



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

FORM 10-Q

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

For the quarterly period ended June 28, 2003

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: 000-04829

**Nabi Biopharmaceuticals**

(Exact name of registrant as specified in its charter)

**Delaware**

**59-1212264**

(State or other jurisdiction of incorporation or organization)

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

**5800 Park of Commerce Boulevard N.W., Boca Raton, FL 33487**

(Address of principal executive offices, including zip code)

**(561) 989-5800**

(Registrant's telephone number, including area code)

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 twelve 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

Indicate by check mark whether the registrant is an accelerated filer (as defined in Rule 12b-2 of the Exchange Act).  Yes  No

The number of shares outstanding of the registrant's common stock, par value \$0.10 per share, at July 22, 2003 was 44,546,953 shares.

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**Nabi Biopharmaceuticals**

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## PART I. FINANCIAL INFORMATION

## Item 1. Financial Statements

## Nabi Biopharmaceuticals

## CONSOLIDATED BALANCE SHEETS

(Amounts in Thousands)

(UNAUDITED)  
June 28, 2003

December 28, 2002

Assets	(UNAUDITED) June 28, 2003	December 28, 2002
<b>Assets</b>		
<b>Current assets:</b>		
Cash and cash equivalents	\$ 58,611	\$ 51,737
Trade accounts receivable, net	22,466	36,326
Inventories, net	24,306	19,388
Prepaid expenses and other current assets	5,272	5,595
<b>Total current assets</b>	<b>110,655</b>	<b>113,046</b>
<b>Property, plant and equipment, net</b>	<b>100,089</b>	<b>103,706</b>
<b>Other assets:</b>		
Intangible assets, net	15,756	13,050
Other, net	4,010	3,014
<b>Total assets</b>	<b>\$230,510</b>	<b>\$232,816</b>
<b>Liabilities and stockholders' equity</b>		
<b>Current liabilities:</b>		
Trade accounts payable	\$ 7,939	\$ 21,654
Accrued expenses	17,748	16,897
Notes payable, short term	1,500	—
<b>Total current liabilities</b>	<b>27,187</b>	<b>38,551</b>
<b>Notes payable</b>	<b>8,500</b>	<b>—</b>
<b>Other liabilities</b>	<b>7,413</b>	<b>5,236</b>
<b>Total liabilities</b>	<b>43,100</b>	<b>43,787</b>
<b>Stockholders' equity:</b>		
Convertible preferred stock, par value \$.10 per share: 5,000 shares authorized; no shares outstanding	—	—
Common stock, par value \$.10 per share: 75,000 shares authorized; 39,583 and 38,947 shares outstanding, respectively	3,958	3,895
Capital in excess of par value	161,965	159,568
Treasury stock, 617 and 386 shares at cost	(3,769)	(2,140)
Retained earnings	25,256	27,706
<b>Total stockholders' equity</b>	<b>187,410</b>	<b>189,029</b>
<b>Total liabilities and stockholders' equity</b>	<b>\$230,510</b>	<b>\$232,816</b>

See accompanying notes to consolidated financial statements

**Nabi Biopharmaceuticals****CONSOLIDATED STATEMENTS OF OPERATIONS**

(Amount in Thousands, Except Per Share Data)	(UNAUDITED)			
	For the Three Months Ended		For the Six Months Ended	
	June 28, 2003	June 29, 2002	June 28, 2003	June 29, 2002
<b>Sales</b>	\$34,649	\$50,802	\$86,160	\$91,771
<b>Costs and expenses:</b>				
Costs of products sold	15,726	30,009	46,680	55,297
Royalty expense	4,384	4,297	8,299	5,856
<b>Gross Margin</b>	14,539	16,496	31,181	30,618
Selling, general and administrative expense	12,698	10,240	22,837	19,423
Research and development expense	5,936	4,930	11,730	9,342
Other operating expense, principally freight and amortization	175	200	365	398
<b>Operating (loss) income</b>	(4,270)	1,126	(3,751)	1,455
<b>Interest income</b>	164	246	370	893
<b>Interest expense</b>	(62)	(77)	(63)	(1,944)
<b>Other income (expense), net</b>	9	(192)	18	(182)
<b>(Loss) income before benefit (provision) for income taxes</b>	(4,159)	1,103	(3,426)	222
<b>Benefit (provision) for income taxes</b>	1,160	(282)	976	(62)
<b>Net (loss) income</b>	\$ (2,999)	\$ 821	\$ (2,450)	\$ 160
<b>Basic (loss) earnings per share</b>	\$ (0.08)	\$ 0.02	\$ (0.06)	\$ —
<b>Diluted (loss) earnings per share</b>	\$ (0.08)	\$ 0.02	\$ (0.06)	\$ —
<b>Basic weighted average shares outstanding</b>	39,138	38,648	39,050	38,585
<b>Diluted weighted average shares outstanding</b>	39,138	39,562	39,050	39,767

*See accompanying notes to consolidated financial statements*

**Nabi Biopharmaceuticals****CONSOLIDATED STATEMENTS OF CASH FLOWS****(UNAUDITED)**  
**For the Six Months Ended**

(Dollars in Thousands)

	June 28, 2003	June 29, 2002
<b>Cash flow from operating activities:</b>		
Net (loss) income	\$ (2,450)	\$ 160
Adjustments to reconcile net income to net cash provided by (used in) operating activities:		
Depreciation and amortization	5,319	4,901
Provision for doubtful accounts	(3)	366
Provision for slow moving or obsolete inventory	707	—
Write-off of loan origination fees	—	400
Non-cash compensation	640	334
Write-off obsolete fixed assets	21	269
Changes in assets and liabilities:		
Decrease in trade accounts receivable	13,861	1,458
Increase in inventories	(5,625)	(2,092)
Decrease in prepaid expenses and other assets	324	3,788
Increase in other assets	(1,027)	(20)
Decrease in accounts payable and accrued liabilities	(11,062)	(10,645)
Total adjustments	3,155	(1,241)
<b>Net cash provided by (used in) operating activities</b>	<b>705</b>	<b>(1,081)</b>
<b>Cash flow from investing activities:</b>		
Capital expenditures	(1,512)	(3,386)
Expenditures for other assets	(2,886)	(1,275)
<b>Net cash used in investing activities</b>	<b>(4,398)</b>	<b>(4,661)</b>
<b>Cash flow from financing activities:</b>		
Borrowings under debt agreement	10,000	—
Retirement of convertible subordinated notes	—	(78,500)
Purchase of treasury stock	—	(917)
Proceeds from exercise of employee stock options	567	675
<b>Net cash provided by (used in) financing activities</b>	<b>10,567</b>	<b>(78,742)</b>
<b>Net increase (decrease) in cash and cash equivalents</b>	<b>6,874</b>	<b>(84,484)</b>
<b>Cash and cash equivalents at beginning of period</b>	<b>51,737</b>	<b>131,192</b>
<b>Cash and cash equivalents at end of period</b>	<b>\$ 58,611</b>	<b>\$ 46,708</b>

*See accompanying notes to consolidated financial statements*

NOTE 1. OVERVIEW

Nabi Biopharmaceuticals discovers, develops, manufactures and markets products that power the immune system to help people with serious, unmet medical needs. We have a broad product portfolio and significant research capabilities focused on developing and commercializing novel vaccines and antibody-based biopharmaceutical products that prevent and treat infectious, autoimmune and addictive diseases, such as hepatitis B, hepatitis C and *Staphylococcus aureus* infections, immune thrombocytopenia purpura (“ITP”) and nicotine addiction. We have four marketed products, Nabi-HB® [Hepatitis B Immune Globulin (Human)] for the prevention of hepatitis B infections, WinRho SDF® [Rho (D) Immune Globulin Intravenous (Human)] for the treatment of acute, chronic and HIV-related ITP, Autoplex® T [Anti-Inhibitor Coagulant Complex, Heat Treated] and Aloprim™ [(Allopurinol sodium) for injection]. We have a significant clinical trials program including clinical trials of our lead investigational products, StaphVAX® (*Staphylococcus aureus* Polysaccharide Conjugate Vaccine), Altastaph™ [*Staphylococcus aureus* Immune Globulin (Human)], Civacir™ [Hepatitis C Immune Globulin (Human)], and NicVAX™ (Nicotine Conjugate Vaccine). We have a state-of-the-art fractionation facility for the manufacture of Nabi-HB and our investigational antibody products and for contract manufacturing. We also collect specialty and non-specific antibodies for use in our products as well as to supply pharmaceutical and diagnostic customers for the subsequent manufacture of their products.

The consolidated financial statements include the accounts of Nabi Biopharmaceuticals and its subsidiaries. All significant intercompany accounts and transactions were eliminated during consolidation. These statements should be read in conjunction with the Consolidated Financial Statements and Notes included in our Annual Report on Form 10-K for the year ended December 28, 2002.

In the opinion of management, the unaudited consolidated financial statements include all adjustments, consisting of normal recurring adjustments, which, in the opinion of management, are necessary to present fairly our consolidated financial position as of June 28, 2003 and June 29, 2002, the consolidated results of our operations for the three months and six months ended June 28, 2003 and June 29, 2002 and our cash flows for the six months then ended. The interim results of operations are not necessarily indicative of the results that may occur for the fiscal year.

NOTE 2. ACCOUNTING POLICIES

*Accounting estimates:* The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of sales and expenses during the reporting period. Actual results could differ from those estimates.

*New accounting pronouncements:* The Financial Accounting Standards Board Interpretation (“FIN”) No. 46, *Consolidation of Variable Interest Entities*, is effective immediately for all enterprises with variable interests in variable interest entities created after January 31, 2003. The provisions of FIN 46 must be applied to variable interests in variable interest entities created before February 1, 2003 from the beginning of the third quarter of 2003. If an entity is determined to be a variable interest entity, it must be consolidated by the enterprise that absorbs the majority of the entity’s expected losses if they occur, receives a majority of the entity’s expected residual returns if they occur, or both. Where it is reasonably possible that the company will consolidate or disclose information about a variable interest entity, the company must disclose the nature, purpose, size and activity of the variable interest entity and the company’s maximum exposure to loss as a result of its involvement with the variable interest entity in all financial statements issued after January 31, 2003. We are currently reviewing the potential impact of FIN 46 on our financial statements.



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*Basis of presentation:* Certain items in the June 28, 2002 consolidated financial statements have been reclassified to conform to the current year's presentation.

*Stock-Based Compensation:* On December 31, 2002, the Financial Accounting Standards Board issued Statement of Financial Accounting Standards ("SFAS") No. 148, *Accounting for Stock-Based Compensation – Transition and Disclosure*. This Statement amends SFAS No. 123, *Accounting for Stock-Based Compensation*, to provide alternative methods of transition for an entity that voluntarily changes to the fair value based method of accounting for stock-based employee compensation. It also amends the disclosure provisions of that Statement to require prominent disclosure about the effects on reported net income of an entity's accounting policy decisions with respect to stock-based employee compensation. Finally, this Statement amends Accounting Principles Board ("APB") Opinion No. 28, *Interim Financial Reporting*, to require disclosure about those effects in interim financial information. We continue to account for stock-based compensation based on the provisions of APB Opinion No. 25, *Accounting for Stock Issued to Employees*.

The following table summarizes our results as if we had recorded stock-based compensation expense for the three months ended June 28, 2003 and June 29, 2002 and for the six months then ended, based on the provisions of SFAS 123, as amended by SFAS 148:

(Dollars in Thousands, except per share amounts)	For the Three Months Ended	
	June 28, 2003	June 29, 2002
<b>Net (loss) income:</b>		
As reported	\$(2,999)	\$ 821
Compensation expense, net of tax	(1,892)	(744)
Pro forma	\$(4,891)	\$ 77
<b>Basic (loss) earnings per share:</b>		
As reported	\$ (0.08)	\$ 0.02
Compensation expense, net of tax	(0.05)	(0.02)
Pro forma	\$ (0.13)	\$ —
<b>Diluted (loss) earnings per share:</b>		
As reported	\$ (0.08)	\$ 0.02
Compensation expense, net of tax	(0.05)	(0.02)
Pro forma	\$ (0.13)	\$ —
<b>For the Six Months Ended</b>		
(Dollars in Thousands, except per share amounts)	June 28, 2003	June 29, 2002
<b>Net (loss) income:</b>		
As reported	\$(2,450)	\$ 160
Compensation expense, net of tax	(2,652)	(1,512)
Pro forma	\$(5,102)	\$(1,352)
<b>Basic (loss) earnings per share:</b>		
As reported	\$ (0.06)	\$ —
Compensation expense, net of tax	(0.07)	(0.04)
Pro forma	\$ (0.13)	\$ (0.04)
<b>Diluted (loss) earnings per share:</b>		
As reported	\$ (0.06)	\$ —
Compensation expense, net of tax	(0.07)	(0.04)
Pro forma	\$ (0.13)	\$ (0.04)



**NOTE 5. OPERATING SEGMENT INFORMATION**

The following table presents information related to our two reportable segments:

(Dollars in Thousands)	For the Three Months Ended		For the Six Months Ended	
	June 28, 2003	June 29, 2002	June 28, 2003	June 29, 2002
<b>Sales:</b>				
Biopharmaceutical products	\$21,993	\$24,827	\$44,653	\$40,136
Antibody products	12,656	25,975	41,507	51,635
<b>Total</b>	<b>\$34,649</b>	<b>\$50,802</b>	<b>\$86,160</b>	<b>\$91,771</b>
<b>Gross Margin:</b>				
Biopharmaceutical products	\$12,885	\$14,787	\$28,352	\$25,849
Antibody products	1,654	1,709	2,829	4,769
<b>Total</b>	<b>\$14,539</b>	<b>\$16,496</b>	<b>\$31,181</b>	<b>\$30,618</b>
<b>Operating (loss) income:</b>				
Biopharmaceutical products	\$ (2,411)	\$ 2,674	\$ 325	\$ 2,774
Antibody products	(1,859)	(1,548)	(4,076)	(1,319)
<b>Total</b>	<b>\$ (4,270)</b>	<b>\$ 1,126</b>	<b>\$ (3,751)</b>	<b>\$ 1,455</b>

Selling and marketing expense and research and development expense are allocated almost fully to the biopharmaceutical products segment based on the allocation of effort within those functions. General and administrative expenses are allocated to each segment based primarily on relative sales levels.

The following table reconciles reportable segment operating (loss) income to (loss) income before benefit (provision) for income taxes:

(Dollars in Thousands)	For the Three Months Ended		For the Six Months Ended	
	June 28, 2003	June 29, 2002	June 28, 2003	June 29, 2002
Reportable segment operating (loss) income	\$(4,270)	\$1,126	\$(3,751)	\$ 1,455
Unallocated interest income	164	246	370	893
Unallocated interest expense	(62)	(77)	(63)	(1,944)
Unallocated other income (expenses), net	9	(192)	18	(182)
<b>(Loss) income before benefit (provision) for income taxes</b>	<b>\$(4,159)</b>	<b>\$1,103</b>	<b>\$(3,426)</b>	<b>\$ 222</b>

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## NOTE 6. TREASURY STOCK

In separate transactions on June 19, 2003, February 24, 2003 and March 28, 2002, an officer of the Company exercised stock options for 355,735 shares, 67,627 shares and 60,000 shares, respectively of our common stock. Additionally, on May 6, 2003 a member of our Board of Directors exercised stock options for 4,500 shares of our common stock. These purchases were paid for by delivery of 190,683 shares of common stock, 38,358 shares of common stock, 40,107 shares of common stock, and 2,371 shares of common stock, respectively, which were valued at \$1.4 million, \$0.2 million, \$0.2 million and \$16 thousand for the respective transactions. In each of the transactions, the shares delivered had been acquired more than six months earlier by the officer and the member of our Board of Directors. These shares have been accounted for as treasury stock.

On September 19, 2001, our Board of Directors approved the buy back of up to \$5.0 million of our common stock in the open market or in privately negotiated transactions. Repurchases will allow us to have treasury stock available to support our stock option and stock purchase programs. During the first six months of 2002, we purchased 171,483 shares of our common stock for \$0.9 million under this buy back program. We did not purchase any shares of our common stock during the first six months of 2003. To date we have acquired 345,883 shares of our common stock for a total of \$1.9 million since the inception of this buy back program. Repurchased shares have been accounted for as treasury stock.

## NOTE 7. INTANGIBLE ASSETS

The components of our intangible assets are as follows:

(Dollars in Thousands)	June 28, 2003	December 28, 2002
Manufacturing Right	\$13,502	\$10,911
Other intangible assets	4,898	4,603
Less accumulated amortization	(2,644)	(2,464)
<b>Total</b>	<b>\$15,756</b>	<b>\$13,050</b>

In 2000, we entered into contract manufacturing agreements with Dow Biopharmaceuticals Contract Manufacturing Services (“Dow”) to establish commercial manufacturing capability for StaphVAX. The manufacturing process for StaphVAX is being transferred to Dow from our pilot manufacturing plant in Rockville, Maryland. We are using StaphVAX material from initial clinical lots manufactured at Dow under current Good Manufacturing Practices for the immunogenicity study that commenced in June 2003 and we plan to use this StaphVAX material for the confirmatory Phase III trial planned to commence in the second half of 2003. We expect Dow to complete scale-up of manufacturing at the facility and to begin the production of consistency lots of StaphVAX in 2004. The contract manufacturing agreements require us to make certain payments to Dow to secure future access to commercial vaccine manufacturing capacity and to enable Dow to ready its facility for its intended use, the future commercial scale manufacture of StaphVAX. These payments have been recorded as a Manufacturing Right and included in Intangible Assets. The original contract to ready the Dow facility to manufacture StaphVAX, which was scheduled to expire in October 2002, has been extended through July 2003. We expect to sign an amended contract with Dow to complete readying the facility for its intended use, the commercial manufacture of StaphVAX. Amortization of the Manufacturing Right is expected to commence when commercial manufacture of StaphVAX commences at Dow. If we determine that commercial manufacture of StaphVAX will not occur at Dow’s facility, we will write off the Manufacturing Right in the period of that determination.

## NOTE 8. RELATED PARTY TRANSACTIONS

On June 20, 2003, we entered into a retirement agreement with David J. Gury, our former Chief Executive Officer. As a result we incurred a charge of \$3.3 million comprising approximately \$3.0 million in future cash payments and \$0.3 million of costs related to modification to certain of his outstanding stock options. The liability for future cash payments is included in accrued expenses for the current portion, and in other liabilities for the long-term portion, as of June 28, 2003. Future cash payments will be paid over three years commencing January 2004. In addition, we entered into a consulting agreement with Mr. Gury for provision of transition services through December 31, 2003. Mr. Gury continues to serve as non-executive Chairman of our Board of Directors.

In October 2001, we engaged Stonebridge Associates, LLC, an investment bank, the president of which is a member of our Board of Directors, to provide financial advisory services in connection with our review and implementation of a corporate expansion strategy. The agreement, as amended in October 2002, provides for a monthly retainer of \$30 thousand plus hourly charges. If the engagement results in transactions by us involving aggregate consideration paid in excess of a specified level, Stonebridge receives additional fees based upon the consideration paid. Stonebridge acted as our financial adviser in connection with our agreement to acquire the worldwide rights to PhosLo® (Calcium Acetate) from Braintree Laboratories, Inc. announced on June 23, 2003 and will receive a fee of approximately \$0.3 million for its services if the transaction is consummated. Refer to Note 12. We believe that the terms of the engagement with Stonebridge are no less favorable to us than would have been obtained from an unrelated party. During the quarters ended June 28, 2003 and June 29, 2002, we paid \$0.1 million and \$0.2 million, respectively to Stonebridge. In the six month periods ended June 28, 2003 and June 29, 2002, we paid \$0.2 million and \$0.3 million, respectively, to Stonebridge.

## NOTE 9. NOTES PAYABLE

Notes payable consist of the following:

Dollars in Thousands	June 28, 2003	December 28, 2002
Bank indebtedness:		
Term loan	\$10,000	\$—
Total notes payable	10,000	—
Current maturities	(1,500)	—
Notes payable, long-term	\$ 8,500	\$—

On June 20, 2003, we entered into a three year credit facility agreement with Wells Fargo Foothill, Inc., part of Wells Fargo & Company, which allows for borrowings of up to \$35 million. The credit facility is comprised of a term loan of \$10 million, which was drawn on June 20, 2003, and a revolving line of credit facility of up to \$25 million. The term loan is repayable on an amortization schedule over the term of the credit agreement with a balloon payment due at the end of the term. Borrowings under the revolving line of credit are limited by borrowing base restrictions, and are comprised of eligible accounts receivable and inventory balances, as defined. Under the terms of the credit facility, the term loan bears interest at LIBOR plus 4.5% and the revolving line of credit bears interest at either the base rate plus 0.5% or LIBOR plus a percentage based upon our financial performance. Our obligations under the credit agreement are secured by all of the assets of the company. Under the terms of the credit agreement we must comply with certain covenants, including a restriction on payment of dividends. As of June 28, 2003 we complied with these covenants. Under the revolving line of credit facility we had no borrowings and an unused borrowing capacity of approximately \$16 million as of June 28, 2003.

On April 8, 2002, we redeemed our 6.5% Convertible Subordinated Notes (the "Notes") in the aggregate principal amount of \$78.5 million. The Notes were redeemed for cash at 100% of the principal balance plus accrued interest through April 8, 2002. The Notes had an original maturity date of February 1, 2003. In conjunction with the redemption notification made to the holders of the Notes on March 15, 2002, we recorded \$0.4 million as interest expense for the write-off of loan origination fees.

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## NOTE 10. CONTINGENT LIABILITIES

We have entered into employment agreements in 2001, 2002 and 2003, with certain members of our senior management that include certain cash payments in the event of termination of employment, and cash payments and stock option modifications in the event of a change in control of the Company.

## NOTE 11. SUPPLEMENTAL CASH FLOW INFORMATION

(Dollars in Thousands)	For the Six Months Ended	
	June 28, 2003	June 29, 2002
Interest paid	\$ 3	\$3,539
Income taxes (refunded) paid	\$ (441)	\$1,644
<b>Supplemental non-cash financing activities:</b>		
Stock options exercised for common stock	\$1,629	\$ 243

## NOTE 12. PRODUCT ACQUISITION

On June 23, 2003, we announced that we had signed an agreement to acquire the worldwide rights to PhosLo from Braintree Laboratories, Inc. PhosLo is currently approved for the control of elevated phosphate levels (hyperphosphatemia) in patients with kidney failure. The transaction is expected to close on August 4, 2003, subject to the satisfaction of certain closing conditions. Under the terms of the agreement, we will acquire the worldwide rights to PhosLo for payment of \$60.3 million in cash and issuance of 1.5 million shares of our common stock at the closing date and the payment of \$30 million cash over the period ending March 1, 2007. Braintree Laboratories will continue to manufacture the product for us under a long-term manufacturing agreement. Stonebridge Associates, LLC, an investment banking firm, the president of which is a member of our Board of Directors, has acted as our financial adviser in connection with the acquisition of PhosLo and will receive a fee of approximately \$0.3 million for its services if the transaction is consummated. Refer to Note 8.

## NOTE 13. SUBSEQUENT EVENT

On July 17, 2003, we completed private placements of 5,577,000 shares of common stock to a group of institutional investors and realized approximately \$31.3 million, net of issuance costs. Proceeds from the private placement will be used for our acquisition of PhosLo. Refer to Note 12.

[Table of Contents](#)**Item 2. Management's Discussion and Analysis of Financial Condition and Results of Operations**

The following is a discussion and analysis of the major factors contributing to our financial condition and results of operations for the three months and six months ended June 28, 2003 and June 29, 2002. The discussion and analysis should be read in conjunction with the Consolidated Financial Statements and Notes thereto.

**RESULTS OF OPERATIONS**

Information concerning our sales by operating segments is set forth in the following tables:

(Dollars in Thousands)	For the Three Months Ended			
	June 28, 2003		June 29, 2002	
<b>Biopharmaceutical products:</b>				
-Nabi-HB	\$ 7,139	20.6%	\$ 8,682	17.1%
-WinRho SDF	12,792	36.9	10,689	21.1
-Other biopharmaceuticals	2,062	6.0	5,456	10.7
<b>Biopharmaceutical subtotal</b>	<b>21,993</b>	<b>63.5</b>	<b>24,827</b>	<b>48.9</b>
<b>Antibody products:</b>				
-Specialty antibodies	6,395	18.4	8,178	16.1
-Non-specific antibodies	6,261	18.1	17,797	35.0
<b>Antibody subtotal</b>	<b>12,656</b>	<b>36.5</b>	<b>25,975</b>	<b>51.1</b>
<b>Total</b>	<b>\$34,649</b>	<b>100.0%</b>	<b>\$50,802</b>	<b>100.0%</b>

(Dollars in Thousands)	For the Six Months Ended			
	June 28, 2003		June 29, 2002	
<b>Biopharmaceutical products:</b>				
-Nabi-HB	\$17,403	20.2%	\$17,663	19.2%
-WinRho SDF	24,112	28.0	14,615	15.9
-Other biopharmaceuticals	3,138	3.6	7,858	8.6
<b>Biopharmaceutical subtotal</b>	<b>44,653</b>	<b>51.8</b>	<b>40,136</b>	<b>43.7</b>
<b>Antibody products:</b>				
-Specialty antibodies	12,478	14.5	15,336	16.7
-Non-specific antibodies	29,029	33.7	36,299	39.6
<b>Antibody subtotal</b>	<b>41,507</b>	<b>48.2</b>	<b>51,635</b>	<b>56.3</b>
<b>Total</b>	<b>\$86,160</b>	<b>100.0%</b>	<b>\$91,771</b>	<b>100.0%</b>

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FOR THE THREE MONTHS ENDED JUNE 28, 2003 AND JUNE 29, 2002

*Sales.* Sales for the second quarter of 2003 were \$34.6 million compared to sales of \$50.8 million for the second quarter of 2002.

Biopharmaceutical sales were \$22.0 million in the second quarter of 2003 compared to \$24.8 million in the second quarter of 2002. In the second quarter of 2003, biopharmaceutical sales benefited from increased sales of WinRho SDF® [Rho (D) Immune Globulin Intravenous (Human)] which increased almost 20% as compared to the second quarter of 2002. Based on our review of patient utilization data, patient use of WinRho SDF has attained record levels in the second quarter of 2003. This increase combined with increases in wholesaler and distributor inventory in response to increased patient demand have driven higher sales of WinRho SDF reported this quarter. Sales of Nabi-HB® [Hepatitis B Immune Globulin (Human)] decreased 18% from second quarter 2002 levels. The most significant use of Nabi-HB is for the treatment of hepatitis B positive liver transplant patients in the period of and following liver transplant. As reported by the United Network for Organ Sharing (“UNOS”), in the current year to date period liver transplants for hepatitis B patients have declined approximately 30% from the prior year. The effects of this decrease were partially offset by the beneficial impact of programs to increase market share for Nabi-HB. During the second quarter of 2002, sales of Nabi-HB to our wholesaler and distributor customers benefited from our management of the transition to product manufactured at our Boca Raton facility following licensure of the facility in October 2001. In the second half of 2001 we had reduced wholesaler and distributor inventories of Nabi-HB manufactured at the then contract manufacturer’s facility in anticipation of our licensure to manufacture of Nabi-HB at our Boca Raton biopharmaceutical manufacturing facility. Other biopharmaceuticals sales primarily comprise sales of Autoplex® T [Anti-Inhibitor Coagulant Complex, Heat Treated] and Aloprim™ [(Allopurinol sodium) for injection]. The decrease in other biopharmaceuticals sales is due to lower sales of Autoplex T and Aloprim compared to the second quarter of 2002. Decreased sales of Autoplex T are the result of product supply shortfalls from the manufacturer that may continue through 2003. Aloprim sales, which were lower in the second quarter of 2003 compared to the second quarter of 2002 were impacted by product supply shortfalls from the manufacturer of the product in the first quarter of 2003 that resulted in patient treatments being supported by alternate products. Aloprim product supply from the manufacturer resumed in the second quarter of 2003 and we anticipate product sales for the full year to return to 2002 patient use levels. Aloprim sales in the second quarter of 2002 benefited from receipt of two backordered lots that were substantially sold in that period.

Total antibody sales in the second quarter of 2003 were \$12.7 million compared to \$26.0 million in the second quarter of 2002. Non-specific antibody sales decreased due to the impact of completing our obligations under a single contract in April 2003, which was retained by us following the sale of the majority of the antibody collection business and testing laboratory in September 2001. The purchaser of the majority of the antibody collection business and testing laboratory supplied us with non-specific antibodies to fulfill this obligation at the selling price under this contract. As a result, we did not record any margin under this arrangement. Because we retained the risk of credit loss associated with this customer we recorded revenues on these sales. Such non-specific antibody sales totaled \$0.2 million in the second quarter of 2003 and \$13.4 million in the second quarter of 2002. Non-specific antibody sales from our antibody collection centers were \$6.0 million in the second quarter of 2003 compared to \$4.4 million in the second quarter of 2002. Specialty antibody sales were \$6.4 million in the second quarter of 2003 compared to \$8.2 million in the second quarter of 2002, a decrease of approximately \$1.8 million, primarily reflecting reduced sales of rabies and RhoD antibodies. We have a contractual commitment to supply substantial quantities of RhoD antibodies to the purchaser of the majority of our antibody collection and laboratory testing business at a low margin through 2004. This commitment limited our ability to sell these antibodies to other customers at higher margins during the second quarter of 2003 and we will be limited in our ability to sell these antibodies to other customers throughout 2003.

*Gross margin.* Gross margin, for the second quarter of 2003 was \$14.5 million, or 42% of sales, compared to \$16.5 million, or 32% of sales in the second quarter of 2002. The dollar decrease in gross profit for the second quarter of 2003 compared to the second quarter of 2002 primarily reflects decreased sales of Nabi-HB and Aloprim. During the second quarter of 2003 we carried out a scheduled



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maintenance shut down at our Boca Raton manufacturing facility. As a result, we incurred excess plant capacity expense of \$1.8 million in the second quarter of 2003. This excess capacity expense compared to an excess plant capacity expense of \$1.6 million in the second quarter of 2002, the facility's third quarter of commercial operation. Gross margin in each of the second quarters of 2003 and 2002 benefited from gross non-performance penalty amounts from the manufacturer of Autoplex T of \$2.1 million and \$0.5 million, respectively.

Royalty expense for the second quarter of 2003 was \$4.4 million, or 20% of biopharmaceutical sales compared to \$4.3 million, or 17% of biopharmaceutical sales, in the second quarter of 2002, primarily reflecting increased sales of WinRho SDF.

*Selling, general and administrative expense.* Selling, general and administrative expense was \$12.7 million for the second quarter of 2003 compared to \$10.2 million, in the second quarter of 2002. Increased selling, general and administrative expense in the second quarter of 2003 included a charge of \$3.3 million related to the retirement of our former Chief Executive Officer.

*Research and development expense.* Research and development expense was \$5.9 million for the second quarter of 2003 compared to \$4.9 million in the second quarter of 2002. Consistent with the strategic focus of our research and development activities, 60% of research and development expense in the second quarter of 2003 has been to support activity under our Gram-positive infections program. Our primary activities in the second quarter of 2003 were to successfully advance the manufacturing process for StaphVAX® (*Staphylococcus aureus* Polysaccharide Conjugate Vaccine), including the formulation of bulk product and preparation for the upcoming confirmatory Phase III clinical trial of StaphVAX. On June 19, 2003, we announced the start of a clinical trial to evaluate the antibody level response of a limited number of clinical trial patients (immunogenicity) of StaphVAX using a lot of vaccine that was manufactured at our contract manufacturer's site. This lot of vaccine is also intended for use in our confirmatory Phase III clinical trial for StaphVAX planned to commence later this year. In the second quarter, we also concluded an agreement with Duke University to conduct a Phase II clinical trial of Altastaph™ [*Staphylococcus aureus* Immune Globulin (Human)] in low birth weight newborns that is planned to commence in the third quarter of 2003. Other significant clinical activities included continuation of a Phase I/II clinical trial for NicVAX™ (Nicotine Conjugate Vaccine) in smokers and ex-smokers in The Netherlands. This trial is now fully enrolled. We expect to announce results from this Phase I/II trial in early 2004 and, based on initial safety data generated in the clinical trial in The Netherlands, we plan to commence a Phase II clinical trial of NicVAX™ in smokers in the US in the third quarter of 2003. This US based Phase II trial will be substantially funded by our National Institute of Drug Abuse ("NIDA") grant. Research and development activities in the second quarter of 2003 further included costs related to ongoing support for our Civacir™ [Hepatitis C Immune Globulin (Human)] Phase I/II clinical trial, which has been completed and for which we expect to announce results later this year, and to support our Nabi-HB Intravenous Biologics License Application filed with the U.S. Food and Drug Administration in November 2002.

*Interest income.* Interest income for the second quarter of 2003 was \$0.2 million compared to \$0.2 million for the comparable period of 2002. Interest income is earned from investing cash and cash equivalents on hand in money market funds and auction rate securities with maturities of three months or less.

*Interest expense.* Interest expense for the second quarter of 2003 was \$62 thousand compared to \$77 thousand for the second quarter of 2002. Interest expense in the second quarter of 2003 represents interest accrued on the credit facility entered into in June 2003.

*Other factors.* The provision for income taxes reflected a benefit of \$1.2 million for the second quarter of 2003, compared to a provision of \$0.3 million for the second quarter of 2002. The 28% effective tax rate in the second quarter of 2003 differs from the statutory rate of 35% primarily due to expected tax benefits arising from research and development tax credits and foreign sales credits.

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FOR THE SIX MONTHS ENDED JUNE 28, 2003 AND JUNE 29, 2002

*Sales.* Sales for the first six months of 2003 were \$86.2 million compared to sales of \$91.8 million for the first six months of 2002.

Biopharmaceutical sales in the first six months of 2003 were \$44.7 million compared to \$40.1 million for the first six months of 2002, an increase of 11%. Sales of WinRho SDF increased 65% in the first six months of 2003 compared to the first six months of 2002. Patient use of WinRho SDF has attained record levels in 2003. This increased patient usage of the product during the first six months of 2003 combined with increases in wholesaler and distributor inventory in response to increased patient demand have driven higher sales of WinRho SDF. In addition, sales of WinRho SDF in the first half of 2002 were negatively impacted by an inventory build-up by our wholesaler and distributor customers in 2001 in response to product supply shortages from the manufacturer of this product in 2001. Sales of Nabi-HB in the first half of 2003 were essentially even with the sales levels reported in the first half of 2002. The most significant use of Nabi-HB is for the treatment of hepatitis B positive liver transplant patients in the period of and following liver transplant. As reported by UNOS, in the current year to date period liver transplants for hepatitis B patients have declined approximately 30% from the prior year. The effects of this decrease were offset by the beneficial impact of programs to increase our market share for Nabi-HB resulting in year to date patient utilization of Nabi-HB being essentially even, in line with our year to date reported sales of Nabi-HB. Sales of Nabi-HB in the first half of 2002 benefited from completion of the transition to Nabi-HB product manufactured in our Boca Raton facility in that period. Other biopharmaceuticals sales primarily comprise sales of Autoplex T and Aloprim. Decreased sales of Autoplex T are the result of product supply shortfalls from the manufacturer that may continue through 2003. Aloprim sales were lower in the six months ended June 28, 2003 compared to the comparable period of 2002. Aloprim sales in the six month period were impacted by product supply shortfalls from the manufacturer of the product in the first quarter of 2003 which resulted in patient treatment being supported by alternate products. Aloprim supply from the manufacturer resumed in April 2003 and we anticipate Aloprim product sales for the full year to return to 2002 patient use levels. Aloprim sales in the first half of 2002 benefited from receipt of two back ordered lots that were substantially sold in that period.

Total antibody sales in the first six months of 2003 were \$41.5 million compared to \$51.6 million in the comparable period of 2002. Non-specific antibody sales include shipments to a single customer under a supply contract that we fulfilled in April 2003, which was retained by us following the sale of the majority of the antibody collection business and testing laboratory in September 2001. The purchaser of the majority of the antibody collection business and testing laboratory supplied us with non-specific antibodies to fulfill this obligation at the selling price under this contract. As a result, we did not record any margin under this arrangement. Because we retained the risk of credit loss with this customer, we recorded revenues on these sales. Such non-specific antibody sales totaled \$18.6 million for the first six months of 2003 and \$27.6 million in the first six months of 2002. Non-specific antibody sales from our own antibody collection centers were \$10.5 million in the first six months of 2003 compared to \$8.6 million in the comparable period of 2002. Specialty antibody sales were \$12.5 million in the six months ended June 28, 2003 compared to \$15.3 million in the comparable period of 2002, a decrease of approximately \$2.8 million. This decrease primarily reflects reduced sales of rabies, hepatitis B and RhoD antibodies. Hepatitis B antibodies produced at our antibody collection centers were primarily retained by us to support the manufacture of Nabi-HB in 2003, limiting the amount of these antibodies available for sale. Hepatitis B antibodies are the primary raw material in the manufacture of Nabi-HB. In addition, we have a contractual commitment to supply substantial quantities of RhoD antibodies to the purchaser of the majority of our antibody collection and laboratory testing business at a low margin through 2004. This commitment limited our ability to sell these antibodies to other customers at higher margins during the first six months of 2003 and we will be limited in our ability to sell these antibodies to other customers throughout 2003. The impact of decreased rabies, hepatitis B and RhoD specialty antibody sales were partially offset by increased tetanus antibody sales.

*Gross margin.* Gross margin for the first six months of 2003 was \$31.2 million, or 36% of sales, compared to \$30.6 million, or 33% of sales, in the first six months of 2002. The increase in gross profit for the first six months of 2003 compared to the first six months of 2002 primarily reflects the increased proportion of higher margin biopharmaceutical sales compared to total sales reported this period. During the first six months of 2003, we incurred excess plant capacity expense of \$1.8 million, which was due to a scheduled plant maintenance shutdown in the second quarter of 2003. Excess plant capacity expense

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was \$2.1 million in the six months ended June 29, 2002, representing a period of the facility's initial commercial operation. Gross margin in the first six months of 2003 and 2002 benefited from gross non-performance penalty amounts from the manufacturer of Autoplex T of \$4.3 million and \$1.7 million, respectively. Offsetting these gross margin gains were reduced margin from sales of antibody products, increased costs of manufacture for Nabi-HB and the impact of lower sales of Aloprim.

Royalty expense for the first six months of 2003 was \$8.3 million, or 19% of biopharmaceutical sales, compared to \$5.9 million, or 15% of biopharmaceutical sales, in the comparable period of 2002, primarily reflecting increased sales of WinRho SDF.

*Selling, general and administrative expense.* Selling, general and administrative expense was \$22.8 million for the first six months of 2003 compared to \$19.4 million in the comparable period of 2002. Increased selling, general and administrative expense in the first six months of 2003 included a charge of \$3.3 million related to the retirement of our former Chief Executive Officer as well as increased use of consultants compared to the comparable period of 2002.

