, sales, use and occupation, and value added, goods and services, ad valorem, transfer, gains, franchise, withholding, payroll, recapture, employment, excise, unemployment, insurance, social security, business license, occupation, business organization, stamp, environmental and property taxes, together with any interest, penalties and additions imposed with respect to such amounts. For purposes of this Agreement, "Taxes" also includes any obligations under any agreements or arrangements with any Person with respect to the liability for, or sharing of, Taxes.

"Tax Return" means any return, statement, declaration, report, estimate, notice, form, schedule or other document (including estimated Tax returns and reports, withholding Tax returns and reports, any schedule or attachment, information returns and reports and any amendment to any of the foregoing) relating to Taxes.

OPTION

2.1 Option. On the terms and subject to the conditions of this Agreement, the Stockholders have granted the Company an option (the "Option") which, when exercised, shall obligate each of the Stockholders to sell the Shares to the Company, and the Company to purchase the Shares from each of the Stockholders.

2.2 Option Premium. In consideration of the grant by the Stockholders to the Company of the Option, the Company has previously paid the Stockholders Two Million Dollars ($2,000,000) (the "Option Premium"). Such amount has been allocated between the Stockholders as provided in Exhibit 2 hereto. If the Option is exercised by the Company, upon closing of the sale of the Shares the Option Premium shall be applied against the Option Purchase Price in accordance with Section 2.3 below. In all other circumstances, including but not limited to the sale of the Shares pursuant to the Put Right, the Stockholders shall be entitled to retain the Option Premium.

2.3 Option Purchase Price. If the Company exercises the Option, the aggregate consideration to be paid by the Company (the "Option Purchase Price") to the Stockholders for the Shares shall be equal to the sum of the Base Option Price plus the Cash Adjustment plus the Royalty Adjustment, and minus the Option Premium, the Tax Adjustment, the Funding Adjustment, the ED Loan Balance and any other outstanding liabilities of ED to the extent not otherwise taken into account in the calculation of the Option Purchase Price. The Stockholders and ED shall provide written notice of the amount of the Cash Adjustment, the Tax Adjustment (including adequate supporting documentation), the Design Fund Loan Balance, the BVI Fund Loan Balance, and any other outstanding liabilities of ED, and the Company shall provide written notice of the amount of the Royalty Adjustment (including adequate supporting

documentation), no later than five (5) Business Days prior to the Option Closing Date. At the Option Closing, the Company shall pay the Option Purchase Price to the Stockholders by wire transfer of immediately available funds to an account or accounts designated in writing by the Stockholders. The Option Purchase Price shall be allocated between the Stockholders pro rata in accordance with the percentage of the Shares held by the Stockholders.

2.4 Term and Method of Exercise of Option. The Option commenced on April 3, 2008 and shall terminate at 5:00 p.m. Eastern time on April 3, 2012 (the "Option Period"). Except as hereafter provided, at any time prior to the expiration of the Option Period, the Company may exercise the Option by delivery to the Stockholders of a written notice (the "Option Exercise Notice") substantially in the form of Exhibit 3 hereto. The Option Exercise Notice shall constitute a binding obligation of the Company to purchase, and the Stockholders to sell, all of the Shares pursuant to the terms and conditions of this Agreement. The Option Exercise Notice may be delivered on any Business Day during the Option Period that is at least twenty (20) days prior to the expiration of the Option Period and shall specify a Business Day (the "Option Closing Date") that is not earlier than ten (10) nor later than twenty (20) days, after the date of the Option Exercise Notice, for the closing of the sale of the Shares pursuant to the Option.

2.5 Option Closing. The closing of the sale of Shares pursuant to the Option (the "Option Closing") shall take place at the offices of Katten Muchin Rosenman LLP, in New York, New York, commencing at 10:00 a.m., local time, on a Business Day within the Option Period (except that the Option Closing may take place on a date following the expiration of the Option Period to the extent the process provided for under Section 3.1B(a) through (d) hereof is invoked on a timely basis, in accordance with the terms thereof). The Option Closing shall be effective as of 5:00 p.m., local time, on the Option Closing Date, and all actions scheduled in this Agreement for the Option Closing Date shall be deemed to occur simultaneously at that time, except as otherwise contemplated hereby or as expressly agreed in writing by the Parties. At the Option Closing the Stockholders shall deliver to the Company certificates representing the Shares, duly endorsed in blank (or accompanied by duly executed stock powers in blank), and the Company shall deliver to the Stockholders the Option Purchase Price by wire transfer of immediately available funds to an account or accounts specified by the Stockholders.

2.6 Satisfaction of Obligations under ED Loan Agreements. Simultaneously with the Option Closing (i) the Company shall be obligated, on behalf of ED, to pay the Design Fund Loan Balance to the Design Fund by wire transfer of immediately available funds to an account specified by the Design Fund and the Design Fund shall be obligated to (A) accept that amount in full satisfaction of all obligations of ED under the Design Fund Loan Agreement and (B) deliver to the Company the cancelled notes of ED and (ii) the Company shall be obligated, on behalf of ED, to pay the BVI Fund Loan Balance to the BVI Fund by wire transfer of immediately available funds to an account specified by the BVI Fund and the BVI Fund shall (A) accept that amount in full satisfaction of all obligations of ED under the BVI Fund Loan Agreement, and (B) deliver to the Company the cancelled notes.

PUT RIGHT

3.1 Put Right. On the terms and subject to the conditions of this Agreement, the Company hereby grants the Stockholders an option (the "Put Right") which, when exercised, shall obligate the Company to purchase the Shares from each of the Stockholders, and obligate each of the Stockholders to sell the Shares to the Company.

3.2 The Put Period. The Put Right shall commence on the earliest of (a) April 3, 2011, (b) any date on which (i) the Market Capitalization of the Company falls below $50,000,000 or (ii) the amount of Cash and Cash Equivalents held by the Company falls below $15,000,000, (c) the fifteenth day following the delivery of written notice to the Company (a "Royalty Default Notice") that the Company has failed to pay Royalties in accordance with the provisions of the Funding and Royalty Agreement, which failure constitutes a breach of the Funding and Royalty Agreement, unless the Company shall have paid such Royalties prior to such fifteenth day and (d) the closing of a Major Transaction. The Put Right shall terminate on the tenth anniversary of the date hereof. The period during which the Shares may be sold pursuant to the Put Right is referred to as the "Put Period."

3.3 Major Transaction Notice and Cash and Cash Equivalent Notice. (a) At least twenty (20) days prior to the consummation of any Major Transaction, but, in any event, not later than the date of the public announcement of such Major Transaction, the Company shall deliver to the Stockholders a written notice setting forth the terms of such Major Transaction (a "Major Transaction Notice"). If, subsequent to the delivery of the Major Transaction Notice, the Stockholders shall have delivered a Put Exercise Notice (as defined below) then, not less than three (3) Business Days prior to the consummation of such Major Transaction, the Company shall deliver to the Stockholders a dated written notice specifying the anticipated closing date for such Major Transaction.

(b) Not less than two (2) Business Days after any date on which the amount of Cash and Cash Equivalents of the Company falls below $15,000,000, the Company shall deliver written notice (a "Cash and Cash Equivalent Notice") thereof to the Stockholders.

