

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

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

For the quarterly period ended June 30, 1996

OR

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

For the transition period from _____ to _____

Commission File Number: 0-23490

VIVUS, INC.

(Exact name of registrant as specified in its charter)

DELAWARE

94-3136179

(State or other jurisdiction of
incorporation or organization)

(I.R.S. Employer
identification Number)

545 MIDDLEFIELD ROAD, SUITE 200

MENLO PARK, CA 94025

(Address of Principal Executive Offices)

(Zip Code)

(415) 325-5511

(Registrant's Telephone Number, Including Area Code)

N/A

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

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

APPLICABLE ONLY TO CORPORATE ISSUERS:

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

At August 8, 1996, 16,162,434 shares of common stock were outstanding.

Exhibit index on page 28

PART II: OTHER INFORMATION

Item 1. Legal Proceedings

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

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

The annual meeting of stockholders was held on May 16, 1996. Matters voted on at that meeting were: (i) a proposal to amend the bylaws to provide for a variable number of directors from five (5) to seven (7), with the number initially set at six (6); (ii) the election of the Company's directors; (iii) a proposal to approve the reincorporation of VIVUS, Inc. from California to Delaware, and (iv) a proposal to confirm the appointment of Arthur Andersen LLP as the independent public accountants of the Company for fiscal year 1996. Tabulation for each proposal and individual director were as follows:

Proposal I To amend the bylaws to provide for a variable number of directors from five (5) to seven (7), with the number to be initially set at six (6).

FOR -----	AGAINST -----	ABSTAIN -----	NON-VOTE -----
11,037,691	142,959	8,448	153,163

Proposal II To elect six directors to serve until the next Annual Meeting of Stockholders and until their successors are duly elected and qualified

NOMINEE	FOR	WITHHELD
Richard L. Casey	11,296,383	45,878
Samuel D. Colella	11,296,833	45,428
Brian H. Dovey	11,296,433	45,828
Peter Barton Hutt	11,288,383	53,878
Virgil A. Place, M.D.	11,296,333	45,928
Leland F. Wilson	11,296,433	45,828

Proposal III To approve the reincorporation of VIVUS, Inc. from California to Delaware.

FOR	AGAINST	ABSTAIN	NON-VOTE
8,342,424	409,544	27,843	2,562,450

Proposal IV To confirm the appointment of Arthur Andersen LLP as the independent public accountants of the Company for fiscal year 1996.

FOR	AGAINST	ABSTAIN	NON-VOTE
11,323,502	11,487	7,272	0

Item 6. Exhibits and Reports on Form 8-K

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

- 3.1 Certificate of Incorporation of the Registrant.
- 3.2 Bylaws of the Registrant.
- *+10.1 Assignment Agreement by and between Alza Corporation and the Registrant dated December 31, 1993
- *+10.2 Memorandum of Understanding by and between Ortho Pharmaceutical Corporation and the Registrant dated February 25, 1992
- *10.3 Assignment Agreement by and between Ortho Pharmaceutical Corporation and the Registrant dated June 9, 1992
- *+10.4 License Agreement by and between Gene A. Voss, M.D., Allen C. Eichler, M.D., and the Registrant dated December 28, 1992
- *+10.5A License Agreement by and between Ortho Pharmaceutical Corporation and Kjell Holmquist AB dated June 23, 1989
- *+10.5B Amendment by and between Kjell Holmquist AB and the Registrant dated July 3, 1992
- *10.5C Amendment by and between Kjell Holmquist AB and the Registrant dated April 22, 1992
- *+10.5D Stock Purchase Agreement by and between Kjell Holmquist AB and the Registrant dated April 22, 1992
- *+10.6A License Agreement by and between Amsu, Ltd., and Ortho Pharmaceutical Corporation dated June 23, 1989
- *+10.6B Amendment by and between Amsu, Ltd., and the Registrant dated July 3, 1992

*10.6C	Amendment by and between Amsu, Ltd., and the Registrant dated April 22, 1992
*+10.6D	Stock Purchase Agreement by and between Amsu, Ltd., and the Registrant dated July 10, 1992
*10.7	Supply Agreement by and between Paco Pharmaceutical Services, Inc., and the Registrant dated November 10, 1993
*+10.8	Agreement by and among Pharmatech, Inc., Spolana Chemical Works AS, and the Registrant dated June 23, 1993
*10.9	Master Services Agreement by and between the Registrant and Teknekron Pharmaceutical Systems dated August 9, 1993
*10.10	Lease by and between McCandless-Triad and the Registrant dated November 23, 1992, as amended
***10.11	Form of Indemnification Agreements by and among the Registrant and the Directors and Officers of the Registrant
**10.12	1991 Incentive Stock Plan and Form of Agreement, as amended
*10.13	1994 Director Option Plan and Form of Agreement
*10.14	Form of 1994 Employee Stock Purchase Plan and Form of Subscription Agreement
*10.15	Stock Restriction Agreement between the Company and Virgil A. Place, M.D. dated November 7, 1991
*10.16	Stock Purchase Agreement between the Company and Leland F. Wilson dated June 26, 1991, as amended
*10.17	Letter Agreement between the Registrant and Leland F. Wilson dated June 14, 1991 concerning severance pay
*10.18	Letter Agreement between the Registrant and Paul Doherty dated January 26, 1994 concerning severance pay
**10.19	Guaranteed Maximum Price Contract by and between the Registrant and Marshall Contractors, Inc. dated January 27, 1995
**10.20	Sub-lease by and among the Registrant, Argonaut Technologies, Inc., ESCAgenetics Corp. and Tanklage Construction Co. dated March 13, 1995
****+10.21	Distribution Services Agreement between the Registrant and Synergy Logistics, Inc. (a wholly-owned subsidiary of Cardinal Health, Inc.) dated February 9, 1996
****+10.22	Manufacturing Agreement between the Registrant and CHINOIN Pharmaceutical and Chemical Works Co., Ltd. dated December 20, 1995
+ 10.23	Distribution and Services Agreement between the Registrant and Alternate Site Distributors, Inc. dated July 17, 1996
*****+10.24	Distribution Agreement made as of May 29, 1996 between the Registrant and Astra AB
*****11.1	Computation of net loss per share
*****27.1	Financial Data Schedule

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- * Incorporated by reference to the same-numbered exhibit filed with the Registrant's Registration Statement on Form S-1 No. 33-75698.
- ** Incorporated by reference to the same-numbered exhibit filed with the Registrant's Registration Statement on Form S-1 No. 33-90390.
- *** Incorporated by reference to the same-numbered exhibit filed with the Registrant's Form 8-B filed with the Commission on June 24, 1996
- **** Incorporated by reference to the same-numbered exhibit filed with the Registrant's Quarterly Report on Form 10Q for the quarter ended March 31, 1996.
- ***** Incorporated by reference to the same numbered exhibit filed with the Registrant's Current Report on Form 8-K/A filed with the Commission on June 21, 1996.
- ***** Incorporated by reference to the same numbered exhibits filed with the Registrant's Quarterly Report on Form 10-Q for the quarter ended June 30, 1996.
- + Confidential treatment granted.