*Research and development expense.* Research and development expense was \$11.7 million for the first six months of 2003 compared to \$9.3 million in the comparable period of 2002. Consistent with the strategic focus of our research and development activities, 55% of research and development expense in 2003 has been to support activity under our Gram-positive infections program. Our primary activities in the first six months of 2003 were to successfully advance the manufacturing process for StaphVAX, including the formulation of bulk StaphVAX product and preparation for the upcoming confirmatory Phase III clinical trial of StaphVAX. On June 19, 2003, we announced the start of a clinical trial to evaluate the immunogenicity of StaphVAX using a lot of vaccine that was manufactured at our contract manufacturer's site. This lot of vaccine is also intended for use in our confirmatory Phase III clinical trial of StaphVAX planned to commence later this year. In addition, we concluded an agreement with Duke University to conduct a Phase II clinical trial of Altastaph™ in low birth weight newborns that is scheduled to commence in the third quarter of this year. In other significant clinical activities we initiated a second Phase I/II clinical trial for NicVAX in smokers and ex-smokers in The Netherlands. This trial is now fully enrolled. We expect to announce results from this Phase I/II trial in early 2004. Based on the initial safety data obtained from the clinical trial conducted in The Netherlands, we plan to commence a Phase II clinical trial of NicVAX in smokers in the U.S. in the third quarter of 2003. This U.S. based Phase II trial will be substantially funded by our NIDA grant. Research and development activities in the first six months of 2003 also included costs related to ongoing support for our Civacir Phase I/II clinical trial, which has been completed and for which we expect to announce results later this year, and to support our Nabi-HB Intravenous Biologics License Application filed with the U.S. Food and Drug Administration in November 2002.

*Interest income.* Interest income for the first six months of 2003 was \$0.4 million compared to \$0.9 million for the comparable period of 2002. Interest income is earned from investing cash and cash equivalents on hand in money market funds and auction rate securities with maturities of three months or less. The decrease in interest income is due to lower average outstanding cash balances and reduced interest rates. In September 2001, we received proceeds of \$135 million, net of repayment of then outstanding bank debt and closing costs, from the sale of the majority of our antibody collection business and testing laboratory. These funds were invested in the financial instruments discussed above. In April 2002, a portion of these funds was utilized to redeem our \$78.5 million 6.5% Convertible Subordinated Notes (the "Notes").

*Interest expense.* Interest expense for the first half of 2003 was \$63 thousand compared to \$1.9 million for the first half of 2002. The 2003 amount represents interest accrued on the credit facility entered into on June 20, 2003. The 2002 expense relates to interest on the 6.5% Convertible Subordinated Notes which were redeemed in April 2002.

*Other factors.* The provision for income taxes reflected a benefit of \$1.0 million for the six months ended June 28, 2003, compared to a provision of \$62 thousand for the comparable period in 2002. The 29% effective tax rate for the six months of 2003 differs from the statutory rate of 35% primarily due to expected tax benefits arising from research and development tax credits and foreign sales credits.

## LIQUIDITY AND CAPITAL RESOURCES

Our cash and cash equivalents at June 28, 2003 were \$58.6 million.

Cash provided by operations for the six months ended June 28, 2003 was \$0.7 million primarily reflecting decreased trade payables and accrued expenses of \$11.1 million, including settlement of our prepaid property insurance premiums and amounts accrued for incentive compensation earned in 2002. In addition, cash used by operations reflected increased inventory of \$5.6 million primarily resulting from increased levels of production of Nabi-HB during the first six months of 2003 to ensure adequate inventory on hand, including inventory to support our market needs during the scheduled plant maintenance shut down that occurred in the second quarter of 2003. These uses of cash were partially offset by reductions in trade receivables of approximately \$13.9 million and cash generated from operations.

On June 20, 2003, we entered into a credit facility agreement with Wells Fargo Foothill, Inc., part of Wells Fargo & Company, which allows for borrowings of up to \$35 million. The credit facility is comprised of a term loan of \$10 million, which was funded on June 20, 2003, and a revolving line of credit up to \$25 million. The credit facility has a term of three years. The term loan is repayable on an amortization schedule over the term of the credit agreement with a balloon payment due at the term of the credit agreement. Borrowings under the revolving line of credit are limited by borrowing base restrictions, and are comprised of eligible accounts receivable and inventory balances, as defined. Under the terms of the credit agreement the term loan bears interest at LIBOR plus 4.5% and the revolving line of credit bears interest at either the base rate plus 0.5% or LIBOR plus a percentage based upon our financial performance. Our obligations under the credit agreement are secured by all of our assets. Under terms of the credit agreement we must comply with certain covenants, including a restriction on payment of dividends. As of June 28, 2003 we complied with these covenants. As of June 28, 2003, we had no borrowings and an unused borrowing capacity of approximately \$16 million under the revolving line of credit agreement.

In 2000, we entered into contract manufacturing agreements with Dow Biopharmaceuticals Contract Manufacturing Services (“Dow”) to establish commercial manufacturing capability for StaphVAX. During the six months ended June 28, 2003, we paid \$2.6 million related to the acquisition of a Manufacturing Right at the Dow facility. The acquired Manufacturing Right is recorded as an Intangible Asset in our financial statements. The original contract to ready the Dow facility to manufacture StaphVAX, which was scheduled to expire in October 2002, has been extended through July 2003. We expect to sign an amended contract with Dow to complete readying the facility for its intended use, the commercial manufacture of StaphVAX. This modification will require us to make significant additional payments to Dow, expected to be in excess of \$15 million, relating to the acquisition of the Manufacturing Right. We also expect to have a right to cancel the amended Dow agreements for a limited period after the amendment is executed.

On June 23, 2003, we announced that we had signed an agreement to acquire the worldwide rights to PhosLo from Braintree Laboratories, Inc. Under the terms of the agreement, we will acquire the rights to PhosLo for the payment of \$60.3 million in cash and issuance of 1.5 million shares of our common stock at the closing date for the transaction, currently anticipated as August 4, 2003, and the payment of \$30 million cash over the period ending March 1, 2007.

Capital expenditures were \$1.5 million for the first six months of 2003. At June 28, 2003, we had total capital commitments of \$2.5 million for the remainder of 2003 related to construction of our laboratory and cold storage facilities on our property in Boca Raton, Florida.

In connection with an agreement related to the retirement of our former Chief Executive Officer announced on June 20, 2003, we incurred a charge of \$3.3 million including \$3.0 million in future cash payments over the three years commencing January 2004 and \$0.3 million of costs related to modification of the rights under certain of his outstanding stock options.

On September 19, 2001, our Board of Directors approved the expenditure of up to \$5.0 million to repurchase shares of our common stock in the open market or in privately negotiated transactions. Repurchases will allow us to have treasury stock available to support our stock option and stock purchase programs. We have acquired no shares under this program in 2003. We will evaluate market conditions in the future and make decisions to repurchase additional shares of our common stock on a case-by-case basis in accordance with our Board of Directors’ approval.

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We believe that cash flow from operations and cash and cash equivalents on hand, together with our ability to borrow funds should the need arise, will be sufficient to meet our anticipated cash requirements for operations for at least the next twelve months. In addition, in July we completed a private placement of 5,577,000 shares of common stock to a group of institutional investors and received cash of approximately \$31.3 million, net of issuance costs. Proceeds from the equity placement will be used for our acquisition of PhosLo.

### CRITICAL ACCOUNTING POLICIES

The preparation of financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosure of contingent assets and liabilities at the date of the financial statements and the reported amounts of sales and expenses during the reporting period. Actual results could differ from those estimates.

#### *Intangible Assets*

In 2000, we entered into contract manufacturing agreements with Dow to establish commercial manufacturing capability for StaphVAX. The manufacturing process for StaphVAX is being transferred to Dow from our pilot manufacturing plant in Rockville, Maryland. We are using StaphVAX material from initial clinical lots manufactured at Dow under current Good Manufacturing Practices for the immunogenicity study that commenced in June 2003, and we intend to use this StaphVAX material for the subsequent confirmatory Phase III trial, planned to commence in the second half of 2003. We expect Dow to complete scale-up of manufacturing at the facility and to begin the production of consistency lots of StaphVAX in 2004. The contract manufacturing agreements require us to make certain payments to Dow to secure future access to commercial vaccine manufacturing capacity and to enable Dow to ready its facility for its intended use, the future commercial scale manufacture of StaphVAX. These payments have been recorded as a Manufacturing Right and included in Intangible Assets. Amortization of the Manufacturing Right is expected to commence when commercial manufacture of StaphVAX commences at Dow. Management believes that we will manufacture StaphVAX at Dow's facility at commercial scale in future periods. If we determine that manufacture of StaphVAX will not occur at Dow's facility, we will write off the Manufacturing Right in the period of that determination. As of June 28, 2003, and December 28, 2002, the Manufacturing Right was \$13.5 million and \$10.9 million, respectively.

#### *Property, Plant and Equipment and Depreciation*

We incurred \$90.3 million to construct our biopharmaceutical manufacturing facility in Boca Raton, Florida. We received approval to manufacture our antibody-based biopharmaceutical product, Nabi-HB, at this facility from the FDA in October 2001. In constructing the facility we incurred approximately \$26.8 million in direct costs of acquiring the building, building systems, manufacturing equipment and computer systems. We also incurred a total of \$63.5 million of costs related to validation of the facility to operate in a FDA approved environment and capitalized interest. Costs related to validation and capitalized interest have been allocated to the building, building systems, manufacturing equipment and computer systems. Buildings and building systems are depreciated on a straight-line basis over 39 years and 20 years, respectively, the estimated useful lives of these assets. The specialized manufacturing equipment and computer systems are depreciated using the units-of-production method of depreciation subject to a minimum level of depreciation based on straight-line depreciation. The units-of-production method of depreciation is based on management's estimate of production levels. Management believes the units-of-production method is appropriate for these specialized assets. Use of the units-of-production method of depreciation may result in significantly different financial results of operation than straight-line depreciation in periods of lower than average or higher than average production levels. However, this differential is

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limited in periods of lower than average production, as we record a minimum of 60% of the depreciation that would have otherwise been recorded had we used the straight-line method. In the first six months of 2003, we recorded additional depreciation of \$1.0 million under this policy, including additional depreciation of \$0.7 million in the second quarter ended June 28, 2003. For the comparable periods of 2002 we recorded additional depreciation of \$1.0 million and \$0.5 million, respectively.

### *Accounts Receivable and Revenue Recognition*

In the first six months of 2003 and 2002, we had biopharmaceutical product sales of \$44.7 million and \$40.1 million, respectively. At June 28, 2003 and December 28, 2002 we had \$22.5 million and \$36.3 million respectively of accounts receivable including \$14.7 million and \$22.2 million respectively from biopharmaceuticals sales. Our primary customers for biopharmaceutical products are pharmaceutical wholesalers. In accordance with our revenue recognition policy, revenue from biopharmaceutical product sales is recognized when title and risk of loss are transferred to the customer. Reported sales are net of estimated customer prompt pay discounts, contractual allowances in accordance with managed care agreements, government payer rebates and other wholesaler fees. At June 28, 2003 and December 28, 2002 we had \$4.5 million and \$3.9 million respectively, recorded in accrued expenses related to these contractual obligations.

### *Inventory and Reserves for Slow Moving or Obsolete Inventory*

At June 28, 2003 and December 28, 2002, we had inventory on hand of \$24.3 million and \$19.4 million respectively. In the six months ended June 28, 2003, we recorded a provision for inventory valuation allowance of \$0.7 million. For the comparable period of 2002 we did not record any provision for inventory valuation allowance. We review inventory on hand at each reporting period to assess that inventory is stated at the lower of cost or market and that inventory on hand is saleable. Our assessment of inventory includes review of selling price compared to inventory carrying cost, recent sales trends, our expectations for sales trends in future periods and product shelf life expiration. Based on these assessments, we provide for an inventory valuation allowance in the period in which the requirement is identified.

## NEW ACCOUNTING PRONOUNCEMENTS

The Financial Accounting Standards Board Interpretation ("FIN") No. 46, *Consolidation of Variable Interest Entities*, is effective immediately for all enterprises with variable interests in variable interest entities created after January 31, 2003. The provisions of FIN 46 must be applied to variable interests in variable interest entities created before February 1, 2003 from the beginning of the third quarter of 2003. If an entity is determined to be a variable interest entity, it must be consolidated by the enterprise that absorbs the majority of the entity's expected losses if they occur, receives a majority of the entity's expected residual returns if they occur, or both. Where it is reasonably possible that the company will consolidate or disclose information about a variable interest entity, the company must disclose the nature, purpose, size and activity of the variable interest entity and the company's maximum exposure to loss as a result of its involvement with the variable interest entity in all financial statements issued after January 31, 2003. We are currently reviewing the potential impact of FIN 46 on our financial statements.

## FORWARD LOOKING STATEMENTS

The part of this Quarterly Report on Form 10-Q captioned "Management's Discussion and Analysis of Financial Condition and Results of Operations" contains certain forward-looking statements, which involve risks and uncertainties. These statements are based on current expectations, estimates and projections about the industries in which we operate, management's beliefs and assumptions made by management. Readers should refer to a discussion under "Risk Factors" contained in our Annual Report on Form 10-K for the year ended December 28, 2002 concerning certain factors that could cause our actual results to differ materially from the results anticipated in such forward-looking statements. Said discussion is hereby incorporated by reference into this Quarterly Report.

**Item 3. Quantitative and Qualitative Disclosures About Market Risk**

We do not engage in trading market risk sensitive instruments or purchasing hedging instruments or “other than trading” instruments that are likely to expose us to significant market risk, whether interest rate, foreign currency exchange, commodity price or equity price risk.

*Interest Rate Risk.* At June 28, 2003, we had a term loan under our credit facility of \$10.0 million and cash and cash equivalents in the amount of \$58.6 million. Cash equivalents consist of money market funds and auction rate securities with maturities of three months or less placed with major financial institutions.

Our exposure to market risk relates to our borrowings and to our cash and investments. Our borrowings under our credit facility are subject to changes in interest rates, specifically LIBOR, and expire in June 2006. We maintain an investment portfolio of money market funds, qualified purchaser funds, and auction rate securities. The securities in our investment portfolio are not leveraged, and are, due to their very short-term nature, subject to minimal interest rate risk. We currently do not hedge interest rate exposure. Because of the short-term maturities of our investments, we do not believe that a change in market rates would have a significant negative impact on the value of our investment portfolio.

The primary objective of our investment activities is to preserve principal while at the same time maximizing yields without significantly increasing risk. To achieve this objective, we invest our excess cash in debt instruments of the U.S. Government and its agencies, bank obligations, repurchase agreements and high-quality corporate issuers, and, by policy, restrict our exposure to any single corporate issuer by imposing concentration limits. To minimize the exposure due to adverse shifts in interest rates, we maintain investments at an average maturity of generally less than one month. The table below presents the principal amount and weighted-average interest rate for our investment and debt portfolio:

Dollars in Millions	Fair Value at June 28, 2003
<b>Assets:</b>	
Cash equivalents	\$58.6
Average interest rate	1.3%
<b>Liabilities:</b>	
Notes payable	\$10.0
Average interest rate	6.5%

**Item 4. Controls and Procedures**

Within 90 days of filing this report, an evaluation was performed under the supervision and with the participation of our management, including the Chief Executive Officer and Chief Financial Officer, of the effectiveness of the design and operation of our disclosure controls and procedures. Based on that evaluation, our management, including the Chief Executive Officer and Chief Financial Officer, believes that our disclosure controls and procedures are adequately designed to ensure that the information that we are required to disclose in this report has been accumulated and communicated to our management, including our Chief Executive Officer and Chief Financial Officer, as appropriate, to allow timely decisions regarding such required disclosure. There have been no significant changes in our internal controls or in other factors that could significantly affect these controls subsequent to the evaluation.

**PART II OTHER INFORMATION****Item 1. Legal Proceedings**

We are a party to litigation in the ordinary course of business. We do not believe that such litigation will have a material adverse effect on our future business, financial condition or results of operations.

During 2002, we were named as one of over 40 pharmaceutical and biopharmaceutical defendants in three lawsuits filed in the Superior Court of the State of California; two filed in the County of San Francisco on August 23, 2002 and September 9, 2002 and one filed in the County of Alameda on July 12, 2002. To date we have been served in only one suit. All three cases were removed to United States District Court for the Northern District of California. The cases each involve claims that insurers and consumers of the defendants' products made overpayments for those products based on an alleged manipulation of Average Wholesale Price, a standard which governs amounts that physicians, hospitals and other providers receive as reimbursement for purchases of the defendants' products. The plaintiffs seek damages, equitable relief and disgorgement of profits. The three lawsuits are in their preliminary stages. As described in our Quarterly Report on Form 10-Q for the quarter ended March 29, 2003, all three cases have been transferred to the United States District Court for the District of Massachusetts for inclusion in the consolidated multi-district litigation ("MDL"). We were not a named defendant in this proceeding's Master Consolidated Complaint, nor were we included as a defendant in the Amended Master Consolidated Complaint, which was filed by the MDL plaintiffs in June 2003. However, we are still a named defendant in the California cases that were transferred to Massachusetts federal court.

**Item 2. Changes in Securities and Use of Proceeds**

Under the terms of our credit agreement with Wells Fargo Foothill, Inc., we may not declare or pay dividends on our common stock.

**Item 3. Defaults Upon Senior Securities**

None.

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

The following matters were approved at our annual stockholder's meeting, which was held on May 16, 2003.

- (a) Election of the following persons to the Board of Directors:

DIRECTOR	VOTES	
	FOR	WITHHELD
David L. Castaldi	36,006,729	393,595
Geoffrey F. Cox	35,954,033	446,291
George W. Ebright	35,735,143	665,181
David J. Gury	33,691,500	2,708,824
Richard A. Harvey, Jr.	33,906,212	2,494,112
Linda Jenckes	35,996,325	403,998
Thomas H. McLain	33,848,191	2,552,133
Stephen G. Sudovar	35,705,104	695,220



(b) Proposal to approve an amendment to the Company's 2000 Employee Stock Purchase Plan:

VOTES		
FOR	AGAINST	ABSTAIN
35,021,345	1,262,685	116,293

**Item 5. Other Information**

None.

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

(a) Exhibits:

- 3.1 By-Laws of Nabi Biopharmaceuticals, as amended.
- 10.1\* Development and License Agreement between Nabi Biopharmaceuticals and Pharmacia and Upjohn Company dated as of April 3, 2003.
- 10.2\* Loan and Security Agreement by and among Nabi Biopharmaceuticals, the Lenders that are signatories thereto, and Wells Fargo Foothill, Inc., dated as of June 18, 2003.
- 10.3\* Asset Purchase Agreement by and between Nabi Biopharmaceuticals and Braintree Laboratories, Inc. dated as of June 23, 2003
- 99.1 Certification of Chief Executive Officer and Chief Financial Officer as required by 18 U.S.C. 1350

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\* The Company has requested confidential treatment of the redacted portions of this exhibit pursuant to Rule 24b-2, under the Securities Exchange Act of 1934, as amended, and has separately filed a complete copy of this exhibit with the Securities and Exchange Commission.

(b) Reports on Form 8-K:

On April 23, 2003, we filed a current report on Form 8-K, reporting under Item 7, "Financial Statements, Pro Forma Financial Information and Exhibits" and Item 9, "Regulation FD Disclosure" furnishing information pursuant to Item 12, "Results of Operations and Financial Condition."

On June 23, 2003, we filed a current report on Form 8-K, reporting under Item 5, "Other Events and Required FD Disclosure."

**Nabi Biopharmaceuticals**

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**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.

Date: July 25, 2003

**Nabi Biopharmaceuticals**

By: /s/ Mark Smith

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**Mark L. Smith**

Senior Vice President, Finance, Chief Financial Officer, Chief Accounting Officer and Treasurer

I, Thomas H. McLain, certify that:

1. I have reviewed this quarterly report on Form 10-Q of Nabi Biopharmaceuticals;
2. Based on my knowledge, this quarterly report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this quarterly report;
3. Based on my knowledge, the financial statements, and other financial information included in this quarterly report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this quarterly report;
4. The registrant's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-14 and 15d-14) for the registrant and we have:
  - a) Designed such disclosure controls and procedures to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this quarterly report is being prepared;
  - b) Evaluated the effectiveness of the registrant's disclosure controls and procedures as of a date within 90 days prior to the filing date of this quarterly report (the "Evaluation Date"); and
  - c) Presented in this quarterly report our conclusions about the effectiveness of the disclosure controls and procedures based on our evaluation as of the Evaluation Date;
5. The registrant's other certifying officers and I have disclosed, based on our most recent evaluation, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
  - a) All significant deficiencies in the design or operation of internal controls which could adversely affect the registrant's ability to record, process, summarize and report financial data and have identified for the registrant's auditors any material weaknesses in internal controls; and
  - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls; and
6. The registrant's other certifying officers and I have indicated in this quarterly report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of our most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

Date: July 25, 2003

By: /s/ Thomas H. McLain

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**Thomas H. McLain**  
Chief Executive Officer and President

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I, Mark L. Smith, certify that:

1. I have reviewed this quarterly report on Form 10-Q of Nabi Biopharmaceuticals;
2. Based on my knowledge, this quarterly report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this quarterly report;
3. Based on my knowledge, the financial statements, and other financial information included in this quarterly report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this quarterly report;
4. The registrant's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-14 and 15d-14) for the registrant and we have:
  - a) Designed such disclosure controls and procedures to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this quarterly report is being prepared;
  - b) Evaluated the effectiveness of the registrant's disclosure controls and procedures as of a date within 90 days prior to the filing date of this quarterly report (the "Evaluation Date"); and
  - c) Presented in this quarterly report our conclusions about the effectiveness of the disclosure controls and procedures based on our evaluation as of the Evaluation Date;
5. The registrant's other certifying officers and I have disclosed, based on our most recent evaluation, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
  - a) All significant deficiencies in the design or operation of internal controls which could adversely affect the registrant's ability to record, process, summarize and report financial data and have identified for the registrant's auditors any material weaknesses in internal controls; and
  - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal controls; and
6. The registrant's other certifying officers and I have indicated in this quarterly report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of our most recent evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.

Date: July 25, 2003

By: /s/ Mark Smith

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**Mark L. Smith**  
Senior Vice President, Finance, Chief Financial Officer, Chief Accounting Officer and Treasurer

BY-LAWS  
OF  
NABI BIOPHARMACEUTICALS

ARTICLE I

Offices

The registered office shall be in the City of Wilmington, County of New Castle, State of Delaware, and the name of the resident agent in charge thereof is The Corporation Trust Company.

The corporation may also have offices at such other places within or without the State of Delaware as the Board of Directors may from time to time appoint or the business of the corporation may require.

ARTICLE II

Meetings of Stockholders

Section 1. Place of Meetings. All meetings of stockholders for any purpose shall be held at such place, within or without the State of Delaware, as shall be designated by the Board of Directors or the Chairman of the Board or the President and stated in the notice of the meeting. The Board of Directors may, in its sole discretion, determine that a meeting of stockholders shall not be held in any place but shall instead be held solely by means of remote communication. If authorized by the Board of Directors in its sole discretion, and subject to such guidelines and procedures as the Board of Directors may adopt, stockholders not physically present at a meeting of stockholders may, by means of remote communication, participate in a meeting of stockholders and be deemed present in person and vote at a meeting of stockholders whether such meeting is to be held at a designated place or solely by means of remote communication, provided that (a) the Board of Directors shall implement reasonable measures to verify that each person deemed present and permitted to vote at the meeting by means of remote communication is a stockholder, (b) the Board of Directors shall implement reasonable measures to provide such stockholders a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings, and (c) if any stockholder votes or takes other action at the meeting by means of remote communication, a record of such vote or other action shall be maintained by the corporation.

Section 2. Annual Meeting. An annual meeting of the stockholders of the corporation, for the election of Directors to succeed those whose terms expire and for the transaction of such

other business as may properly come before the meeting, shall be held on such date and at such time as shall be fixed from time to time by the Board of Directors and stated in the notice of the meeting.

Section 3. Special Meetings. Special meetings of the stockholders may be called by the Chairman of the Board, the President or by order of the Board of Directors. Business transacted at any special meeting shall be confined to the purpose or purposes stated in the notice of such meeting.

Section 4. Notice of Meeting. Whenever stockholders are required or permitted to take any action at a meeting, a written notice of the meeting shall be given which shall state the place, if any, date and hour of the meeting, the means of remote communications, if any, by which stockholders may be deemed to be present in person and vote at such meeting, and, in the case of a special meeting, the purpose or purposes for which the meeting is called. Unless otherwise required by law, the certificate of incorporation or these by-laws, notice of the time and place of holding each annual meeting and each special meeting of stockholders shall be given by the Secretary, not less than ten nor more than sixty days before the meeting, to each stockholder of record entitled to vote at such meeting.

When a meeting is adjourned to another place, date or time, unless the adjournment is for more than thirty days or a new record date is fixed for the adjourned meeting, notice of the adjourned meeting need not be given if the time, place, if any, thereof, and the means of remote communication, if any, by which stockholders may be deemed to be present in person and vote at such adjourned meeting are announced at the meeting at which the adjournment is taken. At such adjourned meeting at which a quorum shall be present or represented any business may be transacted which might have been transacted at the meeting as originally called.

Section 5. List of Stockholders. At least ten 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, shall be prepared by the Secretary, who shall have charge of the stock ledger. Nothing contained in this Section 5 shall require the corporation to include electronic mail addresses or other electronic contact information on such list. Such list shall be open to the examination of any stockholder, for any purpose germane to the meeting, for a period of at least ten days prior to the meeting: (i) on a reasonably accessible electronic network, provided that the information required to gain access to such list is provided with the notice of the meeting, or (ii) during ordinary business hours, at the principal place of business of the corporation. In the event that the corporation determines to make the list available on an electronic network, the corporation may take reasonable steps to ensure that such information is available only to stockholders of the corporation. If the meeting is to be held at a place, then the list shall 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. If the meeting is to be held solely by means of remote communication, then the list shall also be open to the examination of any stockholder during the whole time of the meeting on a reasonably accessible electronic network, and the information required to access such list shall be provided with the notice of the meeting. Except as otherwise provided by law, the stock ledger shall be the only evidence as to who are the

stockholders entitled to examine the stock ledger, the list of stockholders or the books of the corporation, or to vote in person or by proxy at any meeting of stockholders.

Section 6. Quorum. At any meeting of stockholders, the holders of issued and outstanding shares of capital stock which represent a majority of the votes entitled to be cast thereat, present in person or represented by proxy, shall constitute a quorum for the transaction of business. If, however, such quorum shall not be present or represented at any meeting of the stockholders, then either the person presiding over the meeting or the stockholders entitled to vote thereat, present in person or represented by proxy, shall have the power to adjourn the meeting from time to time until a quorum shall be present or represented.

Section 7. Voting. At any meeting of the stockholders, every stockholder having the right to vote shall be entitled to vote in person or may authorize another person or persons to act for such stockholder by proxy, but no such proxy shall be voted or acted upon after 11 months from its date. When a quorum is present at any meeting, a plurality of the votes properly cast for election to the Board of Directors and a majority of the votes properly cast on any question other than election to the Board of Directors shall decide the question unless the question is one upon which by express provision of law or of the certificate of incorporation or of these by-laws a different vote is required, in which case such express provision shall govern and control the decision of such question.

Section 8. Fixing of Record Date.

(a) In order that the corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders or any adjournment thereof, or entitled to receive payment of any dividend or other distribution or allotment of any rights, or entitled to exercise any rights in respect of any change, conversion or exchange of stock or for the purpose of any other lawful action other than stockholder action by written consent, the Board of Directors may fix a record date, which shall not precede the date such record date is fixed and shall not be more than sixty nor less than ten days before the date of such meeting, nor more than sixty days prior to any such other action. If no record date is fixed, 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 day next preceding the day on which notice is given. The record date for any other purpose other than stockholder action by written consent shall be at the close of business on the day on which the Board of Directors adopts the resolution relating thereto. 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; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.

(b) In order that the corporation may determine the stockholders entitled to consent to corporate action in writing without a meeting, the Board of Directors may fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the Board of Directors, and which date shall not be more than 10 days after the date upon which the resolution fixing the record date is adopted by the Board of Directors. Any stockholder of record seeking to have the stockholders authorize or take corporate action by written consent shall, by written notice to the Secretary, request the Board of Directors to fix a

record date. The Board of Directors shall promptly, but in all events within 10 days after the date on which such a request is received, adopt a resolution fixing the record date. If no record date has been fixed by the Board of Directors within 10 days of the date on which such a request is received, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting, when no prior action by the Board of Directors is required by applicable law, shall be the first date on which a signed written consent setting forth the action taken or proposed to be taken is delivered to the corporation by delivery to its registered office in the State of Delaware, its principal place of business, or any officer or agent of the corporation having custody of the book in which proceedings of meetings of stockholders are recorded. Delivery made to the corporation's registered office shall be by hand or by certified or registered mail, return receipt requested. If no record date has been fixed by the Board of Directors and prior action by the Board of Directors is required by applicable law, the record date for determining stockholders entitled to consent to corporate action in writing without a meeting shall be at the close of business on the date on which the Board of Directors adopts the resolution taking such prior action.

Section 9. Nomination of Directors. Only persons who are nominated in accordance with the procedures set forth in the By-laws shall be eligible to serve as Directors. Nominations of persons for election to the Board of Directors of the corporation may be made at a meeting of stockholders (a) by or at the direction of the Board of Directors or (b) by any stockholder of the corporation who is a stockholder of record at the time of giving of notice provided for in this Section 9, who shall be entitled to vote for the election of Directors at the meeting and who complies with the notice procedures set forth in this Section 9. Such nominations, other than those made by or at the direction of the Board of Directors, shall be made pursuant to timely notice in writing to the Secretary of the corporation. To be timely, a stockholder's notice shall be delivered to or mailed and received at the principal executive offices of the corporation not less than 90 days prior to the meeting; provided, however, that in the event that less than 100 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 10th day following the day on which such notice of the date of the meeting or such public disclosure was made. Such stockholder's notice shall set forth (a) as to each person whom the stockholder proposes to nominate for election or reelection as a Director all information relating to such person that is required to be disclosed in solicitations of proxies for election of Directors, or is otherwise required, in each case pursuant to Regulation 14A under the Securities Exchange Act of 1934, as amended (including such person's written consent to being named in the proxy statement as a nominee and to serving as a Director if elected); and (b) as to the stockholder giving the notice (i) the name and address, as they appear on the corporation's books, of such stockholder and (ii) the class and number of shares of the corporation which are beneficially owned by such stockholder. At the request of the Board of Directors, any person nominated by the Board of Directors for election as a Director shall furnish to the Secretary of the corporation that information required to be set forth in a stockholder's notice of nomination which pertains to the nominee. No person shall be eligible to serve as a Director of the corporation unless nominated in accordance with the procedures set forth in this By-law. The person presiding over the meeting shall, if the facts warrant, determine and declare to the meeting that a nomination was not made in accordance with the procedures prescribed by the By-laws, and if he or she should so determine, he or she shall so declare to the meeting and the defective nomination shall be disregarded. Notwithstanding the foregoing provisions of this



Section 9, a stockholder shall also comply with all applicable requirements of the Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder with respect to the matters set forth in this Section.

Section 10. Notice of Business. At any meeting of the stockholders, only such business shall be conducted as shall have been brought before the meeting (a) by or at the direction of the Board of Directors or (b) by any stockholder of the corporation who is a stockholder of record at the time of giving of the notice provided for in this Section 10, who shall be entitled to vote at such meeting and who complies with the notice procedures set forth in this Section 10. For business to be properly brought before a stockholder meeting by a stockholder, the business must relate to a proper subject matter for stockholder action and the stockholder must have given timely notice thereof in writing to the Secretary of the corporation. To be timely, a stockholder's notice must be delivered to or mailed and received at the principal executive offices of the corporation not less than 90 days prior to the meeting; provided, however, that in the event that less than 100 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 received no later than the close of business on the 10th day following the day on which such notice of the date of the meeting was mailed or such public disclosure was made. A stockholder's notice to the Secretary shall set forth as to each matter the stockholder proposes to bring before the meeting (a) a brief description of the business desired to be brought before the meeting and the reasons for conducting such business at the meeting, (b) the name and address, as they appear on the corporation's books, of the stockholder proposing such business, (c) the class and number of shares of the corporation which are beneficially owned by the stockholder and (d) any material interest in the stockholder in such business. Notwithstanding anything in the By-laws to the contrary, no business shall be conducted at a stockholder meeting except in accordance with the procedures set forth in this Section 10. The person presiding over the meeting shall, if the facts warrant, determine and declare to the meeting that business was not properly brought before the meeting and in accordance with the provisions of the By-laws, and if he or she should so determine, he or she shall so declare to the meeting and any such business not properly brought before the meeting shall not be transacted. Notwithstanding the foregoing provisions of this Section 10, a stockholder shall also comply with all applicable requirements of the Securities Exchange Act of 1934, as amended, and the rules and regulations thereunder with respect to the matters set forth in this Section.

Section 11. Conduct of Meeting. The Board of Directors shall be entitled to make such rules or regulations for the conduct of meetings of stockholders as it shall deem appropriate. Subject to such rules and regulations of the Board of Directors, if any, the person presiding over the meeting shall have the right and authority to convene and adjourn the meeting, to prescribe such rules, regulations and procedures and to do all such acts as, in the judgment of the person presiding over the meeting, are necessary, appropriate or convenient for the proper conduct of the meeting, including, without limitation, establishing an agenda or order of business for the meeting, rules and procedures for maintaining order at the meeting and the safety of those present, limitations on participation in such meeting to stockholders of record of the corporation and their duly authorized and constituted proxies and such other persons as the person presiding over the meeting shall permit, restrictions on entry to the meeting after the time fixed for the commencement thereof, limitations on the time allotted to questions or comments by participants

and regulations of the opening and closing of the polls for balloting and matters which are to be voted on by ballot. The person presiding over the meeting, in addition to making any other determinations that may be appropriate to the conduct of the meeting shall, if the facts warrant, determine and declare to the meeting that a matter or business was not properly brought before the meeting and if the person presiding over the meeting should so determine and declare, any such matter or business shall not be transacted or considered. Unless and to the extent determined by the Board of Directors or the person presiding over the meeting, meetings of stockholders shall not be required to be held in accordance with rules of parliamentary procedure.

### ARTICLE III

#### Directors

Section 1. Directors and Their Terms of Office. The corporation shall have one or more Directors, the number of Directors to be determined from time to time by vote of a majority of Directors then in office. Each Director shall hold office until his or her successor is elected and qualified. A Director need not be a stockholder. No decrease in the number of Directors shall affect the term of any Director in office.

Section 2. Powers of Directors. The affairs, property and business of the corporation shall be managed by the Board of Directors which may exercise all such powers of the corporation and do all such lawful acts and things as are not by law or by the certificate of incorporation or these by-laws directed or required to be exercised or done by the stockholders.

Section 3. Vacancies. If any vacancies occur in the Board of Directors caused by death, resignation, retirement, disqualification or removal from office of any Directors or otherwise, or any new Directorship is created by any increase in the authorized number of Directors, Directors to fill the vacancy or vacancies or to fill the newly created Directorship shall be filled solely by a majority vote of the Directors then in office, whether or not a quorum, at any meeting of the Board and the Directors so chosen shall hold office until their successors are duly elected and qualified.

Section 4. Annual Meeting of Directors. The first meeting of each newly elected Board of Directors may be held without notice immediately after an annual meeting of stockholders (or a special meeting of stockholders held in lieu of an annual meeting) at the same place as that at which such meeting of stockholders was held, or such first meeting may be held at such place (within or without the State of Delaware) and time as shall be fixed by the consent in writing of all the Directors or as may be called in the manner hereinafter provided with respect to the call of special meetings.

Section 5. Regular Meetings of Directors. Regular meetings of the Board of Directors may be held at such times and at such place or places (within or without the State of Delaware) as the Board of Directors may from time to time prescribe. No notice need be given of any regular meeting and a notice, if given, need not specify the purposes thereof.

Section 6. Special Meetings of Directors. Special meetings of the Board of Directors may be called at any time by or under the authority of the Chairman of the Board or the President and shall be called by him or her or by the Secretary on written request of any two Directors or, if they fail to do so, by two Directors in the name of the Secretary, to be held in each instance at such place (within or without the State of Delaware) as the person calling the meeting may designate in the call thereof. Notice of each special meeting of the Board of Directors, stating the time and place thereof, shall be given to each Director by the Secretary, not less than twenty-four hours before the meeting. Such notice need not specify the purposes of the meeting.

Section 7. Quorum; Voting. At any meeting of the Board of Directors a majority of the Directors then in office shall constitute a quorum for the transaction of business, but if a quorum shall not be present at any meeting of Directors, the Directors present thereat may adjourn the meeting from time to time without notice other than announcement at the meeting, until a quorum shall be present. Except as otherwise provided by law or by the certificate of incorporation or by these by-laws, the affirmative vote of a majority of the Directors present at a meeting at which there is a quorum shall be the act of the Board of Directors.

Section 8. Meetings by Telephone. Members of the Board of Directors or of any committee thereof may participate in meetings of the Board of Directors or of such committee by means of conference telephone or other communications equipment by means of which all person participating in the meeting can hear each other, and such participation shall constitute presence in person at such meeting.

Section 9. Action Without Meeting. Unless otherwise restricted by the certificate of incorporation, any action required or permitted to be taken at any meeting of the Board of Directors or of any committee thereof may be taken without a meeting if all members of the Board of Directors or of such committee, as the case may be, consent thereto in writing or by electronic transmission and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the Board of Directors or of such committee. Such filings shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.

Section 10. Compensation. By resolution of the Board of Directors, the Directors, as such, may receive stated salaries for their services, and may be allowed a fixed sum and expenses of attendance, if any, for attendance at each regular or special meeting of the Board. Members of committees may also be allowed a fixed sum and expenses of attendance, if any, for attending committee meetings. Nothing herein contained shall preclude any Director from serving the corporation in any other capacity and receiving compensation for such services.

Section 11. Chairman of the Board. The Board of Directors shall select from its members a Chairman of the Board who shall preside at all meetings of the Board of Directors.

## ARTICLE IV

### Committees

The Board of Directors may: (a) designate, change the membership of or terminate the existence of any committee or committees, each committee to consist of one or more Directors; (b) designate one or more Directors as alternate members of any such committee who may replace any absent or disqualified member at any meeting of the committee; and (c) determine the extent to which each such committee shall have and may exercise the powers of the Board of Directors in the management of the business and affairs of the corporation, including the power to authorize the seal of the corporation to be affixed to all papers which require it and the power and authority to declare dividends or to authorize the issuance of stock, excepting, however, such powers which by law, by the certificate of incorporation or by these by-laws the Board of Directors is prohibited from so delegating. In the absence or disqualification of any member of such committee and his or her alternative, if any, the member or members thereof present at any meeting and not disqualified from voting, whether or not constituting a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in the place of any such absent or disqualified member. Except as the Board of Directors may otherwise determine, any committee may make rules for the conduct of its business, but unless otherwise provided by the Board or such rules, its business shall be conducted as nearly as may be in the same manner as is provided by these by-laws for the conduct of business by the Board of Directors. Each committee shall keep regular minutes of its meetings and report the same to the Board of Directors upon request.