3.4 Put Purchase Price. If the Stockholders exercise the Put Right, the aggregate consideration to be paid by the Company (the "Put Purchase Price") to the Stockholders for the Shares shall be equal to the Base Put Price plus the Cash Adjustment and the Royalty Adjustment and minus the Tax Adjustment, the Funding Adjustment, the ED Loan Balance and any other outstanding liabilities of ED to the extent not otherwise taken into account in the calculation of the Put Purchase Price. The Stockholders and ED shall provide written notice of the amount of the Cash Adjustment, the Tax Adjustment (including adequate supporting documentation), the Design Fund Loan Balance, the BVI Fund Loan Balance and any other outstanding liabilities of ED, and the Company shall provide written notice of the amount of the Royalty Adjustment (including adequate supporting documentation), no later than five (5) Business Days prior to the Put Closing Date. At the Put Closing, the Company shall pay the Put Purchase Price to the Stockholders by wire transfer of immediately available funds to an account or accounts designated in writing by the Stockholders. The Put Purchase Price shall be allocated

among the Stockholders pro rata in accordance with the number of the Shares held respectively by the Stockholders.

3.5 Method of Exercise. Except as hereinafter provided, at any time during the Put Period, all, but not less than all, of the Stockholders may exercise the Put Right by delivery to the Company of a written notice executed by each of the Stockholders (the "Put Exercise Notice") substantially in the form of Exhibit 3 hereto. The Put Exercise Notice shall constitute a binding obligation of the Company to purchase, and the Stockholders to sell, all of the Shares pursuant to the terms and conditions of this Agreement. The Put Exercise Notice may be delivered on any Business Day during the Put Period that is at least twenty (20) days prior to the expiration of the Put Period. In addition, the Put Exercise Notice given in respect of (a) the Put Right provided for in Section 3.2(a) may also be given on any date that is no more than twenty (20) days prior to April 3, 2011, (b) the Put Right provided for in Section 3.2(b)(ii) and 3.2(d) may also be given at any time after the delivery of a Cash and Cash Equivalent Notice or a Major Transaction Notice, as the case may be, and (c) the Put Right provided for in Section 3.2(c) may be given simultaneously with or at any time after the delivery of a Royalty Default Notice. The Put Exercise Notice in respect of all Put Rights other than the Put Right provided for in Section 3.2(d) shall specify a Business Day that is not earlier than ten (10), nor later than twenty (20), days after the date of the Put Exercise Notice, for the closing of the sale of Shares pursuant to the Put Right. The Put Exercise Notice in respect of the Put Right provided for in Section 3.2(d) shall specify that the closing date for the sale of the Shares shall take place simultaneously with the closing of the Major Transaction or on a date that is mutually agreeable to the Stockholders and the Company that is prior to the closing of the Major Transaction.

3.6 Put Closing. The closing of the purchase of the Shares pursuant to the Put Right (the "Put Closing") shall take place at the offices of Katten Muchin Rosenman LLP, in New York, New York, commencing at 10:00 a.m., local time on a Business Day within the Put Period (except that the Put Closing may take place on a date following expiration of the Put Period to the extent the process provided under Article 3.1B(a) through (d) hereof is invoked on a timely basis in accordance with the terms thereof). The Put Closing shall be effective as of 5:00 P.M., local time, on the Put Closing Date, and all actions scheduled in this Agreement for the Put Closing Date shall be deemed to occur simultaneously at that time, except as otherwise contemplated hereby or as expressly agreed in writing by the Parties. At the Put Closing the Stockholders shall deliver to the Company certificates representing the Shares, duly endorsed in blank (or accompanied by duly executed stock powers in blank), and the Company shall deliver to the Stockholders the Put Purchase Price, by wire transfer of immediately available funds to an account or accounts specified by the Stockholders in writing to the Company.

3.7 Major Transaction Closing. Notwithstanding anything to the contrary contained herein, including, without limitation, Section 3.1B hereof, the Company shall not consummate a Major Transaction if the Stockholders have previously delivered a Put Exercise Notice unless the Put Purchase Price is paid to the Stockholders in full prior to or simultaneously with the consummation of such Major Transaction.

3.8 Satisfaction of Obligations under ED Loan Agreements. Simultaneously with the Put Closing (i) the Company shall be obligated, on behalf of ED, to pay the Design Fund Loan Balance (less any applicable withholding Taxes) to the Design Fund by wire transfer of

immediately available funds to an account specified by the Design Fund and the Design Fund shall be obligated to (A) accept that amount in full satisfaction of all obligations of ED under the Design Fund Loan Agreement and (B) deliver to the Company the cancelled notes of ED and (ii) the Company shall be obligated, on behalf of ED, to pay the BVI Fund Loan Balance (less any applicable withholding Taxes) to the BVI Fund by wire transfer of immediately available funds to an account specified by the BVI Fund and the BVI Fund shall (a) accept that amount in full satisfaction of all obligations of ED under the BVI Fund Loan Agreement and (b) deliver to the Company the cancelled notes.

ARTICLE IIIA

SECURITY AGREEMENT

3.1A Security Agreement. As security for the performance of its obligations with respect to the Put Right, the Company has entered into the Security Agreement (the "Security Agreement") annexed hereto as Exhibit 4.

ARTICLE IIIB

TAX ADJUSTMENT OBJECTIONS

Notwithstanding anything herein to the contrary:

3.1B (a) The Company shall have the right to object in good faith to the Tax Adjustment amount (the "Initial Tax Adjustment Calculation") set forth in the written notice (the "Initial Adjustment Notice") provided by the Stockholders and ED pursuant to Section 2.3 or Section 3.4 hereof, (other than in respect of a Put Right set forth in Section 3.2(b) or (c), objections to which shall be handled in accordance with subsection (e), (f) and (g) below), by delivering written notice of a specific objection and the basis therefor (a "Tax Adjustment Objection Notice"), together with available supporting documentation, to the Stockholders no less than two (2) Business Days prior to the applicable Option Closing Date or Put Closing Date, as the case may be, set forth in the Option Exercise Notice or Put Exercise Notice, as applicable (or such other date as shall have been mutually agreed to in writing by the parties to constitute the Option Closing Date or Put Closing Date, as the case may be). The Tax Adjustment Objection Notice shall specify a postponed date for the Option Closing or Put Closing, as the case may be, which date shall be a Business Day that is no more than forty-five (45) calendar days following the date of the Tax Adjustment Objection Notice. Such postponed date shall thereafter constitute the "Option Closing Date" or "Put Closing Date", as the case may be, for all purposes hereunder.

(b) If the Company shall have delivered a Tax Adjustment Objection Notice, it shall retain a "Big 4" accounting firm that is reasonably acceptable to the Company and the

Stockholders (the "Resolving Accountant") to review and, if necessary, recalculate the Initial Tax Adjustment Calculation and the Tax Adjustment Objection Notice. The retention set forth in the immediately preceding sentence shall be made pursuant to a retention agreement providing for terms that are reasonably acceptable to the Company and the Stockholders, including the granting of access to the Company and the Stockholders to the Resolving Accountant during the engagement period and providing for the Resolving Accountant to circulate to the Company and the Stockholders, in writing at least ten (10) Business Days prior to the Option Closing Date or Put Closing Date set forth in the Tax Objection Notice, the Resolving Accountants' preliminary calculations of the Tax Adjustment, together with its basis therefor and adequate supporting documentation. From the date that such preliminary calculations have been received by the Company and the Stockholders until 5:00 p.m. New York City time on the date that is three (3) Business Days thereafter, the Company and the Stockholders shall have the opportunity to comment on such preliminary calculations. The fees of the Resolving Accountant shall be paid equally by the Company and the Stockholders.