(b) Reports on Form 8-K

The following reports on Form 8-K have been filed during the quarter for which this report is filed:

(i) On May 31, 1996, the Company filed a Current Report on Form 8-K ("Form 8-K") to report that on May 29, 1996, VIVUS International Limited, a wholly owned subsidiary of the Company, entered into a distribution agreement (the "Distribution Agreement") with Astra AB. Simultaneously with the filing of Form 8-K, the Company requested confidential treatment for the Distribution Agreement.

(ii) On June 21, 1996, the Company filed Amendment No. 1 to Form 8-K/A solely for the purpose of filing a revised version of the Distribution Agreement, which omitted only those portions for which confidential treatment had been granted.

SIGNATURES

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

VIVUS, Inc.

Date: November 19, 1996

/s/ DAVID C. YNTEMA

David C. Yntema
Chief Financial
Officer

/s/ LELAND F. WILSON

Leland F. Wilson
President and Chief
Executive Officer

VIVUS, INC.
INDEX TO EXHIBITS

Exhibit	Description
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3.1	Certificate of Incorporation of the Registrant.
3.2	Bylaws of the Registrant.
10.23	Distribution and Services Agreement between the Registrant and Alternate Site Distributors, Inc. dated July 17, 1996

CERTIFICATE OF INCORPORATION

OF

VIVUS, INC.

ARTICLE I

The name of the corporation is VIVUS, Inc. (the "Corporation").

ARTICLE II

The address of the Corporation's registered office in the State of Delaware is 1209 Orange Street, City of Wilmington, County of New Castle, Delaware 19801. The name of its registered agent at such address is The Corporation Trust Company.

ARTICLE III

The purpose of the Corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware.

ARTICLE IV

The Corporation is authorized to issue two classes of shares of stock to be designated, respectively, Common Stock, \$0.001 par value, and Preferred Stock, \$0.001 par value. The total number of shares that the Corporation is authorized to issue is 35,000,000 shares. The number of shares of Common Stock authorized is 30,000,000. The number of shares of Preferred authorized is 5,000,000.

The Preferred Stock may be issued from time to time in one or more series pursuant to a resolution or resolutions providing for such issue duly adopted by the board of directors (authority to do so being hereby expressly vested in the board). The board of directors is further authorized to determine or alter the rights, preferences, privileges and restrictions granted to or imposed upon any wholly unissued series of Preferred Stock and to fix the number of shares of any series of Preferred Stock and the designation of any such series of Preferred Stock. The board of directors, within the limits and restrictions stated in any resolution or resolutions of the board of directors originally fixing the number of shares constituting any series, may increase or decrease (but not below the number of shares in any such series then outstanding) the number of shares of any series subsequent to the issue of shares of that series.

The authority of the board of directors with respect to each such class or series shall include, without limitation of the foregoing, the right to determine and fix:

(a) the distinctive designation of such class or series and the number of shares to constitute such class or series;

(b) the rate at which dividends on the shares of such class or series shall be declared and paid, or set aside for payment, whether dividends at the rate so determined shall be cumulative or accruing, and whether the shares of such class or series shall be entitled to any participating or other dividends in addition to dividends at the rate so determined, and if so, on what terms;

(c) the right or obligation, if any, of the corporation to redeem shares of the particular class or series of Preferred Stock and, if redeemable, the price, terms and manner of such redemption;

(d) the special and relative rights and preferences, if any, and the amount or amounts per share, which the shares of such class or series of Preferred Stock shall be entitled to receive upon any voluntary or involuntary liquidation, dissolution or winding up of the Corporation;

(e) the terms and conditions, if any, upon which shares of such class or series shall be convertible into, or exchangeable for, shares of capital stock of any other class or series, including the price or prices or the rate or rates of conversion or exchange and the terms of adjustment, if any;

(f) the obligation, if any, of the corporation to retire, redeem or purchase shares of such class or series pursuant to a sinking fund or fund of a similar nature or otherwise, and the terms and conditions of such obligation;

(g) voting rights, if any, on the issuance of additional shares of such class or series or any shares of any other class or series of Preferred Stock;

(h) limitations, if any, on the issuance of additional shares of such class or series or any shares of any other class or series of Preferred Stock; and

(i) such other preferences, powers, qualifications, special or relative rights and privileges thereof as the board of directors of the corporation, acting in accordance with this Restated Certificate of Incorporation, may deem advisable and are not inconsistent with law and the provisions of this Restated Certificate of Incorporation.

ARTICLE V

The Corporation reserves the right to amend, alter, change, or repeal any provision contained in this Certificate of Incorporation, in the manner now or hereafter prescribed by statute, and all rights conferred upon the stockholders herein are granted subject to this right.

ARTICLE VI

The Corporation is to have perpetual existence.

ARTICLE VII

1. Limitation of Liability. To the fullest extent permitted by the General Corporation Law of the State of Delaware as the same exists or as may hereafter be amended, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director.

2. Indemnification. The Corporation may indemnify to the fullest extent permitted by law any person made or threatened to be made a party to an action or proceeding, whether criminal, civil, administrative or investigative, by reason of the fact that such person or his or her testator or intestate is or was a director, officer or employee of the Corporation, or any predecessor of the Corporation, or serves or served at any other enterprise as a director, officer or employee at the request of the Corporation or any predecessor to the Corporation.

3. Amendments. Neither any amendment nor repeal of this Article VII, nor the adoption of any provision of the Corporation's Certificate of Incorporation inconsistent with this Article VII, shall eliminate or reduce the effect of this Article VII, in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this Article VII, would accrue or arise, prior to such amendment, repeal, or adoption of an inconsistent provision.

ARTICLE VIII

In the event any shares of Preferred Stock shall be redeemed or converted pursuant to the terms hereof, the shares so converted or redeemed shall not revert to the status of authorized but unissued shares, but instead shall be canceled and shall not be re-issuable by the Corporation.

ARTICLE IX

Holders of stock of any class or series of this corporation shall not be entitled to cumulate their votes for the election of directors or any other matter submitted to a vote of the stockholders, unless such cumulative voting is required pursuant to Sections 2115 and/or 301.5 of the California Corporations Code, in which event each such holder shall be entitled to as many votes as shall equal the number of votes which (except for this provision as to cumulative voting) such holder would be entitled to cast for the election of directors with respect to his shares of stock multiplied by the number of directors to be elected by him, and the holder may cast all of such votes for a single director or may distribute them among the number of directors to be voted for, or for any two or more of them as such holder may see fit, so long as the name of the candidate for director shall have been placed in nomination prior to the voting and the stockholder, or any other holder of the same class or series of stock, has given notice at the meeting prior to the voting of the intention to cumulate votes.