## ARTICLE V

### Officers

Section 1. Officers and Their Election, Term of Office and Vacancies. The officers of the corporation shall be a President, a Secretary, a Treasurer and such Vice Presidents, Assistant Secretaries, Assistant Treasurers and other officers as the Board of Directors may from time to time determine and elect or appoint. All officers shall be elected annually by the Board of Directors at their first meeting following the annual meeting of stockholders or any special meeting held in lieu thereof and shall hold office until their successors are duly elected and qualified. All officers may, but need not be, members of the Board of Directors. Two or more offices may be held by the same person. Any officer elected by the Board of Directors may be removed at any time by the Board of Directors. If any vacancy shall occur among the officers, it shall be filled by the Board of Directors.

Section 2. President. The President shall be the chief executive officer of the corporation with full control and responsibility for management decisions, subject to the supervision and control of the Board of Directors and such limitations as the Board of Directors may from time to time impose. The President when present shall preside at all meetings of the stockholders. It shall be his duty and he shall have the power to see that all orders and resolutions of the Board are carried into effect. Subject to the direction of the Board of Directors, the President shall have power to sign all stock certificates, contracts and other instruments of the corporation which are authorized and shall have general supervision of all of the other officers.

Section 3. Vice Presidents. In the absence or disability of the President, his or her powers and duties shall be performed by the Vice President, if only one, or, if more than one, by the one designated for the purpose by the Board. Each Vice President shall have such other powers and perform such other duties as the Board shall from time to time designate.

Section 4. Treasurer. The Treasurer shall keep full and accurate accounts of receipts and disbursements in books belonging to the corporation and shall deposit all moneys and other valuable effects in the name and to the credit of the corporation in such depositories as shall be designated by the Board or in the absence of such designation in such depositories as he or she shall from time to time deem proper. He or she shall disburse the funds of the corporation as shall be ordered by the Board, taking proper vouchers for such disbursements. He or she shall promptly render to the President and to the Board such statements of his or her transactions and accounts as the President and Board respectively may from time to time require. The Treasurer shall perform such duties and have such powers additional to the foregoing as the Board may designate.

Section 5. Assistant Treasurers. In the absence or disability of the Treasurer, his or her powers and duties shall be performed by the Assistant Treasurer, if only one, or if more than one, by the one designated for the purpose by the Board. Each Assistant Treasurer shall have such other powers and perform such other duties as the Board shall from time to time designate.

Section 6. The Secretary. The Secretary shall issue notices of all meetings of stockholders and Directors and of the executive and other committees where notices of such meetings are required by law or these by-laws. He or she shall keep the minutes of meetings of stockholders and of the Board of Directors and of the executive and other committees, respectively, unless such committees appoint their own respective secretaries and be responsible for the custody thereof. Unless the Board shall appoint a transfer agent and/or registrar, the Secretary shall be charged with the duty of keeping, or causing to be kept, accurate records of all stock outstanding, stock certificates issued and stock transfers. He or she shall sign such instruments as require his or her signature and shall perform such other duties and shall have such powers as the Board of Directors shall designate from time to time, in all cases subject to the control of the Board of Directors. The Secretary shall have custody of the corporate seal, shall affix and attest such seal on all documents whose execution under seal is duly authorized. In his or her absence at any meeting, an Assistant Secretary or the Secretary pro tempore shall perform his or her duties thereat.

Section 7. Assistant Secretaries. In the absence or disability of the Secretary, his or her powers and duties shall be performed by the Assistant Secretary, if only one, or, if more than one, by the one designated for the purpose by the Board. Each Assistant Secretary shall have such powers and perform such other duties as the Board shall from time to time designate.

Section 8. Salaries. The salaries of officers, agents and employees shall be fixed from time to time by or under authority from the Board of Directors.

## ARTICLE VI

### Resignations and Removals

Section 1. Officers, Agents, Employees and Members of Committees. Any officer of the corporation may resign at any time upon notice given in writing or by electronic transmission given to the Board of Directors or to the Chairman of the Board or to the President or to the Secretary of the corporation; and any member of any committee may resign upon notice given in writing or by electronic transmission given either as aforesaid or to the committee of which he or she is a member or to the chairman thereof. Any such resignation shall take effect at the time specified therein, or if the time be not specified, upon receipt thereof, and, unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective. The Board of Directors may at any time, with or without cause, remove from office or discharge or terminate the employment of any officer, agent, employee or member of any committee.

Section 2. Directors. Any Director of the corporation may resign at any time upon notice given in writing or by electronic transmission given to the Board of Directors or to the Chairman of the Board or to the President or the Secretary of the corporation. Any such resignation shall take effect at the time specified therein, or if the time be not specified, upon receipt thereof; and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective. Any Director, or the entire Board of Directors, may be removed from office at any time, but only for cause and only by the affirmative vote of the holders of at least seventy-five (75%) of the voting power of all of the then-outstanding shares of capital stock of the corporation entitled to vote generally in the election of Directors, and his or her successor or their successors shall be elected by the remaining Directors as provided in these By-laws in the filling of other vacancies. A Director may be removed for cause only after reasonable notice and opportunity to be heard before the body proposing to remove him or her.

## ARTICLE VII

### Indemnification of Directors, Officers and Others

Section 1. Directors and Officers. Subject to the provisions of Section 5, the corporation shall indemnify, to the fullest extent permitted by the General Corporation Law of the State of Delaware as presently in effect or as hereafter amended:

(a) Any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative and whether external or internal to the corporation (other than by action by or in the right of the corporation) by reason of the fact that he or she is or was a Director or officer of the corporation, or 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, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him or her in connection with such suit, action or proceeding if he or she acted in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful. The termination of any action, suit

or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was lawful.

(b) Any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he or she is or was a Director or officer of the corporation, or 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, against expenses (including attorneys' fees) and, to the extent permitted by law, amounts paid in settlement actually and reasonably incurred by him or her in connection with the defense or settlement of such action or suit if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the Court of Chancery of the State of Delaware or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery of the State of Delaware or such other court shall deem proper.

(c) In addition to and without limiting the foregoing provisions of this Article VII and except to the extent otherwise required by law, any person seeking indemnification under or pursuant to this Section 1 shall be deemed and presumed to have met the applicable standard of conduct set forth in this Section 1 unless the contrary shall be established, and the corporation shall have the burden of proof to overcome such presumption in connection with the making by any person or entity of any determination contrary to that presumption.

Section 2. Employees and Agents. Subject to the provisions of Section 5, the Board of Directors, in its discretion, may authorize the corporation to indemnify to the fullest extent permitted by the General Corporation Law of the State of Delaware (as presently in effect or as hereafter amended):

(a) Any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative (other than an action by or in the right of the corporation) by reason of the fact that he or she is or was an employee or agent of the corporation, or 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, against expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by him or her in connection with such suit, action or proceeding if he or she acted in good faith and in a manner he or she reasonably believed to be in or not

opposed to the best interest of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his or her conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

(b) Any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he or she is or was an employee or agent of the corporation, or 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, against expenses (including attorneys' fees) and amounts, to the extent permitted by law, paid in settlement actually and reasonably incurred by him or her in connection with the defense or settlement of such action or suit if he or she acted in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation and except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been adjudged to be liable to the corporation unless and only to the extent that the Court of Chancery of the State of Delaware or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses which the Court of Chancery of the State of Delaware or such other court shall deem proper.

#### Section 3. Indemnification for Expenses of Successful Party.

Notwithstanding the other provisions of this Article, to the extent that a present or former Director or officer of the corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in Section 1 or in Section 2 of this Article, or in defense of any claim, issue or matter therein, such person shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith. Without limiting the foregoing, if any action, suit or proceeding is disposed of, on the merits or otherwise (including a disposition without prejudice), without (i) the disposition being adverse to such person, (ii) an adjudication that such person was liable to the corporation, (iii) a plea of guilty or nolo contendere by such person, (iv) an adjudication that such person did not act in good faith and in a manner he or she reasonably believed to be in or not opposed to the best interests of the corporation, and (v) with respect to any criminal proceeding, an adjudication that such person had reasonable cause to believe his or her conduct was unlawful, such person shall be considered for the purposes hereof to have been wholly successful with respect thereto.

#### Section 4. Procedure. Any indemnification under this Article VII

(unless required by law or ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the present or former Director, officer, employee or agent is proper in the circumstances because he or she has met the applicable



standard of conduct set forth in Sections 1 and 2 of this Article VII. Such determination shall be made, with respect to a person who is a Director or officer at the time of such determination, (i) by a majority vote of the Directors who are not parties to such action, suit or proceeding, even though less than a quorum or (ii) by a committee of such Directors designated by majority vote of such Directors, even though less than a quorum or (iii) if there are no such Directors, or if such Directors so direct, by independent legal counsel in a written opinion, or (iv) by the stockholders of the corporation.

Section 5. Notification and Defense of Claim; Right to Institute Suit.

(a) In addition to and without limiting the foregoing provisions of this Article VII and except to the extent otherwise required by law, it shall be a condition of the corporation's obligation to indemnify under Sections 1 and 2 of this Article VII (in addition to any other condition in these by-laws or by law provided or imposed) that the person asserting, or proposing to assert, the right to be indemnified, must notify the corporation in writing as soon as practicable of any action, suit, proceeding or investigation involving such person for which indemnity will or could be sought, but the failure to so notify shall not affect the corporation's objection to indemnify except to the extent the corporation is adversely affected thereby. With respect to any action, suit, proceeding or investigation of which the corporation is so notified, the corporation will be entitled to participate therein at its own expense and/or to assume the defense thereof at its own expense, with legal counsel reasonably acceptable to such person. After notice from the corporation to such person of its election so to assume such defense, the corporation shall not be liable to such person for any legal or other expenses subsequently incurred by such person in connection with such action, suit, proceeding or investigation other than as provided below in this subsection (a). Such person shall have the right to employ his or her own counsel in connection with such action, suit, proceeding or investigation, but the fees and expenses of such counsel incurred after notice from the corporation of its assumption of the defense thereof shall be at the expense of such person unless (i) the employment of counsel by such person has been authorized by the corporation, (ii) counsel to such person shall have reasonably concluded that there may be a conflict of interest or position on any significant issue between the corporation and such person in the conduct of the defense of such action, suit, proceeding or investigation or (iii) the corporation shall not in fact have employed counsel to assume the defense of such action, suit, proceeding or investigation, in each of which cases the fees and expenses of counsel for such person shall be at the expenses of the corporation, except as otherwise expressly provided by this Article VII. The corporation shall not be entitled, without the consent of such person, to assume the defense of any claim brought by or in the right of the corporation or as to which counsel for such person shall have reasonably made the conclusion provided for in clause (ii) above. The corporation shall not be required to indemnify such person under this Article VII for any amounts paid in settlement of any action, suit, proceeding or investigation effected without its written consent. The corporation shall not settle any action, suit, proceeding or investigation in any manner which would impose any penalty or limitation on such person without such person's written consent. Neither the corporation nor such person will unreasonably withhold their consent to any proposed settlement.

(b) If a claim for indemnification or advancement of expenses under this Article VII is not paid in full by the corporation within 90 days after a written claim therefor has been

received by the corporation, the claimant may at any time thereafter bring suit against the corporation to recover the unpaid amount of the claim and, if successful in whole or in part, the claimant shall be entitled to be paid also the expenses of prosecuting such claim.

Section 6. Reduction and Reimbursement. The corporation's indemnification under Sections 1 and 2 of this Article VII 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, shall be reduced by any amounts such person receives as indemnification (i) under any policy of insurance purchased and maintained on his or her behalf by the corporation, (ii) from such other corporation, partnership, joint venture, trust or other enterprise, or (iii) under any other applicable indemnification provision. In the event the corporation makes an indemnification payment under this Article VII and the person receiving such payment is subsequently reimbursed from the proceeds of insurance or by such other corporation, partnership, joint venture, trust or other enterprise, such person shall promptly refund such indemnification payments to the corporation to the extent of such reimbursement.

Section 7. Advance of Expenses. In the event that the corporation does not assume the defense pursuant to Section 5, any expenses (including attorneys' fees) incurred by a Director or officer in defending any civil, criminal, administrative or investigative action, suit or proceeding shall be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such Director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this Article VII. Any advance under this Section 4 shall be made promptly, and in any event within ninety days, upon the written request of the person seeking the advance.

Section 8. 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 such person and incurred by such person in any such capacity, or arising out of such person's status as such, whether or not the corporation would have the power to indemnify such person against such liability under the provisions of the General Corporation Law of the State of Delaware (as presently in effect or hereafter amended), the certificate of incorporation of the corporation or these by-laws.

Section 9. Consolidation or Merger. In the discretion of the Board of Directors of the corporation, for the purposes of this Article VII, references to "the corporation" may also include any constituent corporation (including any constituent of a constituent) absorbed in a consolidation or merger which, if its separate existence had continued, would have had power and authority to indemnify its Directors or officers, so that any person who is or was a Director or officer of such constituent corporation, or is or was serving at the request of such constituent corporation as a Director or officer of another corporation, partnership, joint venture, trust or other enterprise, would stand in the same position under the provisions of this Article VII with

respect to the resulting or surviving corporation as he or she would have with respect to such other constituent corporation if its separate existence had continued.

Section 10. Non-Exclusive; Savings Clause. The indemnification and advancement of expenses provided by, or granted pursuant to, the other Sections of this Article VII shall not be deemed exclusive of any other rights to which any person, whether or not entitled to be indemnified under this Article VII, may be entitled under any statute, by-law, agreement, vote of stockholders or disinterested Directors or otherwise, both as to action in such person's official capacity and as to action in another capacity while holding such office. Each person who is or becomes a Director or officer as described in Section 1 shall be deemed to have served or to have continued to serve in such capacity in reliance upon the indemnity provided for in this Article VII. All rights to indemnification under this Article VII shall be deemed to be provided by a contract between the corporation and the person who serves as a Director or officer of the corporation at any time while these by-laws and other relevant provisions of the General Corporation Law of the State of Delaware and other applicable law, if any, are in effect. Any repeal or modification thereof shall not affect any rights or obligations then existing.

Section 11. Inurement. The indemnification and advancement of expenses provided by, or granted pursuant to, this Article VII shall continue as to a person who has ceased to be a Director, officer, employee or agent and shall inure to the benefit of the heirs, executors and administrators of such a person.

Section 12. Definitional Matters. For purposes of this Article VII, references to "other enterprises" shall include employee benefit plans; references to "fines" shall include any excise taxes assessed on a person with respect to any employee benefit plan; and references to "serving at the request of the corporation" shall include any service by a Director or officer of the corporation which imposes duties on, or involves services by, such person with respect to any employee benefit plan, its participants, or beneficiaries; and a person who acted in good faith and in a manner he or she reasonably believed to be in the interest of the participants and beneficiaries of an employee benefit plan shall be deemed to have acted in a manner "not opposed to the best interests of the corporation" as referred to in this Article VII.

## ARTICLE VIII

### Capital Stock

Section 1. Stock Certificates. Each stockholder shall be entitled to a certificate or certificates representing in the aggregate the share owned by him or her and certifying the number and class thereof, which shall be in such form as this Board shall adopt. Each certificate of stock shall be signed by the Chairman of the Board or the President or a Vice President, and by the Treasurer or an Assistant Treasurer or the Secretary or an Assistant Secretary. Any of or all 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 the certificate is issued, such

certificate may nevertheless 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.

Section 2. Transfer of Stock. Shares of stock shall be transferable on the books of the corporation pursuant to applicable law and such rules and regulations as the Board of Directors shall from time to time prescribe.

Section 3. Holders of Record. Prior to due presentment for registration of transfer the corporation may treat the holder of record of a share of its stock as the complete owner thereof exclusively entitled to vote, to receive notifications and otherwise entitled to all the rights and powers of a complete owner thereof, notwithstanding notice to the contrary.

Section 4. Transfer Agent and Registrar. The Board of Directors may at any time appoint a transfer agent or agents and/or registrar or registrars for the transfer and/or registration of shares of stock.

Section 5. Lost, Stolen, Destroyed or Mutilated Stock Certificates. The Board of Directors may direct a new stock certificate or certificates to be issued in place of any certificate or certificates theretofore issued by the corporation alleged to have been lost, stolen, destroyed or mutilated, upon the making of an affidavit of that fact by the person claiming the certificate of stock to be lost, stolen, destroyed or mutilated. When authorizing such issue of a new certificate or certificates, the Board of Directors may, in its discretion and as a condition precedent to the issuance thereof, require the owner of such lost, stolen, destroyed or mutilated certificate or certificates, or his or her legal representative, to (a) advertise the same in such manner as it shall require and/or (b) give the corporation a bond in such sum as it may direct as indemnity against any claim that may be made against the corporation with respect to the certificate alleged to have been lost, stolen, destroyed or mutilated and/or (c) comply with any other reasonable requirements prescribed by the Board.

#### ARTICLE IX

##### Securities of Other Corporations

Subject to any limitations that may be imposed by the Board of Directors, the Chairman of the Board, the President or any person or persons authorized by the Board may in the name and on behalf of the corporation (i) act, or appoint any other person or persons (with or without powers of substitution) to act in the name and on behalf of the corporation (as proxy or otherwise), at any meeting of the holders of stock or other securities of any corporation or other organization, securities of which shall be held by this corporation, or (ii) express consent or dissent, as a holder of such securities, to corporate or other action by such other corporation or organization.

ARTICLE X

Checks, Notes, Drafts and Other Instruments

Checks, notes, drafts and other instruments for the payment of money drawn or endorsed in the name of the corporation may be signed by any officer or officers or person or persons authorized by the Board of Directors to sign the same. No officer or person shall sign any such instrument as aforesaid unless authorized by the Board to do so.

ARTICLE XI

Dividends and Reserves

Section 1. Dividends. Dividends upon the capital stock of the corporation may, subject to any provisions of the certificate of incorporation, be declared pursuant to law by the Board of Directors. Dividends may be paid in cash, in property or in shares of the capital stock.

Section 2. Reserves. Before payment of any dividend there may be set aside out of any funds of the corporation available for dividends such sum or sums as the Board of Directors from time to time, in its absolute discretion, thinks proper as a reserve fund to meet contingencies, or for equalizing dividends, or for repairing or maintaining any property of the corporation, or for such other purpose as the Directors shall think conducive to the interest of the corporation, and the Directors may modify or abolish any such reserve in the manner in which it was created.

ARTICLE XII

Corporate Seal

The corporate seal shall be in such form as the Board of Directors may from time to time prescribe and the same may be used by causing it or a facsimile thereof to be impressed or affixed or in any other manner reproduced.

ARTICLE XIII

Fiscal Year

The fiscal year of the corporation shall end on the last Saturday of December of each year.

ARTICLE XIV

Books and Records

The books, accounts and records of the corporation, except as may be otherwise required by the laws of the State of Delaware, may be kept outside of the State of Delaware, at such place or places as the Board of Directors may from time to time appoint. Except as may otherwise be provided by law, the Board of Directors shall determine whether and to what extent the books, accounts, records and documents of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any book,

account, record or document of the corporation, except as conferred by law or by resolution of the stockholders or Board of Directors.

## ARTICLE XV

### Notices

Section 1. Electronic Transmission. Without limiting the manner by which notice otherwise may be given effectively to stockholders, any notice to stockholders given by the corporation under any provision of law, the certificate of incorporation, or these by-laws shall be effective if given by a form of electronic transmission consented to by the stockholder to whom the notice is given. Any such consent shall be revocable by the stockholder by written notice to the corporation. Any such consent shall be deemed revoked if (a) the corporation is unable to deliver by electronic transmission two consecutive notices given by the corporation in accordance with such consent and (b) such inability becomes known to the Secretary or an Assistant Secretary of the corporation or to the transfer agent, or other person responsible for the giving of notice; provided, however, the inadvertent failure to treat such inability as a revocation shall not invalidate any meeting or other action.

Notice given pursuant to the immediately preceding paragraph shall be deemed given: (a) if by facsimile telecommunication, when directed to a number at which the stockholder has consented to receive notice; (b) if by electronic mail, when directed to an electronic mail address at which the stockholder has consented to receive notice; (c) if by a posting on an electronic network together with separate notice to the stockholder of such specific posting, upon the later of (i) such posting and (ii) the giving of such separate notice; and (d) if by any other form of electronic transmission, when directed to the stockholder. An affidavit of the Secretary or any Assistant Secretary or of the transfer agent or other agent of the corporation that the notice has been given by a form of electronic transmission shall, in the absence of fraud, be prima facie evidence of the facts stated therein.

For purposes of these by-laws, "electronic transmission" means any form of communication, not directly involving the physical transmission of paper, that creates a record that may be retained, retrieved and reviewed by a recipient thereof, and that may be directly reproduced in paper form by such a recipient through an automated process

Section 2. Waiver of Notice. Whenever notice is required, the certificate of incorporation, these by-laws or as otherwise provided by law, a written waiver thereof, signed by the person entitled to notice, or a waiver by electronic transmission 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, Directors or members of a committee of directors need be specified in any written waiver of notice or any waiver by electronic transmission.

ARTICLE XVI

Severability

If any term or provision of the by-laws, or the application thereof to any person or circumstance or period of time, shall to any extent be invalid or unenforceable, the remainder of the by-laws, or the application of such term or provision to persons or circumstances or periods of time other than those as to which it is invalid or unenforceable, shall not be affected thereby and each term and provision of the by-laws shall be valid and enforced to the fullest extent permitted by law. All restrictions, limitations, requirements and other provisions of these by-laws shall be construed, insofar as possible, as supplemental and additional to all provisions of law applicable to the subject matter thereof and shall be fully complied with in addition to the said provisions of law unless such compliance shall be contrary to law.

ARTICLE XVII

Amendments

The Board of Directors and the stockholders shall each have the power to adopt, alter, amend and repeal these by-laws, and any by-laws adopted by the Directors or the stockholders under the powers conferred hereby may be altered, amended or repealed by the Directors or by the stockholders; provided, however, that these by-laws shall not be altered, amended or repealed by action of the stockholders, and no by-law shall be adopted by action of the stockholders, without the affirmative vote of the holders of at least seventy-five percent (75%) of the voting power of all the shares of the corporation entitled to vote generally in the election of Directors, voting together as a single class.

\*\*\*] A CONFIDENTIAL PORTION OF THE MATERIAL HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION.

DEVELOPMENT AND LICENSE AGREEMENT

BETWEEN

NABI BIOPHARMACEUTICALS

AND

PHARMACIA AND UPJOHN COMPANY

DATED AS OF APRIL 3, 2003



## DEVELOPMENT AND LICENSE AGREEMENT

THIS DEVELOPMENT AND LICENSE AGREEMENT dated as of April 3, 2003 (the "Agreement") is made between NABI BIOPHARMACEUTICALS, a Delaware corporation having its principal place of business at 5800 Park of Commerce Boulevard, Boca Raton, FL 33487 ("Nabi"), and PHARMACIA AND UPJOHN COMPANY, acting through its Animal Health business, a Delaware corporation having its principal place of business at 7000 Portage Rd, Kalamazoo, MI 49001 ("Pharmacia").

### RECITALS

1. Nabi is a biopharmaceutical company focused on the development and commercialization of drugs that prevent and treat infection and autoimmune diseases.

2. During the course of its work in the area of vaccines, Nabi has developed certain proprietary technology related to the prevention and control of S. AUREUS infections.

3. Nabi is interested in licensing this technology for use in the Field (as hereinafter defined) to a party which can maximize its potential by obtaining approval from appropriate governmental regulatory authorities of products embodying such technology, and then selling such products on a worldwide basis.

4. Pharmacia manufactures and sells animal health pharmaceutical and biological products on a worldwide basis.

5. Pharmacia is interested in obtaining an exclusive, worldwide license to Nabi's technology in the Field.

6. Nabi is willing to grant such a license upon the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the premises and of the covenants herein contained, the parties hereto mutually agree as follows:

### ARTICLE 1. DEFINITIONS

1.1 "AFFILIATE" shall mean any corporation or other entity, which directly or indirectly controls, is controlled by or is under common control with a party to this Agreement. A corporation or other entity shall be regarded as in control of another corporation or entity if it owns or directly or indirectly controls more than fifty (50%) of the voting stock or other ownership interest of the other corporation or entity, or if it possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of the corporation or other entity or the power to elect or appoint fifty percent (50%) or more of the members of the governing body of the corporation or other entity.

1.2 "DEVELOPMENT PHASE" shall mean for each Licensed Product the period commencing on the Effective Date and continuing for each country or jurisdiction

until Final Marketing Approval for the Licensed Product has been obtained in such country or jurisdiction.

1.3 "EFFECTIVE DATE" shall mean the date first written above.

1.4 [\*\*\*].

1.5 "EXCLUDED TECHNOLOGY" shall mean all patent claims (whether of an issued patent or pending patent application), inventions (whether or not patentable), trade secrets, know-how and other intellectual property of any kind unique to the development and/or manufacture of [\*\*\*].

1.6 "FIELD" shall mean vaccines for the prevention and treatment of S. AUREUS infections in cattle using Nabi Technology and Patent Rights.

1.7 "FINAL MARKETING APPROVAL" shall mean final approval of the governing health authority to market (including pricing approval where needed) a Licensed Product in a country (at times this may be referred to as registration or a government license).

1.8 "FIRST COMMERCIAL SALE" shall mean the first sale for use or consumption by the general public of a Licensed Product.

1.9 "IMPROVEMENTS" shall mean all inventions (whether or not patentable), information, know-how and data of any kind owned or controlled by, or licensed (with the right to sublicense) to, Pharmacia during the term of this Agreement for use in connection with the development, manufacture or use of Licensed Products but expressly excluding Nabi Technology and Patented Rights.

1.10 "LICENSED PRODUCTS" shall mean any product in the Field (a) which would be within a Valid Claim of a pending patent application included in the Patent Rights or which, but for the license granted herein, would infringe a Valid Claim of an issued patent included in the Patent Rights or (b) any product in the Field that is not encompassed by 1.10(a) and which utilizes Nabi Technology.

1.11 "NABI TECHNOLOGY" shall mean all present unpatented or unpatentable inventions, trade secrets, know-how, data, and other intellectual property of any kind owned or controlled by, or licensed (with the right to sublicense) to, Nabi necessary or useful for the manufacture, use or sale of the Licensed Products, but expressly excluding Excluded Technology and Patent Rights.

1.12 "NET SALES" shall mean all worldwide sales of the Licensed Products by Pharmacia, its Affiliates and its and their sublicensees as reported by the Pharmacia Global Sales Reporting System, or any succeeding comparable global sales reporting system. Net Sales as reported by the Pharmacia Global Sales Reporting System is the gross invoiced sales price of a Licensed Product less: [\*\*\*]. All translations to U.S. dollars shall be made using the methodology employed in the Pharmacia Global Sales Reporting System. [\*\*\*].

1.13 "PATENT RIGHTS" shall mean the United States and foreign patent applications an/or issued patents set forth in Exhibit A hereto; any division, continuation or continuation-in-part of any such applications; any foreign patent applications corresponding to any such patent applications; and any U.S. or foreign patents or the equivalent thereof issuing thereon or any reissue or extension thereof. Patent Rights shall not include Excluded Technology.

1.14 "THIRD PARTY" shall mean any entity other than Nabi or Pharmacia and their respective Affiliates.

1.15 "VALID CLAIM" shall mean either (a) a claim of an issued and unexpired patent which has not been held permanently revoked, unenforceable or invalid by a decision of a court or other governmental agency of competent jurisdiction, unappealable or unappealed within the time allowed for appeal, and which has not been admitted to be invalid or unenforceable through reissue or disclaimer or otherwise or (b) a claim of a pending patent application which claim was filed in good faith and has not been abandoned or finally disallowed without the possibility of appeal or re-filing of said application.

## ARTICLE 2. LICENSE GRANT

2.1 GRANT OF LICENSE RIGHTS BY NABI TO PHARMACIA. Subject to the provisions of Section 2.3, Nabi hereby grants to Pharmacia the exclusive worldwide (subject to the provisions of Section 9.2.4) right and license under the Patent Rights and Nabi Technology to use, manufacture, have manufactured, distribute for sale and sell the Licensed Products for use in the Field.

2.2 SUBLICENSES. Pharmacia shall have the right to grant sublicenses under the Patent Rights and the Nabi Technology to Affiliates of Pharmacia and, with the prior written consent of Nabi, which shall not be unreasonably withheld, to Third Parties. A copy of each sublicense granted by Pharmacia under this Agreement shall be furnished to Nabi promptly after execution thereof. Any such sublicense shall conform to the terms hereof, and Pharmacia shall be responsible for the performance by its sublicensees of all obligations imposed under the terms of this Agreement.

2.3 MARKETING AND DISTRIBUTION RIGHTS AND OBLIGATIONS. Pharmacia shall have the exclusive worldwide right to market and distribute the Licensed Products. Pharmacia agrees, at its own expense, to use diligent efforts to market the Licensed Products.

2.4 NO OTHER RIGHTS. Except as otherwise expressly provided in this Agreement, under no circumstances shall a party hereto, as a result of this Agreement, obtain any ownership interest in or other right to any technology, know-how, patents, pending patent applications, products or biological materials of the other party, including items owned, controlled or developed by the other party, or transferred by the other party to said party, at any time pursuant to this Agreement. Without limitation of the foregoing, Pharmacia shall obtain no rights to the trademarks StaphVAX or 336 or any variation thereof.

2.5 NO OTHER OBLIGATIONS. Except as otherwise expressly provided in this Agreement or as set forth on Exhibit B, Nabi shall have no obligations to Pharmacia with respect to the development and commercialization of Licensed Products.

### ARTICLE 3. EFFORTS DURING DEVELOPMENT PHASE

3.1 DILIGENT EFFORTS OF PHARMACIA. During the Development Phase and thereafter, Pharmacia agrees, at its own expense, to use commercially reasonable efforts to perform research, preclinical development and clinical development with respect to Licensed Products and to seek and use its best commercially reasonable efforts to obtain Final Market Approvals, where necessary, for Licensed Products throughout the world. Pharmacia shall use its best commercially reasonable efforts to commence commercial sales of Licensed Product on a country-by-country basis at the earliest practicable date. Pharmacia shall have sole responsibility for filing and obtaining registrations for all Licensed Products and shall have sole rights to any such registrations which it obtains. Pharmacia shall have the sole right to determine which markets to seek registration except that it shall seek registration in [\*\*\*].

3.2 INFORMATION EXCHANGE, REPORTS. During the Development Phase and thereafter, Pharmacia shall keep Nabi informed as to its progress related to the Licensed Products, summarizing results of all preclinical or clinical studies or tests performed by Pharmacia or its Affiliates and sublicensees. Attached hereto as Exhibit C is the initial development plan. Once every six months following the Effective Date, Pharmacia shall provide Nabi an updated development plan and a detailed report describing Pharmacia's progress during the preceding twelve months with respect to Pharmacia's efforts under this Agreement. As soon as is reasonably practicable following delivery of each such plan and report, representatives of the parties shall meet to discuss each such plan and report. The site of the meetings shall be alternatively selected by Nabi and Pharmacia. These reports are solely for Nabi informative use to monitor the work on Pharmacia. These reports are to be maintained as confidential disclosures.

3.3 RIGHT TO USE DATA. Pharmacia shall provide Nabi full access to all of its notes, data and other information relating to Licensed Products in the Field on a confidential basis. Pharmacia shall maintain all information and data which Pharmacia generates during the course of preclinical and clinical trials conducted during the Development Phase, and Pharmacia shall grant Nabi a perpetual, non-exclusive, worldwide, royalty-free license to any such information or data, including the right to sublicense outside the Field, subject to the confidentiality provisions of Article 6. In the event this Agreement is terminated other than by Pharmacia pursuant to Section 9.2.1, Nabi shall retain such license and shall have unrestricted access to and use of such information and data for any purpose, including any regulatory purpose.

3.4 ATTENDANCE AT REGULATORY MEETINGS. Pharmacia will inform Nabi, with reasonable prior notice, of all meetings between its representatives and regulatory authorities regarding marketing approval of the Licensed Products. Nabi shall have the right to have a representative present at all important meetings if appropriate. Pharmacia will be solely responsible for the conduct of the meeting.

ARTICLE 4. PAYMENTS

4.1 LUMP SUM PAYMENTS. In consideration of the license and technical materials provided hereunder, Pharmacia shall compensate Nabi by paying to Nabi by wire transfer within five (5) business days after the Effective Date the sum of [\*\*\*].

Upon achievement of each of the milestones set forth below, Pharmacia shall make the corresponding payment stated below:

	MILESTONE	PAYMENT
(a)	Completion of the proof of concept study in dairy cattle and the affirmative decision by Pharmacia to move forward with development of a first Licensed Product in the Field or [***], whichever first occurs	[***]
(b)	If Pharmacia elects to move forward with development of a first Licensed Product in the Field following completion of the proof of concept study, final [***] filing for mastitis vaccine which constitutes a Licensed Product, provided that if such filing is not made by [***], Pharmacia shall make a penalty payment of [***] to Nabi and upon such payment shall have no further payment obligation under this clause (b)	[***]
(c)	First Final Market Approval for a Licensed Product in [***]	[***]
(d)	[***] filing for mastitis vaccine which constitutes a Licensed Product	[***]
(e)	First Final Market Approval for a Licensed Product in [***]	[***]
(f)	First Final Market Approval for a Licensed Product in [***]	[***]
(g)	First Final Market Approval for a Licensed Product in [***]	[***]

Within five (5) business days following the occurrence or successful completion, as the case may be, of each of the milestones set forth above or following the date the penalty payment becomes due under clause (b) above,

Pharmacia shall pay to Nabi the corresponding milestone payment set forth above in United States dollars by wire transfer. Payments made by Pharmacia to Nabi pursuant to this Section 4.1 are not refundable under any circumstances and will not be credited against royalty payments due to Nabi pursuant to Section 4.2.

4.2 ROYALTIES. Following the First Commercial Sale of a Licensed Product, Pharmacia will pay, on a calendar quarterly basis, without offset or deduction except as set forth in Section 1.11, a royalty in the amounts set forth below on Net Sales of the Licensed Product during the previous quarter.

4.2.1 ROYALTY CALCULATION; MINIMUMS. In consideration of the licenses granted to Pharmacia, Pharmacia shall pay to Nabi a royalty at the rates set forth on Exhibit D of the Net Sales of the Licensed Products sold by Pharmacia, its Affiliates and/or sublicensees; PROVIDED, HOWEVER, that:

(a) subject to the provisions of Section 5.1.2, for each of the [\*\*\*] periods beginning three months after Pharmacia, its Affiliates and/or its or their sublicensees shall have received its first Final Market Approval for a Licensed Product in [\*\*\*] (the "[\*\*\*] Period"), Pharmacia shall pay to Nabi royalties of at least [\*\*\*] PROVIDED, HOWEVER, that if the product previously identified by Pharmacia and Nabi has achieved worldwide sales measured in U.S. dollars of at least [\*\*\*] for a [\*\*\*] Period, then for each subsequent [\*\*\*] Period Pharmacia's minimum royalty obligation under this (a) shall be reduced to [\*\*\*];

(b) subject to the provisions of Section 5.1.2, in addition to the minimum royalty obligation set forth in (a) above, for each of the [\*\*\*] periods beginning three months after Pharmacia, its Affiliates and/or its or their sublicensees shall have received its first Final Market Approval for a Licensed Product in [\*\*\*] (the "[\*\*\*] Period"), Pharmacia shall pay to Nabi further royalties of at least [\*\*\*] PROVIDED, HOWEVER, that if the product previously identified by Pharmacia and Nabi has achieved worldwide sales measured in U.S. dollars of at least [\*\*\*] for a [\*\*\*] Period, then for each subsequent [\*\*\*] Period Pharmacia's minimum royalty obligation under this (b) shall be reduced to [\*\*\*];

(c) upon expiration of each of the [\*\*\*] periods set forth in (a) and (b) above, Pharmacia shall continue to make annual minimum royalty payments to Nabi in amounts to be agreed upon by Pharmacia and Nabi acting in good faith;

(d) notwithstanding the provisions of (a) and (b) above, in the event the market share of a product competitive with a Licensed Product that is offered and sold by a third party is [\*\*\*] or greater (i) in [\*\*\*] the minimum royalty set forth in (a) above shall be renegotiated in good faith and (ii) in [\*\*\*] the minimum royalty set forth in (b) above shall be renegotiated in good faith;

(e) notwithstanding the provisions of (a) and (b) above, Pharmacia shall have no obligation to make minimum royalty payments in the event Nabi elects not to take action against an alleged infringer of the Patent Rights in the Field or any action taken by Nabi against

the alleged infringer is unsuccessful and in either such event sales of Licensed Products are materially and adversely affected by sales of the alleged infringing product; and

(f) notwithstanding the provisions of (a) and (b) above, in the event sales of Licensed Products are materially and adversely affected during the [\*\*\*] periods set forth in (a) and (b) above, despite Pharmacia's best documented diligent efforts, because regulatory, technical or supply limitations limit production and sales, Nabi shall in good faith agree to appropriately reduce the minimum royalty payment for [\*\*\*], as appropriate, for the period in question.

4.2.2 ROYALTY PAYMENT REPORTS, EXCHANGE RATES. During the term of this Agreement following the First Commercial Sale of a Licensed Product, Pharmacia shall within forty five (45) days after each calendar quarter pay to Nabi the royalties due under the Agreement for such quarter and furnish to Nabi a written quarterly report showing: (i) the gross sales of the Licensed Products sold by Pharmacia, its Affiliates, and its sublicensees during the reporting period and the calculation of Net Sales from such gross sales; (ii) the royalty due thereon; (iii) withholding taxes, if any, required by law to be deducted in respect of such royalties; and (iv) the exchange rates used in determining the amount of United States dollars. All sales in currencies other than United States dollars shall be converted into United States dollars calculated at the exchange rate published in THE WALL STREET JOURNAL on the last day of the calendar quarter. If no royalty is due for any royalty period hereunder, Pharmacia shall so report. Pharmacia shall keep complete and accurate records in sufficient detail to properly reflect all gross sales and Net Sales and to enable the royalties payable hereunder to be determined. Any royalty payment for the fourth quarter of a [\*\*\*] Period or [\*\*\*] Period shall include an amount sufficient to satisfy the minimum royalty obligation under Section 4.2.1.

4.2.3 AUDITS. Upon the written request and ample advance notice (30 days) of Nabi, Pharmacia shall permit an internal auditor or independent public accountant selected by Nabi and acceptable to Pharmacia which acceptance shall not be unreasonably withheld or delayed, to have access during normal business hours to such records of Pharmacia as may be reasonably necessary to verify the accuracy of the royalty reports described herein, in respect of any calendar year ending not more than thirty-six (36) months prior to the date of such request. All such verifications shall be conducted at Nabi's expense and not more than once in each calendar year. In the event such Nabi representative concludes, providing sufficient evidence that additional royalties were owed to Nabi during such period, the additional royalty shall be paid by Pharmacia within thirty (30) days of the date Nabi delivers to Pharmacia such representative's written report so concluding. The fees charged by such representative shall be paid by Nabi unless the audit discloses that the royalties payable by Pharmacia for the audited period are underpaid by more than [\*\*\*], in which case Pharmacia shall pay the reasonable fees and expenses charged by such representative and a further amount equal to the amount of the additional royalty. Any overpay will be refundable or credited against future royalties. Pharmacia shall include in each Third Party sublicense granted by it pursuant to this Agreement a provision requiring the sublicensee to make reports to Pharmacia, to keep and maintain records of sales made pursuant to such

sublicense and to grant access to such records by Nabi's representatives to the same extent required of Pharmacia under this Agreement. Nabi agrees that all information subject to review under this Section 4.2.3 or under any sublicense agreement is confidential and that Nabi shall cause its representatives to retain all such information in confidence.