(c) The final Tax Adjustment determined by the written report of the Resolving Accountant issued to the Company and the Stockholders at least five (5) Business Days prior to the revised Option Closing Date or Put Closing Date, as the case may be (the "Report Deadline"), shall be the final Tax Adjustment reflected in the Option Purchase Price or Put Purchase Price, as the case may be. If such report shall not be issued to the Company and the Stockholders prior to the Report Deadline (a "Report Failure"), then the Tax Adjustment calculation set forth in the notice provided for in subsection (d) below shall constitute the final Tax Adjustment reflected in the Option Purchase Price or Put Purchase Price, as the case may be.

(d) In order to reflect changes to such amounts since the date of the Initial Adjustment Notice, no later than five (5) Business Days prior to the revised Option Closing Date or Put Closing Date, as the case may be, the Stockholders and ED shall provide written notice of the revised amount of the Cash Adjustment, the Design Fund Loan Balance, the BVI Fund Loan Balance and any other liabilities of ED, and the Company shall provide written notice of the revised amount of the Royalty Adjustment. Such revised amounts shall be the final amounts of such items reflected in the Option Purchase Price or Put Purchase Price, as the case may be, except that the Tax Adjustment Calculation set forth in such notice by the Stockholders and ED shall only be reflected in the Option Purchase Price or Put Purchase Price if there shall be a Report Failure as set forth in subsection (c) above.

(e) The Tax Adjustment amount set forth in the written notice provided by the Stockholders and ED pursuant to Section 3.4 hereof in respect of a Put Right provided for under Section 3.2(b) or (c) hereof (the "Initial 3.2 Adjustment Notice") shall be the Tax Adjustment amount that is reflected in the Put Purchase Price paid by the Company at the Put Closing even if the Company shall have delivered a Section 3.2 Tax Adjustment Objection Notice (as defined in the immediately following sentence). The Company shall have the right to object to the Tax Adjustment Amount set forth in the Initial 3.2 Adjustment Notice, by delivering written notice of a specific objection and the basis therefor (a "Section 3.2 Tax Adjustment Objection Notice"), together with adequate supporting documentation, to the Stockholders no less than two (2) Business Days prior to the applicable Put Closing Date set forth in the Put Exercise Notice (or

such other date as shall have been mutually agreed to in writing by the parties to constitute the Put Closing Date).

(f) If the Company shall have delivered a Section 3.2 Tax Adjustment Objection Notice, it shall retain a "Big 4" accounting firm that is reasonably acceptable and, if necessary, recalculate to the Company and the Stockholders (the "Section 3.2(b) Resolving Accountant") to review and, if necessary, recalculate the Tax Adjustment calculation set forth in the Initial 3.2 Adjustment Notice and the Section 3.2 Tax Adjustment Objection Notice. The retention set forth in the immediately preceding sentence shall be made pursuant to a retention agreement providing for terms that are reasonably acceptable to the Company and the Stockholders, including the granting of access to the Company and the Stockholders to the Section 3.2 Resolving Accountant during the engagement period and providing for the Section 3.2 Resolving Accountant to circulate to the Company and the Stockholders, in writing not more than forty-five (45) Business Days following the Put Closing Date, the Section 3.2 Resolving Accountants' preliminary calculations of the Tax Adjustment, together with its basis therefor and adequate supporting documentation. From the date that such preliminary calculations have been delivered by the Resolving Accountants to the Company and the Stockholders until 5:00 p.m. New York City time on the date that is five (5) Business Days thereafter, the Company and the Stockholders shall have the opportunity to comment on such preliminary calculations. The Section 3.2 Resolving Accountants' final calculations of the Tax Adjustment, together with its basis therefor and adequate supporting documentation, shall be circulated to the Company no later than forty (40) Business Days following the Put Closing Date (the "3.2 Resolving Deadline"). The fees of the Section 3.2 Resolving Accountant shall be paid equally by the Company and the Stockholders.

(g) If the final Tax Adjustment determined by the written report of the Section 3.2 Resolving Accountant circulated to the Company and the Stockholders no later than the 3.2 Resolving Deadline is higher than the Tax Adjustment set forth in the Initial 3.2 Adjustment Notice, then the Stockholders shall pay to the Company, within ten (10) Business Days following the date such report was issued, an amount equal to the amount paid by the Company as the Put Purchase Price on the Put Closing Date, less the amount that would have constituted the Put Purchase Price had the finalized Tax Adjustment determined by the Section 3.2 Resolving Accountant been used in calculating the Put Purchase Price.

(h) The Company and the Stockholders agree to fully and in good faith cooperate with one another and with the Resolving Accountant with respect to the process set forth in this Article IIIB.

REPRESENTATIONS RELATING TO ED

The Stockholders and ED jointly and severally represent to the Company that:

4.1 ED is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware. ED has the requisite corporate power and authority to own the assets that it owns and to conduct its business. The current officers of ED are as follows: Peter Steelman, President; Alexander Karnal, Secretary and Jeffrey Kaplan, Treasurer. The Stockholders shall notify the Company as soon as practicable following any change in the officers of ED that occurs prior to the earlier of (x) the exercise of the Option or the Put Right and (y) the expiration of the Option and the Put Right.

4.2 The authorized capital stock of ED consists of 21,000 shares of common stock having a par value of $0.001 per share. As of the date of this Agreement, 8,357 shares of Common Stock are outstanding. All of the foregoing shares have been duly authorized and validly issued and are fully paid and nonassessable and free of preemptive and similar rights. Except for the foregoing shares and outstanding debt contemplated under the ED Loan Agreements there are no outstanding (i) shares of capital stock, debt securities or other voting securities of ED; (ii) securities of ED which are or may become convertible into or exchangeable for shares of capital stock, debt securities or voting securities or ownership interests in ED; (iii) Contracts that grant or may grant the right to acquire from ED, or obligations of ED to issue any capital stock, debt securities, voting securities or other ownership interests in, or any securities convertible into or exchangeable or exercisable for any capital stock, voting securities, debt securities or ownership interests in, ED, or obligations of ED to grant, extend or enter into any such agreement or commitment; or (iv) obligations of ED to repurchase, redeem or otherwise acquire any outstanding securities of ED, or to vote or to dispose of any shares of the capital stock of ED. All of the outstanding equity securities of ED have been offered and issued in compliance with all applicable federal and state securities laws, including "blue sky" laws. Any outstanding shares of capital stock of ED are referred to as the "Shares."

4.3 There are no agreements, arrangements, proxies or understandings that restrict or otherwise affect the transfer of any of the Shares except as set forth in this Agreement.

4.4 ED has all requisite corporate power and authority to execute, deliver and perform its obligations under this Agreement, and the execution and delivery of this Agreement and the performance of all of its obligations hereunder have been duly authorized by ED and the Stockholders. This Agreement has been duly executed and delivered by ED and constitutes the legal, valid and binding obligation of ED, enforceable against ED in accordance with its terms, except as enforceability may be limited or affected by applicable bankruptcy, insolvency, moratorium, reorganization or other laws of general application relating to or affecting creditors' rights generally.

4.5 The signing, delivery and performance of this Agreement by ED is not prohibited or limited by, and will not result in the breach of or a default under, any provision of the certificate of incorporation or bylaws of ED, or of any applicable Law, Order, writ, injunction or decree of any Governmental Authority, except for such prohibition, limitation or default as would not prevent consummation by ED of the transactions contemplated hereby.

4.6 There is no Proceeding pending or threatened, directly or indirectly, involving ED or the transactions contemplated hereby or ED's ability to perform its obligations hereunder. ED is not a party or subject to or in default under any Order applicable to ED

4.7 No insolvency Proceeding of any character, including, without limitation, bankruptcy, receivership, reorganization, composition or arrangement with creditors, voluntary or involuntary, has been commenced by or against ED or any of its assets, nor is any such Proceeding threatened.