ARTICLE X

1. Number of Directors. The number of directors which constitutes the whole Board of Directors of the corporation shall be designated in the Bylaws of the corporation.

2. Election of Directors. Elections of directors need not be by written ballot unless the Bylaws of the corporation shall so provide.

ARTICLE XI

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors is expressly authorized to make, alter, amend or repeal the Bylaws of the corporation.

ARTICLE XII

No action shall be taken by the stockholders of the corporation except at an annual or special meeting of the stockholders called in accordance with the Bylaws of the corporation, and no action shall be taken by the stockholders by written consent.

ARTICLE XIII

Meetings of stockholders may be held within or without the State of Delaware, as the Bylaws may provide. The books of the Corporation may be kept (subject to any provision contained in the statutes) outside of the State of Delaware at such place or places as may be designated from time to time by the Board of Directors or in the Bylaws of the Corporation.

ARTICLE XIV

The name and mailing address of the incorporator are:

Marnia Nichols, Esq.
Wilson, Sonsini, Goodrich & Rosati
650 Page Mill Road
Palo Alto, California 94304-1050

The undersigned incorporator hereby acknowledges that the above Certificate of Incorporation of VIVUS, Inc. is her act and deed and that the facts stated therein are true.

Dated: May 16, 1996

/s/ MARNIA NICHOLS

Marnia Nichols

BYLAWS
OF
VIVUS, INC.
(A DELAWARE CORPORATION)

BYLAWS OF
VIVUS, INC.
(A DELAWARE CORPORATION)
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BYLAWS
OF
VIVUS, INC.
(A DELAWARE CORPORATION)

ARTICLE I
CORPORATE OFFICES

1.1 Registered Office

The registered office of the corporation shall be fixed in the certificate of incorporation of the corporation.

1.2 Other Offices

The board of directors may at any time establish branch or subordinate offices at any place or places where the corporation is qualified to do business.

ARTICLE II
MEETINGS OF STOCKHOLDERS

2.1 Place of Meetings

Meetings of stockholders shall be held at any place within or outside the State of Delaware designated by the board of directors. In the absence of any such designation, stockholders' meetings shall be held at the principal executive office of the corporation.

2.2 Annual Meeting

The annual meeting of stockholders shall be held each year on a date and at a time designated by the board of directors. In the absence of such designation, the annual meeting of stockholders shall be held on the third Tuesday of May in each year at 10:00 a.m. However, if such day falls on a legal holiday, then the meeting shall be held at the same time and place on the next succeeding full business day. At the meeting, directors shall be elected, and any other proper business may be transacted.

2.3 Special Meeting

A special meeting of the stockholders may be called at any time by the board of directors, or by the chairman of the board, or by the president, or by one or more stockholders holding shares in the aggregate entitled to cast not less than ten percent (10%) of the votes at that meeting.

If a special meeting is called by any person or persons other than the board of directors or the president or the chairman of the board, then the request shall be in writing, specifying the time of such meeting and the general nature of the business proposed to be transacted, and shall be delivered personally or sent by registered mail or by telegraphic or other facsimile transmission to the chairman of the board, the president, any vice president or the secretary of the corporation. The officer receiving the request shall cause notice to be promptly given to the stockholders entitled to vote, in accordance with the provisions of Sections 2.4 and 2.5 of these bylaws, that a meeting will be held at the time requested by the person or persons calling the meeting, so long as that time is not less than thirty-five (35) nor more than sixty (60) days after the receipt of the request. If the notice is not given within twenty (20) days after receipt of the request, then the person or persons requesting the meeting may give the notice. Nothing contained in this paragraph of this Section 2.3 shall be construed as limiting, fixing or affecting the time when a meeting of stockholders called by action of the board of directors may be held.

2.4 Notice of Stockholders' Meetings

All notices of meetings of stockholders shall be sent or otherwise given in accordance with Section 2.6 of these bylaws not less than ten (10) (or, if sent by third-class mail pursuant to Section 2.6 of these bylaws, thirty (30)) nor more than sixty (60) days before the date of the meeting. The notice shall specify the place, date, and hour of the meeting and (i) in the case of a special meeting, the general nature of the business to be transacted (no business other than that specified in the notice may be transacted) or (ii) in the case of the annual meeting, those matters which the board of directors, at the time of giving the notice, intends to present for action by the stockholders (but subject to the provisions of the next paragraph of this Section 2.4 any proper matter may be presented at the meeting for such action). The notice of any meeting at which directors are to be elected shall include the name of any nominee or nominees who, at the time of the notice, the board intends to present for election.

2.5 Notifications of Nominations and Proposed Business.

Subject to the rights of holders of any class or series of stock having a preference over the Common Stock as to dividends or upon liquidation,

(a) nominations for the election of directors, and

(b) business proposed to be brought before any stockholder meeting may be made by the Board of Directors or proxy committee appointed by the Board of Directors or by any stockholder entitled to vote in the election of directors generally if such nomination or business proposed is otherwise proper business before such meeting. However, any such stockholder may nominate one or more persons for election as directors at a meeting or propose business to be brought before a meeting, or both, only if such stockholder has given timely notice in proper written form of his intent to make such nomination or nominations or to propose such business. To be timely, such stockholder's notice must be delivered to or mailed and received by the Secretary of the corporation not less than thirty-five (35) days nor more than sixty (60) days prior to the meeting; provided, however, that in the event that less than forty-five (45) days notice or prior public disclosure of the date of the meeting is given or made to stockholders, notice by the stockholder to be timely must be so received not later than the close of business on the tenth day following the day on which such notice of the date of the meeting was mailed or such public disclosure was made. To be in proper form, a stockholder's notice to the Secretary shall set forth:

(i) the name and address of the stockholder who intends to make the nominations or propose the business and, as the case may be, of the person or persons to be nominated or of the business to be proposed;

(ii) a representation that the stockholder is a holder of record of stock of the corporation entitled to vote at such meeting and, if applicable, intends to appear in person or by proxy at the meeting to nominate the person or persons specified in the notice;

(iii) if applicable, a description of all arrangements or understandings between the stockholder and each nominee and any other person or persons (naming such person or persons) pursuant to which the nomination or nominations are to be made by the stockholder;

(iv) such other information regarding each nominee or each matter of business to be proposed by such stockholder as would be required to be included in a proxy statement filed pursuant to the proxy rules of the Securities and Exchange Commission had the nominee been nominated, or intended to be nominated, or the matter been proposed, or intended to be proposed by the Board of Directors; and

(v) if applicable, the consent of each nominee to serve as director of the corporation if so elected.

The Chairman of the meeting shall refuse to acknowledge the nomination of any person or the proposal of any business not made in compliance with the foregoing procedure.

2.6 Manner of Giving Notice; Affidavit of Notice

Written notice of any meeting of stockholders shall be given either personally or by first-class mail or by telegraphic or other written communication. Notices not personally delivered shall be sent charges prepaid and shall be addressed to the stockholder at the address of that stockholder appearing on the books of the corporation or given by the stockholder to the corporation for the purpose of notice. Notice shall be deemed to have been given at the time when delivered personally or deposited in the mail or sent by telegram or other means of written communication.