4.2.4 FOREIGN ROYALTIES. If royalties are due Nabi hereunder for sales of Licensed Products in a country in which, by reason of currency regulations or taxes of any kind, it is impossible or illegal for Pharmacia, its Affiliates and/or sublicensees to transfer royalty payments to Nabi for Net Sales in that country, such royalties shall be deposited in whatever currency is allowable by the person or entity not able to make the transfer for the benefit or credit of Nabi in an accredited bank in that country that is acceptable to Nabi.

4.2.5 INTEREST ON LATE PAYMENTS. Any payments by Pharmacia to Nabi that are not paid on or before the fifth business day after the date such payments are due under this Agreement shall bear interest at the lower of (a) the maximum rate permitted by applicable law and (b) two (2) percentage points above the prime rate of interest reported from time to time by THE WALL STREET JOURNAL, calculated on the number of days payment is delinquent.

#### ARTICLE 5. INTELLECTUAL PROPERTY

##### 5.1 FILING, PROSECUTION AND MAINTENANCE OF PATENT RIGHTS.

5.1.1 PROSECUTION AND MAINTENANCE. Nabi shall be responsible at its expense for the filing, prosecution and maintenance of the Patent Rights in its own name, keeping Pharmacia informed.

5.1.2 ABANDONMENT; FAILURE TO PAY. Nabi agrees that it will not abandon the prosecution of any patent applications included within the Patent Rights nor shall it fail to make any payment or fail to take any other action necessary to maintain a patent under the Patent Rights unless it has notified Pharmacia in sufficient time for Pharmacia to assume such prosecution or make such payment. If Nabi elects not to continue to seek or maintain patent protection on any patent or patent application included in the Patent Rights and subject to any prior rights Nabi may hereafter grant to Third Parties, [\*\*\*]. Nabi will advise Pharmacia of all decisions taken with respect to any such election in a timely manner in order to allow Pharmacia to protect its rights under this Section 5.1.2.

5.1.3 COOPERATION. Each party shall make available to the other party (or to the other party's authorized attorneys, agents or representatives), its employees, agents or consultants to the extent reasonably necessary or appropriate to enable the appropriate party to file, prosecute and maintain patent applications and resulting patents as set forth in this Section 5.1 for periods of time reasonably sufficient for such party to obtain the assistance it needs from such personnel. Where appropriate, each party shall sign or cause to have signed all documents relating to said patent applications or patents at no charge to the other party.

##### 5.2 INFRINGEMENT BY OTHERS.

5.2.1 PROSECUTION BY NABI. Nabi and Pharmacia shall each promptly notify the other in writing of any alleged or threatened infringement of patents or patent applications included in the Patent Rights in the Field



licensed hereunder to Pharmacia of which they become aware, and the parties shall consult concerning the action to be taken. Nabi shall have the right, but not the obligation, to prosecute at its own expense any such infringement. Any recovery or damages derived from such action shall belong to Nabi.

5.2.2 PROSECUTION BY PHARMACIA. If, within thirty (30) days or shorter as may be necessary to protect Pharmacia's right to seek immediate injunctive relief, after Nabi first becomes aware of any infringement of the Patent Rights in the Field, Nabi declines to prosecute such infringement or fails to cause such infringement to terminate or to bring or diligently prosecute a suit or action to compel termination, if Nabi so elects in writing, Pharmacia shall have the right, but not the obligation, to bring such suit or action to compel termination at the sole expense of Pharmacia. In such event, Pharmacia shall have the right, if Nabi is a legally indispensable party, to bring such suit or action in the name of Nabi. Nabi shall have the right to join any such suit or action brought by Pharmacia at Nabi's expense. Any recovery or damages derived from such action shall first be used to reimburse the parties for all legal expenses relating to the suit and thereafter shall [\*\*\*]. No settlement, consent, judgment or other voluntary final disposition of the suit may be entered into without the consent of Nabi, which consent shall not unreasonably be withheld.

5.3 DECLARATORY ACTIONS. In the event that a declaratory judgment action alleging invalidity or non-infringement of any of the Patent Rights shall be brought against Pharmacia, Pharmacia shall notify Nabi in writing, and the parties shall consult concerning the action to be taken. Nabi, at its sole option, shall have the right, within thirty (30) days after commencement of such action, to intervene, take over and duly prosecute the sole defense of the action at its own expense. Pharmacia shall have no obligation to defend any such action, but Pharmacia shall have the right, at its own expense, to join in the defense of any such suit or action.

5.4 INFRINGEMENT ACTION AGAINST PHARMACIA. In the event that a suit or action is brought against Pharmacia alleging infringement of any third-party patent right as a result of the exercise of Pharmacia's rights under Section 2.1, Pharmacia shall have the exclusive right to defend such suit or action at its sole expense. Nabi will confer with and assist Pharmacia, at Nabi's expense, in the conduct or settlement of such defense. Nabi shall have the right to be represented in such suit or action by advisory counsel at its expense. Pharmacia shall not have the right to settle any such suit or action without the prior written consent of Nabi if as a result of such settlement Nabi would be obligated to make any payment, assume any obligation, part with any property or interest therein, be subject to any injunction or order, grant any license or other right under the Patent Rights, or acknowledge the invalidity of any of the Patent Rights. Any recovery or damages obtained by Pharmacia in relation to any counterclaim or the like filed by Pharmacia in such suit shall be applied first in satisfaction of any expenses and legal fees of Pharmacia relating to the suit. Any recovery or damages still remaining shall [\*\*\*].

5.5 COOPERATION. In any infringement suit either party may institute to enforce or defend the Patent Rights or in which either party defends claims of infringement of third-party patents pursuant to this Agreement or in any declaratory judgment action defended by a party, the other party shall, at the

request of the party initiating or defending such suit, cooperate at its expense in all respects and, to the extent possible, have its employees testify when requested and make available relevant records, papers, information, samples and the like. Pharmacia's cooperation in any suit initiated by Nabi shall be at Nabi's expense. Nabi's cooperation in any suit initiated by Pharmacia shall be at Pharmacia's expense.

5.6 IMPROVEMENTS. Pharmacia hereby grants to Nabi a non-exclusive, worldwide, royalty-free license, including the right to sublicense, to all Improvements directly related to Nabi Technology for all purposes. If Pharmacia, its Affiliates and/or its and their sublicensees develop or acquire Improvements not directly related to Nabi Technology, such Improvements shall be promptly disclosed to Nabi in reasonable detail and [\*\*\*]. In the event this Agreement is terminated other than by Pharmacia pursuant to Section 9.2.1, [\*\*\*].

5.7 ADDITIONAL AGREEMENT. Pharmacia shall have the right to test vaccines using Nabi Technology and Patent Rights in staphylococcal disease in [\*\*\*] to attempt to demonstrate successful proof of concept in [\*\*\*]. If Pharmacia has successfully demonstrated proof of concept in [\*\*\*] and decides to move forward, Pharmacia shall pay to Nabi the sum of [\*\*\*] and Pharmacia and Nabi shall in good faith negotiate the terms of an exclusive licensing agreement substantially similar to this Agreement for the field of prevention and treatment of S. AUREUS infections in [\*\*\*]. In such event, the milestone events and all payments and the royalty rates shall be based upon then-prevailing market rates and terms.

5.8 OTHER TECHNOLOGY. (a) In the event that subsequent to the Effective Date, Nabi develops or acquires (with the right to sublicense) new technology which has application in the field of veterinary medicine, subject to the provisions of Section 5.8(b) Nabi shall offer to negotiate in good faith with Pharmacia rights to such technology in such field. If the parties are unable to reach agreement in principle on terms within sixty (60) days after Nabi has made the offer and to execute and deliver definitive agreements within ninety (90) days after Nabi has made the offer, Nabi shall be free thereafter to take whatever action it determines with respect to such technology with no further obligation to Pharmacia.

(b) Notwithstanding the provisions of Section 5.8(a), in the event that subsequent to the Effective Date, Nabi develops or acquires (with the right to sublicense) new technology which is specific to the treatment, control or prevention of S. AUREUS infections in dairy cattle and proposes to transfer such technology to a Third Party, Nabi shall notify Pharmacia in writing and set forth in reasonable detail the nature of such technology and the principal terms of such proposed transfer. Such offer shall constitute an offer to transfer such technology on such terms to Pharmacia. Pharmacia shall have the right to accept such offer within sixty (60) days after Nabi has made the offer. If such offer has not been accepted by Pharmacia in writing within sixty (60) days after Nabi has made such offer or definitive agreements with respect to such offer have not been executed and delivered within ninety (90) days after Nabi has made such offer, Nabi shall be free to transfer the new technology to the Third Party on terms no less favorable to Nabi than those offered to Pharmacia.

## ARTICLE 6. CONFIDENTIALITY

### 6.1 NONDISCLOSURE OBLIGATIONS.

6.1.1 GENERAL. Except as otherwise provided in this Article 6, during the term of this Agreement and for a period of five (5) years thereafter, both parties shall maintain in confidence and use only for purposes specifically authorized under this Agreement (i) information and data received from the other party resulting from or related to the development of the Licensed Products and (ii) all information and data not described in clause (i) but supplied by the other party under this Agreement. For purposes of this Article 6, information and data described in clause (i) or (ii) shall be referred to as "Information".

6.1.2 LIMITATIONS. To the extent it is reasonably necessary or appropriate to fulfill its obligations or exercise its rights under this Agreement, a party may disclose to its Affiliates, sublicensees, consultants, outside contractors and clinical investigators, Information it is otherwise obligated under this Section 6.1 not to disclose on a need-to-know basis on condition that such entities or persons agree to keep the Information confidential for the same time periods and to the same extent as such party is required to keep the Information confidential; and a party or its sublicensees may disclose such Information to government or other regulatory authorities to the extent that such disclosure is reasonably necessary to obtain patents or authorizations to conduct clinical trials of, and to commercially market, the Licensed Products. The obligation not to disclose Information shall not apply to any part of such Information that: (i) is or becomes part of the public domain other than by unauthorized acts of the party obligated not to disclose such Information or its Affiliates or sublicensees; (ii) can be shown by written documents to have been disclosed to the receiving party or its Affiliates or sublicensees by a Third Party, provided such Information was not obtained by such Third Party directly or indirectly from the other party under this Agreement pursuant to a confidentiality agreement; (iii) prior to disclosure under this Agreement, was already in the possession of the receiving party or its Affiliates or sublicensees, provided such Information was not obtained directly or indirectly from the other party under this Agreement pursuant to a confidentiality agreement; (iv) can be shown by written documents to have been independently developed by the receiving party or its Affiliates without breach of any of the provisions of this Agreement; or (v) is disclosed by the receiving party pursuant to interrogatories, requests for information or documents, subpoena, civil investigative demand issued by a court or governmental agency or as otherwise required by law, provided that the receiving party notifies the other party immediately upon receipt thereof and provided further that the disclosing party furnishes only that portion of the Information which it is advised by counsel is legally required.

6.2 TERMS OF THIS AGREEMENT. Except as provided in Section 10.7 hereof, Nabi and Pharmacia each agree not to disclose any terms or conditions of this Agreement to any Third Party without the prior consent of the other party, except as required by applicable law or pursuant to a confidentiality agreement no less restrictive than this Article 6. If either party determines that it is required to file with the Securities and Exchange Commission or other governmental agency this Agreement for any reason, such party shall request confidential treatment of such portions of this Agreement, as it and the other party shall together determine. Notwithstanding the foregoing, prior to execution of this Agreement, Nabi and Pharmacia shall agree upon the substance of information that can be used as a routine reference in the usual course of business to describe the terms of this transaction, and Nabi and Pharmacia may disclose such information, as modified by mutual agreement from time to time, without the other party's consent.

### 6.3 PUBLICATIONS.

6.3.1 PROCEDURE. Both parties recognize the mutual interest in obtaining patent protection for inventions, which arise under this Agreement. In the event that employees or consultants or any other Third Party under contract to Nabi or Pharmacia wishes to make a publication (including any oral disclosure made without obligation of confidentiality) relating to work performed under this Agreement in the Field (the "Publishing Party"), the Publishing Party shall transmit to Nabi or Pharmacia a copy of the proposed written publication at least thirty (30) days prior to submission for publication, or an abstract of such oral disclosure at least thirty (30) days prior to submission of the abstract or the oral disclosure, whichever is earlier. Nabi and Pharmacia shall have the right (a) to propose modifications to the publication for patent reasons, (b) to request a delay in publication or presentation in order to protect patentable information, or (c) to request that the information be maintained as a trade secret and, in such case, the Publishing Party shall not make such publication.

6.3.2 DELAY. If Nabi requests a delay as described in Section 6.3.1(b), the Publishing Party shall delay submission or presentation of the publication for a period of ninety (90) days to enable patent applications protecting rights in such information to be filed.

6.3.3 RESOLUTION. Upon the receipt of written approval of Nabi, the Publishing Party may proceed with the written publication or the oral presentation.

6.4 INJUNCTIVE RELIEF. The parties hereto understand and agree that remedies at law may be inadequate to protect against any breach of any provisions of this Article 6 by either party or their employees, agent, officers or directors or any other person acting in concert with it or on its behalf. Accordingly, each party shall be entitled to the granting of injunctive relief by a court of competent jurisdiction against any action that constitutes any such breach of this Article 6, without any requirement to post a bond.

### ARTICLE 7. REPRESENTATIONS AND WARRANTIES

7.1 MUTUAL REPRESENTATIONS. Nabi and Pharmacia each represent and warrant to the other as follows:

7.1.1 ORGANIZATION. It is a corporation duly organized, validly existing and is in good standing under the laws of the jurisdiction of its incorporation and has all requisite power and authority, corporate or otherwise, to execute, deliver and perform this Agreement.

7.1.2 AUTHORIZATION. The execution, delivery and performance by it of this Agreement has been duly authorized by all necessary corporate action and does not violate any provision of any law, rule, regulation, order, writ, judgment, injunction, decree, determination or award presently in effect having applicability to it or any provision of its charter documents or any agreement or other instrument or obligation to which it is bound or its assets are subject.

7.1.3 BINDING AGREEMENT. This Agreement is a legal, valid and binding obligation of it enforceable against it in accordance with its terms and conditions.

7.1.4 NO INCONSISTENT OBLIGATION. Except as provided in Section 2.3, it is not under any obligation to any person, or entity, contractual or otherwise, that is conflicting or inconsistent in any respect with the terms of this Agreement or that would impede the diligent and complete fulfillment of its obligations.

## 7.2 LIMITATIONS

7.2.1 DISCLAIMER OF WARRANTY. Except as provided in Section 7.1, the rights granted by Nabi herein are provided WITHOUT REPRESENTATION OR WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR ANY OTHER WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED. NABI MAKES NO REPRESENTATION OR WARRANTY THAT EXERCISE OF THE RIGHTS GRANTED IN THIS AGREEMENT WILL NOT INFRINGE ANY THIRD-PARTY OR OTHER PROPRIETARY RIGHT. NABI ASSUMES NO RESPONSIBILITY WHATSOEVER WITH RESPECT TO THE PATENT RIGHTS OR NABI TECHNOLOGY, OR THE USE THEREOF, OR THE MANUFACTURE, POSSESSION, USE, MARKETING, SALE OR OTHER DISPOSITION, BY PHARMACIA OR ANYONE ELSE, OF LICENSED PRODUCT(S). Without limitation of the generality of this Section, nothing contained herein or in the Patents Rights or Nabi Technology shall be construed as extending any representation or warranty with respect to any of the foregoing or the results to be obtained thereby.

7.2.2 DISCLAIMER OF CERTAIN DAMAGES. IN NO EVENT WILL NABI BE LIABLE TO PHARMACIA OR ANY OTHER PARTY, REGARDLESS OF THE CAUSE OR THEORY OF ACTION (WHETHER CONTRACT, TORT INCLUDING WITHOUT LIMITATION STRICT LIABILITY AND NEGLIGENCE, OR OTHERWISE) FOR ANY INCIDENTAL, SPECIAL, PUNITIVE, CONSEQUENTIAL OR OTHER EXTRAORDINARY DAMAGES RESULTING FROM OR ARISING UNDER THIS AGREEMENT INCLUDING WITHOUT LIMITATION THE EXERCISE OF THE RIGHTS GRANTED IN THIS AGREEMENT, THE USE OF PATENT RIGHTS OR NABI TECHNOLOGY, OR THE MANUFACTURE, SALE OR USE OF LICENSED PRODUCTS UNLESS THE DAMAGES ARE CAUSED BY NABI'S WILLFUL AND MALICIOUS MISCONDUCT

7.2.3 FURTHER LIMITATIONS. Nothing in this Agreement shall be construed as:

(a) a warranty or representation by Nabi as to the validity or scope of any Patent Rights; or

(b) a warranty or representation that anything made, used, sold or otherwise disposed of under the rights granted in this Agreement is or will be free from infringement of a third-party patent or other proprietary right; or

(c) a warranty or representation that any of the Nabi Technology has not been, or may not hereafter be, developed independently by a Third Party; or

(d) conferring by implication, estoppel or otherwise any license or other right under patents or technology of Nabi except for activities within the Field.

#### ARTICLE 8. INDEMNITY

8.1 PHARMACIA INDEMNITY OBLIGATIONS. Pharmacia agrees to defend, indemnify and hold Nabi, its Affiliates and their respective directors, officers, employees and agents harmless against any and all claims, suits, losses, judgments, liabilities, damages, costs and fees (including but not limited to reasonable attorneys' fees) and expenses resulting from or arising out of (a) the breach by Pharmacia of its representations and warranties in Article 7 or any other breach of this Agreement; (b) actual or asserted violations of any applicable law or regulation by Pharmacia, its Affiliates or sublicensees by virtue of which the Licensed Products manufactured, distributed or sold shall be alleged or determined to be adulterated, misbranded, mislabeled or otherwise not in compliance with such applicable law or regulation; (c) claims for bodily injury, death or property damage attributable to the manufacture, distribution, sale or use of the Licensed Products by Pharmacia, its Affiliates or sublicensees; or (d) a recall ordered by a governmental agency, or required by a confirmed failure, of Licensed Products manufactured, distributed, or sold by Pharmacia, its Affiliates or sublicensees and to the extent not caused by the willful misconduct of Nabi.

8.2 NABI INDEMNITY OBLIGATIONS. Nabi agrees to defend, indemnify and hold Pharmacia, its Affiliates and their respective directors, officers, employees and agents harmless against any and all claims, suits, losses, judgments, liabilities, damages, costs, fees (including but not limited to reasonable attorneys' fees) and expenses resulting from or arising out of the breach by Nabi of its representations and warranties in Article 7 or any other breach of this Agreement not caused by the willful misconduct of Pharmacia.

8.3 PROCEDURE. A party or any of its Affiliates or their respective employees or agents (the "Indemnitee") that intends to claim indemnification under this Article 8 shall promptly notify the other party (the "Indemnitor") of any loss, claim, damage, liability or action in respect of which the Indemnitee intends to claim such indemnification, and the Indemnitor shall assume the defense thereof with counsel mutually satisfactory to the parties; PROVIDED, HOWEVER, that an Indemnitee shall have the right to retain its own counsel, with the fees and expenses to be paid by the Indemnitor, if representation of such Indemnitee by the counsel retained by the Indemnitor would be inappropriate due to actual or potential differing interests between the Indemnitee and the Indemnitor. The indemnity agreement in this Article 8 shall not apply to amounts paid in settlement of any loss, claim, damage, liability or action if such settlement is effected without the consent of the Indemnitor, which consent shall not be withheld unreasonably. The failure to deliver notice to the Indemnitor within a reasonable time after the commencement of any such action shall not relieve the Indemnitor of any liability to the Indemnitee under this Article 8. The Indemnitee and its employees and agents shall cooperate fully with the Indemnitor and its legal representatives in the investigation of any action, claim or liability covered by this indemnification. In the event that an Indemnitee claims indemnity from the Indemnitor and the Indemnitor is finally

held liable to indemnify the Indemnitee, the Indemnitor shall additionally be liable to pay the reasonable legal costs and attorneys' fees incurred by the Indemnitee in establishing its claim for indemnity.

8.4 INSURANCE. Pharmacia shall carry and maintain at its expense during the term of the Agreement, appropriate insurance coverage of the kind and with liability limits acceptable to Nabi to protect itself and Nabi from and against any and all claims or liabilities which may arise directly or indirectly as a result of its performance under this Agreement. A certificate evidencing adequate insurance coverage and any renewal thereof shall be provided to Nabi upon request of Nabi.

#### ARTICLE 9. EXPIRATION AND TERMINATION

9.1 EXPIRATION. Unless this Agreement is sooner terminated in accordance with the provisions of this Article 9, the term of Pharmacia's obligation of royalty payments pursuant to Section 4.2 hereof shall cease [\*\*\*] (a) with respect to royalties calculated on the basis of Section 1 of Exhibit B, [\*\*\*] or (b) with respect to royalties calculated on the basis of Section 2 of Exhibit B, [\*\*\*] after the date of the Agreement in the country in which the sales occur. [\*\*\*].

#### 9.2 TERMINATION.

9.2.1 TERMINATION BY EITHER PARTY. Subject to the provisions of Section 9.2.2, this Agreement may be terminated by either party (i) by reason of a material breach if the breaching party fails to remedy such breach within ninety (90) days after written notice thereof by the non-breaching party or (ii) upon bankruptcy, insolvency, dissolution or winding up of the other party.

9.2.2 INTELLECTUAL PROPERTY LICENSE SURVIVAL DURING BANKRUPTCY. All rights and license rights granted under or pursuant to this Agreement are, and shall otherwise be deemed to be, for purposes of Section 365(n) of the U.S. Bankruptcy Code, licenses of rights to "intellectual property" as defined under Section 101(52) of the U.S. Bankruptcy Code. The parties agree that each party, as a licensee of such rights under this Agreement shall retain and may fully exercise all of its rights and elections under the U.S. Bankruptcy Code, subject to performance by the other party of its preexisting obligations under this Agreement.

9.2.3 TERMINATION BY PHARMACIA. [\*\*\*].

9.2.4 TERMINATION BY NABI. This Agreement may be terminated by Nabi by written notice to Pharmacia if (i) Pharmacia fails to make any royalty or other payment within ten (10) business days after such payment becomes payable and such failure is not remedied within ten (10) days after notice thereof from Nabi, (ii) Pharmacia is in breach of its obligations under Sections 2.3 or 3.1 hereof or (iii) Pharmacia fails to make the full annual minimum royalty payment for a twelve-month period agreed upon pursuant to Section 4.2.1(c) or to agree upon an annual minimum royalty payment as contemplated by Section 4.2.1(c), in each case for any reason whatsoever, including, without limitation, as a result of a renegotiation, reduction or elimination of the annual minimum royalty as provided in Sections 4.2.1(d), 4.2.1(e) and 4.2.1(f) or in Section 5.1.2. Pharmacia shall cease to have any rights under Section 2.1

with respect to [\*\*\*] if Pharmacia fails to make minimum royalty payments of at least [\*\*\*] for a [\*\*\*] period covered by Section 4.2.1(a) or to have any rights under Section 2.1 with respect to [\*\*\*] if Pharmacia fails to make minimum royalty payments of at least [\*\*\*] for a [\*\*\*] period covered by Section 4.2.1(b), in each case for any reason whatsoever, including, without limitation, as a result of a renegotiation, reduction or elimination of the annual minimum royalty as provided in Sections 4.2.1(d), 4.2.1(e) and 4.2.1(f) or in Section 5.1.2. The failure by Pharmacia to expend by [\*\*\*] at least [\*\*\*] in U.S. dollars for the development and commercialization of Licensed Products shall be conclusively deemed to be a breach of Section 3.1 hereof.

9.3 SURVIVAL. The provisions of Articles 5, 6, 7 and 8 and Sections 3.3, 4.1 (with regard to milestone payments due and unpaid), 4.2 (with respect to royalties accrued but not yet paid and with respect to Sections 4.2.2, 4.2.3, 4.2.4 and 4.2.5), 9.4, 10.11 and this Section 9.3 shall survive the expiration or termination of this Agreement.

9.4 NON-LIMITATION OF RIGHTS. Termination of this Agreement pursuant to Section 9.2 shall not be exclusive or prejudicial to any other rights or remedies of the non-defaulting party on account of the defaulting party's breach or default under this Agreement.

#### ARTICLE 10. MISCELLANEOUS

10.1 FORCE MAJEURE. Neither party shall be held liable or responsible to the other party nor be deemed to have defaulted under or be in breach of this Agreement for failure or delay in fulfilling or performing any term of this Agreement when such failure or delay is caused by or results from causes beyond the reasonable control of the affected party, including but not limited to fire, floods, embargoes, war, acts of war (whether war is declared or not), insurrections, riots, civil commotions, strikes, lockouts or other labor disturbances, act of God or acts, omissions or delays in acting by any governmental authority or the other party; PROVIDED, HOWEVER, that the party so affected shall use reasonable commercial efforts to avoid or remove such causes of nonperformance, and shall continue performance hereunder with reasonable dispatch whenever such causes are removed. Either party shall provide the other party with prompt written notice of any delay or failure to perform that occurs by reason of FORCE MAJEURE. The parties shall mutually seek a resolution of the delay or the failure to perform as noted above.





WITH A COPY TO:

Nutter McClennen & Fish LLP  
World Trade Center West  
155 Seaport Boulevard  
Boston, MA 02210-2604  
Attention: Constantine Alexander, Esq.  
Telephone: 617 439-2595  
Telecopy: 617-310-9597

If to Pharmacia:

Pharmacia Corp  
Pharmacia Animal Health 7000 Portage Road  
Kalamazoo, Michigan 49001  
Attention: Andrew Solomon, Esq.  
Assistant General Counsel  
Telephone: 269 833 2692  
Telecopy: 269-833- 2600

10.5 APPLICABLE LAW. This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, without giving effect to the choice of laws provisions thereof, PROVIDED, HOWEVER, that the scope, validity and enforceability of patents shall be determined in accordance with the applicable laws of the countries in which such patents have been issued.

#### 10.6 DISPUTE RESOLUTION.

10.6.1 GOOD FAITH ATTEMPT TO RESOLVE. The parties hereby agree that they will attempt in good faith to resolve any controversy or claim arising out of or relating to this Agreement promptly by negotiations.

10.6.2 ARBITRATION. If the parties are unable to resolve the matter through negotiations, the parties shall submit the dispute to arbitration. The arbitration shall be held in accordance with the Commercial Arbitration Rules of the American Arbitration Association (the "Arbitration Rules") as the Arbitration Rules then exist by one or more arbitrators appointed in accordance with the Arbitration Rules. The arbitration shall take place in Boca Raton, Florida if initiated by Pharmacia or New York City, N.Y. if initiated by Nabi. Each party shall have the right to take discovery of the other party by any or all methods provided in the Federal Rules of Civil Procedure. The arbitrator may, upon request, exclude any evidence not made available to the other party pursuant to a proper discovery request from being used in the arbitration. Any decision or award resulting from the arbitration provided for herein shall be final and binding on the parties hereto. Judgment upon the arbitrator's award may be entered in any court of competent jurisdiction. Under no circumstances shall either party be obliged to use arbitration to reconcile Nabi patent issues.

10.6.3 RIGHT TO SEEK INJUNCTIVE RELIEF. Notwithstanding the foregoing provisions of this Section 10.6, either party has the right to bring suit in a court of competent jurisdiction against the other party for (i) any breach of such other party's duties of confidentiality pursuant to Article 6 of

this Agreement and (ii) any infringement of its own proprietary rights by the other party.

10.6.4 NO OTHER PROCEEDINGS. The parties agree not to institute any litigation or other proceedings against each other in connection with this Agreement except as provided in this Section 10.6 unless this Agreement otherwise provides.

10.7 PUBLIC ANNOUNCEMENTS. The parties agree that press releases and other announcements to be made by either of them in relation to this Agreement shall be subject to the written consent of the other party, which consent shall not be unreasonably withheld or delayed, except to the extent otherwise required by law. Except to the extent required by law, no disclosure will discuss terms or scope of this Agreement.

10.8 ENTIRE AGREEMENT. This Agreement, together with the Exhibits hereto, contains the entire understanding of the parties with respect to the subject matter hereof. All express or implied agreements and understandings, either oral or written, heretofore made are expressly merged in and made a part of this Agreement. This Agreement may be amended, or any term hereof modified, only by a written instrument duly executed by both parties hereto.

10.9 HEADINGS. The captions to the several Articles and Sections hereof are not a part of this Agreement, but are merely guides or labels to assist in locating and reading the several Articles and Section hereof.

10.10 INDEPENDENT CONTRACTORS. It is expressly agreed that Nabi and Pharmacia shall be independent contractors and that the relationship between the two parties shall not constitute a partnership, joint venture or agency. Neither Nabi nor Pharmacia shall have the authority to make any statements, representations or commitments of any kind, or to take any action, which shall be binding on the other, without the prior consent of the other party to do so.

10.11 AGREEMENT NOT TO SOLICIT. During the first three years of this Agreement, Pharmacia and its Affiliates shall not hire any employee of Nabi, or any person who had been an employee of Nabi within [\*\*\*] of the date of hire, who is or was actively involved in the development or commercialization of the Patent Rights or Nabi Technology [\*\*\*]; PROVIDED, HOWEVER, that nothing contained in this Section 10.11 shall prohibit Pharmacia or any of its Affiliates from hiring a person responding to a general advertisement for employment.

10.12 EXPORTS. The parties acknowledge that the export of technical data, materials, or products is subject to the exporting party receiving any necessary export licenses and that the parties cannot be responsible for any delays attributable to export controls, which are beyond the reasonable control of either party. Nabi and Pharmacia agree not to export or re-export, directly or indirectly, any information, technical data, the direct product of such data, samples or equipment received or generated under this Agreement in violation of any applicable export control laws or governmental regulations. Nabi and Pharmacia agree to obtain similar covenants from their licensees, sublicensees and contractors with respect to the subject matter of this Section 10.12.

10.13 WAIVER. The waiver by either party hereto of any right hereunder or the failure to perform or of a breach by the other party shall not be deemed a waiver of any other right hereunder or of any other breach or failure by said other party whether of a similar nature or otherwise.

10.14 COUNTERPARTS. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

10.15 INTERPRETATION. The parties acknowledge and agree that: (i) each party and its counsel reviewed and negotiated the terms and provisions of this Agreement and has contributed to its revision; (ii) the rule of construction to the effect that any ambiguities are resolved against the drafting party shall not be employed in the interpretation of this Agreement; and (iii) the terms and provision of this agreement shall be construed fairly as to all parties hereto and not in favor of or against any party, regardless of which party was generally responsible for the preparation of this Agreement.

10.16 IDENTIFICATION OF PATENT RIGHTS; PATENT MARKING. Where appropriate, all packaging and documentation for the Licensed Products shall include a notation acknowledging Nabi's patent rights in the Licensed Products. Pharmacia shall mark, and cause its Affiliates and sublicensees to mark, all Licensed Products made, sold or used under this Agreement, or their containers, in accordance with the applicable patent marking laws of each country in which such Licensed Products are to be sold or offered for sale.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first set forth above.

NABI BIOPHARMACEUTICALS

PHARMACIA AND UPJOHN COMPANY

By: /s/ THOMAS H. MCLAIN

By: /s/ GEORGE GUNN

-----  
Title: President and Chief  
Operating Officer

-----  
Title: President, Pharmacia  
Animal Health

[\*\*\*] A CONFIDENTIAL PORTION OF THE MATERIAL HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION.

=====

LOAN AND SECURITY AGREEMENT

BY AND AMONG

NABI BIOPHARMACEUTICALS

AS BORROWER,

THE LENDERS THAT ARE SIGNATORIES HERETO

AS THE LENDERS,

AND

WELLS FARGO FOOTHILL, INC.,

AS THE ARRANGER AND ADMINISTRATIVE AGENT

DATED AS OF JUNE 18, 2003

=====

## LOAN AND SECURITY AGREEMENT

THIS LOAN AND SECURITY AGREEMENT (this "Agreement"), is entered into as of June 18, 2003 between and among, on the one hand, the lenders identified on the signature pages hereof (such lenders, together with their respective successors and assigns, are referred to hereinafter each individually as a "Lender" and collectively as the "Lenders"), WELLS FARGO FOOTHILL, INC., a California corporation, as the arranger and administrative agent for the Lenders ("Agent"), and, on the other hand, NABI BIOPHARMACEUTICALS, a Delaware corporation ("Borrower").

The parties agree as follows:

### 1. DEFINITIONS AND CONSTRUCTION.

1.1 DEFINITIONS. As used in this Agreement, the following terms shall have the following definitions:

"Account Debtor" means any Person who is or who may become obligated under, with respect to, or on account of, an Account, chattel paper, or a General Intangible.

"Accounts" means all of Borrower's now owned or hereafter acquired right, title, and interest with respect to "accounts" (as that term is defined in the Code), and any and all supporting obligations in respect thereof.

"ACH Transactions" means any cash management or related services (including the Automated Clearing House processing of electronic funds transfers through the direct Federal Reserve Fedline system) provided by Wells Fargo or its Affiliates for the account of Borrower or its Subsidiaries.

"Activation Notice" has the meaning set forth in SECTION 2.7(B).

"Additional Documents" has the meaning set forth in SECTION 4.4(C).

"Advances" has the meaning set forth in SECTION 2.1.

"Affiliate" means, as applied to any Person, any other Person who, directly or indirectly, controls, is controlled by, or is under common control with, such Person. For purposes of this definition, "control" means the possession, directly or indirectly, of the power to direct the management and policies of a Person, whether through the ownership of Stock, by contract, or otherwise; provided, however, that, for the purposes of the definition of Eligible Accounts and SECTION 7.14 hereof: (a) any Person which owns directly or indirectly 10% or more of the securities having ordinary voting power for the election of directors or other members of the governing body of a Person or 10% or more of the partnership or other ownership interests of a Person (other than as a limited partner of such Person) shall be deemed to control such Person, (b) each director (or comparable manager) of a Person shall be deemed to be an Affiliate of such Person, and (c) each partnership or joint venture in which a Person is a partner or joint venturer shall be deemed to be an Affiliate of such Person.

"Agent" means Foothill, solely in its capacity as agent for the Lenders hereunder, and any successor thereto.

"Agent Advances" has the meaning set forth in SECTION 2.3(E)(I).

"Agent's Account" means an account identified on SCHEDULE A-1.

"Agent's Liens" means the Liens granted by Borrower to Agent for the benefit of the Lender Group under this Agreement or the other Loan Documents.

"Agent-Related Persons" means Agent together with its Affiliates, officers, directors, employees, and agents.

"Agreement" has the meaning set forth in the preamble hereto.

"AmerisourceBergen" means AmerisourceBergen Corporation, a Delaware corporation.

"Applicable LIBOR Rate Revolver Margin" means, as of any date of determination, the percentage points set forth below with respect to Advances corresponding to the ratio of (x) Total Funded Debt at the end of the immediately preceding fiscal quarter of Borrower to (y) EBITDA for the twelve-month period ending as of the end of such fiscal quarter, as determined by Agent based upon Borrower's financial statements delivered to Agent and Lenders pursuant to SECTION 6.3(A) for such fiscal quarter:

Level	Ratio of Total Funded Debt to EBITDA	Applicable LIBOR Rate Revolver Margin
I	Less than 1.25:1	2.25 percentage points
II	1.25:1 to 2.50:1	2.75 percentage points
III	Greater than 2.50:1	3.00 percentage points

PROVIDED, that, notwithstanding the foregoing, (a) the Applicable LIBOR Rate Revolver Margin shall be effective from the date of delivery of Borrower's financial statements for the fiscal quarter used to determine the Applicable LIBOR Rate Revolver Margin until the date of delivery of such financial statements pursuant to SECTION 6.3(A) hereof for the next fiscal quarter, (b) if Borrower fails to deliver financial statements to Agent and the Lenders for any fiscal quarter within 5 days of the date such financial statements are due in accordance with SECTION 6.3(A) hereof, then until such financial statements are delivered, the Applicable LIBOR Rate Revolver Margin shall be set in accordance with Level III, and (c) on and after the Closing Date until the financial statements for the first fiscal quarter ending after the Closing Date are delivered, the Applicable LIBOR Rate Revolver Margin shall be set at Level II above.

"Applicable Prepayment Premium" means, as of any date of determination, an amount equal to (a) during the period of time from and after the date of the execution and delivery of this Agreement up to the date that is the first anniversary of the Closing Date, 2.0% times the Maximum Revolver

Amount, (b) during the period of time from and including the date that is the first anniversary of the Closing Date up to the date that is the second anniversary of the Closing Date, 1.0% times the Maximum Revolver Amount, and (c) during the period of time from and including the date that is the second anniversary of the Closing Date up to the date prior to the Maturity Date, 0.5% times the Maximum Revolver Amount.

"Appraised Value" means the net forced liquidation value (net of liquidation expenses) of any Equipment or the gross orderly liquidation value of any Real Property Collateral, in each case, determined by the most recent appraisal performed by a qualified independent appraiser, in form and substance satisfactory to Agent.

"Approved Acquisitions" means the acquisitions by Borrower of certain assets and other rights relating to the manufacture, sale and/or distribution of certain biopharmaceutical products to the extent approved by Agent in writing prior to the Closing Date.

"Assignee" has the meaning set forth in SECTION 14.1.

"Assignment and Acceptance" means an Assignment and Acceptance in the form of Exhibit A-1.

"Authorized Person" means any officer or other employee of Borrower set forth on SCHEDULE A-2.

"Autoplex T" means Autoplex(R) T (Anti-Inhibitor Coagulant Complex, Heat Treated).

"Availability" means, as of any date of determination, if such date is a Business Day, and determined at the close of business on the immediately preceding Business Day, if such date of determination is not a Business Day, the amount that Borrower is entitled to borrow as Advances under SECTION 2.1 (after giving effect to all then outstanding Obligations (other than Bank Products Obligations) and all sublimits and reserves applicable hereunder).

"Bank Product Agreements" means those certain cash management service agreements entered into from time to time by Borrower or its Subsidiaries in connection with any of the Bank Products.

"Bank Product Obligations" means all obligations, liabilities, contingent reimbursement obligations, fees, and expenses owing by Borrower or its Subsidiaries to Wells Fargo or its Affiliates pursuant to or evidenced by the Bank Product Agreements and irrespective of whether for the payment of money, whether direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising, and including all such amounts that Borrower is obligated to reimburse to Lender as a result of Lender purchasing participations or executing indemnities or reimbursement obligations with respect to the Bank Products provided to Borrower or its Subsidiaries pursuant to the Bank Product Agreements.

"Bank Product Reserves" means, as of any date of determination, the amount of reserves that Lender has established (based upon Wells Fargo's or its Affiliate's reasonable determination of the credit exposure



in respect of then extant Bank Products) for Bank Products then provided or outstanding.