Neither the Stockholders nor ED contemplates, nor has ED or either Stockholder taken any action in contemplation of, the institution of any such insolvency Proceedings.

4.8 No broker, investment banker, agent, finder or other intermediary acting on behalf of ED or under the authority of ED is or will be entitled to any broker's or finder's fee or any other commission or similar fee directly or indirectly in connection with any of the transactions contemplated hereby, except for the arrangement fee paid to Deerfield Management Company, L.P. pursuant to Section 6(a) of the Securities Purchase Agreement dated as of April 3, 2008, among VIVUS, the Stockholders and Deerfield Management Company, L.P. (the "Arrangement Fee").

4.9 As of the date of this Agreement, ED's sole assets consist of Cash Assets and Cash Equivalents and its rights under the Funding and Royalty Agreement. ED has no Liabilities, other than those Liabilities that are incidental to the permitted activities of ED or are otherwise created by the Funding and Royalty Agreement, this Agreement or the ED Loan Agreements or relate to the payment of Taxes. ED has timely filed all material Tax Returns required to be filed by it and has timely paid all material Taxes required to be paid by it. ED does not own any interest in any other Person.

4.10 There are no Encumbrances upon any of the Shares other than those created by this Agreement.

4.11 None of the Shares has been issued in violation of any Legal Requirement or the certificate of incorporation or bylaws of ED or in violation of any preemptive, subscription or similar rights.

4.12 ED was formed solely for the purpose of engaging in the transactions contemplated by this Agreement and the Funding and Royalty Agreement. ED has not owned, operated or conducted and, other than its receipt of Royalties and loans under the ED Loan Agreements, will not own any assets other than Cash and Cash Equivalents or operate or conduct any assets, businesses or activities other than in connection with its organization, the negotiation and execution of this Agreement and the consummation of the transactions contemplated hereby and by the Funding and Royalty Agreement.

4.13 No Governmental Authorization is required by ED in connection with the execution or delivery by ED of this Agreement or the performance by ED of ED's obligations under this Agreement. Neither the execution and delivery of this Agreement by ED nor the performance of ED's obligations hereunder shall (with or without notice or lapse of time) (i) result in the creation of any Encumbrance upon the Shares or (ii) conflict with or violate any Legal Requirement applicable to ED.

4.14 The Board of Directors of ED and the Stockholders have approved this Agreement, the Funding and Royalty Agreement and the transactions contemplated hereby and

thereby and the Board of Directors of ED has approved the ED Loan Agreements. Design Fund and BVI Fund have approved each of the ED Loan Agreements to which they are a party.

4.15 ED is not, and does not intend to conduct its business in a manner in which it would be, required to be registered as an "investment company" as defined in Section 3(a) of the Investment Company Act of 1940, as amended.

4.16 EXCEPT AS EXPRESSLY SET FORTH IN THIS ARTICLE IV AND IN ARTICLE V AND ARTICLE VA, NEITHER THE STOCKHOLDERS NOR ED MAKES, AND NO PARTY SHALL BE ENTITLED TO RELY UPON, ANY REPRESENTATION OR WARRANTY AS TO ANY FACT OR MATTER ABOUT ED UNDER THIS AGREEMENT.

REPRESENTATIONS RELATING TO THE STOCKHOLDERS

Each Stockholder represents to the Company, solely with respect to itself, that:

5.1 Organization. Such Stockholder is a limited partnership and is duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization.

5.2 Authority; Enforceability. Such Stockholder has the requisite legal power and authority to (i) execute and deliver this Agreement and each certificate, document and agreement to be executed by such Stockholder in connection herewith (collectively, the "Stockholder Documents") and (ii) perform its obligations hereunder and thereunder, and such execution, delivery and performance have been duly and validly authorized by such Stockholder. This Agreement has been duly and validly executed and delivered by such Stockholder and constitutes, and upon execution and delivery by such Stockholder of each Stockholder Document to which such Stockholder is a party, each such Stockholder Document will constitute, a legal, valid and binding obligation of such Stockholder, enforceable against such Stockholder in accordance with its terms, except as the enforcement may be limited by bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer or other laws relating to or limiting creditors' rights generally or by general principles of equity.

5.3 No Violation; Enforceability. The signing, delivery and performance of this Agreement by such Stockholder is not prohibited or limited by, and will not result in the breach of or a default under, any provision of the limited partnership agreement or other formation documents of such Stockholder, or of any material agreement or instrument binding on such Stockholder, or of any applicable law or Order, except for such prohibition, limitation or default as would not prevent consummation by such Stockholder of the transactions contemplated hereby. The execution, delivery and performance of this Agreement by such Stockholder and such Stockholder's compliance with the terms and provisions hereof do not and will not conflict with or result in a breach of any of the terms and provisions of or constitute a default, with or without the passage of time and the giving of notice, under any material Contract binding or affecting such Stockholder or such Stockholder's property.

5.4 No Proceedings. There is no Proceeding pending or threatened involving such Stockholder that would materially affect such Stockholder's ability to perform its obligations hereunder.

5.5 Financial Condition. No insolvency Proceeding of any character, including, without limitation, bankruptcy, receivership, reorganization, composition or arrangement with creditors, voluntary or involuntary, has been commenced by or against such Stockholder or any of its assets or properties, nor is any such Proceeding threatened. Such Stockholder does not contemplate, and has not taken any action in contemplation of, the institution of any such insolvency Proceedings.

5.6 Sufficient Funds. Design Fund has sufficient capital commitments to be capable of funding its obligations under the Design Fund Loan Agreement on the terms and conditions set forth in the Design Fund Loan Agreement.

5.7 Consents and Approvals; No Violation.

(a) No Governmental Authorization is required by such Stockholder in connection with the execution or delivery by such Stockholder of this Agreement or the Stockholder Documents to which such Stockholder is a party, or the performance by such Stockholder of the Stockholder's obligations under this Agreement or the Stockholder Documents to which such Stockholder is a party, except for any Governmental Authorizations that are not material.

(b) Neither the execution and delivery of this Agreement and the Stockholder Documents by such Stockholder nor the performance of such Stockholder's obligations hereunder or thereunder shall (with or without notice or lapse of time) conflict with or violate any Legal Requirement applicable to such Stockholder, except for any Legal Requirements that are not material.

5.8 Capital Stock. As of the date of this Agreement, Design Fund and International are the sole record and beneficial owners of 3,201 shares and 5,156 Share's respectively, free and clear of any Encumbrances (other than restrictions on transfer under applicable Legal Requirements).

5.9 Brokers, Etc. No broker, investment banker, agent, finder or other intermediary acting on behalf of such Stockholder or under the authority of such Stockholder is or will be entitled to any broker's or finder's fee or any other commission or similar fee directly or indirectly in connection with any of the transactions contemplated hereby, except for the Arrangement Fee.

5.10 Investment Company Act of 1940. Such Stockholder is not, and does not intend to conduct its business in a manner in which it would be, required to be registered as an "investment company" as defined in Section 3(a) of the Investment Company Act of 1940, as amended.

5.11 No Other Representations or Warranties. EXCEPT AS EXPRESSLY SET FORTH IN ARTICLE IV, ARTICLE V AND THIS ARTICLE VA, NEITHER THE STOCKHOLDERS NOR ED MAKES, AND NO PARTY SHALL BE ENTITLED TO RELY

UPON, ANY REPRESENTATION OR WARRANTY AS TO ANY FACT OR MATTER ABOUT THE STOCKHOLDERS UNDER THIS AGREEMENT.