An affidavit of the mailing or other means of giving any notice of any stockholders' meeting, executed by the secretary, assistant secretary or any transfer agent of the corporation giving the notice, shall be prima facie evidence of the giving of such notice.

2.7 Quorum

The holders of a majority in voting power of the stock issued and outstanding and entitled to vote thereat, present in person or represented by proxy, shall constitute a quorum at all meetings of the stockholders for the transaction of business except as otherwise provided by statute or by the certificate of incorporation. If, however, such quorum is not present or represented at any meeting of the stockholders, then either (i) the chairman of the meeting or (ii) the stockholders entitled to vote thereat, present in person or represented by proxy, shall have power to adjourn the meeting in accordance with Section 2.7 of these bylaws.

When a quorum is present at any meeting, the vote of the holders of a majority of the stock having voting power present in person or represented by proxy shall decide any question brought before such meeting, unless the question is one upon which, by express provision of the laws of the State of Delaware or of the certificate of incorporation or these bylaws, a different vote is required, in which case such express provision shall govern and control the decision of the question.

If a quorum be initially present, the stockholders may continue to transact business until adjournment, notwithstanding the withdrawal of enough stockholders to leave less than a quorum, if any action taken is approved by a majority of the stockholders initially constituting the quorum.

2.8 Adjourned Meeting; Notice

When a meeting is adjourned to another time and place, unless these bylaws otherwise require, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken. At the adjourned meeting the corporation may transact any business that might have been transacted at the original meeting. If the adjournment is for more than thirty (30) days, or if after the adjournment a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given to each stockholder of record entitled to vote at the meeting.

2.9 Voting

The stockholders entitled to vote at any meeting of stockholders shall be determined in accordance with the provisions of Section 2.11 of these bylaws, subject to the provisions of Sections 217 and 218 of the General Corporation Law of Delaware (relating to voting rights of fiduciaries, pledgors and joint owners, and to voting trusts and other voting agreements).

Except as may be otherwise provided in the articles of incorporation or these bylaws, each stockholder shall be entitled to one vote for each share of capital stock held by such stockholder and stockholders shall not be entitled to cumulate their votes in the election of directors or with respect to any matter submitted to a vote of the stockholders.

Notwithstanding the foregoing, if the stockholders of the corporation are entitled, pursuant to Sections 2115 and 301.5 of the California Corporations Code, to cumulate their votes in the election of directors, each such stockholder shall be entitled to cumulate votes (i.e., cast for any candidate a number of votes greater than the number of votes that such stockholder normally is entitled to cast) only if the candidates'

names have been properly placed in nomination (in accordance with these bylaws) prior to commencement of the voting, and the stockholder requesting cumulative voting has given notice prior to commencement of the voting of the stockholder's intention to cumulate votes. If cumulative voting is properly requested, each holder of stock, or of any class or classes or of a series or series thereof, who elects to cumulate votes shall be entitled to as many votes as equals the number of votes that (absent this provision as to cumulative voting) he or she would be entitled to cast for the election of directors with respect to his or her shares of stock multiplied by the number of directors to be elected by him, and he or she may cast all of such votes for a single director or may distribute them among the number to be voted for, or for any two or more of them, as he or she may see fit.

2.10 Waiver of Notice

Whenever notice is required to be given under any provision of the General Corporation Law of Delaware or of the certificate of incorporation or these bylaws, a written waiver thereof, signed by the person entitled to notice, whether before or after the time stated therein, shall be deemed equivalent to notice. Attendance of a person at a meeting shall constitute a waiver of notice of such meeting, except when the person attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the stockholders need be specified in any written waiver of notice unless so required by the certificate of incorporation or these bylaws.

2.11 Record Date For Stockholder Notice; Voting

For purposes of determining the stockholders entitled to notice of any meeting or to vote thereat, the board of directors may fix, in advance, a record date, which shall not precede the date upon which the resolution fixing the record date is adopted by the board of directors and which shall not be more than sixty (60) days nor less than ten (10) days before the date of any such meeting, and in such event only stockholders of record on the date so fixed are entitled to notice and to vote, notwithstanding any transfer of any shares on the books of the corporation after the record date.

If the board of directors does not so fix a record date, the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the business day next preceding the day on which notice is given, or, if notice is waived, at the close of business on the business day next preceding the day on which the meeting is held.

A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting unless the board of directors fixes a new record date for the adjourned meeting, but the board of directors shall fix a new record date if the meeting is adjourned for more than thirty (30) days from the date set for the original meeting.

The record date for any other purpose shall be as provided in Section 8.1 of these bylaws.

2.12 Proxies

Every person entitled to vote for directors, or on any other matter, shall have the right to do so either in person or by one or more agents authorized by a written proxy signed by the person and filed with the secretary of the corporation, but no such proxy shall be voted or acted upon after three (3) years from its date unless the proxy provides for a longer period. A proxy shall be deemed signed if the stockholder's name is placed on the proxy (whether by manual signature, typewriting, telegraphic transmission, telefacsimile or otherwise) by the stockholder or the stockholder's attorney-in-fact. The revocability of a proxy that states on its face that it is irrevocable shall be governed by the provisions of Section 212(e) of the General Corporation Law of Delaware.

2.13 Organization

The president, or in the absence of the president, the chairman of the board, or, in the absence of the president and the chairman of the board, one of the corporation's vice presidents, shall call the meeting of the

stockholders to order, and shall act as chairman of the meeting. In the absence of the president, the chairman of the board, and all of the vice presidents, the stockholders shall appoint a chairman for such meeting. The chairman of any meeting of stockholders shall determine the order of business and the procedures at the meeting, including such matters as the regulation of the manner of voting and the conduct of business. The secretary of the corporation shall act as secretary of all meetings of the stockholders, but in the absence of the secretary at any meeting of the stockholders, the chairman of the meeting may appoint any person to act as secretary of the meeting.

2.14 List of Stockholders Entitled to Vote

The officer who has charge of the stock ledger of the corporation shall prepare and make, at least ten (10) days before every meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, during ordinary business hours, for a period of at least ten (10) days prior to the meeting, either at a place within the city where the meeting is to be held, which place shall be specified in the notice of the meeting, or, if not so specified, at the place where the meeting is to be held. The list shall also be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder who is present.

ARTICLE III

DIRECTORS

3.1 Powers

Subject to the provisions of the General Corporation Law of Delaware and any limitations in the certificate of incorporation and these bylaws relating to action required to be approved by the stockholders or by the outstanding shares, the business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the board of directors.

3.2 Number of Directors

The board of directors shall be not less than five (5) nor more than seven (7) members. The exact number of directors shall be six (6) until changed, within the limits specified above by a bylaw amending this Section 3.2 duly adopted by the board of directors or by the stockholders. The indefinite number of directors may be changed, or a definite number may be fixed without provision for an indefinite number, by an amendment to this bylaw, duly adopted by the board of directors or by the stockholders, or by a duly adopted amendment to the certificate of incorporation.