"Bank Products" means any service or facility extended to Borrower or its Subsidiaries by Wells Fargo or any Affiliate of Wells Fargo including: (a) credit cards, (b) credit card processing services, (c) debit cards, (d) purchase cards, (e) ACH Transactions, (f) cash management, including controlled disbursement, accounts or services, or (g) Hedge Agreements.

"Bankruptcy Code" means the United States Bankruptcy Code, as in effect from time to time.

"Base LIBOR Rate" means, the rate per annum determined by Agent in accordance with its customary procedures, and utilizing Bloomberg Reporting Service or, if Bloomberg Reporting Service is unavailable, such other electronic or other quotation sources as it considers appropriate (rounded upwards, if necessary, to the next 1/16%), on the basis of the rates at which Dollar deposits as are offered to major banks in the London interbank market as such rates are in effect on or about 11:00 a.m. (California time) 2 Business Days prior to the commencement of the applicable Interest Period, for a term and in amounts comparable to the Interest Period and amount of the LIBOR Rate Loan requested by Borrower in accordance with this Agreement, which determination shall be conclusive in the absence of manifest error.

"Base Rate" means, the rate of interest announced within Wells Fargo at its principal office in San Francisco as its "prime rate", with the understanding that the "prime rate" is one of Wells Fargo's base rates (not necessarily the lowest of such rates) and serves as the basis upon which effective rates of interest are calculated for those loans making reference thereto and is evidenced by the recording thereof after its announcement in such internal publication or publications as Wells Fargo may designate.

"Base Rate Loan" means each portion of an Advance or the Term Loan that bears interest at a rate determined by reference to the Base Rate.

"Base Rate Margin" means 0.50 percentage points.

"Base Rate Term Loan Margin" means 2.25 percentage points.

"Bayer" means Bayer Corporation, an Indiana corporation.

"Benefit Plan" means a "defined benefit plan" (as defined in Section 3(35) of ERISA) for which Borrower or any Subsidiary or ERISA Affiliate of Borrower has been an "employer" (as defined in Section 3(5) of ERISA) within the past six years.

"Board of Directors" means the board of directors (or comparable managers) of Borrower or any committee thereof duly authorized to act on behalf of the board.

"Books" means Borrower's and its Subsidiaries' now owned or hereafter acquired books and records (including all of its Records indicating, summarizing, or evidencing its assets (including the Collateral) or liabilities,

all of Borrower's or its Subsidiaries' Records relating to its or their business operations or financial condition, and all of its or their goods or General Intangibles related to such information).

"Borrower" has the meaning set forth in the preamble to this Agreement.

"Borrowing" means a borrowing hereunder consisting of Advances (or term loans, in the case of the Term Loan) made on the same day by the Lenders (or Agent on behalf thereof), or by Swing Lender in the case of a Swing Loan, or by Agent in the case of an Agent Advance.

"Borrowing Base" has the meaning set forth in SECTION 2.1.

"Business Day" means any day that is not a Saturday, Sunday, or other day on which national banks are authorized or required to close, except that, if a determination of a Business Day shall relate to a LIBOR Rate Loan, the term "Business Day" also shall exclude any day on which banks are closed for dealings in Dollar deposits in the London interbank market.

"Capital Lease" means a lease that is required to be capitalized for financial reporting purposes in accordance with GAAP.

"Capitalized Lease Obligation" means any Indebtedness represented by obligations under a Capital Lease.

"Cardinal" means Cardinal Health, Inc., an Ohio corporation.

"Carryforward Amount" has the meaning set forth in SECTION 7.19(C).

"Cash Equivalents" means (a) marketable direct obligations issued or unconditionally guaranteed by the United States or issued by any agency thereof and backed by the full faith and credit of the United States, in each case maturing within 1 year from the date of acquisition thereof, (b) marketable direct obligations issued by any state of the United States or any political subdivision of any such state or any public instrumentality thereof maturing within 1 year from the date of acquisition thereof and, at the time of acquisition, having the highest rating obtainable from either S&P or Moody's, (c) commercial paper maturing no more than 270 days from the date of acquisition thereof and, at the time of acquisition, having a rating of A-1 or P-1, or better, from S&P or Moody's, (d) certificates of deposit or bankers' acceptances maturing within 1 year from the date of acquisition thereof either (i) issued by any bank organized under the laws of the United States or any state thereof which bank has a rating of A or A2, or better, from S&P or Moody's, or (ii) certificates of deposit less than or equal to \$100,000 in the aggregate issued by any other bank insured by the Federal Deposit Insurance Corporation, (e) investments made in accordance with Borrower's investment policy provided to Agent prior to the Closing Date, and (f) other similar investments approved in writing by Agent.

"Cash Management Account" has the meaning set forth in SECTION 2.7(A).

"Cash Management Agreements" means those certain cash management service agreements, in form and substance satisfactory to Agent, each of which is among Borrower, Agent, and one of the Cash Management Banks.

"Cash Management Bank" has the meaning set forth in SECTION 2.7(A).

"Change of Control" means (a) any "person" or "group" (within the meaning of Sections 13(d) and 14(d) of the Exchange Act), becomes the beneficial owner (as defined in Rule 13d-3 under the Exchange Act), directly or indirectly, of 15%, or more, of the Stock of Borrower having the right to vote for the election of members of the Board of Directors, or (b) a majority of the members of the Board of Directors do not constitute Continuing Directors, or (c) Borrower ceases to directly own and control 100% (or such lower percentage that Borrower owns on the Closing Date or with respect to Subsidiaries that are acquired or formed after the Closing Date, such percentage that Borrower owns on the date of acquisition or formation of such Subsidiary) of the outstanding capital Stock of each of its Subsidiaries (other than its Subsidiaries existing on the Closing Date).

"Closing Date" means the date of the making of the initial Advance (or other extension of credit) hereunder or the date on which Agent sends Borrower a written notice that each of the conditions precedent set forth in SECTION 3.1 either have been satisfied or have been waived.

"Closing Date Business Plan" means the set of Projections of Borrower for the one year period following the Closing Date (on a month by month basis), in form and substance (including as to scope and underlying assumptions) satisfactory to Agent.

"Code" means the New York Uniform Commercial Code, as in effect from time to time.

"Collateral" means all of Borrower's now owned or hereafter acquired property, including all of Borrower's right, title, and interest in and to each of the following:

- (a) Accounts,
- (b) Books,
- (c) Equipment,
- (d) General Intangibles and DDA's,
- (e) Inventory,
- (f) Investment Property,
- (g) Negotiable Collateral,
- (h) Real Property Collateral,

(i) money or other assets of Borrower that now or hereafter come into the possession, custody, or control of any member of the Lender Group, and

(j) the proceeds and products, whether tangible or intangible, of any of the foregoing, including proceeds of insurance covering any or all of the foregoing, and any and all Accounts, Books, Equipment, General Intangibles and DDA's, Inventory, Investment Property, Negotiable Collateral, Real Property, money, deposit accounts, or other tangible or intangible property resulting from the sale, exchange, collection, or other disposition of any of the foregoing, or any portion thereof or interest therein, and the proceeds thereof.

"Collateral Access Agreement" means a landlord waiver, bailee letter, or acknowledgement agreement of any lessor, warehouseman, processor, consignee, or other Person in possession of, having a Lien upon, or having rights or interests in the Equipment or Inventory, in each case, in form and substance reasonably satisfactory to Agent.

"Collections" means all cash, checks, notes, instruments, and other items of payment (including insurance proceeds, proceeds of cash sales, rental proceeds, and tax refunds) of Borrower.

"Commercial Tort Claim Assignment" has the meaning set forth in SECTION 4.4(B).

"Commitment" means, with respect to each Lender, its Revolver Commitment, its Term Loan Commitment, or its Total Commitment, as the context requires, and, with respect to all Lenders, their Revolver Commitments, their Term Loan Commitments, or their Total Commitments, as the context requires, in each case as such Dollar amounts are set forth beside such Lender's name under the applicable heading on SCHEDULE C-1 or on the signature page of the Assignment and Acceptance pursuant to which such Lender became a Lender hereunder in accordance with the provisions of SECTION 14.1.

"Compliance Certificate" means a certificate substantially in the form of EXHIBIT C-1 delivered by the chief financial officer of Borrower to Agent.

"Consolidated Net Income" means, with respect to any Person for any period, the net income (loss) of such Person and its Subsidiaries for such period, determined on a consolidated basis and in accordance with GAAP, but excluding from the determination of Consolidated Net Income (without duplication) (a) any extraordinary or non-recurring gains or losses or gains or losses from dispositions, (b) restructuring charges, (c) effects of discontinued operations, and (d) interest income.

"Continuing Director" means (a) any member of the Board of Directors who was a director (or comparable manager) of Borrower on the Closing Date, and (b) any individual who becomes a member of the Board of Directors after the Closing Date if such individual was appointed or nominated for election to the Board of Directors by a majority of the Continuing Directors, but excluding any such individual originally proposed for election in opposition to the Board of Directors in office at the Closing Date in an actual or threatened election contest relating to the election of the directors (or comparable managers) of Borrower (as such terms are used in Rule 14a-11 under the Exchange Act) and whose initial assumption of office resulted from such contest or the settlement thereof.

"Control Agreement" means a control agreement, in form and substance reasonably satisfactory to Agent, executed and delivered by Borrower,

Agent, and the applicable securities intermediary with respect to a Securities Account or bank with respect to a deposit account.

"Daily Balance" means, with respect to each day during the term of this Agreement, the amount of an Obligation owed at the end of such day.

"DDA" means any checking or other demand deposit account maintained by Borrower.

"Default" means an event, condition, or default that, with the giving of notice, the passage of time, or both, would be an Event of Default.

"Defaulting Lender" means any Lender that fails to make any Advance (or other extension of credit) that it is required to make hereunder on the date that it is required to do so hereunder.

"Defaulting Lender Rate" means (a) the Base Rate for the first 3 days from and after the date the relevant payment is due, and (b) thereafter, at the interest rate then applicable to Advances that are Base Rate Loans (inclusive of the Base Rate Margin applicable thereto).

"Designated Account" means that certain DDA of Borrower identified on SCHEDULE D-1.

"Dilution" means, as of any date of determination, a percentage, based upon the experience of the immediately prior twelve month period, that is the result of dividing the Dollar amount of (a) bad debt write-downs, discounts, advertising allowances, credits, or other dilutive items with respect to the Accounts during such period, by (b) Borrower's gross billings plus the Dollar amount of clause (a).

"Dilution Reserve" means, as of any date of determination, an amount sufficient to reduce the advance rate against Eligible Accounts by one percentage point for each percentage point by which Dilution is in excess of 5.0%.

"Disbursement Letter" means an instructional letter executed and delivered by Borrower to Agent regarding the extensions of credit to be made on the Closing Date, the form and substance of which is satisfactory to Agent.

"Dollars" or "\$" means United States dollars.

"Due Diligence Letter" means the due diligence letter sent by Agent's counsel to Borrower, together with Borrower's completed responses to the inquiries set forth therein, the form and substance of such responses to be satisfactory to Agent.

"EBITDA" means, with respect to any fiscal period, Borrower's and its Subsidiaries' consolidated net earnings (or loss), MINUS extraordinary gains, PLUS extraordinary losses, PLUS interest expense, income taxes, depreciation and amortization, as determined in accordance with GAAP, PLUS all non-cash expenses attributable to stock option plans and to severance payments made to employees for such period, provided, that, in the case of any fiscal

period in which an acquisition occurs, EBITDA shall be calculated on a pro forma basis giving effect to such acquisition as of the first day of such fiscal period.

"Eligible Accounts" means those Accounts created by Borrower in the ordinary course of its business, that arise out of Borrower's sale of goods or rendition of services, that comply with each of the representations and warranties respecting Eligible Accounts made by Borrower in the Loan Documents, that are reflected on the books and records of Borrower in a consistent manner using substantially the same methodology as that which is used on the Closing Date and that are not excluded as ineligible by virtue of one or more of the criteria set forth below. In determining the amount to be included, Eligible Accounts shall be calculated net of customer deposits and unapplied cash remitted to Borrower and all chargebacks, rebates (and related fees) and discounts of any kind that are at any time owing, granted, outstanding, available or claimed with respect to such Eligible Accounts. Eligible Accounts shall not include the following:

(a) Accounts that the Account Debtor has failed to pay within 90 days of original invoice date or Accounts with selling terms of more than 90 days,

(b) Accounts owed by an Account Debtor (or its Affiliates) where 50% or more of all Accounts owed by that Account Debtor (or its Affiliates) are deemed ineligible under clause (a) above,

(c) Accounts with respect to which the Account Debtor is an employee, Affiliate, or agent of Borrower,

(d) Accounts arising in a transaction wherein goods are placed on consignment or are sold pursuant to a guaranteed sale, a sale or return, a sale on approval, a bill and hold, or any other terms by reason of which the payment by the Account Debtor may be conditional,

(e) Accounts that are not payable in Dollars,

(f) Accounts with respect to which the Account Debtor either (i) does not maintain its chief executive office in the United States, or (ii) is not organized under the laws of the United States or any state thereof, or (iii) is the government of any foreign country or sovereign state, or of any state, province, municipality, or other political subdivision thereof, or of any department, agency, public corporation, or other instrumentality thereof, unless (y) the Account is supported by an irrevocable letter of credit reasonably satisfactory to Agent (as to form, substance, and issuer or domestic confirming bank) that has been delivered to Agent and is directly drawable by Agent, or (z) the Account is covered by credit insurance in form, substance, and amount, and by an insurer, reasonably satisfactory to Agent,

(g) Accounts with respect to which the Account Debtor is either (i) the United States or any department, agency, or instrumentality of the United States (exclusive, however, of Accounts with respect to which Borrower has complied, to the reasonable satisfaction of Agent, with the Assignment of Claims Act, 31 USC ss. 3727), or (ii) any state of the United States (exclusive, however, of (y) Accounts owed by any state that does not have

a statutory counterpart to the Assignment of Claims Act, or (z) Accounts owed by any state that does have a statutory counterpart to the Assignment of Claims Act as to which Borrower has complied to Agent's reasonable satisfaction),

(h) Accounts with respect to which the Account Debtor is a creditor of Borrower, including as a result of royalties payable by Borrower to the Account Debtor (including Accounts with respect to which ZLB is the Account Debtor and Accounts related to the sale of the plasma business to ZLB for which Bayer is the Account Debtor), has or has asserted a right of setoff, has disputed its liability, or has made any claim with respect to its obligation to pay the Account, to the extent of such claim, right of setoff, or dispute,

(i) Accounts with respect to (i) an Account Debtor whose total obligations owing to Borrower exceed 10% (or 35%, in the case of each of Cardinal, Bayer, McKesson and AmerisourceBergen) (each such percentage as applied to a particular Account Debtor being subject to reduction by Agent in its Permitted Discretion if the creditworthiness of such Account Debtor deteriorates) of all Eligible Accounts, to the extent of the obligations owing by such Account Debtor in excess of such percentage and (ii) Cardinal, Bayer, McKesson and AmerisourceBergen whose combined total obligations owing to Borrower exceed 75% of all Eligible Accounts, to the extent of the obligations owing by such Account Debtors in excess of such percentage,

(j) Accounts with respect to which the Account Debtor is subject to an Insolvency Proceeding, is not Solvent, has gone out of business, or as to which Borrower has received notice of an imminent Insolvency Proceeding or notice of a material impairment of the financial condition of such Account Debtor,

(k) Accounts with respect to which the Account Debtor is located in the states of New Jersey, Minnesota, or West Virginia (or any other state that requires a creditor to file a business activity report or similar document in order to bring suit or otherwise enforce its remedies against such Account Debtor in the courts or through any judicial process of such state), unless Borrower has qualified to do business in New Jersey, Minnesota, West Virginia, or such other states, or has filed a business activities report with the applicable division of taxation, the department of revenue, or with such other state offices, as appropriate, for the then-current year, or is exempt from such filing requirement,

(l) Accounts, the collection of which, Agent, in its Permitted Discretion, believes to be doubtful by reason of the Account Debtor's financial condition,

(m) Accounts that are not subject to a valid and perfected first priority Agent's Lien,

(n) Accounts with respect to which (i) the goods giving rise to such Account have not been shipped and billed to the Account Debtor, or (ii) the services giving rise to such Account have not been performed and billed to the Account Debtor,

(o) Accounts that represent the right to receive progress payments or other advance billings that are due prior to the completion of performance by Borrower of the subject contract for goods or services, or

(p) Accounts which are generated from the sale, license or distribution of products that are manufactured using any Material IP consisting of patentable materials, which patentable materials have not been registered with the United States Patent and Trademark Office.

"Eligible Equipment" means Equipment of Borrower located at one of the business locations of Borrower set forth on SCHEDULE E-1, that complies with each of the representations and warranties respecting Eligible Equipment made by Borrower in the Loan Documents, and that is not excluded as ineligible by virtue of the one or more of the criteria set forth below. In determining the amount to be included, Equipment shall be valued based upon the Appraised Value of such Equipment. An item of Equipment shall not be included in Eligible Equipment if:

(a) Borrower does not have good, valid, and marketable title thereto,

(b) it is not located at one of the locations in the United States set forth on SCHEDULE E-1,

(c) it is located on real property leased by Borrower, unless (i) it is subject to a Collateral Access Agreement executed by the lessor, or other third party, as the case may be, and (ii) it is segregated or otherwise separately identifiable from goods of others, if any, stored on the premises,

(d) it is not subject to a valid and perfected first priority Agent's Lien,

(e) it is substantially worn, damaged or defective (in each case, if the Equipment is no longer suitable for its intended use), or obsolete, or it constitutes furnishings, parts, fixtures or is affixed to real property, unless such Equipment is affixed to Real Property that comprises Real Property Collateral,

(f) Agent has not received evidence of the property insurance required by this Agreement with respect to such Equipment, or

(g) it is subject to a lease with any Person.

"Eligible Inventory" means Inventory consisting of first quality finished goods held for sale in the ordinary course of Borrower's business and raw materials (other than supplies), in each case located at one of Borrower's business locations set forth on SCHEDULE E-2 (or in-transit between any such locations), that complies with each of the representations and warranties respecting Eligible Inventory made by Borrower in the Loan Documents, and that is not excluded as ineligible by virtue of the one or more of the criteria set forth below. In determining the amount to be so included, Inventory shall be valued at the lower of cost or market on a basis consistent with Borrower's historical accounting practices. An item of Inventory shall not be included in Eligible Inventory if:

(a) Borrower does not have good, valid, and marketable title thereto,



(b) it is (i) located at Borrower's Rockville, Maryland research and development facility or (ii) it is not located at one of the locations in the United States set forth on SCHEDULE E-2 or in transit from one such location to another such location,

(c) it is located on real property leased by Borrower or in a contract warehouse, in each case, unless it is subject to a Collateral Access Agreement executed by the lessor, warehouseman, or other third party, as the case may be, and unless it is segregated or otherwise separately identifiable from goods of others, if any, stored on the premises,

(d) it is not subject to a valid and perfected first priority Agent's Lien,

(e) it consists of goods returned or rejected by Borrower's customers, unless the goods can be resold as first quality goods,

(f) the Inventory is sold under a licensed patent or trademark (other than a patent or trademark owned by Borrower), Agent shall have entered into a licensor waiver letter, in form and substance reasonably satisfactory to Agent, with the licensor with respect to the rights of Agent to use the patent or trademark to manufacture, sell or otherwise distribute such Inventory,

(g) it consists of goods that are obsolete, slow moving or materially impaired, restrictive or custom items, work-in-process (including products that are quarantined), or goods that constitute spare parts, packaging and shipping materials, supplies used or consumed in Borrower's business, bill and hold goods, defective goods, "seconds," or Inventory acquired on consignment, or

(h) the Inventory consists of products that are manufactured, marketed, sold, licensed or distributed using any Material IP consisting of trademarkable or patentable materials, which trademarkable or patentable materials have not been registered with the United States Patent and Trademark Office.

"Eligible Real Property Collateral" means the Real Property owned by Borrower located in Boca Raton, Florida, as more specifically identified on SCHEDULE R-1.

"Eligible Transferee" means (a) a commercial bank organized under the laws of the United States, or any state thereof, and having total assets in excess of \$250,000,000, (b) a commercial bank organized under the laws of any other country which is a member of the Organization for Economic Cooperation and Development or a political subdivision of any such country and which has total assets in excess of \$250,000,000, provided that such bank is acting through a branch or agency located in the United States, (c) a finance company, insurance company, or other financial institution or fund that is engaged in making, purchasing, or otherwise investing in commercial loans in the ordinary course of its business and having (together with its Affiliates) total assets in excess of \$250,000,000, (d) any Affiliate (other than individuals) of a Lender that was party hereto as of the Closing Date, (e) so long as no Event of Default has occurred and is continuing, any other Person approved in writing by Agent and Borrower, and (f) during the continuation of an Event of Default, any other Person approved in writing by Agent.

"Enterprise Value" means the "enterprise value" of Borrower, as determined by Agent pursuant to an enterprise valuation reasonably satisfactory to Agent, using a methodology similar to the methodology used in the enterprise valuation delivered to Agent pursuant to SECTION 3.1(M), and performed by a third party reasonably satisfactory to Agent.

"Environmental Actions" means any complaint, summons, citation, notice, directive, order, claim, litigation, investigation, judicial or administrative proceeding, judgment, letter, or other communication from any Governmental Authority, or any third party involving violations of Environmental Laws or releases of Hazardous Materials from (a) any assets, properties, or businesses of Borrower or any predecessor in interest, (b) from adjoining properties or businesses, or (c) from or onto any facilities which received Hazardous Materials generated by Borrower or any predecessor in interest.

"Environmental Law" means any applicable federal, state, provincial, foreign or local statute, law, rule, regulation, ordinance, code, binding and enforceable guideline, binding and enforceable written policy, or rule of common law now or hereafter in effect and in each case as amended, or any judicial or administrative interpretation thereof, including any judicial or administrative order, consent decree or judgment, to the extent binding on Borrower, relating to the environment, employee health and safety, or Hazardous Materials, including CERCLA; RCRA; the Federal Water Pollution Control Act, 33 USC ss. 1251 ET SEQ.; the Toxic Substances Control Act, 15 USC ss. 2601 ET SEQ.; the Clean Air Act, 42 USC ss. 7401 ET SEQ.; the Safe Drinking Water Act, 42 USC ss. 3803 ET SEQ.; the Oil Pollution Act of 1990, 33 USC ss. 2701 ET SEQ.; the Emergency Planning and the Community Right-to-Know Act of 1986, 42 USC ss. 11001 ET SEQ.; the Hazardous Material Transportation Act, 49 USC ss. 1801 ET SEQ.; the Occupational Safety and Health Act, 29 USC ss. 651 ET SEQ. (to the extent it regulates occupational exposure to Hazardous Materials); and any state and local or foreign counterparts or equivalents, in each case as amended from time to time.

"Environmental Liabilities and Costs" means all liabilities, monetary obligations, Remedial Actions, losses, damages, punitive damages, consequential damages, treble damages, costs and expenses (including all reasonable fees, disbursements and expenses of counsel, experts, or consultants, and costs of investigation and feasibility studies), fines, penalties, sanctions, and interest incurred as a result of any claim or demand by any Governmental Authority or any third party, and which relate to any Environmental Action.

"Environmental Lien" means any Lien in favor of any Governmental Authority for Environmental Liabilities and Costs.

"Environmental Reserves" means reserves (determined from time to time by Agent in its Permitted Discretion) for the estimated remediation of any Environmental Liabilities and Costs as Agent in its Permitted Discretion determines may be assessed against Borrower or any Real Property Collateral.

"Equipment" means all of Borrower's now owned or hereafter acquired right, title, and interest with respect to equipment, machinery, machine tools, motors, furniture, furnishings, fixtures, vehicles (including motor vehicles), tools, parts, goods (other than consumer goods, farm products,

or Inventory), wherever located, including all attachments, accessories, accessions, replacements, substitutions, additions, and improvements to any of the foregoing.

"ERISA" means the Employee Retirement Income Security Act of 1974, as amended, and any successor statute thereto.

"ERISA Affiliate" means (a) any Person subject to ERISA whose employees are treated as employed by the same employer as the employees of Borrower under IRC Section 414(b), (b) any trade or business subject to ERISA whose employees are treated as employed by the same employer as the employees of Borrower under IRC Section 414(c), (c) solely for purposes of Section 302 of ERISA and Section 412 of the IRC, any organization subject to ERISA that is a member of an affiliated service group of which Borrower is a member under IRC Section 414(m), or (d) solely for purposes of Section 302 of ERISA and Section 412 of the IRC, any Person subject to ERISA that is a party to an arrangement with Borrower and whose employees are aggregated with the employees of Borrower under IRC Section 414(o).

"ERISA Event" means (a) a Reportable Event with respect to any Benefit Plan or Multiemployer Plan, (b) within the meaning of Section 4063 of ERISA the withdrawal of Borrower, any of its Subsidiaries or ERISA Affiliates from a Benefit Plan during a plan year in which it was a "substantial employer" (as defined in Section 4001(a)(2) of ERISA), (c) the providing of notice of intent to terminate a Benefit Plan in a distress termination (as described in Section 4041(c) of ERISA), (d) the institution by the PBGC of proceedings to terminate a Benefit Plan or Multiemployer Plan, (e) any event or condition (i) that provides a basis under Section 4042(a)(1), (2), or (3) of ERISA for the termination of, or the appointment of a trustee to administer, any Benefit Plan or Multiemployer Plan, or (ii) that may result in termination of a Multiemployer Plan pursuant to Section 4041A of ERISA, (f) the partial or complete withdrawal within the meaning of Sections 4203 and 4205 of ERISA, of Borrower, any of its Subsidiaries or ERISA Affiliates from a Multiemployer Plan, or (g) providing any security to any Plan under Section 401(a)(29) of the IRC by Borrower or its Subsidiaries or any of their ERISA Affiliates.

"Event of Default" has the meaning set forth in SECTION 8.

"Excess Availability" means the amount, as of the date any determination thereof is to be made, equal to (i) Availability, PLUS (ii) all unrestricted cash in an account that is subject to a Control Agreement, MINUS (iii) the aggregate amount, if any, of all trade payables of Borrower aged in excess of historical levels with respect thereto and all book overdrafts in excess of historical practices with respect thereto, in each case as determined by Agent in its Permitted Discretion.

"Excess Cash Flow" means, with respect to any Person for any period, (i) Consolidated Net Income of such Person and its Subsidiaries for such period, PLUS (ii) all non-cash items of such Person and its Subsidiaries deducted in determining Consolidated Net Income for such period, LESS (iii) the sum of (A) all non-cash items of such Person and its Subsidiaries added to the calculation of Consolidated Net Income for such period, (B) all scheduled and mandatory cash principal payments on the Advances and Term Loan made during such period (but, in the case of the Advances, only to the extent that the Revolver

Commitment is permanently reduced by the amount of such payments), and all scheduled cash principal payments on other Indebtedness of such Person or any of its Subsidiaries during such period to the extent such other Indebtedness is permitted to be incurred, and such payments are permitted to be made, under this Agreement, and (C) the cash portion of capital expenditures made by such Person and its Subsidiaries during such period to the extent permitted to be made under this Agreement.

"Exchange Act" means the Securities Exchange Act of 1934, as in effect from time to time.

"Extraordinary Receipts" means any Collections received by Borrower not in the ordinary course of business (and not consisting of proceeds described in SECTION 2.4(C)(IV) hereof), including, (i) foreign, United States, state or local tax refunds, (ii) pension plan reversions, (iii) proceeds of insurance (including proceeds of the key person life insurance policies), but excluding property and casualty insurance with respect to Inventory, Equipment and Real Property, (iv) judgments, proceeds of settlements or other consideration of any kind in connection with any cause of action, (v) condemnation awards (and payments in lieu thereof), but excluding condemnation awards with respect to Inventory, Equipment and Real Property, (vi) indemnity payments and (vii) any purchase price adjustment received in connection with any purchase agreement.

"FDA" means the United States Food and Drug Administration and any successor agency.

"FDA Notice" has the meaning set forth in SECTION 5.21.

"Fee Letter" means that certain fee letter, dated as of even date herewith, between Borrower and Agent, in form and substance satisfactory to Agent.

"FEIN" means Federal Employer Identification Number.

"Fiscal Year" means the fiscal year of Borrower ending on December 31st of each calendar year.

"Fixed Asset Coverage Ratio" means the ratio of (a) the sum of (i) the Appraised Value of the Eligible Equipment and (ii) the Appraised Value of the Eligible Real Property to (b) the outstanding principal amount of the Term Loan.

"Food and Drug Act" means the Federal Food, Drug and Cosmetic Act, 21 USCss. 1 ET SEQ. and any successor act.

"Foothill" means Wells Fargo Foothill, Inc., a California corporation.

"Foreign Subsidiary" means a Subsidiary organized under the laws of a jurisdiction other than the United States or the states thereof.

"Funded Debt" of any Person means all Indebtedness of such Person.

"Funding Date" means the date on which a Borrowing occurs.

"Funding Losses" has the meaning set forth in SECTION 2.13(B)(II).

"GAAP" means generally accepted accounting principles as in effect from time to time in the United States, consistently applied.

"General Intangibles" means all of Borrower's now owned or hereafter acquired right, title, and interest with respect to general intangibles (including Intellectual Property, payment intangibles, contract rights, rights to payment, judgments, rights arising under common law, statutes, or regulations, choses or things in action, goodwill, designs, inventions, trade secrets, d/b/a's, Internet domain names, logos, blueprints, drawings, purchase orders, customer lists, monies due or recoverable from pension funds, route lists, rights to payment and other rights under any royalty or licensing agreements, computer programs, information contained on computer disks or tapes, software, literature, reports, catalogs, money, deposit accounts, insurance premium rebates, tax refunds, and tax refund claims), and any and all supporting obligations in respect thereof, and any other personal property other than goods, Accounts, Investment Property, and Negotiable Collateral.

"Governing Documents" means, with respect to any Person, the certificate or articles of incorporation, by-laws, or other organizational documents of such Person.

"Governmental Authority" means any federal, state, local, or other governmental or administrative body, instrumentality, department, or agency (including, without limitation, the FDA) or any court, tribunal, administrative hearing body, arbitration panel, commission, or other similar dispute-resolving panel or body.

"Guarantor" means each Person that guarantees all or any part of the obligations pursuant to a Guaranty.

"Guaranty" means that certain general continuing guaranty executed and delivered by Guarantor in favor of Agent, for the benefit of the Lender Group, in form and substance satisfactory to Agent.

"Hazardous Materials" means (a) substances that are defined or listed in, or otherwise classified pursuant to, any applicable laws or regulations as "hazardous substances," "hazardous materials," "hazardous wastes," "toxic substances," or any other formulation intended to define, list, or classify substances by reason of deleterious properties such as ignitability, corrosivity, reactivity, carcinogenicity, reproductive toxicity, or "EP toxicity", (b) oil, petroleum, or petroleum derived substances, natural gas, natural gas liquids, synthetic gas, drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal resources, (c) any flammable substances or explosives or any radioactive materials, and (d) asbestos in any form or electrical equipment that contains any oil or dielectric fluid containing levels of polychlorinated biphenyls in excess of 50 parts per million.

"Hedge Agreement" means any and all transactions, agreements, or documents now existing or hereafter entered into between Borrower or its Subsidiaries and Wells Fargo or its Affiliates, which provide for an interest rate, credit, commodity or equity swap, cap, floor, collar, forward foreign

exchange transaction, currency swap, cross currency rate swap, currency option, or any combination of, or option with respect to, these or similar transactions, for the purpose of hedging Borrower's or its Subsidiaries' exposure to fluctuations in interest or exchange rates, loan, credit exchange, security or currency valuations or commodity prices.

"Inactive Subsidiaries" means BioMune Corp., a Delaware corporation, and NABI ForeignSales, Ltd., a company formed under the laws of Barbados, West Indies.

"Indebtedness" means (a) all obligations for borrowed money, (b) all obligations evidenced by bonds, debentures, notes, or other similar instruments and all reimbursement or other obligations in respect of letters of credit, bankers acceptances, interest rate swaps, or other financial products, (c) all obligations under Capital Leases, (d) all obligations or liabilities of others secured by a Lien on any asset of Borrower or its Subsidiaries, irrespective of whether such obligation or liability is assumed, (e) all obligations for the deferred purchase price of assets (other than trade debt incurred in the ordinary course of business and repayable in accordance with customary trade practices), and (f) any obligation guaranteeing or intended to guarantee (whether directly or indirectly guaranteed, endorsed, co-made, discounted, or sold with recourse) any obligation of any other Person.

"Indemnified Liabilities" has the meaning set forth in SECTION 11.3.

"Indemnified Person" has the meaning set forth in SECTION 11.3.

"Insolvency Proceeding" means any proceeding commenced by or against any Person under any provision of the Bankruptcy Code or under any other state or federal bankruptcy or insolvency law, assignments for the benefit of creditors, formal or informal moratoria, compositions, extensions generally with creditors, or proceedings seeking reorganization, arrangement, or other similar relief.

"Intellectual Property" means all foreign and domestic (i) trademarks, service marks, brand names, certification marks, collective marks, d/b/a's, Internet domain names, logos, symbols, trade dress, assumed names, fictitious names, trade names, and other indicia of origin, all applications and registrations for all of the foregoing, and all goodwill associated therewith and symbolized thereby, including all extensions, modifications and renewals of same; (ii) inventions, discoveries and ideas, whether patentable or not, and all patents, registrations, and applications therefor, including divisions, continuations, continuations-in-part and renewal applications, and including renewals, extensions and reissues; (iii) confidential and proprietary information, trade secrets and know-how, including processes, schematics, databases, formulae, drawings, prototypes, models, designs and customer lists; (iv) published and unpublished works of authorship, whether copyrightable or not, copyrights therein and thereto, and registrations and applications therefor, and all renewals, extensions, restorations and reversions thereof; and (v) all other intellectual property or proprietary rights and claims or causes of action arising out of or related to any infringement, misappropriation or other violation of any of the foregoing, including rights to recover for past, present and future violations thereof.

"Interest Period" means, with respect to each LIBOR Rate Loan, a period commencing on the date of the making of such LIBOR Rate Loan and ending 1, 2, or 3 months thereafter; provided, however, that (a) if any Interest Period would end on a day that is not a Business Day, such Interest Period shall be extended (subject to clauses (c)-(e) below) to the next succeeding Business Day,

(b) interest shall accrue at the applicable rate based upon the LIBOR Rate from and including the first day of each Interest Period to, but excluding, the day on which any Interest Period expires, (c) any Interest Period that would end on a day that is not a Business Day shall be extended to the next succeeding Business Day unless such Business Day falls in another calendar month, in which case such Interest Period shall end on the next preceding Business Day, (d) with respect to an Interest Period that begins on the last Business Day of a calendar month (or on a day for which there is no numerically corresponding day in the calendar month at the end of such Interest Period), the Interest Period shall end on the last Business Day of the calendar month that is 1, 2, or 3 months after the date on which the Interest Period began, as applicable, and (e) Borrower may not elect an Interest Period which will end after the Maturity Date.

"Inventory" means all Borrower's now owned or hereafter acquired right, title, and interest with respect to plasma and other inventory, including goods held for sale or lease or to be furnished under a contract of service, goods that are leased by Borrower as lessor, goods that are furnished by Borrower under a contract of service, and raw materials, work in process, or materials used or consumed in Borrower's business.

"Investment" means, with respect to any Person, any investment by such Person in any other Person (including Affiliates) in the form of loans, guarantees, advances, or capital contributions (excluding (a) commission, travel, and similar advances to officers and employees of such Person made in the ordinary course of business, and (b) bona fide Accounts arising in the ordinary course of business consistent with past practices), purchases or other acquisitions for consideration of Indebtedness or Stock, and any other items that are or would be classified as investments on a balance sheet prepared in accordance with GAAP.

"Investment Property" means all of Borrower's now owned or hereafter acquired right, title, and interest with respect to "investment property" as that term is defined in the Code, and any and all supporting obligations in respect thereof.

"IRC" means the Internal Revenue Code of 1986, as in effect from time to time.

"Issuing Lender" means Foothill or any other Lender that, at the request of Borrower and with the consent of Agent agrees, in such Lender's sole discretion, to become an Issuing Lender for the purpose of issuing L/Cs or L/C Undertakings pursuant to SECTION 2.12.

"L/C" has the meaning set forth in SECTION 2.12(A).

"L/C Disbursement" means a payment made by the Issuing Lender pursuant to a Letter of Credit.

"L/C Undertaking" has the meaning set forth in SECTION 2.12(A).

"Lender" and "Lenders" have the respective meanings set forth in the preamble to this Agreement, and shall include any other Person made a party to this Agreement in accordance with the provisions of SECTION 14.1.

"Lender Group" means, individually and collectively, each of the Lenders (including the Issuing Lender) and Agent.

"Lender Group Expenses" means all (a) costs or expenses (including taxes, and insurance premiums) required to be paid by Borrower under any of the Loan Documents that are paid or incurred by the Lender Group, (b) reasonable fees or charges paid or incurred by Agent in connection with the Lender Group's transactions with Borrower, including, fees or charges for photocopying, notarization, couriers and messengers, telecommunication, public record searches (including tax lien, judgment searches, and searches for liens under the Uniform Commercial Code and including searches with the patent and trademark office, the copyright office, or the department of motor vehicles), filing, recording, publication, appraisal (including periodic Collateral appraisals or business valuations to the extent of the fees and charges (and up to the amount of any limitation) contained in this Agreement), real estate surveys, real estate title policies and endorsements, and environmental audits, (c) costs and expenses incurred by Agent in the disbursement of funds to Borrower (by wire transfer or otherwise), (d) charges paid or incurred by any one or more members of the Lender Group resulting from the dishonor of checks, (e) reasonable costs and expenses paid or incurred by the Lender Group to correct any default or enforce any provision of the Loan Documents, or in gaining possession of, maintaining, handling, preserving, storing, shipping, selling, preparing for sale, or advertising to sell the Collateral, or any portion thereof, irrespective of whether a sale is consummated, (f) reasonable audit fees and expenses of any one or more members of the Lender Group related to audit examinations of the Books to the extent of the fees and charges (and up to the amount of any limitation) contained in this Agreement, (g) reasonable costs and expenses of third party claims or any other suit paid or incurred by any one or more members of the Lender Group in enforcing or defending the Loan Documents or in connection with the transactions contemplated by the Loan Documents or any one or more members of the Lender Group's relationship with Borrower or any guarantor of the Obligations, (h) Agent's and each Lender's reasonable fees and expenses (including attorneys fees) incurred in advising, structuring, drafting, reviewing, administering, or amending the Loan Documents, and (i) Agent's and each Lender's reasonable fees and expenses (including attorneys fees) incurred in terminating, enforcing (including attorneys fees and expenses incurred in connection with a "workout," a "restructuring," or an Insolvency Proceeding concerning Borrower or in exercising rights or remedies under the Loan Documents), or defending the Loan Documents, irrespective of whether suit is brought, or in taking any Remedial Action concerning the Collateral.

"Lender-Related Person" means, with respect to any Lender, such Lender, together with such Lender's Affiliates, and the officers, directors, employees, and agents of such Lender.

"Letter of Credit" means an L/C or an L/C Undertaking, as the context requires.