ARTICLE VA

REPRESENTATIONS RELATING TO THE BVI FUND

International and the BVI Fund represent to the Company that:

5.1A Organization. The BVI Fund is a limited partnership duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization.

5.2A Authority; Enforceability. The BVI Fund has the requisite legal power and authority to (i) execute and deliver the BVI Fund Loan Agreement and (ii) perform its obligations thereunder, and such execution, delivery and performance have been duly and validly authorized by the BVI Fund. The BVI Fund Loan Agreement has been duly and validly executed and delivered by the BVI Fund and constitutes, a legal, valid and binding obligation of the BVI Fund, enforceable against it in accordance with its terms, except as the enforcement may be limited by bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer or other laws relating to or limiting creditors' rights generally or by general principles of equity.

5.3A No Violation; Enforceability. The signing, delivery and performance of the BVI Fund Loan Agreement by the BVI Fund is not prohibited or limited by, and will not result in the breach of or a default under, any provision of the formation documents of the BVI Fund, or of any agreement or instrument binding on the BVI Fund, or of any applicable law or Order, except for such prohibition, limitation or default as would not prevent consummation by the BVI Fund of the transactions contemplated thereby. The execution, delivery and performance of the BVI Fund Loan Agreement by the BVI Fund and the BVI Fund's compliance with the terms and provisions thereof do not and will not conflict with or result in a breach of any of the terms and provisions of or constitute a default, with or without the passage of time and the giving of notice, under any material Contract binding or affecting the BVI Fund or the BVI Fund's property.

5.4A No Proceedings. There is no Proceeding pending or threatened involving the BVI Fund that would affect the BVI Fund's ability to perform its obligations, under the BVI Fund Loan Agreement.

5.5A Financial Condition. No insolvency Proceeding of any character, including, without limitation, bankruptcy, receivership, reorganization, composition or arrangement with creditors, voluntary or involuntary, has been commenced by or against the BVI Fund or any of its assets or properties, nor is any such Proceeding threatened. The BVI Fund does not contemplate, and has not taken any action in contemplation of, the institution of any such insolvency Proceedings.

5.6A Sufficient Funds. The BVI Fund has sufficient capital commitments to be capable of funding its obligations under the BVI Fund Loan Agreement on the terms and conditions set forth in the BVI Fund Loan Agreement.

5.7A Consents and Approvals; No Violation.

(a) No Governmental Authorization is required by the BVI Fund in connection with the execution or delivery by the BVI Fund of the BVI Fund Loan Agreement or the performance by the BVI Fund of the BVI Fund's obligations thereunder except for any Governmental Authorizations that are not material.

(b) Neither the execution and delivery of the BVI Fund Loan Agreement nor the performance of the BVI Fund's obligations thereunder shall (with or without notice or lapse of time) conflict with or violate any Legal Requirement applicable to the BVI Fund, except for any Legal Requirements that are not material.

5.8A No Other Representations or Warranties. EXCEPT AS EXPRESSLY SET FORTH IN ARTICLE IV, ARTICLE V AND THIS ARTICLE VA, NEITHER THE STOCKHOLDERS NOR ED MAKES, AND NO PARTY SHALL BE ENTITLED TO RELY UPON, ANY REPRESENTATION OR WARRANTY AS TO ANY FACT OR MATTER ABOUT THE STOCKHOLDERS UNDER THIS AGREEMENT.

5.9A Compliance With Laws. BVI Fund is in compliance with all material Legal Requirements applicable to the BVI Fund. BVI Fund has not received any written notice from any Governmental Authority regarding any violation of, or failure to comply with, any material Legal Requirement.

REPRESENTATIONS RELATING TO THE COMPANY

The Company represents to the Stockholders and ED:

6.1 Organization. The Company is a corporation duly organized, validly existing and in good standing under the laws of the state of its organization. The Company has the requisite power and authority to own, lease and use the properties and assets that it owns, leases and uses and to conduct its business as presently conducted.

6.2 Authority; Enforceability. The Company has the requisite power and authority to (i) execute and deliver this Agreement, the Security Agreement, the Funding and Royalty Agreement and each certificate, document and agreement to be executed by the Company in connection herewith and therewith (collectively, the "Company Documents") and (ii) perform its obligations hereunder and thereunder. The execution and delivery of this Agreement, the Security Agreement, the Funding and Royalty Agreement and the Company Documents and the consummation of the transactions contemplated hereby and thereby have been duly and validly authorized by all necessary corporate action on the part of the Company, and no other Proceedings on the part of the Company are necessary to authorize this Agreement, the Security Agreement, the Funding and Royalty Agreement, or any of the Company Documents or to consummate the transactions contemplated hereby or thereby. This Agreement, the Security Agreement, and the Funding and Royalty Agreement have been duly and validly executed and delivered by the Company and constitute, and upon execution and delivery by the Company of

each Company Document, each Company Document will constitute, a legal, valid and binding obligation of the Company, enforceable against it in accordance with its terms, except as the enforcement thereof may be limited by bankruptcy, insolvency, reorganization, moratorium, fraudulent transfer or other laws relating to or limiting creditors' rights generally or by general principles of equity.

6.3 Consents and Approvals; No Violation.

(a) No Governmental Authorization is required by the Company in connection with the execution or delivery by the Company of this Agreement, the Security Agreement, the Funding and Royalty Agreement, or the Company Documents, or the performance of the Company's obligations under this Agreement, the Security Agreement, the Funding and Royalty Agreement, or the Company Documents.

(b) Neither the execution and delivery of this Agreement, the Security Agreement, the Funding and Royalty Agreement, and the Company Documents by the Company nor the performance of the Company's obligations hereunder or thereunder shall (with or without notice or lapse of time): (i) conflict with or violate any provision of the certificate of incorporation or bylaws of the Company or any resolution adopted by the board of directors or stockholders of the Company, (ii) conflict with or breach any of the terms or provisions of, or give any Person a right to declare a default or exercise any remedy under, any material Contract binding on the Company or (iii) conflict with or violate any Legal Requirement applicable to the Company, but excluding from the foregoing clauses (ii) and (iii) conflicts, breaches, defaults, remedies and violations that would not be reasonably likely, either individually or in the aggregate, to adversely affect the Company's ability to consummate the transactions contemplated by this Agreement.

6.4 Compliance With Laws. The Company is in compliance with all material Legal Requirements applicable to the Company. The Company has not received any written notice from any Governmental Authority regarding any violation of, or failure to comply with, any material Legal Requirement.

6.5 Litigation. There are no Proceedings that are pending against or threatened against the Company that would adversely affect its ability to consummate the transactions contemplated by this Agreement. The Company is not subject to any Order that could affect the enforceability of this Agreement against the Company or that would adversely affect the Company's ability to consummate the transactions contemplated by this Agreement.

6.6 Investment Interest. The Company is an "accredited investor" within the meaning of Regulation D promulgated under the Securities Act and the Shares were acquired for its own account for investment purposes only and not with a view to, or for sale or resale in connection with, any distribution within the meaning of Section 2(11) of the Securities Act. The Company understands that the Shares are characterized as "restricted securities" under the federal securities laws inasmuch as they are being acquired from the Stockholders in a transaction not involving a public offering and that under such laws and applicable regulations such securities may be resold without registration under the Securities Act only in certain limited circumstances.

6.7 Brokers. No broker, investment banker, agent, finder or other intermediary acting on behalf of the Company or under the authority of the Company is or will be entitled to any broker's or finder's fee or any other commission or similar fee directly or indirectly in connection with any of the transactions contemplated hereby, except for the Arrangement Fee.