No reduction of the authorized number of directors shall have the effect of removing any director before that director's term of office expires.

3.3 Election and Term of Office of Directors

Except as provided in Section 3.4 of these bylaws, directors shall be elected at each annual meeting of stockholders to hold office until the next annual meeting. Each director, including a director elected or appointed to fill a vacancy, shall hold office until the expiration of the term for which elected and until a successor has been elected and qualified.

3.4 Resignation and Vacancies

Any director may resign effective on giving written notice to the chairman of the board, the president, the secretary or the board of directors, unless the notice specifies a later time for that resignation to become effective. If the resignation of a director is effective at a future time, the board of directors may elect a successor to take office when the resignation becomes effective.

Vacancies in the board of directors may be filled by a majority of the remaining directors, even if less than a quorum, or by a sole remaining director; however, a vacancy created by the removal of a director by the vote of the stockholders or by court order may be filled only by the affirmative vote of a majority of the shares represented and voting at a duly held meeting at which a quorum is present (which shares voting affirmatively also constitute a majority of the required quorum). Each director so elected shall hold office until the next annual meeting of the stockholders and until a successor has been elected and qualified.

Unless otherwise provided in the certificate of incorporation or these bylaws:

(i) Vacancies and newly created directorships resulting from any increase in the authorized number of directors elected by all of the stockholders having the right to vote as a single class may be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director.

(ii) Whenever the holders of any class or classes of stock or series thereof are entitled to elect one or more directors by the provisions of the certificate of incorporation, vacancies and newly created directorships of such class or classes or series may be filled by a majority of the directors elected by such class or classes or series thereof then in office, or by a sole remaining director so elected.

If at any time, by reason of death or resignation or other cause, the corporation should have no directors in office, then any officer or any stockholder or an executor, administrator, trustee or guardian of a stockholder, or other fiduciary entrusted with like responsibility for the person or estate of a stockholder, may call a special meeting of stockholders in accordance with the provisions of the certificate of incorporation or these bylaws, or may apply to the Court of Chancery for a decree summarily ordering an election as provided in Section 211 of the General Corporation Law of Delaware.

If, at the time of filling any vacancy or any newly created directorship, the directors then in office constitute less than a majority of the whole board (as constituted immediately prior to any such increase), then the Court of Chancery may, upon application of any stockholder or stockholders holding at least ten (10) percent of the total number of the shares at the time outstanding having the right to vote for such directors, summarily order an election to be held to fill any such vacancies or newly created directorships, or to replace the directors chosen by the directors then in office as aforesaid, which election shall be governed by the provisions of Section 211 of the General Corporation Law of Delaware as far as applicable.

3.5 Place of Meetings; Meetings by Telephone

Regular meetings of the board of directors may be held at any place within or outside the State of Delaware that has been designated from time to time by resolution of the board. In the absence of such a designation, regular meetings shall be held at the principal executive office of the corporation. Special meetings of the board may be held at any place within or outside the State of Delaware that has been designated in the notice of the meeting or, if not stated in the notice or if there is no notice, at the principal executive office of the corporation.

Any meeting, regular or special, may be held by conference telephone or similar communication equipment, so long as all directors participating in the meeting can hear one another; and all such directors shall be deemed to be present in person at the meeting.

3.6 Regular Meetings

Regular meetings of the board of directors may be held without notice if the times of such meetings are fixed by the board of directors. If any regular meeting day shall fall on a legal holiday, then the meeting shall be held next succeeding full business day.

3.7 Special Meetings; Notice

Special meetings of the board of directors for any purpose or purposes may be called at any time by the chairman of the board, the president, any vice president, the secretary or any two directors.

Notice of the time and place of special meetings shall be delivered personally or by telephone to each director or sent by first-class mail or telegram, charges prepaid, addressed to each director at that director's address as it is shown on the records of the corporation. If the notice is mailed, it shall be deposited in the United States mail at least four (4) days before the time of the holding of the meeting. If the notice is delivered personally or by telephone or telegram, it shall be delivered personally or by telephone or to the telegraph company at least forty-eight (48) hours before the time of the holding of the meeting. Any oral notice given personally or by telephone may be communicated either to the director or to a person at the office of the director who the person giving the notice has reason to believe will promptly communicate it to the director. The notice need not specify the purpose or the place of the meeting, if the meeting is to be held at the principal executive office of the corporation.

3.8 Quorum

A majority of the authorized number of directors shall constitute a quorum for the transaction of business, except to adjourn as provided in Section 3.10 of these bylaws. Every act or decision done or made by a majority of the directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the board of directors, subject to the provisions of the certificate of incorporation and other applicable law.

A meeting at which a quorum is initially present may continue to transact business notwithstanding the withdrawal of directors, if any action taken is approved by at least a majority of the required quorum for that meeting.

3.9 Waiver of Notice

Notice of a meeting need not be given to any director (i) who signs a waiver of notice or a consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or (ii) who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such directors. All such waivers, consents, and approvals shall be filed with the corporate records or made part of the minutes of the meeting. A waiver of notice need not specify the purpose of any regular or special meeting of the board of directors.

3.10 Adjournment

A majority of the directors present, whether or not constituting a quorum, may adjourn any meeting to another time and place.

3.11 Notice of Adjournment

Notice of the time and place of holding an adjourned meeting need not be given unless the meeting is adjourned for more than twenty-four (24) hours. If the meeting is adjourned for more than twenty-four (24) hours, then notice of the time and place of the adjourned meeting shall be given before the adjourned meeting takes place, in the manner specified in Section 3.7 of these bylaws, to the directors who were not present at the time of the adjournment.

3.12 Board Action by Written Consent Without a Meeting

Any action required or permitted to be taken by the board of directors may be taken without a meeting, provided that all members of the board individually or collectively consent in writing to that action. Such action by written consent shall have the same force and effect as a unanimous vote of the board of directors. Such written consent and any counterparts thereof shall be filed with the minutes of the proceedings of the board.

3.13 Fees and Compensation of Directors

Directors and members of committees may receive such compensation, if any, for their services and such reimbursement of expenses as may be fixed or determined by resolution of the board of directors. This Section 3.13 shall not be construed to preclude any director from serving the corporation in any other capacity as an officer, agent, employee or otherwise and receiving compensation for those services.

3.14 Approval of Loans to Officers

The corporation may lend money to, or guarantee any obligation of, or otherwise assist any officer or other employee of the corporation or any of its subsidiaries, including any officer or employee who is a director of the corporation or any of its subsidiaries, whenever, in the judgment of the directors, such loan, guaranty or assistance may reasonably be expected to benefit the corporation. The loan, guaranty or other assistance may be with or without interest and may be unsecured, or secured in such manner as the board of directors shall approve, including, without limitation, a pledge of shares of stock of the corporation. Nothing contained in this section shall be deemed to deny, limit or restrict the powers of guaranty or warranty of the corporation at common law or under any statute.