"Letter of Credit Usage" means, as of any date of determination, the aggregate undrawn amount of all outstanding Letters of Credit PLUS 100% of the amount of outstanding time drafts accepted by an Underlying Issuer as a result of drawings under Underlying Letters of Credit.

"LIBOR Deadline" has the meaning set forth in SECTION 2.13(B)(I).



"LIBOR Notice" means a written notice in the form of EXHIBIT L-1.

"LIBOR Rate" means, for each Interest Period for each LIBOR Rate Loan, the rate per annum determined by Agent (rounded upwards, if necessary, to the next 1/16%) by DIVIDING (a) the Base LIBOR Rate for such Interest Period, BY (b) 100% MINUS the Reserve Percentage. The LIBOR Rate shall be adjusted on and as of the effective day of any change in the Reserve Percentage.

"LIBOR Rate Loan" means each portion of an Advance or the Term Loan that bears interest at a rate determined by reference to the LIBOR Rate.

"LIBOR Rate Term Loan Margin" means 4.5 percentage points.

"Licensing Agreements" means each of the licensing agreements set forth on SCHEDULE L-1 hereto among Borrower and any licensor with respect to the rights to manufacture, sell and/or distribute Inventory.

"Lien" means any interest in an asset securing an obligation owed to, or a claim by, any Person other than the owner of the asset, whether such interest shall be based on the common law, statute, or contract, whether such interest shall be recorded or perfected, and whether such interest shall be contingent upon the occurrence of some future event or events or the existence of some future circumstance or circumstances, including the lien or security interest arising from a mortgage, deed of trust, encumbrance, pledge, hypothecation, assignment, deposit arrangement, security agreement, conditional sale or trust receipt, or from a lease, consignment, or bailment for security purposes and also including reservations, exceptions, encroachments, easements, rights-of-way, covenants, conditions, restrictions, leases, and other title exceptions and encumbrances affecting Real Property.

"Loan Account" has the meaning set forth in SECTION 2.10.

"Loan Documents" means this Agreement, the Bank Product Agreements, the Cash Management Agreements, the Control Agreements, the Disbursement Letter, the Due Diligence Letter, the Fee Letter, any Guaranty, the Letters of Credit, the Mortgages, the Officers' Certificate, the Patent Security Agreement, the Trademark Security Agreement, any note or notes executed by Borrower in connection with this Agreement and payable to a member of the Lender Group, and any other agreement entered into, now or in the future, by Borrower and the Lender Group in connection with this Agreement.

"Material Adverse Change" means (a) a material adverse change in the business, operations, results of operations, assets, liabilities or condition (financial or otherwise) of Borrower and its Subsidiaries, taken as a whole, (b) a material impairment of Borrower's ability to perform its obligations under the Loan Documents to which it is a party or of the Lender Group's ability to enforce the Obligations or realize upon the Collateral, or (c) a material impairment of the enforceability or priority of Agent's Liens with respect to the Collateral as a result of an action or failure to act on the part of Borrower.

"Material Contract" means any agreement or contract which (a) involves consideration to Borrower of \$250,000 or more in any year, (b) involves consideration by Borrower of \$250,000 or more in any year, (c) imposes financial

obligations on Borrower of \$250,000 or more in any year (other than any agreement that by its terms may be terminated by Borrower upon sixty (60) days' notice or less), or (d) is otherwise material (or together with related agreements and contracts, is material) to the business, operations, financial condition, performance or properties of Borrower and its Subsidiaries, taken as a whole, excluding, however, customer purchase orders or purchase orders to any vendor, in each case entered into in the ordinary course of Borrower's business. The Material Contracts shall in any event include the Licensing Agreements.

"Material IP" means all patentable, copyrightable or trademarkable materials that (i) relate to or are used in connection with the manufacturing, marketing, sale, license or distribution of products that generate any Accounts or Inventory of Borrower or its Subsidiaries, which Accounts or Inventory have an aggregate book value in excess of \$500,000 at any time or (ii) are otherwise material to the businesses of Borrower and its Subsidiaries taken as a whole, PROVIDED that Material IP shall not include copyrightable material arising in documents that are not made available by Borrower or its Subsidiaries to the public.

"Maturity Date" has the meaning set forth in SECTION 3.4.

"Maximum Revolver Amount" means \$25,000,000.

"McKesson" means McKesson Drug Company, an Alaskan company.

"Mortgages" means, individually and collectively, one or more mortgages, deeds of trust, or deeds to secure debt, executed and delivered by Borrower in favor of Agent, for the benefit of the Lender Group, in form and substance satisfactory to Agent, that encumber the Real Property Collateral and the related improvements thereto.

"Multiemployer Plan" means a "multiemployer plan" (as defined in Section 4001(a)(3) of ERISA) to which Borrower, any of its Subsidiaries, or any ERISA Affiliate has contributed, or was obligated to contribute, within the past six years.

"Negotiable Collateral" means all of Borrower's now owned and hereafter acquired right, title, and interest with respect to letters of credit, letter of credit rights, instruments, promissory notes, drafts, documents, and chattel paper (including electronic chattel paper and tangible chattel paper), and any and all supporting obligations in respect thereof.

"Net Cash Proceeds" means, with respect to any sale or disposition by any Person or any Subsidiary thereof of property or assets, the amount of cash received (directly or indirectly) from time to time (whether as initial consideration or through the payment of deferred consideration) by or on behalf of such Person or such Subsidiary, in connection therewith after deducting therefrom only (i) the amount of any Indebtedness secured by any Permitted Lien on any asset (other than (A) Indebtedness owing to Agent or any Lender under this Agreement or the other Loan Documents and (B) Indebtedness assumed by the purchaser of such asset) which is required to be, and is, repaid in connection with such disposition, (ii) reasonable expenses related thereto incurred by such Person or such Subsidiary in connection therewith, and (iii)

taxes paid or payable to any taxing authorities by such Person or such Subsidiary in connection therewith, in each case to the extent, but only to the extent, that the amounts so deducted are, at the time of receipt of such cash, actually paid or payable to a Person that is not an Affiliate and are properly attributable to such transaction.

"Net Liquidation Percentage" means the percentage of the book value of Borrower's Inventory that is estimated to be recoverable in an orderly liquidation of such Inventory, such percentage to be as determined from time to time by a qualified appraisal company selected by Agent in its Permitted Discretion.

"Obligations" means (a) all loans (including the Term Loan), Advances, debts, principal, interest (including any interest that, but for the provisions of the Bankruptcy Code, would have accrued), contingent reimbursement obligations with respect to outstanding Letters of Credit, premiums, liabilities (including all amounts charged to Borrower's Loan Account pursuant hereto), obligations, fees (including the fees provided for in the Fee Letter), charges, costs, Lender Group Expenses (including any fees or expenses that, but for the provisions of the Bankruptcy Code, would have accrued), lease payments, guaranties, covenants, and duties of any kind and description owing by Borrower to the Lender Group pursuant to or evidenced by the Loan Documents and irrespective of whether for the payment of money, whether direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising, and including all interest not paid when due and all Lender Group Expenses that Borrower is required to pay or reimburse by the Loan Documents, by law, or otherwise, and (b) all Bank Product Obligations. Any reference in this Agreement or in the Loan Documents to the Obligations shall include all amendments, changes, extensions, modifications, renewals replacements, substitutions, and supplements, thereto and thereof, as applicable, both prior and subsequent to any Insolvency Proceeding.

"Officers' Certificate" means the representations and warranties of officers form submitted by Agent to Borrower, together with Borrower's completed responses to the inquiries set forth therein, the form and substance of such responses to be satisfactory to Agent.

"Originating Lender" has the meaning set forth in SECTION 14.1(E).

"Overadvance" has the meaning set forth in SECTION 2.5.

"Participant" has the meaning set forth in SECTION 14.1(E).

"Patent Security Agreement" means a patent security agreement executed and delivered by Borrower and Agent, the form and substance of which is satisfactory to Agent.

"Permitted Discretion" means a determination made in good faith and in the exercise of reasonable (from the perspective of a secured asset-based lender) business judgment.

"Permitted Dispositions" means (a) sales or other dispositions by Borrower or its Subsidiaries of Equipment that is substantially worn, damaged, or obsolete (in each case, if such Equipment is no longer suitable for its intended use) in the ordinary course of business, (b) sales by Borrower or its Subsidiaries of Inventory to buyers in the ordinary course of business, including, without limitation, (i) sales involving discounts that are substantially consistent with Borrower's past practice with respect to discounts, (ii) bulk sales of products, and (iii) sales of products outside of the ordinary course of business that are similar to sales that have been

previously conducted by Borrower, (c) the use or transfer of money or Cash Equivalents by Borrower or its Subsidiaries in a manner that is not prohibited by the terms of this Agreement or the other Loan Documents, (d) the licensing by Borrower or its Subsidiaries, on a non-exclusive basis, of patents, trademarks, copyrights, and other intellectual property rights in the ordinary course of business, (e) the licensing by Borrower or its Subsidiaries, on an exclusive basis for a particular country or countries, of patents, trademarks, copyrights and other intellectual property rights, (f) the licensing, sale or other disposition of patents, trademarks, copyrights and other intellectual property, other than the Specified IP, and (g) any other sales or dispositions by Borrower or its Subsidiaries of any assets (other than Accounts, Eligible Equipment, Eligible Inventory, or Eligible Real Property Collateral), provided that the aggregate book value of such assets sold or disposed of after the Closing Date does not exceed \$2,000,000.

"Permitted Investments" means (a) investments in Cash Equivalents, (b) investments in negotiable instruments for collection, (c) advances made in connection with purchases of goods or services in the ordinary course of business, (d) the Approved Acquisitions, provided that both immediately before and after giving effect to each such Approved Acquisition, no Event of Default shall have occurred and be continuing, (e) acquisitions, other than the Approved Acquisition, provided that the aggregate consideration paid by Borrower in connection with such acquisitions does not exceed \$1,000,000, (f) investments in Subsidiaries (other than Foreign Subsidiaries) of Borrower, PROVIDED that (i) the investment in any Subsidiary that is not wholly-owned by Borrower does not include any Specified IP, (ii) the book value of the investment, other than patents, trademarks, copyrights and other intellectual property, does not exceed \$1,000,000, (iii) Borrower and such Subsidiary comply with SECTION 6.18, and (iv) both immediately before and after giving effect to each such acquisition, no Event of Default shall have occurred and be continuing, and (g) investments in Foreign Subsidiaries, joint ventures and partnerships PROVIDED that (i) the investment does not include any Specified IP, it being understood that the licensing of Specified IP to Foreign Subsidiaries, joint ventures or partnerships on a non-exclusive basis at fair market value (whether for a license fee or other payment and whether in cash or other consideration) shall not constitute an investment in such Foreign Subsidiary, joint venture or partnership, (ii) the book value of the investment, other than patents, trademarks, copyrights and other intellectual property, does not exceed \$500,000, (iii) both immediately before and after giving effect to each such acquisition, no Event of Default shall have occurred and be continuing, and (iv) Agent receives a pledge, in form and substance satisfactory to Agent, of 100% (or 65% in the case of a Foreign Subsidiary) of all of the Stock owned by Borrower in such Foreign Subsidiary, joint venture or partnership.

"Permitted Liens" means (a) Liens held by Agent for the benefit of Agent and the Lenders, (b) Liens for unpaid taxes that either (i) are not yet delinquent, or (ii) do not constitute an Event of Default hereunder and are the subject of Permitted Protests, (c) Liens set forth on SCHEDULE P-1, (d) the interests of lessors under operating leases, (e) purchase money Liens or the interests of lessors under Capital Leases to the extent that such Liens or interests secure Permitted Purchase Money Indebtedness and so long as such Lien attaches only to the asset purchased or acquired and the proceeds thereof, (f) Liens arising by operation of law in favor of warehousemen, landlords, carriers, mechanics, materialmen, laborers, or suppliers, incurred in the ordinary course of business and not in connection with the borrowing of money, and which Liens either (i) are for sums not yet delinquent, or (ii) are the subject of Permitted Protests, (g) Liens arising from deposits made in connection with obtaining worker's compensation or other unemployment insurance, (h) Liens or deposits to secure performance of bids, tenders, or leases incurred in the ordinary course of business and not in connection with the borrowing of money, (i) Liens granted

as security for surety or appeal bonds in connection with obtaining such bonds in the ordinary course of business, (j) Liens resulting from any judgment or award that is not an Event of Default hereunder, (k) Liens with respect to the Real Property Collateral that are exceptions to the commitments for title insurance issued in connection with the Mortgages, as accepted by Agent, (l) with respect to any Real Property that is not part of the Real Property Collateral, easements, rights of way, and zoning restrictions that do not materially interfere with or impair the use or operation thereof, (m) Liens securing the Indebtedness permitted by SECTION 7.1(E), (n) Liens upon any property or assets of any Subsidiary of Borrower existing at the time such Subsidiary is acquired by, merged into or consolidated with Borrower in accordance with the terms of this Agreement, provided that such Liens (i) do not secure Indebtedness or other obligations for the payment of money in an amount in excess of \$500,000 and (ii) were not created in contemplation of any such acquisition, merger or consolidation, and (o) Liens upon any property or assets existing at the time such property or assets are acquired by Borrower, provided that such Liens (i) do not secure Indebtedness or other obligations for the payment of money in an amount in excess of \$500,000 and (ii) were not created in contemplation of such acquisition.

"Permitted Protest" means the right of Borrower or any of its Subsidiaries, as applicable, to protest any Lien (other than any such Lien that secures the Obligations), taxes (other than payroll taxes or taxes that are the subject of a United States federal tax lien), or rental payment, provided that (a) a reserve with respect to such obligation is established on the Books in such amount as is required under GAAP, (b) any such protest is instituted promptly and prosecuted diligently by Borrower or any of its Subsidiaries, as applicable, in good faith, and (c) Agent is satisfied that, while any such protest is pending, there will be no impairment of the enforceability, validity, or priority of any of Agent's Liens.

"Permitted Purchase Money Indebtedness" means, as of any date of determination, Purchase Money Indebtedness incurred after the Closing Date in an aggregate principal amount outstanding at any one time not in excess of \$2,500,000.

"Person" means natural persons, corporations, limited liability companies, limited partnerships, general partnerships, limited liability partnerships, joint ventures, trusts, land trusts, business trusts, or other organizations, irrespective of whether they are legal entities, and governments and agencies and political subdivisions thereof.

"Personal Property Collateral" means all Collateral other than Real Property.

"Pro Rata Share" means:

(a) with respect to a Lender's obligation to make Advances and receive payments of principal, interest, fees, costs, and expenses with respect thereto, (x) prior to the Revolver Commitment being terminated or reduced to zero, the percentage obtained by dividing (i) such Lender's Revolver Commitment, by (ii) the aggregate Revolver Commitments of all Lenders and (y) from and after the time the Revolver Commitment has been terminated or reduced

to zero, the percentage obtained by dividing (i) the aggregate unpaid principal amount of such Lender's Advances by (ii) the aggregate unpaid principal amount of all Advances,

(b) with respect to a Lender's obligation to participate in Letters of Credit, to reimburse the Issuing Lender, and to receive payments of fees with respect thereto, (x) prior to the Revolver Commitment being terminated or reduced to zero, the percentage obtained by dividing (i) such Lender's Revolver Commitment, by (ii) the aggregate Revolver Commitments of all Lenders and (y) from and after the time the Revolver commitment has been terminated or reduced to zero, the percentage obtained by dividing (i) the aggregate unpaid principal amount of such Lender's Advances by (ii) the aggregate unpaid principal amount of all Advances,

(c) with respect to a Lender's obligation to make the Term Loan and receive payments of interest, fees, and principal with respect thereto, the percentage obtained by dividing (i) such Lender's Term Loan Commitment, by (ii) the aggregate amount of all Lenders' Term Loan Commitments, and

(d) with respect to all other matters (including the indemnification obligations arising under SECTION 16.7), the percentage obtained by dividing (i) such Lender's Total Commitment, by (ii) the aggregate amount of Total Commitments of all Lenders; PROVIDED, HOWEVER, that, in each case, in the event all Commitments have been terminated, Pro Rata Share shall be determined according to the Commitments in effect immediately prior to such termination.

"Product Recall Notice" means any written notice from the FDA stating that any product or product line of Borrower has been or will be recalled.

"Projections" means Borrower's forecasted (a) balance sheets, (b) profit and loss statements, and (c) cash flow statements, all prepared on a basis consistent with Borrower's historical financial statements, together with appropriate supporting details and a statement of underlying assumptions.

"Purchase Money Indebtedness" means Indebtedness (other than the Obligations, but including Capitalized Lease Obligations), incurred at the time of, or within 20 days after, the acquisition of any fixed assets for the purpose of financing all or any part of the acquisition cost thereof.

"Real Property" means any estates or interests, including leasehold interests, in real property now owned or hereafter acquired by Borrower and the improvements thereto.

"Real Property Collateral" means the Eligible Real Property Collateral and any Real Property hereafter acquired by Borrower.

"Record" means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

"Remedial Action" means all actions taken to (a) clean up, remove, remediate, contain, treat, monitor, assess, evaluate, or in any way address Hazardous Materials in the indoor or outdoor environment, (b) prevent or

minimize a release or threatened release of Hazardous Materials so they do not migrate or endanger or threaten to endanger public health or welfare or the indoor or outdoor environment, (c) perform any pre-remedial studies, investigations, or post-remedial operation and maintenance activities, or (d) conduct any other actions authorized by 42 USC ss. 9601.

"Report" has the meaning set forth in SECTION 16.17.

"Required Availability" means Excess Availability and unrestricted cash and Cash Equivalents in an amount of not less than \$10,000,000.

"Required Lenders" means, at any time, (i) Lenders whose Pro Rata Shares aggregate (a) 51% of the Total Commitments when there are more than three Lenders and (b) 100% of the Total Commitments when there are three or fewer Lenders or (ii) if the Commitments have been terminated irrevocably, (a) 51% of the Obligations (other than Bank Product Obligations) then outstanding when there are more than three Lenders and (b) 100% of the Obligations (other than Bank Product Obligations) then outstanding when there are three or fewer Lenders.

"Reserve Percentage" means, on any day, for any Lender, the maximum percentage prescribed by the Board of Governors of the Federal Reserve System (or any successor Governmental Authority) for determining the reserve requirements (including any basic, supplemental, marginal, or emergency reserves) that are in effect on such date with respect to eurocurrency funding (currently referred to as "eurocurrency liabilities") of that Lender, but so long as such Lender is not required or directed under applicable regulations to maintain such reserves, the Reserve Percentage shall be zero.

"Revolver Commitment" means, with respect to each Lender, its Revolver Commitment, and, with respect to all Lenders, their Revolver Commitments, in each case as such Dollar amounts are set forth beside such Lender's name under the applicable heading on SCHEDULE C-1 or on the signature page of the Assignment and Acceptance pursuant to which such Lender became a Lender hereunder in accordance with the provisions of SECTION 14.1.

"Revolver Usage" means, as of any date of determination, the sum of (a) the then extant amount of outstanding Advances, plus (b) the then extant amount of the Letter of Credit Usage.

"Risk Participation Liability" means, as to each Letter of Credit, all reimbursement obligations of Borrower to the Issuing Lender with respect to an L/C Undertaking, consisting of (a) the amount available to be drawn or which may become available to be drawn, (b) all amounts that have been paid by the Issuing Lender to the Underlying Issuer to the extent not reimbursed by Borrower, whether by the making of an Advance or otherwise, and (c) all accrued and unpaid interest, fees, and expenses payable with respect thereto.

"SEC" means the United States Securities and Exchange Commission and any successor thereto.

"Securities Account" means a "securities account" as that term is defined in the Code.

"Settlement" has the meaning set forth in SECTION 2.3(F)(I).

"Settlement Date" has the meaning set forth in SECTION 2.3(F)(I).

"Solvent" means, with respect to any Person on a particular date, that such Person is not insolvent (as such term is defined in the Uniform Fraudulent Transfer Act).

"Specified IP" means the intellectual property that is related to or derived from an existing product line set forth on SCHEDULE S-1 hereto.

"Stock" means all shares, options, warrants, interests, participations, or other equivalents (regardless of how designated) of or in a Person, whether voting or nonvoting, including common stock, preferred stock, or any other "equity security" (as such term is defined in Rule 3a11-1 of the General Rules and Regulations promulgated by the SEC under the Exchange Act).

"Subsidiary" of a Person means a corporation, partnership, limited liability company, or other entity in which that Person directly or indirectly owns or controls the shares of Stock having ordinary voting power to elect a majority of the board of directors (or appoint other comparable managers) of such corporation, partnership, limited liability company, or other entity.

"Swing Lender" means Foothill or any other Lender that, at the request of Borrower and with the consent of Agent agrees, in such Lender's sole discretion, to become the Swing Lender hereunder.

"Swing Loan" has the meaning set forth in SECTION 2.3(D)(I).

"Taxes" has the meaning set forth in SECTION 16.11.

"Term Loan" has the meaning set forth in SECTION 2.2.

"Term Loan Amount" means an amount equal to the lesser of:

- (a) \$10,000,000, and
- (b) the sum of
  - (i) 100% times the Appraised Value of Eligible Equipment, and
  - (ii) 100% of the Appraised Value of the Eligible Real Property Collateral, and
  - (iii) \$4,000,000.



"Term Loan Commitment" means, with respect to each Lender, its Term Loan Commitment, and, with respect to all Lenders, their Term Loan Commitments, in each case as such Dollar amounts are set forth beside such Lender's name under the applicable heading on SCHEDULE C-1 or on the signature page of the Assignment and Acceptance pursuant to which such Lender became a Lender hereunder in accordance with the provisions of SECTION 14.1.

"Total Commitment" means, with respect to each Lender, its Total Commitment, and, with respect to all Lenders, their Total Commitments, in each case as such Dollar amounts are set forth beside such Lender's name under the applicable heading on SCHEDULE C-1 attached hereto or on the signature page of the Assignment and Acceptance pursuant to which such Lender became a Lender hereunder in accordance with the provisions of SECTION 14.1.

"Total Funded Debt" means, at any time, the aggregate Funded Debt of Borrower at such time.

"Trademark Security Agreement" means a trademark security agreement executed and delivered by Borrower and Agent, the form and substance of which is satisfactory to Agent.

"Underlying Issuer" means a third Person which is the beneficiary of an L/C Undertaking and which has issued a letter of credit at the request of the Issuing Lender for the benefit of Borrower.

"Underlying Letter of Credit" means a letter of credit that has been issued by an Underlying Issuer.

"Voidable Transfer" has the meaning set forth in SECTION 17.7.

"WARN" has the meaning set forth in SECTION 5.25.

"Wells Fargo" means Wells Fargo Bank, National Association, a national banking association.

"WinRho SDF" means WinRho SDF(R) (Rho (D) Immune Globulin Intravenous (Human)).

"ZLB" means ZLB Bioplasma, Inc., a Delaware corporation.

1.2 ACCOUNTING TERMS. All accounting terms not specifically defined herein shall be construed in accordance with GAAP. When used herein, the term "financial statements" shall include the notes and schedules thereto except as otherwise expressly provided in this Agreement. Whenever the term "Borrower" is used in respect of a financial covenant or a related definition, it shall be understood to mean Borrower and its Subsidiaries on a consolidated basis unless the context clearly requires otherwise.

1.3 CODE. Any terms used in this Agreement that are defined in the Code shall be construed and defined as set forth in the Code unless otherwise defined herein.

1.4 CONSTRUCTION. Unless the context of this Agreement or any other Loan Document clearly requires otherwise, references to the plural include the singular, references to the singular include the plural, the term "including" is not limiting, and the term "or" has, except where otherwise indicated, the inclusive meaning represented by the phrase "and/or." The words "hereof," "herein," "hereby," "hereunder," and similar terms in this Agreement or any other Loan Document refer to this Agreement or such other Loan Document, as the case may be, as a whole and not to any particular provision of this Agreement or such other Loan Document, as the case may be. Section, subsection, clause, schedule, and exhibit references herein are to this Agreement unless otherwise specified. Any reference in this Agreement or in the other Loan Documents to any agreement, instrument, or document shall include all alterations, amendments, changes, extensions, modifications, renewals, replacements, substitutions, joinders, and supplements, thereto and thereof, as applicable (subject to any restrictions on such alterations, amendments, changes, extensions, modifications, renewals, replacements, substitutions, joinders, and supplements set forth herein). Any reference herein to any Person shall be construed to include such Person's successors and assigns. Any requirement of a writing contained herein or in the other Loan Documents shall be satisfied by the transmission of a Record and any Record transmitted shall constitute a representation and warranty as to the accuracy and completeness of the information contained therein.

1.5 SCHEDULES AND EXHIBITS. All of the schedules and exhibits attached to this Agreement shall be deemed incorporated herein by reference.

## 2. LOAN AND TERMS OF PAYMENT.

### 2.1 REVOLVER ADVANCES.

(a) Subject to the terms and conditions of this Agreement, and during the term of this Agreement, each Lender with a Revolver Commitment agrees (severally, not jointly or jointly and severally) to make advances ("Advances") to Borrower in an amount at any one time outstanding not to exceed such Lender's Pro Rata Share of an amount equal to THE LESSER OF (i) the Maximum Revolver Amount LESS the Letter of Credit Usage, and (ii) the Borrowing Base LESS the Letter of Credit Usage. For purposes of this Agreement, "Borrowing Base", as of any date of determination, shall mean the result of:

(x) THE LESSER OF

- (i) 85% of the amount of Eligible Accounts, LESS the amount, if any, of the Dilution Reserve, and
- (ii) an amount equal to Borrower's Collections with respect to Accounts for the immediately preceding 75 day period, PLUS

(y) THE LOWEST OF

- (i) \$15,000,000,
- (ii) 60% of the value of Eligible Inventory,

(iii) 80% TIMES the then extant Net Liquidation Percentage TIMES the book value of Borrower's Inventory, and

(iv) only on the last Business Day of each calendar quarter, 85% of the amount of credit availability created by CLAUSE (X) above, MINUS

(z) the sum of (i) the Bank Products Reserve, (ii) the Environmental Reserves, and (iii) the aggregate amount of reserves, if any, established by Agent under SECTION 2.1(B).

(b) Anything to the contrary in this SECTION 2.1

notwithstanding, Agent shall have the right to establish reserves in such amounts, and with respect to such matters, as Agent in its Permitted Discretion shall deem necessary or appropriate, against the Borrowing Base, including, without limitation, reserves with respect to (i) sums that Borrower is required to pay (such as taxes, assessments, insurance premiums, or, in the case of leased assets, rents or other amounts payable under such leases) and has failed to pay under any Section of this Agreement or any other Loan Document, (ii) amounts owing by Borrower to any Person to the extent secured by a Lien on, or trust over, any of the Collateral (other than any existing Permitted Lien set forth on SCHEDULE P-1 which is specifically identified thereon as entitled to have priority over Agent's Liens), which Lien or trust, in the Permitted Discretion of Agent likely would have a priority superior to Agent's Liens (such as Liens or trusts in favor of landlords, warehousemen, carriers, mechanics, materialmen, laborers, or suppliers, or Liens or trusts for AD VALOREM, excise, sales, or other taxes where given priority under applicable law) in and to such item of the Collateral, and (iii) amounts past due to any licensor under any License Agreement pursuant to which Borrower manufactures or sells Inventory or generates Accounts. In addition to the foregoing, Agent shall have the right to have the Inventory reappraised by a qualified appraisal company selected by Agent in its Permitted Discretion from time to time after the Closing Date for the purpose of redetermining the Net Liquidation Percentage of the Eligible Inventory portion of the Collateral and, as a result, redetermining the Borrowing Base; provided that, so long as no Event of Default has occurred and is continuing, Borrower shall not be obligated to pay for more than two appraisals of the Inventory each calendar year.

(c) The Lenders with Revolver Commitments shall have no obligation to make additional Advances hereunder to the extent such additional Advances would cause the Revolver Usage to exceed the Maximum Revolver Amount.

(d) Amounts borrowed pursuant to this Section may be repaid and, subject to the terms and conditions of this Agreement, reborrowed at any time during the term of this Agreement.

2.2 TERM LOAN. Subject to the terms and conditions of this Agreement, on the Closing Date each Lender with a Term Loan Commitment agrees (severally, not jointly or jointly and severally) to make term loans (collectively, the "Term Loan") to Borrower in an amount equal to such Lender's Pro Rata Share of the Term Loan Amount. The Term Loan shall be repaid in an amount equal to

\$500,000 on the first day of each calendar quarter commencing October 1, 2003; PROVIDED, HOWEVER, that the last such installment shall be in the amount necessary to repay in full the unpaid principal amount of the Term Loan. Borrower may, at any time, prepay all or a portion of the Term Loan without penalty or premium. Each prepayment of the Term Loan shall be applied against the remaining installments of the principal due on the Term Loan in the inverse order of maturity. The outstanding unpaid principal balance and all accrued and unpaid interest under the Term Loan shall be due and payable on the date of termination of this Agreement, whether by its terms, by prepayment, or by acceleration. All amounts outstanding under the Term Loan shall constitute Obligations.

### 2.3 BORROWING PROCEDURES AND SETTLEMENTS.

(a) PROCEDURE FOR BORROWING. Each Borrowing shall be made by an irrevocable written request by an Authorized Person delivered to Agent (which notice must be received by Agent no later than 10:00 a.m. (California time) on the Business Day prior to the date that is the requested Funding Date in the case of a request for an Advance or the Term Loan specifying (i) the amount of such Borrowing, and (ii) the requested Funding Date, which shall be a Business Day; PROVIDED, HOWEVER, that in the case of a request for Swing Loan in an amount of \$3,500,000, or less, such notice will be timely received if it is received by Agent no later than 10:00 a.m. (California time) on the Business Day that is the requested Funding Date) specifying (i) the amount of such Borrowing, and (ii) the requested Funding Date, which shall be a Business Day. At Agent's election, in lieu of delivering the above-described written request, any Authorized Person may give Agent telephonic notice of such request by the required time, with such telephonic notice to be confirmed in writing within 24 hours of the giving of such notice.

(b) AGENT'S ELECTION. Promptly after receipt of a request for a Borrowing pursuant to SECTION 2.3(A), Agent shall elect, in its discretion, (i) to have the terms of SECTION 2.3(C) apply to such requested Borrowing, or (ii) if the Borrowing is for an Advance, to request Swing Lender to make a Swing Loan pursuant to the terms of SECTION 2.3(D) in the amount of the requested Borrowing; PROVIDED, HOWEVER, that if Swing Lender declines in its sole discretion to make a Swing Loan pursuant to SECTION 2.3(D), Agent shall elect to have the terms of SECTION 2.3(C) apply to such requested Borrowing.

#### (c) MAKING OF ADVANCES.

(i) In the event that Agent shall elect to have the terms of this SECTION 2.3(C) apply to a requested Borrowing as described in SECTION 2.3(B), then promptly after receipt of a request for a Borrowing pursuant to SECTION 2.3(A), Agent shall notify the Lenders, not later than 1:00 p.m. (California time) on the Business Day immediately preceding the Funding Date applicable thereto, by telecopy, telephone, or other similar form of transmission, of the requested Borrowing. Each Lender shall make the amount of such Lender's Pro Rata Share of the requested Borrowing available to Agent in immediately available funds, to Agent's Account, not later than 10:00 a.m. (California time) on the Funding Date applicable thereto. After Agent's receipt of the proceeds of such Advances (or the Term Loan, as applicable), upon satisfaction of the applicable conditions precedent set forth in SECTION 3 hereof, Agent shall make the proceeds thereof

available to Borrower on the applicable Funding Date by transferring immediately available funds equal to such proceeds received by Agent to Borrower's Designated Account; PROVIDED, HOWEVER, that, subject to the provisions of SECTION 2.3(I), Agent shall not request any Lender to make, and no Lender shall have the obligation to make, any Advance (or its portion of the Term Loan) if Agent shall have actual knowledge that (1) one or more of the applicable conditions precedent set forth in SECTION 3 will not be satisfied on the requested Funding Date for the applicable Borrowing unless such condition has been waived, or (2) the requested Borrowing would exceed the Availability on such Funding Date.

(ii) Unless Agent receives notice from a Lender on or prior to the Closing Date or, with respect to any Borrowing after the Closing Date, at least one Business Day prior to the date of such Borrowing, that such Lender will not make available as and when required hereunder to Agent for the account of Borrower the amount of that Lender's Pro Rata Share of the Borrowing, Agent may assume that each Lender has made or will make such amount available to Agent in immediately available funds on the Funding Date and Agent may (but shall not be so required), in reliance upon such assumption, make available to Borrower on such date a corresponding amount. If and to the extent any Lender shall not have made its full amount available to Agent in immediately available funds and Agent in such circumstances has made available to Borrower such amount, that Lender shall on the Business Day following such Funding Date make such amount available to Agent, together with interest at the Defaulting Lender Rate for each day during such period. A notice submitted by Agent to any Lender with respect to amounts owing under this subsection shall be conclusive, absent manifest error. If such amount is so made available, such payment to Agent shall constitute such Lender's Advance on the date of Borrowing for all purposes of this Agreement. If such amount is not made available to Agent on the Business Day following the Funding Date, Agent will notify Borrower of such failure to fund and, upon demand by Agent, Borrower shall pay such amount to Agent for Agent's account, together with interest thereon for each day elapsed since the date of such Borrowing, at a rate per annum equal to the interest rate applicable at the time to the Advances composing such Borrowing. The failure of any Lender to make any Advance on any Funding Date shall not relieve any other Lender of any obligation hereunder to make an Advance on such Funding Date, but no Lender shall be responsible for the failure of any other Lender to make the Advance to be made by such other Lender on any Funding Date.

(iii) Agent shall not be obligated to transfer to a Defaulting Lender any payments made by Borrower to Agent for the Defaulting Lender's benefit, and, in the absence of such transfer to the Defaulting Lender, Agent shall transfer any such payments to each other non-Defaulting Lender member of the Lender Group ratably in accordance with their Commitments (but only to the extent that such Defaulting Lender's Advance was funded by the other members of the Lender Group) or, if so directed by Borrower and if no Default or Event of Default had occurred and is continuing (and to the extent such Defaulting Lender's Advance was not funded by the Lender Group), retain same to be re-advanced to Borrower as if such Defaulting Lender had made Advances to Borrower. Subject to the foregoing, Agent may hold and, in its Permitted Discretion, re-lend to Borrower for the account of such Defaulting Lender the amount of all such payments received and retained by it for the account of such Defaulting Lender. Solely for the purposes of voting or consenting to matters with respect to the Loan Documents, such Defaulting Lender shall be deemed not to be a "Lender" and such Lender's Commitment shall be deemed to be zero. This Section shall remain effective with respect to such Lender until (x) the Obligations under this Agreement shall have been declared or shall have become immediately due and payable, (y) the non-Defaulting Lenders, Agent, and Borrower shall have waived such Defaulting Lender's default in writing, or (z) the Defaulting Lender makes its Pro Rata Share of the applicable Advance and pays to Agent all amounts owing by Defaulting Lender in respect thereof. The operation of this Section shall not be construed to increase or otherwise affect the Commitment of any Lender, to relieve or excuse the performance by such Defaulting Lender or any other Lender of its duties and obligations hereunder, or to relieve or excuse the performance by Borrower of its duties and obligations hereunder to Agent or to the Lenders other than such Defaulting Lender. Any such failure to fund by any Defaulting Lender shall constitute a material breach by such Defaulting Lender of this Agreement and shall entitle Borrower at its option, upon written notice to Agent, to arrange for a substitute Lender to assume the Commitment

of such Defaulting Lender, such substitute Lender to be acceptable to Agent. In connection with the arrangement of such a substitute Lender, the Defaulting Lender shall have no right to refuse to be replaced hereunder, and agrees to execute and deliver a completed form of Assignment and Acceptance Agreement in favor of the substitute Lender (and agrees that it shall be deemed to have executed and delivered such document if it fails to do so) subject only to being repaid its share of the outstanding Obligations (other than Bank Product Obligations) (including an assumption of its Pro Rata Share of the Risk Participation Liability) without any premium or penalty of any kind whatsoever; PROVIDED FURTHER, HOWEVER, that any such assumption of the Commitment of such Defaulting Lender shall not be deemed to constitute a waiver of any of the Lender Groups' or Borrower's rights or remedies against any such Defaulting Lender arising out of or in relation to such failure to fund.

(d) MAKING OF SWING LOANS.

(i) In the event Agent shall elect, with the consent of Swing Lender, as a Lender, to have the terms of this SECTION 2.3(D) apply to a requested Borrowing as described in SECTION 2.3(B), Swing Lender as a Lender shall make such Advance in the amount of such Borrowing (any such Advance made solely by Swing Lender as a Lender pursuant to this SECTION 2.3(D) being referred to as a "Swing Loan" and such Advances being referred to collectively as "Swing Loans") available to Borrower on the Funding Date applicable thereto by transferring immediately available funds to Borrower's Designated Account. Each Swing Loan is an Advance hereunder and shall be subject to all the terms and conditions applicable to other Advances, except that no such Swing Loan shall be eligible for the LIBOR Option and all payments on any Swing Loan shall be payable to Swing Lender as a Lender solely for its own account (and for the account of the holder of any participation interest with respect to such Swing Loan). Subject to the provisions of SECTION 2.3(I), Agent shall not request Swing Lender as a Lender to make, and Swing Lender as a Lender shall not make, any Swing Loan if Agent has actual knowledge that (i) one or more of the applicable conditions

precedent set forth in SECTION 3 will not be satisfied on the requested Funding Date for the applicable Borrowing unless such condition has been waived, or (ii) the requested Borrowing would exceed the Availability on such Funding Date. Swing Lender as a Lender shall not otherwise be required to determine whether the applicable conditions precedent set forth in SECTION 3 have been satisfied on the Funding Date applicable thereto prior to making, in its sole discretion, any Swing Loan.

(ii) The Swing Loans shall be secured by Agent's Liens, shall constitute Advances and Obligations hereunder, and shall bear interest at the rate applicable from time to time to Advances that are Base Rate Loans.

(e) AGENT ADVANCES.

(i) Agent hereby is authorized by Borrower and the Lenders, from time to time in Agent's sole discretion, (1) after the occurrence and during the continuance of a Default or an Event of Default, or (2) at any time that any of the other applicable conditions precedent set forth in SECTION 3 have not been satisfied, to make Advances to Borrower on behalf of the Lenders that Agent, in its Permitted Discretion deems necessary or desirable (A) to preserve or protect the Collateral, or any portion thereof, (B) to enhance the likelihood of repayment of the Obligations (other than Bank Product Obligations), or (C) to pay any other amount chargeable to Borrower pursuant to the terms of this Agreement, including Lender Group Expenses and the costs, fees, and expenses described in SECTION 10 (any of the Advances described in this SECTION 2.3(E) shall be referred to as "Agent Advances"). Each Agent Advance is an Advance hereunder and shall be subject to all the terms and conditions applicable to other Advances, except that no such Agent Advance shall be eligible for the LIBOR Option and all payments thereon shall be payable to Agent solely for its own account (and for the account of the holder of any participation interest with respect to such Agent Advance).

(ii) The Agent Advances shall be repayable by Borrower on demand and secured by Agent's Liens granted to Agent under the Loan Documents, shall constitute Advances and Obligations hereunder, and shall bear interest at the rate applicable from time to time to Advances that are Base Rate Loans.