6.8 No Other Representations. EXCEPT AS EXPRESSLY SET FORTH IN THIS ARTICLE VI, THE COMPANY DOES NOT MAKE, AND NO PARTY SHALL BE ENTITLED TO RELY UPON, ANY REPRESENTATION AS TO ANY FACT OR MATTER ABOUT THE COMPANY.

COVENANTS

7.1 Tax.

(a) From the date that the Option or Put Right is exercised to the Option Closing Date or Put Closing Date, as the case may be, ED will not:

(1) make any new Tax election except as described in Section 7.1(a)(3) below;

(2) consent to any claim or assessment relating to any material Taxes or any waiver of the statute of limitations for any such claim or assessment; and

(3) make any material change in a Tax accounting method (except as required below) without the Company's prior written consent (which consent may not be unreasonably withheld, conditioned or delayed).

(b) From the date the Option or Put Right is exercised to the Option Closing Date or Put Closing Date, as the case may be:

(1) ED will promptly notify the Company of any Tax Proceeding initiated against ED where an adverse determination could result in a material Tax Liability or materially and adversely affect the Tax attributes of ED; and

(2) for purposes of apportioning a Tax to any pre-Closing portion of a Straddle Period, the Parties shall treat such Straddle Period as if it were two Tax Periods, one ending with the Option Closing or the Put Closing, as the case may be, and the other beginning immediately following such Option Closing or Put Closing; the Parties shall elect to do so if permitted by applicable law.

(c) From the date hereof to the Option Closing Date or Put Closing Date, as the case may be, ED will timely file all Tax Returns required to be filed by it during such period and will pay when due all Taxes due and payable by ED during such period.

7.2 Operations During Purchase Period. From April 3, 2008 through the first to occur of (a) the expiration or termination of the Option and the Put Right or (b) the Option Closing

Date or the Put Closing Date, ED shall, and the Stockholders shall cause ED to, engage in no other business other than the payment of the Funding Payments pursuant to the Funding and Royalty Agreement, the receipt of the Royalties, the investment of Royalties in Cash and the distribution of Cash to the Stockholders and the payment of obligations under the ED Loan Agreements. Without limiting the foregoing, ED shall not, and the Stockholders shall not cause ED to, do any of the following without the prior written consent of the Company:

(a) amend its Certificate of Incorporation or By-laws;

(b) except for Shares issued prior to the date of this Amended and Restated Option and Put Agreement, issue any capital stock or any option, warrant or right relating thereto or any securities convertible into or exchangeable for any shares of capital stock, equity securities or other equity interests.

(c) permit, allow or suffer any of its assets to be subject to any Encumbrance other than Permitted Encumbrances;

(d) sell, transfer or lease rights to the Royalties;

(e) acquire or agree to acquire any assets other than (A) Royalties and (B) Cash and Cash Equivalents;

(f) utilize the proceeds of any loans received under the ED Loan Agreements for any purpose other than the satisfaction of funding obligations of ED under the Funding and Royalty Agreement; and

(g) agree to any of the foregoing.

7.3 Preservation of Shares. No Stockholder shall (a) sell, lease or otherwise dispose of any Shares or (b) permit, allow or suffer any Shares to be subject to any Encumbrance, in each case until the expiration or termination of the Option and the Put Right.

7.4 Further Assurances. Upon the terms and subject to the conditions of this Agreement, each Party shall use commercially reasonable efforts to take, or cause to be taken, all actions, and to do, or cause to be done, all things necessary, proper or advisable under applicable Legal Requirements to consummate and make effective the transactions contemplated by this Agreement as promptly as practicable, including, without limitation, the prompt preparation and filing of all forms, registrations and notices required to be filed to consummate the transactions contemplated by this Agreement and the taking of such commercially reasonable actions as are necessary to obtain any requisite consents, Orders, exemptions or waivers by any Governmental Authority or any other Person. Each Party shall promptly consult with the other Parties with respect to, provide the other Parties any necessary information with respect to and provide the other Parties (or their respective counsel) copies of, all filings made by such Party with any Governmental Authority or any other Person or any other information supplied by such Party to a Governmental Authority or any other Person in connection with this Agreement and the transactions contemplated by this Agreement. From time to time after the Option Closing or Put Closing, without additional consideration, each Party will execute and deliver such further instruments and take such other action as may be necessary or reasonably requested by each

other Party to make effective the transactions contemplated by this Agreement and to provide each other Party with the benefits of this Agreement.

CLOSING CONDITIONS

8.1 Mutual Condition. The obligation of the Parties to consummate the Option Closing or the Put Closing, as applicable, shall be subject to the satisfaction (or waiver, if permissible under applicable Legal Requirements) of the following conditions:

(a) No Legal Requirement, temporary restraining Order, preliminary injunction or permanent injunction, judgment or ruling enacted, promulgated, issued, entered, amended or enforced by any Governmental Authority shall be in effect enjoining, restraining, preventing or prohibiting the consummation of such Option Closing or Put Closing, as applicable.

(b) The Company shall have delivered to the Stockholders the Option Exercise Notice or the Stockholders shall have delivered to the Company the Put Exercise Notice, as applicable.

8.2 The Company's Conditions. The obligation of the Company to consummate the Option Closing or the Put Closing (each, a "Closing"), as applicable, shall be subject to the satisfaction (or waiver, if permissible under applicable Legal Requirements) of the following conditions:

(a) Each of the representations and warranties of ED and each Stockholder set forth in this Agreement, shall be true and correct in all material respects, in each case as of (i) the date of this Agreement; and (ii) the Closing, as though made on and as of the Closing, except for representations and warranties that are made as of the date of this Agreement (which shall be true and correct as of the date of this Agreement) and except where the failure or failures to be true and correct would not in the aggregate reasonably be expected to materially and adversely affect the Company.

(b) ED and each Stockholder shall have performed in all material respects all obligations and complied with all covenants required to be performed by it under this Agreement at or prior to the Closing.

(c) The Stockholders shall have delivered to the Company a certificate certifying the matters set forth in Sections 8.2(a) and (b).

(d) As of the Closing, all Cash and Cash Equivalents held by the Company shall have been converted to Cash Assets.

8.3 Stockholders' Conditions. The obligation of ED and the Stockholders to consummate any Closing shall be subject to the satisfaction (or waiver, if permissible under applicable Legal Requirements) of the following conditions:

(a) Each of the representations and warranties of the Company set forth in this Agreement shall be true and correct in all material respects, in each case as of (i) the date of this Agreement and (ii) the Closing, as though made on and as of the Closing, except for representations and warranties that are made as of the date of this Agreement (which shall be true and correct as of the date of this Agreement) and except where the failure or failures to be true and correct would not in the aggregate reasonably be expected to materially and adversely affect the Stockholders.

(b) The Company shall have performed in all material respects all obligations and complied with all covenants required to be performed by it under this Agreement at or prior to the Closing.

(c) The Company shall have delivered to the Stockholders a certificate certifying the matters set forth in Sections 8.3(a) and (b) executed by a duly authorized officer of the Company.

INDEMNIFICATION

9.1 Survival. All representations and warranties made by the Stockholders, ED and the Company in this Agreement and the documents to be executed in connection with this Agreement shall survive the Closing until the earlier of the expiration of the applicable statute of limitations with respect to such matters or the payment of all Royalty obligations by the Company under the Funding and Royalty Agreement. All covenants and agreements contained in this Agreement and the documents to be executed in connection with this Agreement shall survive the Closing in accordance with their respective terms.