ARTICLE IV

COMMITTEES

4.1 Committees of Directors

The board of directors may, by resolution adopted by a majority of the authorized number of directors, designate one (1) or more committees, each consisting of two or more directors, to serve at the pleasure of the board. The board may designate one (1) or more directors as alternate members of any committee, who may replace any absent member at any meeting of the committee. The appointment of members or alternate members of a committee requires the vote of a majority of the authorized number of directors. Any committee, to the extent provided in the resolution of the board, shall have and may exercise all the powers and authority of the board, but no such committee shall have the power of authority to:

(a) amend the certificate of incorporation (except that a committee may, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the board of directors as provided in Section 151(a) of the General Corporation Law of Delaware, fix the designations and any of the preferences or rights of such shares relating to dividends, redemption, dissolution, any distribution of assets of the corporation or the conversion into, or the exchange of such shares for, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation);

(b) adopt an agreement of merger or consolidation under Sections 251 or 252 of the General Corporation Law of Delaware;

(c) recommend to the stockholders the sale, lease or exchange of all or substantially all of the corporation's property and assets;

(d) recommend to the stockholders a dissolution of the corporation or a revocation of a dissolution; or

(e) amend the bylaws of the corporation; and, unless the board resolution establishing the committee, the bylaws or the certificate of incorporation expressly so provide, no such committee shall have the power or authority to declare a dividend, to authorize the issuance of stock, or to adopt a certificate of ownership and merger pursuant to Section 253 of the General Corporation Law of Delaware.

4.2 Meetings and Action of Committees

Meetings and actions of committees shall be governed by, and held and taken in accordance with, the provisions of Article III of these bylaws, Section 3.5 (place of meetings), Section 3.6 (regular meetings), Section 3.7 (special meetings and notice), Section 3.8 (quorum), Section 3.9 (waiver of notice), Section 3.10 (adjournment), Section 3.11 (notice of adjournment), and Section 3.12 (action without meeting), with such changes in the context of those bylaws as are necessary to substitute the committee and its members for the board of directors and its members; provided, however, that the time of regular meetings of committees may be determined either by resolution of the board of directors or by resolution of the committee, that special meetings of committees may also be called by resolution of the board of directors, and that notice of special meetings of committees shall also be given to all alternate members, who shall have the right to attend all meetings of the committee. The board of directors may adopt rules for the government of any committee not inconsistent with the provisions of these bylaws.

4.3 Committee Minutes

Each committee shall keep regular minutes of its meetings and report the same to the board of directors when required.

ARTICLE V

OFFICERS

5.1 Officers

The officers of the corporation shall be a president, a secretary, and a chief financial officer. The corporation may also have, at the discretion of the board of directors, a chairman of the board, one or more vice presidents, one or more assistant secretaries, one or more assistant treasurers, and such other officers as may be appointed in accordance with the provisions of Section 5.3 of these bylaws. Any number of offices may be held by the same person.

5.2 Election of Officers

The officers of the corporation, except such officers as may be appointed in accordance with the provisions of Section 5.3 or Section 5.5 of these bylaws, shall be chosen by the board, subject to the rights, if any, of an officer under any contract of employment.

5.3 Subordinate Officers

The board of directors may appoint, or may empower the president to appoint, such other officers as the business of the corporation may require, each of whom shall hold office for such period, have such authority, and perform such duties as are provided in these bylaws or as the board of directors may from time to time determine.

5.4 Removal and Resignation of Officers

Subject to the rights, if any, of an officer under any contract of employment, any officer may be removed, either with or without cause, by the board of directors at any regular or special meeting of the board or, except in case of an officer chosen by the board of directors, by any officer upon whom such power of removal may be conferred by the board of directors.

Any officer may resign at any time by giving written notice to the corporation. Any resignation shall take effect at the date of the receipt of that notice or at any later time specified in that notice; and, unless otherwise specified in that notice, the acceptance of the resignation shall not be necessary to make it effective. Any resignation is without prejudice to the rights, if any, of the corporation under any contract to which the officer is a party.

5.5 Vacancies in Offices

A vacancy in any office because of death, resignation, removal, disqualification or any other cause shall be filled in the manner prescribed in these bylaws for regular appointments to that office.

5.6 Chairman of the Board

The chairman of the board, if such an officer be elected, shall, if present, preside at meetings of the board of directors and exercise and perform such other powers and duties as may from time to time be assigned to him by the board of directors or as may be prescribed by these bylaws. If there is no president, then the chairman of the board shall also be the chief executive officer of the corporation and shall have the powers and duties prescribed in Section 5.7 of these bylaws.

5.7 President

Subject to such supervisory powers, if any, as may be given by the board of directors to the chairman of the board, if there be such an officer, the president shall be the chief executive officer of the corporation and shall, subject to the control of the board of directors, have general supervision, direction, and control of the business and the officers of the corporation. He shall preside at all meetings of the stockholders and, in the absence or nonexistence of a chairman of the board, at all meetings of the board of directors. He shall have the general powers and duties of management usually vested in the office of president of a corporation, and shall have such other powers and duties as may be prescribed by the board of directors or these bylaws.

5.8 Vice Presidents

In the absence or disability of the president, the vice presidents, if any, in order of their rank as fixed by the board of directors or, if not ranked, a vice president designated by the board of directors, shall perform all the duties of the president and when so acting shall have all the powers of, and be subject to all the restrictions upon, the president. The vice presidents shall have such other powers and perform such other duties as from time to time may be prescribed for them respectively by the board of directors, these bylaws, the president or the chairman of the board.

5.9 Secretary

The secretary shall keep or cause to be kept, at the principal executive office of the corporation or such other place as the board of directors may direct, a book of minutes of all meetings and actions of directors, committees of directors and stockholders. The minutes shall show the time and place of each meeting, whether regular or special (and, if special, how authorized and the notice given), the names of those present at directors' meetings or committee meetings, the number of shares present or represented at stockholders' meetings, and the proceedings thereof.

The secretary shall keep, or cause to be kept, at the principal executive office of the corporation or at the office of the corporation's transfer agent or registrar, as determined by resolution of the board of directors, a share register, or a duplicate share register, showing the names of all stockholders and their addresses, the number and classes of shares held by each, the number and date of certificates evidencing such shares, and the number and date of cancellation of every certificate surrendered for cancellation.

The secretary shall give, or cause to be given, notice of all meetings of the stockholders and of the board of directors required to be given by law or by these bylaws. He shall keep the seal of the corporation, if one be adopted, in safe custody and shall have such other powers and perform such other duties as may be prescribed by the board of directors or by these bylaws.