(f) SETTLEMENT. It is agreed that each Lender's funded portion of the Advances is intended by the Lenders to equal, at all times, such Lender's Pro Rata Share of the outstanding Advances. Such agreement notwithstanding, Agent, Swing Lender, and the other Lenders agree (which agreement shall not be for the benefit of or enforceable by Borrower) that in order to facilitate the administration of this Agreement and the other Loan Documents, settlement among them as to the Advances, the Swing Loans, and the Agent Advances shall take place on a periodic basis in accordance with the following provisions:

(i) Agent shall request settlement ("Settlement") with the Lenders on a weekly basis, or on a more frequent basis if so determined by Agent, (1) on behalf of Swing Lender, with respect to each outstanding Swing Loan, (2) for itself, with respect to each Agent Advance, and (3) with respect to Collections received, as to each by notifying the Lenders by telecopy, telephone, or other similar form of transmission, of such requested Settlement, no later than 2:00 p.m. (California time) on the Business Day immediately prior to the date of such requested Settlement (the date of such requested Settlement being the "Settlement Date"). Such notice of a Settlement Date shall include a summary statement of the amount of outstanding Advances, Swing Loans,

and Agent Advances for the period since the prior Settlement Date. Subject to the terms and conditions contained herein (including SECTION 2.3(C)(III)): (y) if a Lender's balance of the Advances, Swing Loans, and Agent Advances exceeds such Lender's Pro Rata Share of the Advances, Swing Loans, and Agent Advances as of a Settlement Date, then Agent shall, by no later than 12:00 p.m. (California time) on the Settlement Date, transfer in immediately available funds to the account of such Lender as such Lender may designate, an amount such that each such Lender shall, upon receipt of such amount, have as of the Settlement Date, its Pro Rata Share of the Advances, Swing Loans, and Agent Advances, and (z) if a Lender's balance of the Advances, Swing Loans, and Agent Advances is less than such Lender's Pro Rata Share of the Advances, Swing Loans, and Agent Advances as of a Settlement Date, such Lender shall no later than 12:00 p.m. (California time) on the Settlement Date transfer in immediately available funds to the Agent's Account, an amount such that each such Lender shall, upon transfer of such amount, have as of the Settlement Date, its Pro Rata Share of the Advances, Swing Loans, and Agent Advances. Such amounts made available to Agent under clause (z) of the immediately preceding sentence shall be applied against the amounts of the applicable Swing Loan or Agent Advance and, together with the portion of such Swing Loan or Agent Advance representing Swing Lender's Pro Rata Share thereof, shall constitute Advances of such Lenders. If any such amount is not made available to Agent by any Lender on the Settlement Date applicable thereto to the extent required by the terms hereof, Agent shall be entitled to recover for its account such amount on demand from such Lender together with interest thereon at the Defaulting Lender Rate.

(ii) In determining whether a Lender's balance of the Advances, Swing Loans, and Agent Advances is less than, equal to, or greater than such Lender's Pro Rata Share of the Advances, Swing Loans, and Agent Advances as of a Settlement Date, Agent shall, as part of the relevant Settlement, apply to such balance the portion of payments actually received in good funds by Agent with respect to principal, interest and fees payable by Borrower and allocable to the Lenders hereunder, and proceeds of Collateral. To the extent that a net amount is owed to any such Lender after such application, such net amount shall be distributed by Agent to that Lender as part of such next Settlement.

(iii) Between Settlement Dates, Agent, to the extent no Agent Advances or Swing Loans are outstanding, may pay over to Swing Lender any payments received by Agent, that in accordance with the terms of this Agreement would be applied to the reduction of the Advances, for application to Swing Lender's Pro Rata Share of the Advances. If, as of any Settlement Date, Collections received since the then immediately preceding Settlement Date have been applied to Swing Lender's Pro Rata Share of the Advances other than to Swing Loans, as provided for in the previous sentence, Swing Lender shall pay to Agent for the accounts of the Lenders, and Agent shall pay to the Lenders, to be applied to the outstanding Advances of such Lenders, an amount such that each Lender shall, upon receipt of such amount, have, as of such Settlement Date, its Pro Rata Share of the Advances. During the period between Settlement Dates, Swing Lender with respect to Swing Loans, Agent with respect to Agent Advances, and each Lender (subject to the effect of letter agreements between Agent and individual Lenders) with respect to



the Advances other than Swing Loans and Agent Advances, shall be entitled to interest at the applicable rate or rates payable under this Agreement on the daily amount of funds employed by Swing Lender, Agent, or the Lenders, as applicable.

(g) NOTATION. Agent shall record on its books the principal amount of the Advances owing to each Lender, including the Swing Loans owing to Swing Lender, and Agent Advances owing to Agent, and the interests therein of each Lender, from time to time. In addition, each Lender is authorized, at such Lender's option, to note the date and amount of each payment or prepayment of principal of such Lender's Advances in its books and records, including computer records, such books and records constituting conclusive evidence, absent manifest error, of the accuracy of the information contained therein.

(h) LENDERS' FAILURE TO PERFORM. All Advances (other than Swing Loans and Agent Advances) shall be made by the Lenders contemporaneously and in accordance with their Pro Rata Shares. It is understood that (i) no Lender shall be responsible for any failure by any other Lender to perform its obligation to make any Advance (or other extension of credit) hereunder, nor shall any Commitment of any Lender be increased or decreased as a result of any failure by any other Lender to perform its obligations hereunder, and (ii) no failure by any Lender to perform its obligations hereunder shall excuse any other Lender from its obligations hereunder.

(i) OPTIONAL OVERADVANCES. Any contrary provision of this Agreement notwithstanding, the Lenders hereby authorize Agent or Swing Lender, as applicable, and Agent or Swing Lender, as applicable, may, but is not obligated to, knowingly and intentionally, continue to make Advances (including Swing Loans) to Borrower notwithstanding that an Overadvance exists or thereby would be created, so long as (i) after giving effect to such Advances (including a Swing Loan), the outstanding Revolver Usage does not exceed the Borrowing Base by more than \$3,500,000, (ii) after giving effect to such Advances (including a Swing Loan), the outstanding Revolver Usage (except for and excluding amounts charged to the Loan Account for interest, fees, or Lender Group Expenses) does not exceed the Maximum Revolver Amount, and (iii) at the time of the making of any such Advance (including any Swing Loan), Agent does not believe, in good faith, that the Overadvance created by such Advance will be outstanding for more than 90 days. The foregoing provisions are for the exclusive benefit of Agent, Swing Lender, and the Lenders and are not intended to benefit Borrower in any way. The Advances and Swing Loans, as applicable, that are made pursuant to this SECTION 2.3(I) shall be subject to the same terms and conditions as any other Advance or Swing Loan, as applicable, except that they shall not be eligible for the LIBOR Option and the rate of interest applicable thereto shall be the rate applicable to Advances that are Base Rate Loans under SECTION 2.6(C) hereof without regard to the presence or absence of a Default or Event of Default.

(i) In the event Agent obtains actual knowledge that the Revolver Usage exceeds the amounts permitted by the preceding paragraph, regardless of the amount of, or reason for, such excess, Agent shall notify Lenders as soon as practicable (and prior to making any (or any additional) intentional Overadvances (except for and excluding amounts charged to the Loan Account for interest, fees, or Lender Group Expenses) unless Agent determines that prior notice would

result in imminent harm to the Collateral or its value), and the Lenders with Revolver Commitments thereupon shall, together with Agent, jointly determine the terms of arrangements that shall be implemented with Borrower intended to reduce, within a reasonable time, the outstanding principal amount of the Advances to Borrower to an amount permitted by the preceding paragraph. In the event Agent or any Lender disagrees over the terms of reduction or repayment of any Overadvance, the terms of reduction or repayment thereof shall be implemented according to the determination of the Required Lenders.

(ii) Each Lender with a Revolver Commitment shall be obligated to settle with Agent as provided in SECTION 2.3(F) for the amount of such Lender's Pro Rata Share of any unintentional Overadvances by Agent reported to such Lender, any intentional Overadvances made as permitted under this SECTION 2.3(I), and any Overadvances resulting from the charging to the Loan Account of interest, fees, or Lender Group Expenses.

## 2.4 PAYMENTS.

### (a) PAYMENTS BY BORROWER.

(i) Except as otherwise expressly provided herein, all payments by Borrower shall be made to Agent's Account for the account of the Lender Group and shall be made in immediately available funds, no later than 11:00 a.m. (California time) on the date specified herein. Any payment received by Agent later than 11:00 a.m. (California time) shall be deemed to have been received on the following Business Day and any applicable interest or fee shall continue to accrue until such following Business Day.

(ii) Unless Agent receives notice from Borrower prior to the date on which any payment is due to the Lenders that Borrower will not make such payment in full as and when required, Agent may assume that Borrower has made (or will make) such payment in full to Agent on such date in immediately available funds and Agent may (but shall not be so required), in reliance upon such assumption, distribute to each Lender on such due date an amount equal to the amount then due such Lender. If and to the extent Borrower does not make such payment in full to Agent on the date when due, each Lender severally shall repay to Agent on demand such amount distributed to such Lender, together with interest thereon at the Defaulting Lender Rate for each day from the date such amount is distributed to such Lender until the date repaid.

### (b) APPORTIONMENT AND APPLICATION OF PAYMENTS.

(i) Except as otherwise provided with respect to Defaulting Lenders and except as otherwise provided in the Loan Documents (including letter agreements between Agent and individual Lenders), aggregate principal and interest payments shall be apportioned ratably among the Lenders (according to the unpaid principal balance of the Obligations to which such payments relate held by each Lender) and payments of fees and expenses (other than fees or expenses that are for Agent's separate account, after giving effect to any letter agreements between Agent and individual Lenders) shall be apportioned ratably

among the Lenders having a Pro Rata Share of the type of Commitment or Obligation to which a particular fee relates. Except as otherwise specifically provided in SECTION 2.4(C) below, all payments shall be remitted to Agent and all such payments (other than payments received while no Event of Default has occurred and is continuing and which either (i) relate (or are designated by Borrower to be applied) to the payment of principal of or interest on specific Obligations or (ii) relate (or are designated by Borrower to be applied) to the payment of specific fees), and all proceeds of Accounts or other Collateral received by Agent in accordance with the terms of this Agreement, shall be applied as follows:

- (A) FIRST, to pay any Lender Group Expenses then due to Agent under the Loan Documents, until paid in full,
- (B) SECOND, to pay any Lender Group Expenses then due to the Lenders under the Loan Documents, on a ratable basis, until paid in full,
- (C) THIRD, to pay any fees then due to Agent (for its separate accounts, pursuant to any letter agreements between Agent and individual Lenders) under the Loan Documents until paid in full,
- (D) FOURTH, to pay any fees then due to any or all of the Lenders (pursuant to any letter agreements between Agent and individual Lenders) under the Loan Documents, on a ratable basis, until paid in full,
- (E) FIFTH, to pay interest due in respect of all Agent Advances, until paid in full,
- (F) SIXTH, ratably to pay interest due in respect of the Advances (other than Agent Advances), the Swing Loans, and the Term Loan until paid in full,
- (G) SEVENTH, to pay the principal of all Agent Advances until paid in full,
- (H) EIGHTH, ratably to pay all principal amounts then due and payable (other than as a result of an acceleration thereof) with respect to the Term Loan until paid in full,
- (I) NINTH, to pay the principal of all Swing Loans until paid in full,
- (J) TENTH, so long as no Event of Default has occurred and is continuing, and at Agent's election (which election Agent agrees will not be made if an Overadvance would be created thereby) to pay amounts then due and owing by Borrower or its Subsidiaries in respect of Bank Products, until paid in full,

(K) ELEVENTH, so long as no Event of Default has occurred and is continuing, to pay the principal of all Advances until paid in full,

(L) TWELFTH, if an Event of Default has occurred and is continuing, ratably (i) to pay the principal of all Advances until paid in full, and (ii) to Agent, to be held by Agent, for the benefit of Wells Fargo or its Affiliates, as applicable, as cash collateral in an amount up to the amount of the Bank Products Reserve established prior to the occurrence of, and not in contemplation of, the subject Event of Default until Borrower's and its Subsidiaries' obligations in respect of the then extant Bank Products have been paid in full or the cash collateral amount has been exhausted,

(M) THIRTEENTH, if an Event of Default has occurred and is continuing, to pay the outstanding principal balance of the Term Loan (in the inverse order of the maturity of the installments due thereunder) until the Term Loan is paid in full,

(N) FOURTEENTH, if an Event of Default has occurred and is continuing, to Agent, to be held by Agent, for the ratable benefit of Issuing Lender and those Lenders having a Revolver Commitment, as cash collateral in an amount up to 102% of the then extant Letter of Credit Usage until paid in full,

(O) FIFTEENTH, to pay any other Obligations (including Bank Product Obligations) until paid in full, and

(P) SIXTEENTH, to Borrower (to be wired to the Designated Account) or such other Person entitled thereto under applicable law.

(ii) Agent promptly shall distribute to each Lender, pursuant to the applicable wire instructions received from each Lender in writing, such funds as it may be entitled to receive, subject to a Settlement delay as provided in SECTION 2.3(F).

(iii) In each instance, so long as no Event of Default has occurred and is continuing, SECTION 2.4(B)(I) shall not be deemed to apply to any payment by Borrower specified by Borrower to be for the payment of principal of or interest or fees on specific Obligations then due and payable (or prepayable) under any provision of this Agreement.

(iv) For purposes of the foregoing, "paid in full" means payment of all amounts owing under the Loan Documents according to the terms thereof, including loan fees, service fees, professional fees, interest (and specifically including interest accrued after the commencement of any Insolvency Proceeding), default interest, interest on interest, and expense reimbursements, whether or not the same would be or is allowed or disallowed in whole or in part in any Insolvency Proceeding.

(v) In the event of a direct conflict between the priority provisions of this SECTION 2.4 and other provisions contained in any other Loan Document, it is the intention of the parties hereto that

such priority provisions in such documents shall be read together and construed, to the fullest extent possible, to be in concert with each other. In the event of any actual, irreconcilable conflict that cannot be resolved as aforesaid, the terms and provisions of this SECTION 2.4 shall control and govern.

(c) MANDATORY PREPAYMENTS.

(i) If on any day the sum of the Revolver Usage exceeds the Borrowing Base, Borrower shall immediately pay to Agent an amount equal to such excess to be applied to the outstanding principal of the Advances.

(ii) If on any day the Revolver Commitment is terminated, Borrower shall immediately repay the Term Loan.

(iii) If at any time the Fixed Asset Coverage Ratio is less than 0.50 to 1.0, Borrower shall immediately pay to Agent an amount equal to such excess, to be applied to the principal installments of the Term Loan in the inverse order of maturity. Agent shall have the right to have the Eligible Equipment and the Eligible Real Property Collateral reappraised by a qualified appraisal company selected by Agent in its Permitted Discretion from time to time after the Closing Date for the purposes of the definition of "Term Loan Amount" and this SECTION 2.4(C)(III), provided that, so long as no Event of Default has occurred and is continuing, appraisals of the Eligible Equipment shall not be conducted more frequently than once each calendar year and appraisals of the Eligible Real Property Collateral shall not be conducted more frequently than once each calendar year.

(iv) Immediately upon any sale or disposition by Borrower of property or assets (other than a Permitted Disposition described in clauses (b), (c), (d), (e) or (f) of the definition of such term) or the receipt by Borrower of the proceeds of any insurance policy with respect to Inventory, Equipment or Real Property or condemnation awards with respect to Inventory, Equipment or Real Property, Borrower shall prepay the outstanding principal amount of the Term Loan and the Advances in accordance with SECTION 2.4(D) in an amount equal to 100% of the Net Cash Proceeds or the insurance or condemnation proceeds received by such Person in connection with such sales or dispositions or such casualty or condemnation event to the extent that the aggregate amount of Net Cash Proceeds or proceeds of insurance or condemnation awards received by Borrower (and not paid to Agent as a prepayment of the Term Loan and the Advances) for all such sales or dispositions shall exceed, since the Closing Date, (A) \$500,000 in the case of Net Cash Proceeds of sales or dispositions and (B) \$1,000,000 in the case of proceeds of insurance or condemnation awards (other than sales or dispositions of Inventory, Equipment or Real Property or insurance proceeds or condemnation awards with respect to Inventory, Equipment or Real Property as to which, except as otherwise provided in SECTION 6.7(B), no minimum amount will apply), PROVIDED, that, except during the continuance of an Event of Default, proceeds from any insurance policy or condemnation award with respect to either of the facilities located in Boca Raton, Florida shall not be required to be so applied to the extent that such proceeds are used to replace, repair or restore the applicable facility located in Boca Raton, Florida if (i) the amount of proceeds received in respect of such insurance policy or condemnation award is less than \$2,000,000, (ii) Borrower delivers a certificate to Agent within 30 days after the date of such loss,

destruction or taking stating that such proceeds shall be used to replace, repair or restore the applicable facility located in Boca Raton, Florida within a period specified in such certificate not to exceed 180 days after the receipt of such proceeds (which certificate shall set forth estimates of the proceeds to be so expended) and (iii) such proceeds are deposited in a DDA subject to a Control Agreement. If all or any portion of such proceeds not so applied to the prepayment of the Term Loan and Advances in accordance with this SUBCLAUSE (IV) are not used in accordance with the preceding sentence within such 180 day period, such remaining portion shall be applied to the Term Loan and Advances in accordance with this SUBCLAUSE (IV) on the last day of such specified period. Borrower shall not be obligated under this Agreement and the other Loan Documents to replace, repair or restore the applicable facility located in Boca Raton, Florida to the extent, but only to the extent, that the proceeds received in respect of any insurance policy or condemnation award are applied to the Term Loan or the Advances. Nothing contained in this SUBCLAUSE (IV) shall permit Borrower to sell or otherwise dispose of any property or assets other than in accordance with SECTION 7.4.

(v) Upon the receipt by Borrower of any Extraordinary Receipts during the continuance of an Event of Default, Borrower shall prepay the outstanding principal of the Term Loan and the Advances in accordance with Section 2.4(d) below in an amount equal to 100% of such Extraordinary Receipts, net of any reasonable expenses incurred in collecting such Extraordinary Receipts.

(vi) Within ten (10) Business Days of delivery to Agent of each of the audited annual financial statements pursuant to SECTION 6.3(B) or, if such financial statements are not delivered to Agent on the date such statements are required to be delivered pursuant to SECTION 6.3(B), ten (10) Business Days after the date such statements are required to be delivered to Agent pursuant to SECTION 6.3(B), Borrower shall pay to Agent an amount equal to 25% of the Excess Cash Flow for the Fiscal Year covered by such financial statements, to be applied in accordance with SECTION 2.4(D).

(d) APPLICATION OF PAYMENTS.

(i) Each prepayment pursuant to SUBCLAUSES (C)(V) AND (C)(VI) above shall be applied, first, to the outstanding principal amount of the Term Loan until paid in full, and second, to the outstanding principal amount of the Advances (together with a corresponding permanent reduction in the Revolver Commitment) until paid in full. Each such prepayment of the Term Loan shall be applied against the remaining installments of principal of the Term Loan in the inverse order of maturity.

(ii) Each prepayment pursuant to SUBCLAUSE (C)(IV) above shall be applied as follows:

(1) if the proceeds are from any sale or disposition of any Accounts or Inventory or any insurance policy or condemnation award with respect to Inventory, such proceeds shall be applied, first, to the outstanding principal amount

of the Advances until paid in full, and second, to the outstanding principal amount of the Term Loan until paid in full;

(2) subject to CLAUSE (3) below, if the proceeds are from the sale or disposition of any other assets or any insurance policy or condemnation award not described in CLAUSE (1) above, such proceeds shall be applied, first, to the outstanding principal amount of the Term Loan, until paid in full, and second, to the outstanding principal amount of the Advances, until paid in full. Each such prepayment of the Term Loan shall be applied against the remaining installments of principal of the Term Loan in the inverse order of maturity; and

(3) if the proceeds are from a sale or disposition of assets or any insurance, which sale or disposition includes, or proceeds of insurance relate to, Accounts, Inventory and other assets, such proceeds shall be applied as follows: (x) an amount equal to the Advances actually supported by such assets determined using the effective advance rate under the Borrowing Base against such Accounts, Inventory and (determined at the time of such sale or disposition or event resulting in such insurance proceeds), shall be applied to the outstanding principal amount of the Advances and (y) the remaining proceeds shall be applied, first, to the outstanding principal amount of the Term Loan until paid in full, and second, to the outstanding principal amount of the Advances until paid in full. Each such prepayment of the Term Loan shall be applied against the remaining installments of principal of the Term Loan in the inverse order of maturity.

2.5 OVERADVANCES. If, at any time or for any reason, the amount of Obligations (other than Bank Product Obligations) owed by Borrower to the Lender Group pursuant to SECTIONS 2.1 AND 2.12 is greater than either the Dollar or percentage limitations set forth in SECTIONS 2.1 OR 2.12 (an "Overadvance"), Borrower immediately shall pay to Agent, in cash, the amount of such excess, which amount shall be used by Agent to reduce the Obligations in accordance with the priorities set forth in SECTION 2.4(B). In addition, Borrower hereby promises to pay the Obligations (including principal, interest, fees, costs, and expenses) in Dollars in full to the Lender Group as and when due and payable under the terms of this Agreement and the other Loan Documents.

2.6 INTEREST RATES AND LETTER OF CREDIT FEE: RATES, PAYMENTS, AND CALCULATIONS.

(a) INTEREST RATES. Except as provided in clause (c) below, all Obligations (except for undrawn Letters of Credit and except for Bank Product Obligations) that have been charged to the Loan Account pursuant to the terms hereof shall bear interest on the Daily Balance thereof as follows (i) if the relevant Obligation is an Advance that is a LIBOR Rate Loan, at a per annum rate equal to the LIBOR Rate plus the Applicable LIBOR Rate Revolver Margin, (ii) if the relevant Obligation is a portion of the Term Loan that is a LIBOR Rate Loan, at a per annum rate equal to the LIBOR Rate plus the LIBOR Rate Term

Loan Margin, (iii) if the relevant Obligation is a portion of the Term Loan that is a Base Rate Loan, at a per annum rate equal to the Base Rate plus the Base Rate Term Loan Margin, and (iv) otherwise, at a per annum rate equal to the Base Rate plus the Base Rate Margin.

(b) LETTER OF CREDIT FEE. Borrower shall pay Agent (for the ratable benefit of the Lenders with a Revolver Commitment, subject to any letter agreement between Agent and individual Lenders), a Letter of Credit fee (in addition to the charges, commissions, fees, and costs set forth in SECTION 2.12(E)) which shall accrue at a rate equal to the Applicable LIBOR Rate Revolver Margin TIMES the Daily Balance of the undrawn amount of all outstanding Letters of Credit.

(c) DEFAULT RATE. Upon the occurrence and during the continuation of an Event of Default (and at the election of Agent or the Required Lenders),

(i) all Obligations (except for undrawn Letters of Credit and except for Bank Product Obligations) that have been charged to the Loan Account pursuant to the terms hereof shall bear interest on the Daily Balance thereof at a per annum rate equal to 2 percentage points above the per annum rate otherwise applicable hereunder, and

(ii) the Letter of Credit fee provided for above shall be increased to 2 percentage points above the per annum rate otherwise applicable hereunder.

(d) PAYMENT. Interest, Letter of Credit fees, and all other fees payable hereunder shall be due and payable, in arrears, on the first day of each month (or, in the case of fees, such other date on which such fees are due and payable pursuant to the terms of the Fee Letter) at any time that Obligations or Commitments are outstanding. Borrower hereby authorizes Agent, from time to time without prior notice to Borrower, to, and Agent agrees that it will, charge such interest and fees, all Lender Group Expenses (as and when incurred), the charges, commissions, fees, and costs provided for in SECTION 2.12(E) (as and when accrued or incurred), the fees and costs provided for in SECTION 2.11 (as and when accrued or incurred), and all other payments as and when due and payable under any Loan Document (including the installments due and payable with respect to the Term Loan and including any amounts due and payable to Wells Fargo or its Affiliates in respect of Bank Products up to the amount of the then extant Bank Products Reserve) to Borrower's Loan Account, which amounts thereafter shall constitute Advances hereunder and shall accrue interest at the rate then applicable to Advances hereunder. Any interest not paid when due shall be compounded by being charged to Borrower's Loan Account and shall thereafter constitute Advances hereunder and shall accrue interest at the rate then applicable to Advances that are Base Rate Loans hereunder.

(e) COMPUTATION. All interest and fees chargeable under the Loan Documents shall be computed on the basis of a 360 day year for the actual number of days elapsed. In the event the Base Rate is changed from time to time hereafter, the rates of interest hereunder based upon the Base Rate automatically and immediately shall be increased or decreased by an amount equal to such change in the Base Rate.



(f) INTENT TO LIMIT CHARGES TO MAXIMUM LAWFUL RATE. In no event shall the interest rate or rates payable under this Agreement, plus any other amounts paid in connection herewith, exceed the highest rate permissible under any law that a court of competent jurisdiction shall, in a final determination, deem applicable. Borrower and the Lender Group, in executing and delivering this Agreement, intend legally to agree upon the rate or rates of interest and manner of payment stated within it; PROVIDED, HOWEVER, that, anything contained herein to the contrary notwithstanding, if said rate or rates of interest or manner of payment exceeds the maximum allowable under applicable law, then, IPSO FACTO, as of the date of this Agreement, Borrower is and shall be liable only for the payment of such maximum as allowed by law, and payment received from Borrower in excess of such legal maximum, whenever received, shall be applied to reduce the principal balance of the Obligations to the extent of such excess.

## 2.7 CASH MANAGEMENT.

(a) Borrower shall (i) establish and maintain cash management services of a type and on terms reasonably satisfactory to Agent at one or more of the banks set forth on SCHEDULE 2.7(A) (each, a "Cash Management Bank"), and shall request in writing and otherwise take such reasonable steps to ensure that all of its Account Debtors forward payment of the amounts owed by them directly to such Cash Management Bank, and (ii) deposit or cause to be deposited promptly, and in any event no later than the first Business Day after the date of receipt thereof, all Collections (including those sent directly by Account Debtors to a Cash Management Bank) into a bank account in Agent's name (a "Cash Management Account") at one of the Cash Management Banks.

(b) Each Cash Management Bank shall establish and maintain Cash Management Agreements with Agent and Borrower, in form and substance acceptable to Agent. Each such Cash Management Agreement shall provide, among other things, that (i) all items of payment deposited in such Cash Management Account and proceeds thereof are held by such Cash Management Bank as agent or bailee-in-possession for Agent, (ii) the Cash Management Bank has no rights of setoff or recoupment or any other claim against the applicable Cash Management Account other than for payment of its service fees and other charges directly related to the administration of such Cash Management Account and for returned checks or other items of payment, (iii) from and after receipt of a notice (an "Activation Notice") from Agent (which Activation Notice may be given by Agent at any time (A) Borrower's Excess Availability is less than \$15,000,000 or (B) an Event of Default has occurred), the Cash Management Bank shall immediately forward by daily sweep all amounts in the applicable Cash Management Account to the Agent's Account, and (iv) prior to the receipt by such Cash Management Bank of an Activation Notice, all amounts in such Cash Management Account may be transferred to and used by Borrower in the ordinary course of business. From and after the date Agent has delivered an Activation Notice to any Cash Management Bank with respect to any Cash Management Account(s), Borrower shall not accumulate or maintain cash in disbursement or payroll accounts as of any date of determination in excess of checks outstanding against such accounts as of that date and amounts necessary to meet minimum balance requirements.

(c) So long as no Default or Event of Default has occurred and is continuing, Borrower may amend SCHEDULE 2.7(A) to add or replace a Cash Management Bank or Cash Management Account; PROVIDED, HOWEVER, that (i) such prospective Cash Management Bank shall be reasonably satisfactory to Agent and Agent shall have consented in writing in advance to the opening of such Cash

Management Account with the prospective Cash Management Bank, which consent shall not be unreasonably withheld or delayed, and (ii) prior to the time of the opening of such Cash Management Account, Borrower and such prospective Cash Management Bank shall have executed and delivered to Agent a Cash Management Agreement. Borrower shall close any of its Cash Management Accounts (and establish replacement cash management accounts in accordance with the foregoing sentence) promptly and in any event within 30 days of notice from Agent that the creditworthiness of any Cash Management Bank is no longer acceptable in Agent's reasonable judgment, or as promptly as practicable and in any event within 60 days of notice from Agent that the operating performance, funds transfer, or availability procedures or performance of the Cash Management Bank with respect to Cash Management Accounts or Agent's liability under any Cash Management Agreement with such Cash Management Bank is no longer acceptable in Agent's reasonable judgment.

(d) The Cash Management Accounts shall be cash collateral accounts, with all cash, checks and similar items of payment in such accounts securing payment of the Obligations, and in which Borrower is hereby deemed to have granted a Lien to Agent.

2.8 CREDITING PAYMENTS; FLOAT CHARGE. The receipt of any payment item by Agent (whether from transfers to Agent by the Cash Management Banks pursuant to the Cash Management Agreements or otherwise) shall not be considered a payment on account unless such payment item is a wire transfer of immediately available federal funds made to the Agent's Account or unless and until such payment item is honored when presented for payment. Should any payment item not be honored when presented for payment, then Borrower shall be deemed not to have made such payment and interest shall be calculated accordingly. Anything to the contrary contained herein notwithstanding, any payment item shall be deemed received by Agent only if it is received into the Agent's Account on a Business Day on or before 11:00 a.m. (California time). If any payment item is received into the Agent's Account on a non-Business Day or after 11:00 a.m. (California time) on a Business Day, it shall be deemed to have been received by Agent as of the opening of business on the immediately following Business Day. From and after the Closing Date, Agent shall be entitled to charge Borrower for one Business Day of 'clearance' or 'float' at the rate applicable to Base Rate Loans under SECTION 2.6 on all Collections that are received by Borrower (regardless of whether forwarded by the Cash Management Banks to Agent), provided that such 'clearance' or 'float' charge shall be applied without duplication with respect to Collections that are received by Borrower the proceeds of which are deposited in multiple accounts of the Loan Parties. This across-the-board one Business Day clearance or float charge on all Collections is acknowledged by the parties to constitute an integral aspect of the pricing of the financing of Borrower and shall apply irrespective of whether or not there are any outstanding monetary Obligations; the effect of such clearance or float charge being the equivalent of charging one Business Day of interest on such Collections. The parties acknowledge and agree that the economic benefit of the foregoing provisions of this SECTION 2.8 shall be for the exclusive benefit of Agent.

2.9 DESIGNATED ACCOUNT. Agent is authorized to make the Advances and the Term Loan, and Issuing Lender is authorized to issue the Letters of Credit, under this Agreement based upon written instructions (which may be by telecopy) received from anyone purporting to be an Authorized Person, or without

instructions if pursuant to SECTION 2.6(D). Borrower agrees to establish and maintain the Designated Account with the Designated Account Bank for the purpose of receiving the proceeds of the Advances requested by Borrower and made by Agent or the Lenders hereunder. Unless otherwise agreed by Agent and Borrower, any Advance, Agent Advance, or Swing Loan requested by Borrower and made by Agent or the Lenders hereunder shall be made to the Designated Account.

2.10 MAINTENANCE OF LOAN ACCOUNT; STATEMENTS OF OBLIGATIONS. Agent shall maintain an account on its books in the name of Borrower (the "Loan Account") on which Borrower will be charged with the Term Loan, all Advances (including Agent Advances and Swing Loans) made by Agent, Swing Lender, or the Lenders to Borrower or for Borrower's account, the Letters of Credit issued by Issuing Lender for Borrower's account, and with all other payment Obligations hereunder or under the other Loan Documents (except for Bank Product Obligations), including, accrued interest, fees and expenses, and Lender Group Expenses. In accordance with SECTION 2.8, the Loan Account will be credited with all payments received by Agent from Borrower or for Borrower's account, including all amounts received in the Agent's Account from any Cash Management Bank. Agent shall render written statements regarding the Loan Account to Borrower, including principal, interest, fees, and including an itemization of all charges and expenses constituting Lender Group Expenses owing, and such statements shall be conclusively presumed to be correct and accurate and constitute an account stated between Borrower and the Lender Group unless, within 30 days after receipt of such statements by Borrower, Borrower shall deliver to Agent written objection thereto describing the error or errors contained in any such statements.

2.11 FEES. Borrower shall pay to Agent the following fees and charges, which fees and charges shall be non-refundable when paid (irrespective of whether this Agreement is terminated thereafter) and shall be apportioned among the Lenders in accordance with the terms of letter agreements between Agent and individual Lenders:

(a) UNUSED LINE FEE. On the first day of each month during the term of this Agreement, an unused line fee in an amount equal to 0.50% per annum TIMES the result of (i) the Maximum Revolver Amount, LESS (ii) the sum of (A) the average Daily Balance of Advances that were outstanding during the immediately preceding month, PLUS (B) the average Daily Balance of the Letter of Credit Usage during the immediately preceding month,

(b) FEE LETTER FEES. As and when due and payable under the terms of the Fee Letter, Borrower shall pay to Agent the fees set forth in the Fee Letter, and

(c) AUDIT, APPRAISAL, AND VALUATION CHARGES. For the separate account of Agent, audit, appraisal, and valuation fees and charges as follows (i) a fee of \$950 per day, per auditor, plus actual and reasonable out-of-pocket expenses for each financial audit of Borrower performed by personnel employed by Agent, plus a charge of \$950 per day plus actual and reasonable out-of-pocket expenses incurred by personnel employed by Agent to establish electronic collateral reporting systems, if such systems are implemented, (ii) actual costs of each appraiser, including reasonable out-of-pocket expenses, for each appraisal of the Collateral performed by personnel employed by Agent, and (iii) the actual charges paid or incurred by Agent if it elects to employ the services of one or more third Persons, selected by Agent in its Permitted Discretion, to perform financial audits of Borrower, to appraise the Collateral, or any portion thereof, or to assess Borrower's business valuation, provided that (x) Lender

intends to perform financial audits not less than quarterly and (y) so long as no Event of Default has occurred and is continuing, Borrower shall not be obligated to pay for more than one appraisal of the Equipment each calendar year, more than two appraisals of the Inventory each calendar year, and more than one appraisal of the Real Property each calendar year.

## 2.12 LETTERS OF CREDIT.

(a) Subject to the terms and conditions of this Agreement, the Issuing Lender agrees to issue letters of credit for the account of Borrower (each, an "L/C") or to purchase participations or execute indemnities or reimbursement obligations (each such undertaking, an "L/C Undertaking") with respect to letters of credit issued by an Underlying Issuer (as of the Closing Date, the prospective Underlying Issuer is to be Wells Fargo) for the account of Borrower. To request the issuance of an L/C or an L/C Undertaking (or the amendment, renewal, or extension of an outstanding L/C or L/C Undertaking), Borrower shall hand deliver or telecopy (or transmit by electronic communication, if arrangements for doing so have been approved by the Issuing Lender) to the Issuing Lender and Agent at the address set forth in SECTION 12 hereof (reasonably, but in any event not more than five (5) Business Days, in advance of the requested date of issuance, amendment, renewal, or extension) a notice requesting the issuance of an L/C or L/C Undertaking, or identifying the L/C or L/C Undertaking to be amended, renewed, or extended, the date of issuance, amendment, renewal, or extension, the date on which such L/C or L/C Undertaking is to expire, the amount of such L/C or L/C Undertaking, the name and address of the beneficiary thereof (or the beneficiary of the Underlying Letter of Credit, as applicable), and such other information as shall be necessary to prepare, amend, renew, or extend such L/C or L/C Undertaking. If requested by the Issuing Lender, Borrower also shall be an applicant under the application with respect to any Underlying Letter of Credit that is to be the subject of an L/C Undertaking. The Issuing Lender shall have no obligation to issue a Letter of Credit if any of the following would result after giving effect to the requested Letter of Credit:

(i) the Letter of Credit Usage would exceed the Borrowing Base LESS the amount of outstanding Advances, or

(ii) the Letter of Credit Usage would exceed \$10,000,000, or

(iii) the Letter of Credit Usage would exceed the Maximum Revolver Amount LESS the then extant amount of outstanding Advances.

Borrower and the Lender Group acknowledge and agree that certain Underlying Letters of Credit may be issued to support letters of credit that already are outstanding as of the Closing Date. Each Letter of Credit (and corresponding Underlying Letter of Credit) shall be in form and substance acceptable to the Issuing Lender (in the exercise of its Permitted Discretion), including the requirement that the amounts payable thereunder must be payable in Dollars. If Issuing Lender is obligated to advance funds under a Letter of Credit, Borrower immediately shall reimburse such L/C Disbursement to Issuing Lender by paying to Agent an amount equal to such L/C Disbursement not later

than 12:00 p.m., California time, on the date that such L/C Disbursement is made, if Borrower shall have received written or telephonic notice of such L/C Disbursement prior to 9:00 a.m., California time, on such date, or, if such notice has not been received by Borrower prior to such time on such date, then not later than 12:00 p.m., California time, on the Business Day that Borrower receives such notice, if such notice is received prior to 9:00 a.m., California time, on the date of receipt, and, in the absence of such reimbursement, the L/C Disbursement immediately and automatically shall be deemed to be an Advance hereunder and, thereafter, shall bear interest at the rate then applicable to Advances that are Base Rate Loans under SECTION 2.6. To the extent an L/C Disbursement is deemed to be an Advance hereunder, Borrower's obligation to reimburse such L/C Disbursement shall be discharged and replaced by the resulting Advance. Promptly following receipt by Agent of any payment from Borrower pursuant to this paragraph, Agent shall distribute such payment to the Issuing Lender or, to the extent that Lenders have made payments pursuant to SECTION 2.12(C) to reimburse the Issuing Lender, then to such Lenders and the Issuing Lender as their interest may appear.

(b) Promptly following receipt of a notice of L/C Disbursement pursuant to SECTION 2.12(A), each Lender with a Revolver Commitment agrees to fund its Pro Rata Share of any Advance deemed made pursuant to the foregoing subsection on the same terms and conditions as if Borrower had requested such Advance and Agent shall promptly pay to Issuing Lender the amounts so received by it from the Lenders. By the issuance of a Letter of Credit (or an amendment to a Letter of Credit increasing the amount thereof) and without any further action on the part of the Issuing Lender or the Lenders with Revolver Commitment, the Issuing Lender shall be deemed to have granted to each Lender with a Revolver Commitment, and each Lender with a Revolver Commitment shall be deemed to have purchased, a participation in each Letter of Credit, in an amount equal to its Pro Rata Share of the Risk Participation Liability of such Letter of Credit, and each such Lender agrees to pay to Agent, for the account of the Issuing Lender, such Lender's Pro Rata Share of any payments made by the Issuing Lender under such Letter of Credit. In consideration and in furtherance of the foregoing, each Lender with a Revolver Commitment hereby absolutely and unconditionally agrees to pay to Agent, for the account of the Issuing Lender, such Lender's Pro Rata Share of each L/C Disbursement made by the Issuing Lender and not reimbursed by Borrower on the date due as provided in clause (a) of this Section, or of any reimbursement payment required to be refunded to Borrower for any reason. Each Lender with a Revolver Commitment acknowledges and agrees that its obligation to deliver to Agent, for the account of the Issuing Lender, an amount equal to its respective Pro Rata Share pursuant to this SECTION 2.12(B) shall be absolute and unconditional and such remittance shall be made notwithstanding the occurrence or continuation of an Event of Default or Default or the failure to satisfy any condition set forth in SECTION 3 hereof. If any such Lender fails to make available to Agent the amount of such Lender's Pro Rata Share of any payments made by the Issuing Lender in respect of such Letter of Credit as provided in this Section, Agent (for the account of the Issuing Lender) shall be entitled to recover such amount on demand from such Lender together with interest thereon at the Defaulting Lender Rate until paid in full.