9.2 Indemnification by the Stockholders. Subject to the limitations set forth in this Article IX, after the Closing the Stockholders shall jointly and severally indemnify and hold harmless the Company from, and shall pay to the Company, any and all Damages arising, directly or indirectly, from or in connection with:

(a) the breach of any of the representations, warranties, covenants or agreements of any Stockholder or ED contained in this Agreement;

(b) any Liabilities of ED arising prior to the Option Closing Date or Put Closing Date, as the case may be (including any Liability for Taxes attributable to any Taxable Period or portion thereof (calculated as provided in Section 7.1(b)(2)), ending on or prior to the Option Closing Date or Put Closing Date, as the case may be, other than (i) obligations arising solely from ED's right to receive the Royalties, (ii) Liabilities (including any Tax Adjustment) that have been reflected in the computation of the Option Purchase Price or the Put Purchase Price, as the case may be, and (iii) Liabilities caused by the acts or omissions of the Company, but only to the extent such Liabilities are caused by the acts or omissions of the Company; and

(c) the violation by ED or any Stockholder of any Legal Requirement, or any gross negligence or willful misconduct of ED or any Stockholder, or the performance by ED or any Stockholder of its obligations under this Agreement.

9.3 Indemnification by the Company. Subject to the limitations set forth in this Article IX, after the Closing the Company shall indemnify and hold harmless the Stockholders from, and shall pay to the Stockholders, any and all Damages arising, directly or indirectly, from or in connection with:

(a) the breach of any of the representations, warranties, covenants or agreements of the Company contained in this Agreement; and

(b) the violation by the Company of any Legal Requirement, or any gross negligence or willful misconduct of the Company, or the failure by the Company of its obligations under this Agreement.

9.4 Procedure for Indemnification — Third Party Claims.

(a) If any Person shall claim indemnification hereunder arising from any claim or demand or potential claim or demand of a third party, the Party seeking indemnification (the "Indemnified Party") shall notify the Party from whom indemnification is sought (the "Indemnifying Party") in writing of the basis for such claim or demand and such notice shall set forth the nature of the claim or demand in reasonable detail. The failure of the Indemnified Party to so notify the Indemnifying Party shall not relieve the Indemnifying Party of any indemnification obligation hereunder except to the extent that the defense of such claim or demand is prejudiced by the failure to give such notice.

(b) If any Proceeding is brought by a third party against an Indemnified Party and the Indemnified Party gives notice to the Indemnifying Party pursuant to Section 9.4(a), the Indemnifying Party may assume the defense and control the settlement of such Proceeding. The Indemnified Party shall, in its sole discretion, have the right to employ separate counsel (who may be selected by the Indemnified Party in its sole discretion) in any such Proceeding and to participate in the defense thereof, and the fees and expenses of such counsel shall be paid by such Indemnified Party. If the Indemnified Party assumes the defense of such Proceeding pursuant to Section 9.4(c) because of the failure of the Indemnifying Party to conduct such defense in good faith, the fees and expenses of such counsel shall be paid by the Indemnifying Party. The Indemnified Party shall cooperate fully with the Indemnifying Party and its counsel in the defense or settlement of such Proceeding. If the Indemnifying Party assumes the defense of a Proceeding, no compromise or settlement of such claims may be effected by the Indemnifying Party without the Indemnified Party's consent unless (i) there is no finding or admission of any violation of Legal Requirements or the rights of any Person by the Indemnified Party and no material adverse effect on the Indemnified Party with respect to any other claims that may be made against it, and (ii) the sole relief provided is monetary damages that are paid in full by the Indemnifying Party.

(c) If (i) notice is given to the Indemnifying Party of the commencement of any third party Proceeding and the Indemnifying Party does not, within ten (10) days after the Indemnified Party's notice is given, give notice to the Indemnified Party of its election to assume the defense of such Proceeding, or (ii) having assumed the defense of such Proceeding, the Indemnifying Party fails to conduct such defense in good faith, then the Indemnified Party shall (upon notice to the Indemnifying Party) have the right to undertake the defense, compromise or settlement of

such Proceeding; provided that no compromise or settlement of such Proceeding may be affected by the Indemnified Party without the Indemnifying Party's consent, if (A) the Indemnifying Party will be liable for any amounts to be paid to compromise or settle the Proceeding, (B) there is a finding or admission of any violation by the Indemnifying Party of any Legal Requirement or the rights of any Person, or (C) the compromise or settlement would have a material adverse effect on the Indemnifying Party with respect to any other claims that may be made against it. The Indemnifying Party shall reimburse the Indemnified Party for the costs and expenses of defending against the third party Proceeding (including reasonable attorneys' fees and expenses) and the Indemnifying Party shall remain responsible for any Damages arising from or related to such third party Proceeding to the extent provided in this Article IX. The Indemnifying Party may elect to participate in such Proceedings, negotiations or defense at any time at its own expense.

9.5 Limitation on Damages.

(a) The Stockholders' aggregate liability for Damages under this Agreement shall be limited to the amount of the Option Purchase Price or the Put Purchase Price, as the case may be.

(b) The Company's aggregate liability for Damages under this Agreement shall be limited to the amount of the Option Purchase Price or the Put Purchase Price, as the case may be.

(c) Upon any payment of Damages to or on behalf of an Indemnified Party, the Indemnifying Party shall be subrogated to all rights of the Indemnified Party with respect to the Damages to which such indemnification relates to the extent of the amount of such payment.

(c) The Indemnified Party shall have no right to recover consequential, punitive or multiplied damages pursuant to this Article IX except to the extent the Indemnified Party is liable to a third party for such damages.

9.6 Tax Treatment of Indemnity. Notwithstanding anything to the contrary in this Article IX, any Tax or other amount for which indemnification is provided under this Agreement shall be treated as an adjustment to the Option Purchase Price or the Put Purchase Price, as the case may be.

MISCELLANEOUS PROVISIONS

10.1 No Joint Venture. The relationship between the Parties is that of independent contractors. The Parties are not joint venturers, partners, principal and agent, master and servant, employer or employee, and have no relationship other than as independent contracting parties. No Party shall have the power to bind or obligate any other in any manner.

10.2 Expenses. Except as set forth in Section 3.1B(b) and (f), each Party shall pay all costs and expenses incurred by such Party in connection with this Agreement and the transactions contemplated hereby, including in each case all fees and expenses of investment bankers, finders, brokers, agents, representatives, consultants, counsel and accountants.

10.3 Amendment and Modification. This Agreement may be amended, modified or supplemented only by an agreement in writing signed by the Party against whom such amendment, modification or supplement is sought to be enforced.

10.4 Waiver of Compliance; Consents. The rights and remedies of the Parties are cumulative and not alternative and may be exercised concurrently or separately. No failure or delay by any Party in exercising any right, power or privilege under this Agreement shall operate as a waiver of such

right, power or privilege, and no single or partial exercise of any such right, power or privilege shall preclude any other or further exercise of such right, power or privilege or the exercise of any other right, power or privilege. To the maximum extent permitted by applicable law, (i) no claim or right arising out of this Agreement can be discharged by one Party, in whole or in part, by a waiver or renunciation of the claim or right unless in writing signed by the other Parties; (ii) no waiver that may be given by a Party shall be applicable except in the specific instance for which it is given; and (iii) no notice to or demand on one Party shall be deemed to be a waiver of any obligation of such Party or of the right of the Party giving such notice or demand to take further action without notice or demand as provided in this Agreement. Any consent required or permitted by this Agreement is binding only if in writing.