5.10 Chief Financial Officer

The chief financial officer shall keep and maintain, or cause to be kept and maintained, adequate and correct books and records of accounts of the properties and business transactions of the corporation, including

accounts of its assets, liabilities, receipts, disbursements, gains, losses, capital, retained earnings, and shares. The books of account shall at all reasonable times be open to inspection by any director.

The chief financial officer shall deposit all money and other valuables in the name and to the credit of the corporation with such depositaries as may be designated by the board of directors. He shall disburse the funds of the corporation as may be ordered by the board of directors, shall render to the president and directors, whenever they request it, an account of all of his transactions as chief financial officer and of the financial condition of the corporation, and shall have such other powers and perform such other duties as may be prescribed by the board of directors or these bylaws.

ARTICLE VI

INDEMNIFICATION OF DIRECTORS, OFFICERS, EMPLOYEES, AND OTHER AGENTS

6.1 Indemnification of Directors and Officers

The corporation shall, to the maximum extent and in the manner permitted by the General Corporation Law of Delaware as the same now exists or may hereafter be amended, indemnify any person against expenses (including attorneys' fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred in connection with any threatened, pending or completed action, suit, or proceeding in which such person was or is a party or is threatened to be made a party by reason of the fact that such person is or was a director or officer of the corporation. For purposes of this Section 6.1, a "director" or "officer" of the corporation shall mean any person (i) who is or was a director or officer of the corporation, (ii) who is or was serving at the request of the corporation as a director or officer of another corporation, partnership, joint venture, trust or other enterprise, or (iii) who was a director or officer of a corporation which was a predecessor corporation of the corporation or of another enterprise at the request of such predecessor corporation.

The corporation shall be required to indemnify a director or officer in connection with an action, suit, or proceeding (or part thereof) initiated by such director or officer only if the initiation of such action, suit, or proceeding (or part thereof) by the director or officer was authorized by the Board of Directors of the corporation.

The corporation shall pay the expenses (including attorney's fees) incurred by a director or officer of the corporation entitled to indemnification hereunder in defending any action, suit or proceeding referred to in this Section 6.1 in advance of its final disposition; provided, however, that payment of expenses incurred by a director or officer of the corporation in advance of the final disposition of such action, suit or proceeding shall be made only upon receipt of an undertaking by the director or officer to repay all amounts advanced if it should ultimately be determined that the director or officer is not entitled to be indemnified under this Section 6.1 or otherwise.

The rights conferred on any person by this Article shall not be exclusive of any other rights which such person may have or hereafter acquire under any statute, provision of the corporation's Certificate of Incorporation, these bylaws, agreement, vote of the stockholders or disinterested directors or otherwise.

Any repeal or modification of the foregoing provisions of this Article shall not adversely affect any right or protection hereunder of any person in respect of any act or omission occurring prior to the time of such repeal or modification.

6.2 Indemnification of Others

The corporation shall have the power, to the maximum extent and in the manner permitted by the General Corporation Law of Delaware as the same now exists or may hereafter be amended, to indemnify any person (other than directors and officers) against expenses (including attorneys' fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred in connection with any threatened, pending or completed action, suit, or proceeding, in which such person was or is a party or is threatened to be made a party by reason of the fact that such person is or was an employee or agent of the corporation. For purposes of

this Section 6.2, an "employee" or "agent" of the corporation (other than a director or officer) shall mean any person (i) who is or was an employee or agent of the corporation, (ii) who is or was serving at the request of the corporation as an employee or agent of another corporation, partnership, joint venture, trust or other enterprise, or (iii) who was an employee or agent of a corporation which was a predecessor corporation of the corporation or of another enterprise at the request of such predecessor corporation.

6.3 Insurance

The corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer, employee or agent of the corporation, or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise against any liability asserted against him or her and incurred by him or her in any such capacity, or arising out of his or her status as such, whether or not the corporation would have the power to indemnify him or her against such liability under the provisions of the General Corporation Law of Delaware.

ARTICLE VII

RECORDS AND REPORTS

7.1 Maintenance and Inspection of Records

The corporation shall, either at its principal executive office or at such place or places as designated by the board of directors, keep a record of its stockholders listing their names and addresses and the number and class of shares held by each stockholder, a copy of these bylaws as amended to date, accounting books and other records of its business and properties.

Any stockholder of record, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose the corporation's stock ledger, a list of its stockholders, and its other books and records and to make copies or extracts therefrom. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder. In every instance where an attorney or other agent is the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing that authorizes the attorney or other agent to so act on behalf of the stockholder. The demand under oath shall be directed to the corporation at its registered office in Delaware or at its principal place of business.

7.2 Inspection by Directors

Any director shall have the right to examine (and to make copies of) the corporation's stock ledger, a list of its stockholders and its other books and records for a purpose reasonably related to his or her position as a director.

7.3 Annual Statement to Stockholders

The board of directors shall present at each annual meeting, and at any special meeting of the stockholders when called for by vote of the stockholders, a full and clear statement of the business and condition of the corporation.

7.4 Representation of Shares of Other Corporations

The chairman of the board, if any, the president, any vice president, the chief financial officer, the secretary or any assistant secretary of this corporation, or any other person authorized by the board of directors or the president or a vice president, is authorized to vote, represent and exercise on behalf of this corporation all rights incident to any and all shares of the stock of any other corporation or corporations standing in the name of this corporation. The authority herein granted may be exercised either by such person directly or by any other person authorized to do so by proxy or power of attorney duly executed by such person having the authority.

7.5 Certification and Inspection of Bylaws

The original or a copy of these bylaws, as amended or otherwise altered to date, certified by the secretary, shall be kept at the corporation's principal executive office and shall be open to inspection by the stockholders of the corporation, at all reasonable times during office hours.

ARTICLE VIII

GENERAL MATTERS

8.1 Record Date for Purposes Other Than Notice and Voting

For purposes of determining the stockholders entitled to receive payment of any dividend or other distribution or allotment of any rights or the stockholders entitled to exercise any rights in respect of any other lawful action (other than action by stockholders by written consent without a meeting), the board of directors may fix, in advance, a record date, which shall not be more than sixty (60) days before any such action. In that case, only stockholders of record at the close of business on the date so fixed are entitled to receive the dividend, distribution or allotment of rights, or to exercise such rights, as the case may be, notwithstanding any transfer of any shares on the books of the corporation after the record date so fixed, except as otherwise provided in the General Corporation Law of Delaware.

If the board of directors does not so fix a record date, then the record date for determining stockholders for any such purpose shall be at the close of business on the day on which the board adopts the applicable resolution.

8.2 Checks; Drafts; Evidences of Indebtedness

From time to time, the board of directors shall determine by resolution which person or persons may sign or endorse all checks, drafts, other orders for payment of money, notes or other evidences of indebtedness that are issued in the name of or payable to the corporation, and only the persons so authorized shall sign or endorse those instruments.