10.5 Notices. All notices, consents, waivers and other communications hereunder shall be in writing and shall be (i) delivered by hand, (ii) sent by facsimile transmission, or (iii) sent by certified mail or by a nationally recognized overnight delivery service, charges prepaid, to the address set forth below (or such other address for a Party as shall be specified by like notice):

If to the Stockholders or ED, to:

c/o Deerfield Capital, L.P.
780 Third Avenue, 37th Floor
New York, New York 10017
Attention: James E. Flynn
Facsimile: (212) 573-8111

Copies to: Katten Muchin Rosenman LLP
575 Madison Avenue
New York, New York 10022
Attention: Mark I. Fisher
Facsimile: (212) 894-5877

If to the Company, to:

VIVUS, Inc.
1172 Castro Street
Mountain View, California 94040
Attention: Leland F. Wilson
Timothy Morris
Lee Perry
Facsimile: (650) 934-5389

Copy to: Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
Attn: Mark Reinstra, Esq.
John Slebir
Facsimile: 650-493-6811

Each such notice or other communication shall be deemed to have been duly given and to be effective (x) if delivered by hand, immediately upon delivery if delivered on a Business Day during normal business hours and, if otherwise, on the next Business Day; (y) if sent by facsimile transmission, immediately upon confirmation that such transmission has been successfully transmitted on a Business Day before or during normal business hours and, if otherwise, on the Business Day following such confirmation; or (z) if sent by a nationally recognized overnight delivery service, on the day of delivery by such service or, if not a Business Day, on the first Business Day after delivery. Notices and other communications sent via facsimile must be followed by notice delivered by hand or by overnight delivery service as set forth herein within five (5) Business Days.

10.6 Publicity. No Party shall issue any press release or any other form of public disclosure regarding the existence of this Agreement or the terms hereof, or use the name of any other Party hereto in any press release or other public disclosure without the prior written consent of the other Parties, except (i) for those disclosures and notifications contemplated by this Agreement and (ii) as required by any Legal Requirement and solely to the extent necessary to satisfy such Legal Requirement.

10.7 Assignment; Third-Party Rights. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and permitted assigns, but neither this Agreement nor any of the rights, interests or obligations hereunder shall be assigned by any Party hereto without the prior written consent of each other Party. Notwithstanding the foregoing, and subject to compliance with Section 3.7, in the event the Option Closing or Put Closing has not occurred prior to or simultaneously with the closing of

a Major Transaction, the Company shall assign this Agreement to the surviving or acquiring entity in such Major Transaction, and shall cause the successor entity resulting from such Major Transaction to assume all of the obligations of the Company under this Agreement pursuant to an assumption agreement in form and substance reasonably satisfactory to the Stockholders. This Agreement and, its provisions are for the sole benefit of the Parties to this Agreement and their successors and permitted assigns and shall not give any other Person any legal or equitable right, remedy or claim; provided, however, that the BVI Fund, and its successors and assigns, shall be a third party beneficiary of the obligations of the Company under Section 2.6 and Section 3.8 with full rights of enforcement as if a party under this Agreement.

10.8 Confidentiality. Each Stockholder and ED hereby agrees, and shall cause its respective employees and agents, not to disclose to any third party any material non-public information received from or on behalf of the Company in connection with this Agreement, or to use such material non-public

information for any purpose except as expressly permitted under this Agreement. Each Stockholder and ED further agrees that it and its respective employees and agents have not and will not engage in any trades, transfers or other similar transactions involving the Company's common stock in violation of federal securities laws while in receipt of such non-public information of the Company. Notwithstanding the foregoing, the Parties shall be permitted to make such public and other statements as are necessary for it to comply with applicable federal and state securities laws or rules.

10.9 Governing Law. The execution, interpretation and performance of this Agreement, and any disputes with respect to the transactions contemplated by this Agreement, including any fraud claims, shall be governed by the internal laws and judicial decisions of the State of Delaware, without regard to principles of conflicts of laws.

10.10 Severability. If any provision contained in this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein, unless the invalidity of any such provision substantially deprives any Party of the practical benefits intended to be conferred by this Agreement. Notwithstanding the foregoing, any provision of this Agreement held invalid, illegal or unenforceable only in part or degree shall remain in full force and effect to the extent not held invalid or unenforceable, and the determination that any provision of this Agreement is invalid, illegal or unenforceable as applied to particular circumstances shall not affect the application of such provision to circumstances other than those as to which it is held invalid, illegal or unenforceable.

10.11 Construction. Each Party acknowledges that it and its attorneys have been given an equal opportunity to negotiate the terms and conditions of this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting Party or any similar rule operating against the drafter of an agreement shall not be applicable to the construction or interpretation of this Agreement.

10.12 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Agreement may be executed on signature pages exchanged by facsimile, in

which event each Party shall promptly deliver to the others such number of original executed copies as the other Parties may reasonably request.

10.13 Entire Agreement. This Agreement constitutes the entire agreement and understanding of the Parties hereto in respect of the subject matter hereof. This Agreement supersedes all prior agreements, understandings, promises, representations and statements between the Parties and their representatives with respect to the transactions contemplated by this Agreement.

[The remainder of this page is left blank intentionally.]

IN WITNESS WHEREOF, the Parties have executed this Option and Put Agreement as of the date first written above.

VIVUS, INC.

By: /s/ Timothy E. Morris
Name: Timothy E. Morris
Title: Chief Financial Officer

DEERFIELD ED CORPORATION

By: /s/ Jeffery R. Kaplan
Name: Jeffery R. Kaplan
Title: Treasurer

DEERFIELD PRIVATE DESIGN FUND, L.P.

By: /s/ James E. Flynn
Name: James E. Flynn
Title: General Partner

DEERFIELD PRIVATE DESIGN INTERNATIONAL, L.P.

By: /s/ James E. Flynn
Name: James E. Flynn
Title: General Partner

DEERFIELD PDI FINANCING, L.P.

By: /s/ James E. Flynn
Name: James E. Flynn
Title: General Partner

Signature Page to Option and Put Agreement

EXHIBIT 1

Stockholders

Stockholders

Deerfield Private Design International, L.P., a British Virgin Islands limited partnership

Deerfield Private Design Fund, L.P., a Delaware limited partnership

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EXHIBIT 2

ALLOCATIONS

Name	Amount
Deerfield Private Design International, L.P.	**$ 1,234,000**
Deerfield Private Design Fund, L.P.	**$ 766,000**

EXHIBIT 3

OPTION EXERCISE NOTICE

Deerfield ED Corporation
c/o Deerfield Capital, L.P.
780 Third Avenue
New York, New York 10017
Attention: James E. Flynn

Dear Mr. Flynn:

Reference is made to that certain Amended and Restated Option and Put Agreement dated as of March 16, 2009 (the "Agreement"), between VIVUS, Inc., a Delaware corporation (the "Company"), Deerfield ED Corporation, a Delaware corporation ("ED"), the Stockholders of ED and Deerfield PDI Financing L.P., a British Virgin Islands limited partnership. Capitalized terms used herein and not otherwise defined herein shall have the meanings assigned to them in the Agreement.

Pursuant to Section 2.4 of the Agreement, the Company hereby provides notice of its exercise of the Option. The Company will purchase all of the Shares from the Stockholders on , 20 or, if applicable, such other date as shall constitute the Option Closing Date pursuant to Section 3.1B(a) of this Agreement, in accordance with and subject to the terms and conditions set forth in the Agreement.

IN WITNESS WHEREOF, the Company has caused this Option Exercise Notice to be given by its duly authorized representative as of the date written above:

VIVUS INC.

By: _____
Name:
Title:

EXHIBIT 4

Security Agreement