8.3 Corporate Contracts and Instruments: How Executed

The board of directors, except as otherwise provided in these bylaws, may authorize any officer or officers, or agent or agents, to enter into any contract or execute any instrument in the name of and on behalf of the corporation; such authority may be general or confined to specific instances. Unless so authorized or ratified by the board of directors or within the agency power of an officer, no officer, agent or employee shall have any power or authority to bind the corporation by any contract or engagement or to pledge its credit or to render it liable for any purpose or for any amount.

8.4 Stock Certificates; Transfer; Partly Paid Shares

The shares of the corporation shall be represented by certificates, provided that the board of directors of the corporation may provide by resolution or resolutions that some or all of any or all classes or series of its stock shall be uncertificated shares. Any such resolution shall not apply to shares represented by a certificate until such certificate is surrendered to the corporation. Notwithstanding the adoption of such a resolution by the board of directors, every holder of stock represented by certificates and, upon request, every holder of uncertificated shares, shall be entitled to have a certificate signed by, or in the name of the corporation by, the chairman or vice-chairman of the board of directors, or the president or vice-president, and by the treasurer or an assistant treasurer, or the secretary or an assistant secretary of such corporation representing the number of shares registered in certificate form. Any or all of the signatures on the certificate may be a facsimile. In case any officer, transfer agent or registrar who has signed or whose facsimile signature has been placed upon a certificate has ceased to be such officer, transfer agent or registrar before such certificate is issued, it may be issued by the corporation with the same effect as if he or she were such officer, transfer agent or registrar at the date of issue.

Certificates for shares shall be of such form and device as the board of directors may designate and shall state the name of the record holder of the shares represented thereby; its number; date of issuance; the number of shares for which it is issued; a summary statement or reference to the powers, designations, preferences or other special rights of such stock and the qualifications, limitations or restrictions of such preferences and/or rights, if any; a statement or summary of liens, if any; a conspicuous notice of restrictions upon transfer or registration of transfer, if any; a statement as to any applicable voting trust agreement; if the shares be assessable, or, if assessments are collectible by personal action, a plain statement of such facts.

Upon surrender to the secretary or transfer agent of the corporation of a certificate for shares duly endorsed or accompanied by proper evidence of succession, assignment or authority to transfer, it shall be the duty of the corporation to issue a new certificate to the person entitled thereto, cancel the old certificate and record the transaction upon its books.

The corporation may issue the whole or any part of its shares as partly paid and subject to call for the remainder of the consideration to be paid therefor. Upon the face or back of each stock certificate issued to represent any such partly paid shares, or upon the books and records of the corporation in the case of uncertificated partly paid shares, the total amount of the consideration to be paid therefor and the amount paid thereon shall be stated. Upon the declaration of any dividend on fully paid shares, the corporation shall declare a dividend upon partly paid shares of the same class, but only upon the basis of the percentage of the consideration actually paid thereon.

8.5 Special Designation on Certificates

If the corporation is authorized to issue more than one class of stock or more than one series of any class, then the powers, the designations, the preferences and the relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights shall be set forth in full or summarized on the face or back of the certificate that the corporation shall issue to represent such class or series of stock; provided, however, that, except as otherwise provided in Section 202 of the General Corporation Law of Delaware, in lieu of the foregoing requirements there may be set forth on the face or back of the certificate that the corporation shall issue to represent such class or series of stock a statement that the corporation will furnish without charge to each stockholder who so requests the powers, the designations, the preferences and the relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions of such preferences and/or rights.

8.6 Lost Certificates

Except as provided in this Section 8.6, no new certificates for shares shall be issued to replace a previously issued certificate unless the latter is surrendered to the corporation and cancelled at the same time. The board of directors may, in case any share certificate or certificate for any other security is lost, stolen or destroyed, authorize the issuance of replacement certificates on such terms and conditions as the board may require; the board may require indemnification of the corporation secured by a bond or other adequate security sufficient to protect the corporation against any claim that may be made against it, including any expense or liability, on account of the alleged loss, theft or destruction of the certificate or the issuance of the replacement certificate.

8.7 Transfer Agents and Registrars

The board of directors may appoint one or more transfer agents or transfer clerks, and one or more registrars, each of which shall be an incorporated bank or trust company -- either domestic or foreign, who shall be appointed at such times and places as the requirements of the corporation may necessitate and the board of directors may designate.

8.8 Construction; Definitions

Unless the context requires otherwise, the general provisions, rules of construction, and definitions in the General Corporation Law of Delaware shall govern the construction of these bylaws. Without limiting the

generality of this provision, the singular number includes the plural, the plural number includes the singular, and the term "person" includes both a corporation and a natural person.

ARTICLE IX

AMENDMENTS

The original or other bylaws of the corporation may be adopted, amended or repealed by the stockholders entitled to vote or by the board of directors of the corporation. The fact that such power has been so conferred upon the directors shall not divest the stockholders of the power, nor limit their power to adopt, amend or repeal bylaws.

Whenever an amendment or new bylaw is adopted, it shall be copied in the book of bylaws with the original bylaws, in the appropriate place. If any bylaw is repealed, the fact of repeal with the date of the meeting at which the repeal was enacted or the filing of the operative written consent(s) shall be stated in said book.

DISTRIBUTION AND SERVICES AGREEMENT

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

Background Information

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

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

C. VIVUS desires to engage ASD (as limited pursuant to the terms of Section 2 below), for various services relating to its Products (as such term is defined in Appendix A attached hereto) including its first advanced pharmacological and therapeutic product and application system for the treatment of erectile dysfunction known as MUSE(R) (aplprostadi1) ("MUSE") as (1) its primary agent on a non-exclusive basis for distribution and reporting of all samples (as such term is defined in Appendix A attached hereto) which VIVUS shall provide in its sole discretion for distribution in the United States, (2) its primary agent on a non-exclusive basis for storage, distribution and reporting of all promotional and literature marketing materials developed by VIVUS for the Products which VIVUS shall provide in its sole discretion for distribution in the United States, (3) its primary telemarketing agent on a non-exclusive basis in the United States, and (4) an agent for servicing 1-800 customer service line(s) to be accessed by U.S. physicians and VIVUS's U.S. sales representatives for the Products. VIVUS also desires to identify ASD to it called on physician practices in the United States for Products as a competitively priced, full service physician supplier for VIVUS's trade pharmaceutical products listed in Exhibit A, and such other products that may be added to Exhibit A by VIVUS and ASD from time to time. All services to be performed by ASD are described in this Agreement, and are to be performed upon the terms and conditions set forth in this Agreement.

Statement of Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VIVUS, INC.

ALTERNATE SITE DISTRIBUTORS,
INC.

By: /s/ LELAND F. WILSON

By: /s/ STEVEN H. COLLIS

Leland F. Wilson
President and CEO

Steven H. Collis
VP and General Manager

Address and facsimile number:

Address and facsimile number:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"SEC" means the Securities and Exchange Commission.

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

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

EXHIBIT A

List of Products

MUSE alprostadil product line

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

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

EXHIBIT C
VIVUS RETURNED GOODS POLICY

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

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

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