(c) Borrower hereby agrees to indemnify, save, defend, and hold the Lender Group harmless from any loss, cost, expense, or liability, and reasonable attorneys fees incurred by the Lender Group arising out of or in connection with any Letter of Credit; PROVIDED, HOWEVER, that Borrower shall not be obligated hereunder to indemnify for any loss, cost, expense, or liability that is caused by (i) the gross negligence or willful misconduct of the Issuing

Lender or any other member of the Lender Group, or (ii) the breach by a Lender of its payment obligations under this Agreement as finally determined by a court of competent jurisdiction. Borrower agrees to be bound by the Underlying Issuer's regulations and reasonable interpretations of any Underlying Letter of Credit or by Issuing Lender's reasonable interpretations of any L/C issued by Issuing Lender to or for Borrower's account, even though this interpretation may be different from Borrower's own, and Borrower understands and agrees that the Lender Group shall not be liable for any error made in good faith, negligence, or mistake, whether of omission or commission, in following Borrower's instructions or those contained in the Letter of Credit or any modifications, amendments, or supplements thereto. Borrower understands that the L/C Undertakings may require Issuing Lender to indemnify the Underlying Issuer for certain costs or liabilities arising out of claims by Borrower against such Underlying Issuer. Borrower hereby agrees to indemnify, save, defend, and hold the Lender Group harmless with respect to any loss, cost, expense (including reasonable attorneys fees), or liability incurred by the Lender Group under any L/C Undertaking as a result of the Lender Group's indemnification of any Underlying Issuer for such claims by Borrower; PROVIDED, HOWEVER, that Borrower shall not be obligated hereunder to indemnify for any loss, cost, expense, or liability that is caused by the gross negligence or willful misconduct of the Issuing Lender or any other member of the Lender Group.

(d) Borrower hereby authorizes and directs any Underlying Issuer to deliver to the Issuing Lender all instruments, documents, and other writings and property received by such Underlying Issuer pursuant to such Underlying Letter of Credit and to accept and rely upon the Issuing Lender's instructions with respect to all matters arising in connection with such Underlying Letter of Credit and the related application.

(e) Any and all charges, commissions, fees, and costs incurred by the Issuing Lender relating to Underlying Letters of Credit shall be Lender Group Expenses for purposes of this Agreement and immediately upon notice to Borrower shall be reimbursable by Borrower to Agent (or without notice to Borrower charged to the Loan Account) for the account of the Issuing Lender; it being acknowledged and agreed by Borrower that, as of the Closing Date, the issuance charge imposed by the prospective Underlying Issuer is .825% per annum times the face amount of each Underlying Letter of Credit, that such issuance charge may be changed from time to time, and that the Underlying Issuer also imposes a schedule of charges for amendments, extensions, drawings, and renewals.

(f) If by reason of (i) any change in any applicable law, treaty, rule, or regulation or any change in the interpretation or application thereof by any Governmental Authority, or (ii) compliance by the Underlying Issuer or the Lender Group with any direction, request, or requirement (irrespective of whether having the force of law) of any Governmental Authority or monetary authority including, Regulation D of the Federal Reserve Board as from time to time in effect (and any successor thereto):

(i) any reserve, deposit, or similar requirement is or shall be imposed or modified in respect of any Letter of Credit issued hereunder, or

(ii) there shall be imposed on the Underlying Issuer or the Lender Group any other condition regarding any Underlying Letter of Credit or any Letter of Credit issued pursuant hereto,

and the result of the foregoing is to increase, directly or indirectly, the cost to the Lender Group of issuing, making, guaranteeing, or maintaining any Letter of Credit or to reduce the amount receivable in respect thereof by the Lender Group, then, and in any such case, Agent may, at any time within a reasonable period after the additional cost is incurred or the amount received is reduced, notify Borrower, and Borrower shall pay on demand such amounts as Agent may specify in good faith to be necessary to compensate the Lender Group for such additional cost or reduced receipt, together with interest on such amount from the date of such demand until payment in full thereof at the rate then applicable to Base Rate Loans hereunder. The determination by Agent of any amount due pursuant to this Section, as set forth in a certificate setting forth the calculation thereof in reasonable detail, shall, in the absence of manifest or demonstrable error, be final and conclusive and binding on all of the parties hereto.

#### 2.13 LIBOR OPTION.

(a) INTEREST AND INTEREST PAYMENT DATES. In lieu of having interest charged at the rate based upon the Base Rate, Borrower shall have the option (the "LIBOR Option") to have interest on all or a portion of the Advances or the Term Loan be charged at a rate of interest based upon the LIBOR Rate. Interest on LIBOR Rate Loans shall be payable on the earliest of (i) the last day of the Interest Period applicable thereto, (ii) the occurrence of an Event of Default in consequence of which the Required Lenders or Agent on behalf thereof elect to accelerate the maturity of all or any portion of the Obligations, or (iii) termination of this Agreement pursuant to the terms hereof. On the last day of each applicable Interest Period, unless Borrower properly has exercised the LIBOR Option with respect thereto, the interest rate applicable to such LIBOR Rate Loan automatically shall convert to the rate of interest then applicable to a LIBOR Rate Loan with an Interest Period of three months. At any time that an Event of Default has occurred and is continuing, Borrower no longer shall have the option to request that Advances or the Term Loan bear interest at the LIBOR Rate and Agent shall have the right to convert the interest rate on all outstanding LIBOR Rate Loans to the rate then applicable to Base Rate Loans hereunder.

#### (b) LIBOR ELECTION.

(i) Borrower may, at any time and from time to time, so long as no Event of Default has occurred and is continuing, elect to exercise the LIBOR Option by notifying Agent prior to 11:00 a.m. (California time) at least 2 Business Days prior to the commencement of the proposed Interest Period (the "LIBOR Deadline"). Notice of Borrower's election of the LIBOR Option for a permitted portion of the Advances or the Term Loan and an Interest Period pursuant to this Section shall be made by delivery to Agent of a LIBOR Notice received by Agent before the LIBOR Deadline, or by telephonic notice received by Agent before the LIBOR Deadline (to be confirmed by delivery to Agent of a LIBOR Notice received by Agent prior to 5:00 p.m. (California time) on the same day. Promptly upon its receipt of each such LIBOR Notice, Agent shall provide a copy thereof to each of the Lenders having a Revolver Commitment.

(ii) Each LIBOR Notice shall be irrevocable and binding on Borrower. In connection with each LIBOR Rate Loan, Borrower shall indemnify, defend, and hold Agent and the Lenders harmless against any loss, cost, or expense incurred by Agent or any Lender as a result of (a) the payment of any principal of any LIBOR Rate Loan other than on the last day of an Interest Period applicable thereto (including as a result of an Event of Default), (b) the conversion of any LIBOR Rate Loan other than on the last day of the Interest Period applicable thereto, or (c) the failure to borrow, convert, continue or prepay any LIBOR Rate Loan on the date specified in any LIBOR Notice delivered pursuant hereto (such losses, costs, and expenses, collectively, "Funding Losses"). Funding Losses shall, with respect to Agent or any Lender, be deemed to equal the amount determined by Agent or such Lender to be the excess, if any, of (i) the amount of interest that would have accrued on the principal amount of such LIBOR Rate Loan had such event not occurred, at the LIBOR Rate that would have been applicable thereto, for the period from the date of such event to the last day of the then current Interest Period therefor (or, in the case of a failure to borrow, convert, or continue, for the period that would have been the Interest Period therefor), MINUS (ii) the amount of interest that would accrue on such principal amount for such period at the interest rate which Agent or such Lender would be offered were it to be offered, at the commencement of such period, on Dollar deposits of a comparable amount and period in the London interbank market. A certificate of Agent or a Lender delivered to Borrower setting forth any amount or amounts that Agent or such Lender is entitled to receive pursuant to this Section shall be conclusive absent manifest error.

(iii) Borrower shall have not more than ten LIBOR Rate Loans in effect at any given time. Borrower only may exercise the LIBOR Option for LIBOR Rate Loans of at least \$250,000 and integral multiples of \$100,000 in excess thereof.

(c) PREPAYMENTS. Borrower may prepay LIBOR Rate Loans at any time; PROVIDED, HOWEVER, that in the event that LIBOR Rate Loans are prepaid on any date that is not the last day of the Interest Period applicable thereto, including as a result of any automatic prepayment through the required application by Agent of proceeds of Collections in accordance with SECTION 2.4(B) or for any other reason, including early termination of the term of this Agreement or acceleration of all or any portion of the Obligations pursuant to the terms hereof, Borrower shall indemnify, defend, and hold Agent and the Lenders and their Participants harmless against any and all Funding Losses in accordance with clause (b)(ii) above.

(d) SPECIAL PROVISIONS APPLICABLE TO LIBOR RATE.

(i) The LIBOR Rate may be adjusted by Agent with respect to any Lender on a prospective basis to take into account any additional or increased costs to such Lender of maintaining or obtaining any eurodollar deposits or increased costs due to changes in applicable law occurring subsequent to the commencement of the then applicable Interest Period, including changes in tax laws (except



changes of general applicability in corporate income tax laws) and changes in the reserve requirements imposed by the Board of Governors of the Federal Reserve System (or any successor), excluding the Reserve Percentage, which additional or increased costs would increase the cost of funding loans bearing interest at the LIBOR Rate. In any such event, the affected Lender shall give Borrower and Agent notice of such a determination and adjustment and Agent promptly shall transmit the notice to each other Lender and, upon its receipt of the notice from the affected Lender, Borrower may, by notice to such affected Lender (y) require such Lender to furnish to Borrower a statement setting forth the basis for adjusting such LIBOR Rate and the method for determining the amount of such adjustment, or (z) repay the LIBOR Rate Loans with respect to which such adjustment is made (together with any amounts due under clause (b)(ii) above).

(ii) In the event that any change in market conditions or any law, regulation, treaty, or directive, or any change therein or in the interpretation of application thereof, shall at any time after the date hereof, in the reasonable opinion of any Lender, make it unlawful or impractical for such Lender to fund or maintain LIBOR Advances or to continue such funding or maintaining, or to determine or charge interest rates at the LIBOR Rate, such Lender shall give notice of such changed circumstances to Agent and Borrower and Agent promptly shall transmit the notice to each other Lender and (y) in the case of any LIBOR Rate Loans of such Lender that are outstanding, the date specified in such Lender's notice shall be deemed to be the last day of the Interest Period of such LIBOR Rate Loans, and interest upon the LIBOR Rate Loans of such Lender thereafter shall accrue interest at the rate then applicable to Base Rate Loans, and (z) Borrower shall not be entitled to elect the LIBOR Option until such Lender determines that it would no longer be unlawful or impractical to do so.

(e) NO REQUIREMENT OF MATCHED FUNDING. Anything to the contrary contained herein notwithstanding, neither Agent, nor any Lender, nor any of their Participants, is required actually to acquire eurodollar deposits to fund or otherwise match fund any Obligation as to which interest accrues at the LIBOR Rate. The provisions of this Section shall apply as if each Lender or its Participants had match funded any Obligation as to which interest is accruing at the LIBOR Rate by acquiring eurodollar deposits for each Interest Period in the amount of the LIBOR Rate Loans.

2.14 CAPITAL REQUIREMENTS. If, after the date hereof, any Lender reasonably determines that (i) the adoption of or change in any law, rule, regulation or guideline regarding capital requirements for banks or bank holding companies, or any change in the interpretation or application thereof by any Governmental Authority charged with the administration thereof, or (ii) compliance by such Lender or its parent bank holding company with any guideline, request, or directive of any such entity regarding capital adequacy (whether or not having the force of law), the effect of reducing the return on such Lender's or such holding company's capital as a consequence of such Lender's Commitments hereunder to a level below that which such Lender or such holding company could have achieved but for such adoption, change, or compliance (taking into consideration such Lender's or such holding company's then existing policies with respect to capital adequacy and assuming the full utilization of such entity's capital) by any amount deemed by such Lender to be material, then such Lender may notify Borrower and Agent thereof. Following receipt of such notice, Borrower agrees to pay such Lender on demand the amount of such reduction of return of capital as and when such reduction is determined, payable within 90 days after presentation by such Lender of a statement in the amount and setting forth in reasonable detail such Lender's calculation thereof and the assumptions upon which such calculation was based (which statement shall be deemed true and

correct absent manifest error). In determining such amount, such Lender may use any reasonable averaging and attribution methods.

### 3. CONDITIONS; TERM OF AGREEMENT.

#### 3.1 CONDITIONS PRECEDENT TO THE INITIAL EXTENSION OF CREDIT.

The obligation of the Lender Group (or any member thereof) to make the initial Advance (or otherwise to extend any credit provided for hereunder), is subject to the fulfillment, to the satisfaction of Agent, of each of the conditions precedent set forth below:

(a) the Closing Date shall occur on or before June 25, 2003;

(b) Agent shall have received all financing statements required by Agent, duly executed or otherwise authorized by Borrower, and Agent shall have received evidence satisfactory to it of the filing of all such financing statements;

(c) Agent shall have received each of the following documents, in form and substance satisfactory to Agent, duly executed, and each such document shall be in full force and effect:

(i) the Cash Management Agreements,

(ii) the Control Agreements,

(iii) the Disbursement Letter,

(iv) the Due Diligence Letter,

(v) the Fee Letter,

(vi) the Mortgage,

(vii) the Officers' Certificate,

(viii) the Patent Security Agreement, along with a collateral assignment agreement with respect to each United States patent owned by Borrower and confirmation (or other evidence reasonably satisfactory to Agent) of the filing of such collateral assignment agreement with the United States Patent and Trademark Office, and

(ix) the Trademark Security Agreement, along with a collateral assignment agreement with respect to each United States trademark and tradename owned by Borrower and confirmation (or other evidence reasonably satisfactory to Agent) of the filing of such collateral assignment agreement with the United States Patent and Trademark Office;

(d) Agent shall have received a certificate from the Secretary of Borrower (i) attesting to the resolutions of Borrower's Board of Directors authorizing its execution, delivery, and performance of this Agreement and the

other Loan Documents to which Borrower is a party and authorizing specific officers of Borrower to execute the same and (ii) certifying the names and true signatures of the officers of Borrower authorized to sign each Loan Document to which it is a party;

(e) Agent shall have received copies of Borrower's Governing Documents, as amended, modified, or supplemented to the Closing Date, certified by the Secretary of Borrower;

(f) Agent shall have received a certificate of status with respect to Borrower, dated within 10 days of the Closing Date, such certificate to be issued by the appropriate officer of the jurisdiction of organization of Borrower, which certificate shall indicate that Borrower is in good standing in such jurisdiction;

(g) Agent shall have received certificates of status with respect to Borrower, each dated within 30 days of the Closing Date, such certificates to be issued by the appropriate officer of the jurisdictions (other than the jurisdiction of organization of Borrower) in which its failure to be duly qualified or licensed would constitute a Material Adverse Change, which certificates shall indicate that Borrower is in good standing in such jurisdictions;

(h) Agent shall have received a certificate of insurance, together with the endorsements thereto, as are required by SECTION 6.7, the form and substance of which shall be reasonably satisfactory to Agent;

(i) Agent shall have received Collateral Access Agreements with respect to each of the locations leased by Borrower set forth on SCHEDULE 3.1(I);

(j) Agent shall have received an opinion of Borrower's counsel in form and substance reasonably satisfactory to Agent;

(k) Agent shall have received evidence reasonably satisfactory to it (including a certificate of the chief financial officer of Borrower) that all tax returns required to be filed by Borrower have been timely filed and all taxes upon Borrower or its properties, assets, income, and franchises (including Real Property taxes and payroll taxes) have been paid prior to delinquency, except such taxes that are the subject of a Permitted Protest;

(l) Borrower shall have the Required Availability after giving effect to the initial extensions of credit hereunder;

(m) Agent shall have completed its business, legal, and collateral due diligence, including (i) a collateral audit and review of Borrower's books and records and verification of Borrower's representations and warranties to the Lender Group, the results of which shall be reasonably satisfactory to Agent, (ii) an inspection of each of the locations where Inventory is located, the results of which shall be reasonably satisfactory to Agent, (iii) a review of all Material Contracts, (iv) a review of all substantive documents to be executed in connection with any Approved Acquisitions to the extent such documents exist (even if only in draft form) prior to the Closing Date, and (v) receipt and review of an Enterprise Value of Borrower, the results of which shall be reasonably satisfactory to Lender Group;

(n) Agent shall have received completed reference checks with respect to Borrower's senior management, the results of which are reasonably satisfactory to Agent in its sole discretion;

(o) Agent shall have received an appraisal of the Net Liquidation Percentage applicable to Borrower's Inventory and an appraisal of Borrower's Equipment, the results of which shall be reasonably satisfactory to Agent;

(p) Agent shall have received Borrower's financial projections, together with a certificate of the chief financial officer of Borrower stating, on behalf of Borrower, that the financial projections have been prepared on a reasonable basis and in good faith and are based on reasonable assumptions and the best information available;

(q) Borrower shall pay all Lender Group Expenses incurred in connection with the transactions evidenced by this Agreement;

(r) Agent shall have received (i) appraisals of the Eligible Real Property Collateral satisfactory to Agent, and (ii) mortgagee title insurance policies (or marked commitments to issue the same) for the Eligible Real Property Collateral issued by a title insurance company reasonably satisfactory to Agent (each a "Mortgage Policy" and, collectively, the "Mortgage Policies") in amounts satisfactory to Agent assuring Agent that the Mortgages on such Real Property Collateral are valid and enforceable first priority mortgage Liens on such Real Property Collateral free and clear of all defects and encumbrances except Permitted Liens, and the Mortgage Policies otherwise shall be in form and substance reasonably satisfactory to Agent;

(s) Agent shall have received a phase-I environmental report and a real estate survey with respect to each parcel composing the Eligible Real Property Collateral; the environmental consultants and surveyors retained for such reports or surveys, the scope of the reports or surveys, and the results thereof shall be reasonably acceptable to Agent;

(t) Agent shall have received copies of each Material Contract, each of which shall be reasonably satisfactory to Agent, together with a certificate of an officer of Borrower certifying, on behalf of Borrower, that each such document as being a true, correct, and complete copy thereof;

(u) Borrower shall have (i) received all licenses, approvals or evidence of other actions required by any Governmental Authority in connection with the Eligible Real Property Collateral, the plasma collection centers, the execution and delivery by Borrower of this Agreement or any other Loan Document or with the consummation of the transactions contemplated hereby and thereby and (ii) delivered copies of each such document to Agent, together with a certificate of Borrower stating that no other license, approval or any other actions required by any Governmental Authority is necessary in order for the operation of Borrower's business;

(v) Agent shall have received a certificate from the chief executive officer or the chief financial officer of Borrower (or, in the case of the signatures of the Authorized Persons of Borrower, the Secretary) certifying, on behalf of Borrower, (i) as to (A) the truth and accuracy of the

representations and warranties of Borrower contained in SECTION 5 and (B) the absence of any Default or Events of Default, (ii) that after giving effect to the incurrence of Indebtedness under this Agreement, Borrower is Solvent, and (iii) the names and true signatures of the Authorized Persons of Borrower;

(w) Agent shall have received a certificate from the chief executive officer or the chief financial officer of Borrower certifying, on behalf of Borrower that there exists no claim, action, suit, investigation, litigation or proceeding, pending or, to the knowledge of Borrower, threatened in any court or before any arbitrator or governmental instrumentality which relates to this Agreement, which is reasonably likely to result in a Material Adverse Change; and

(x) all other documents and legal matters in connection with the transactions contemplated by this Agreement shall have been delivered, executed, or recorded and shall be in form and substance reasonably satisfactory to Agent.

3.2 CONDITIONS SUBSEQUENT TO THE INITIAL EXTENSION OF CREDIT. The obligation of the Lender Group (or any member thereof) to continue to make Advances (or otherwise extend credit hereunder) is subject to the fulfillment, on or before the date applicable thereto, of each of the conditions subsequent set forth below (the failure by Borrower to so perform or cause to be performed constituting an Event of Default):

(a) within 30 days of the Closing Date, Borrower shall deliver to Agent certified copies of the policies of insurance, together with the endorsements thereto, as are required by SECTION 6.7, the form and substance of which shall be satisfactory to Agent and its counsel; and

(b) Agent shall have received, on or before August 31, 2003, an appraisal of Borrower's Inventory, the results of which are satisfactory to Agent, provided that Agent shall order such appraisal and shall take reasonable efforts to receive such appraisal on or before August 31, 2003.

3.3 CONDITIONS PRECEDENT TO ALL EXTENSIONS OF CREDIT. The obligation of the Lender Group (or any member thereof) to make all Advances (or to extend any other credit hereunder) shall be subject to the following conditions precedent:

(a) the representations and warranties contained in this Agreement and the other Loan Documents shall be true and correct in all material respects on and as of the date of such extension of credit, as though made on and as of such date (except to the extent that such representations and warranties relate solely to an earlier date),

(b) no Default or Event of Default shall have occurred and be continuing on the date of such extension of credit, nor shall either result from the making thereof,

(c) no injunction, writ, restraining order, or other order of any nature prohibiting, directly or indirectly, the extending of such credit shall have been issued and remain in force by any Governmental Authority against Borrower, Agent, any Lender, or any of their Affiliates.

(d) no Material Adverse Change shall have occurred.

3.4 TERM. This Agreement shall become effective upon the execution and delivery hereof by Borrower, Agent, and the Lenders and shall continue in full force and effect for a term ending on June 19, 2006 (the "Maturity Date"). The foregoing notwithstanding, the Lender Group, upon the election of the Required Lenders, shall have the right to terminate its obligations under this Agreement immediately and without notice upon the occurrence and during the continuation of an Event of Default.

3.5 EFFECT OF TERMINATION. On the date of termination of this Agreement, all Obligations (including contingent reimbursement obligations of Borrower with respect to outstanding Letters of Credit and including all Bank Products Obligations) immediately shall become due and payable without notice or demand (including (a) either (i) providing cash collateral to be held by Agent in an amount equal to 102% of the then extant Letter of Credit Usage, or (ii) causing the original Letters of Credit to be returned to Agent, and (b) providing cash collateral to be held by Agent for the benefit of Wells Fargo or its Affiliates with respect to the then extant Bank Products Obligations). No termination of this Agreement, however, shall relieve or discharge Borrower of its duties, Obligations, or covenants hereunder and Agent's Liens in the Collateral shall remain in effect until all Obligations have been fully and finally discharged and Agent's obligations to provide additional credit hereunder have been terminated. When this Agreement has been terminated and all of the Obligations have been fully and finally discharged and Agent's obligations to provide additional credit under the Loan Documents have been terminated irrevocably, Agent will, at Borrower's sole expense, execute and deliver any Uniform Commercial Code termination statements, lien releases, mortgage releases, re-assignments of trademarks, discharges of security interests, and other similar discharge or release documents (and, if applicable, in recordable form) as are reasonably necessary to release, as of record, Agent's Liens and all notices of security interests and liens previously filed by Agent with respect to the Obligations.

3.6 EARLY TERMINATION BY BORROWER. Borrower has the option, at any time upon 90 days prior written notice to Agent, to terminate this Agreement by paying to Agent, in cash, the Obligations (including (a) either (i) providing cash collateral to be held by Agent in an amount equal to 102% of the then extant Letter of Credit Usage, or (ii) causing the original Letters of Credit to be returned to Agent, and (b) providing cash collateral to be held by Agent for the benefit of Wells Fargo or its Affiliates with respect to the then extant Bank Products Obligations), in full, together with the Applicable Prepayment Premium. If Borrower has sent a notice of termination pursuant to the provisions of this Section, then Agent's obligations to extend credit hereunder shall terminate and Borrower shall be obligated to repay the Obligations (including (a) either (i) providing cash collateral to be held by Agent in an amount equal to 102% of the then extant Letter of Credit Usage, or (ii) causing the original Letters of Credit to be returned to Agent, and (b) providing cash collateral to be held by Agent for the benefit of Wells Fargo or its Affiliates with respect to the then extant Bank Products Obligations), in full, together with the Applicable Prepayment Premium, on the date set forth as the date of termination of this Agreement in such notice. In the event of the termination of this Agreement and repayment of the Obligations at any time prior to the Maturity Date, for any other reason, including (a) termination upon the election of Agent to terminate after the occurrence and during the continuance of an Event of Default, (b) foreclosure and sale of Collateral, (c) sale of the Collateral in

any Insolvency Proceeding, or (iv) restructure, reorganization, or compromise of the Obligations by the confirmation of a plan of reorganization or any other plan of compromise, restructure, or arrangement in any Insolvency Proceeding, then, in view of the impracticability and extreme difficulty of ascertaining the actual amount of damages to Agent or profits lost by Agent as a result of such early termination, and by mutual agreement of the parties as to a reasonable estimation and calculation of the lost profits or damages of Agent, Borrower shall pay the Applicable Prepayment Premium to Agent, measured as of the date of such termination.

#### 4. CREATION OF SECURITY INTEREST.

4.1 GRANT OF SECURITY INTEREST. Borrower hereby grants to Agent, for the benefit of the Lender Group, a continuing security interest in all of its right, title, and interest in all currently existing and hereafter acquired or arising Personal Property Collateral in order to secure prompt repayment of any and all of the Obligations in accordance with the terms and conditions of the Loan Documents and in order to secure prompt performance by Borrower of each of its covenants and duties under the Loan Documents. The Agent's Liens in and to the Personal Property Collateral shall attach to all Personal Property Collateral without further act on the part of Agent or Borrower. Anything contained in this Agreement or any other Loan Document to the contrary notwithstanding, except for Permitted Dispositions, Borrower has no authority, express or implied, to dispose of any item or portion of the Collateral.

4.2 NEGOTIABLE COLLATERAL. In the event that any Collateral, including proceeds, is evidenced by or consists of Negotiable Collateral, and if and to the extent that perfection or priority of Agent's security interest is dependent on or enhanced by possession, Borrower, promptly upon the written request of Agent, shall endorse and deliver physical possession of such Negotiable Collateral to Agent.

4.3 COLLECTION OF ACCOUNTS, GENERAL INTANGIBLES, AND NEGOTIABLE COLLATERAL. At any time after the occurrence and during the continuation of an Event of Default, Agent or Agent's designee may (a) notify Account Debtors of Borrower that the Accounts, chattel paper, or General Intangibles have been assigned to Agent or that Agent has a security interest therein, or (b) collect the Accounts, chattel paper, or General Intangibles directly and charge the collection costs and expenses to the Loan Account. Borrower agrees that it will hold in trust for the Lender Group, as the Lender Group's trustee, any Collections that it receives and immediately will deliver said Collections to Agent or a Cash Management Bank in their original form as received by Borrower.

4.4 FILING OF FINANCING STATEMENTS; COMMERCIAL TORT CLAIMS, ETC.

(a) Borrower authorizes Agent to file any financing statement required hereunder, and any continuation statement for amendment with respect thereto, in any appropriate filing office without the signature of Borrower where permitted by applicable law. Borrower hereby ratifies the filing of any financing statement, and any continuation statement or amendment with respect thereto, filed without the signature of Borrower prior to the date hereof. Agent shall deliver to Borrower copies of all such financing statements, continuation statements, and/or amendments simultaneously with or promptly after the filing thereof.

(b) If Borrower acquires any commercial tort claims after the date hereof, Borrower shall promptly deliver to Agent a written description of such commercial tort claim and shall deliver a written agreement, in form and substance satisfactory to Agent, pursuant to which Borrower shall pledge and collaterally assign all of its right, title and interest in and to such commercial tort claim to Lender as security for the Obligations (a "Commercial Tort Claim Assignment").

(c) At any time upon the reasonable request of Agent, Borrower shall execute and deliver to Agent, any and all financing statements, original financing statements in lieu of continuation statements, fixture filings, security agreements, pledges, assignments, endorsements of certificates of title, and all other documents (the "Additional Documents") that Agent may request in its Permitted Discretion, in form and substance satisfactory to Agent, to perfect and continue perfected or better perfect Agent's Liens in the Collateral (whether now owned or hereafter arising or acquired), and in order to fully consummate all of the transactions contemplated hereby and under the other Loan Documents. To the maximum extent permitted by applicable law, Borrower authorizes Agent to execute any such Additional Documents in Borrower's name and authorizes Agent to file such executed Additional Documents in any appropriate filing office pursuant to SECTION 4.5 hereof. To the maximum extent permitted by applicable law, Borrower authorizes the filing of any such Additional Documents without the signature of Borrower in any appropriate filing office. In addition, on a quarterly basis (not later than the fifteenth day of such quarter), Borrower (i) shall provide Agent with a report of all new Material IP acquired or generated by Borrower during the prior quarter, (ii) shall, with respect to all Material IP acquired or generated by Borrower that is not already the subject of a registration with the appropriate filing office (or an application therefor diligently prosecuted), file and diligently prosecute an application to register such Material IP with such appropriate filing office in a manner sufficient to impart constructive notice of Borrower's ownership thereof, and (iii) shall cause to be prepared, executed, and delivered to Agent supplemental schedules to the applicable Loan Documents to identify such Material IP as being subject to the security interests created thereunder.

4.5 POWER OF ATTORNEY. Borrower hereby irrevocably makes, constitutes, and appoints Agent (and any of Agent's officers, employees, or agents designated by Agent) as Borrower's true and lawful attorney, with power to (a) if Borrower refuses to, or fails reasonably promptly to execute and deliver any of the documents described in SECTION 4.4, sign the name of Borrower on any of the documents described in SECTION 4.4, (b) at any time that an Event of Default has occurred and is continuing, sign Borrower's name on any invoice or bill of lading relating to the Collateral, drafts against Account Debtors, or notices to Account Debtors, (c) send requests for verification of Accounts and, in the absence of a continuing Event of Default, notify Borrower of such requests, (d) endorse Borrower's name on any Collection item that may come into the Lender Group's possession in accordance with the terms of this Agreement or any other Loan Document, (e) at any time that an Event of Default has occurred and is continuing, make, settle, and adjust all claims under Borrower's policies of insurance and make all determinations and decisions with respect to such policies of insurance, and (f) at any time that an Event of Default has occurred and is continuing, settle and adjust disputes and claims respecting the Accounts, chattel paper, or General Intangibles directly with Account Debtors, for amounts and upon terms that Agent determines to be reasonable, and Agent may cause to be executed and delivered any documents and releases that Agent reasonably determines to be necessary. The appointment of Agent as Borrower's attorney, and each and every one of its rights and powers, being coupled with an



interest, is irrevocable until all of the Obligations have been fully and finally repaid and performed and the Lender Group's obligations to extend credit hereunder are terminated.

4.6 RIGHT TO INSPECT. Agent and each Lender (through any of their respective officers, employees, or agents) shall have the right, from time to time hereafter to inspect the Books and to check, test, and appraise the Collateral in order to verify Borrower's financial condition or the amount, quality, value, condition of, or any other matter relating to, the Collateral, provided that, in the absence of a continuing Event of Default, Agent and any such Lender shall give Borrower reasonable notice of any such inspection, check, test or appraisal and shall conduct any such inspection, check, test or appraisal during normal business hours.

4.7 CONTROL AGREEMENTS. Borrower agrees that it will not transfer assets out of any Securities Accounts other than as permitted under SECTION 7.18 and, if to another securities intermediary, unless each of Borrower, Agent, and the substitute securities intermediary have entered into a Control Agreement. Borrower hereby agrees to take any and all action that Agent requests in order for Agent to obtain control in accordance with Sections 9-104, 9-105, 9-106 and 9-107 of the Code with respect to any Securities Accounts, DDA's, chattel paper, Investment Property and letter-of-credit rights. No arrangement contemplated hereby or by any Control Agreement in respect of any Securities Accounts or other Investment Property or any DDA, electronic chattel paper or letter-of-credit rights shall be modified by Borrower without the prior written consent of Agent. Upon the occurrence and during the continuance of a Default or Event of Default, Agent may notify any securities intermediary or depository to liquidate the applicable Securities Account or any related Investment Property maintained or held thereby and remit the proceeds thereof to the Agent's Account.

#### 5. REPRESENTATIONS AND WARRANTIES.

In order to induce the Lender Group to enter into this Agreement, Borrower makes the following representations and warranties to the Lender Group which shall be true, correct, and complete, in all material respects, as of the date hereof, and shall be true, correct, and complete, in all material respects, as of the Closing Date, and at and as of the date of the making of each Advance (or other extension of credit) made thereafter, as though made on and as of the date of such Advance (or other extension of credit) (except to the extent that such representations and warranties relate solely to an earlier date) and such representations and warranties shall survive the execution and delivery of this Agreement:

5.1 NO ENCUMBRANCES. Borrower has good and indefeasible title to the Collateral and the Real Property, free and clear of Liens except for Permitted Liens.

#### 5.2 ELIGIBLE ACCOUNTS.

(a) The Eligible Accounts are bona fide existing payment obligations of Account Debtors created by the sale and delivery of Inventory or the rendition of services to such Account Debtors in the ordinary course of Borrower's business, owed to Borrower without defenses, disputes, offsets, counterclaims, or rights of return or cancellation. As to each Account

that is identified by Borrower as an Eligible Account in a borrowing base report submitted to Agent, such Account is not excluded as ineligible by virtue of one or more of the excluding criteria set forth in the definition of Eligible Accounts.

5.3 ELIGIBLE INVENTORY. All Eligible Inventory is of good and merchantable quality, free from defects. As to each item of Inventory that is identified by Borrower as Eligible Inventory in a borrowing base report submitted to Agent, such Inventory is not excluded as ineligible by virtue of one or more of the excluding criteria set forth in the definition of Eligible Inventory.

5.4 ELIGIBLE EQUIPMENT. All of the Eligible Equipment is used or held for use in Borrower's business and is fit for such purposes. As to each item of Equipment that is identified from time to time by Borrower as Eligible Equipment, such Equipment is not excluded as ineligible by virtue of one or more of the excluding criteria set forth in the definition of Eligible Equipment.

5.5 LOCATION OF INVENTORY AND EQUIPMENT. The Inventory and Equipment are not stored with a bailee (other than the Inventory stored at the Making Distribution Intelligent facility, located at 240 Shorland Drive in Walton, Kentucky), warehouseman, or similar party and are located only at the locations identified on SCHEDULE 5.5.

5.6 INVENTORY RECORDS. Borrower keeps correct and accurate records itemizing and describing the type, quality, and quantity of its Inventory and the book value thereof.

5.7 JURISDICTION OF INCORPORATION; LOCATION OF CHIEF EXECUTIVE OFFICE; FEIN.

(a) The jurisdiction of incorporation of Borrower is set forth in SCHEDULE 5.7.

(b) The chief executive office of Borrower is located at the address indicated in SCHEDULE 5.7 and Borrower's FEIN is identified in SCHEDULE 5.7.

(c) Borrower's organizational identification number is identified in SCHEDULE 5.7.

(d) Borrower hold no commercial tort claims as of the date hereof, except as identified in SCHEDULE 5.7.

5.8 DUE ORGANIZATION AND QUALIFICATION; SUBSIDIARIES.

(a) Borrower is duly organized and existing and in good standing under the laws of the jurisdiction of its organization and qualified to do business in any state where the failure to be so qualified reasonably could be expected to have a Material Adverse Change.

(b) Set forth on SCHEDULE 5.8(B), is a complete and accurate description of the authorized capital Stock of Borrower, by class, and, as of the third trading day preceding the Closing Date, a description of the number of shares of each such class that are issued and outstanding. Other than as described on SCHEDULE 5.8(B), there are no subscriptions, options, warrants, or calls relating to any shares of Borrower's capital Stock, including any right of conversion or exchange under any outstanding security or other instrument. Borrower is not subject to any obligation (contingent or otherwise) to repurchase or otherwise acquire or retire any shares of its capital Stock or any security convertible into or exchangeable for any of its capital Stock.

(c) Set forth on SCHEDULE 5.8(C), is a complete and accurate list of Borrower's direct and indirect Subsidiaries, showing: (i) the jurisdiction of their organization, (ii) the number of shares of each class of common and preferred Stock authorized for each of such Subsidiaries, and (iii) the number and the percentage of the outstanding shares of each such class owned directly or indirectly by Borrower. All of the outstanding capital Stock of each such Subsidiary has been validly issued and is fully paid and non-assessable.

(d) Except as set forth on SCHEDULE 5.8(C), there are no subscriptions, options, warrants, or calls relating to any shares of Borrower's Subsidiaries' capital Stock, including any right of conversion or exchange under any outstanding security or other instrument. Neither Borrower nor any of its Subsidiaries is subject to any obligation (contingent or otherwise) to repurchase or otherwise acquire or retire any shares of Borrower's Subsidiaries' capital Stock or any security convertible into or exchangeable for any such capital Stock.

#### 5.9 DUE AUTHORIZATION; NO CONFLICT.

(a) The execution, delivery, and performance by Borrower of this Agreement and the Loan Documents to which it is a party have been duly authorized by all necessary action on the part of Borrower.

(b) The execution, delivery, and performance by Borrower of this Agreement and the Loan Documents to which it is a party do not and will not (i) violate any provision of federal, state, or local law or regulation applicable to Borrower, the Governing Documents of Borrower, or any order, judgment, or decree of any court or other Governmental Authority binding on Borrower, (ii) conflict with, result in a breach of, or constitute (with due notice or lapse of time or both) a default under any material contractual obligation of Borrower (including, without limitation, any Material Contract of Borrower), (iii) result in or require the creation or imposition of any Lien of any nature whatsoever upon any properties or assets of Borrower, other than Permitted Liens, or (iv) require any approval of Borrower's interestholders or any approval or consent of any Person under any material contractual obligation of Borrower.

(c) Other than the filing of financing statements, fixture filings, and Mortgages, the execution, delivery, and performance by Borrower of this Agreement and the Loan Documents to which Borrower is a party do not and will not require any registration with, consent, or approval of, or notice to, or other action with or by, any Governmental Authority or other Person.

(d) This Agreement and the other Loan Documents to which Borrower is a party, and all other documents contemplated hereby and thereby, when executed and delivered by Borrower will be the legally valid and binding obligations of Borrower, enforceable against Borrower in accordance with their respective terms, except as enforcement may be limited by equitable principles or by bankruptcy, insolvency, reorganization, moratorium, or similar laws relating to or limiting creditors' rights generally.

(e) The Agent's Liens are validly created, perfected, and first priority Liens, subject only to Permitted Liens.

5.10 LITIGATION. Other than those matters disclosed on SCHEDULE 5.10, there are no actions, suits, or proceedings pending or, to the best knowledge of Borrower, threatened against Borrower, or any of its Subsidiaries, as applicable, except for (a) matters that are fully covered by insurance (subject to customary deductibles), (b) matters arising after the Closing Date that, if decided adversely to Borrower, or any of its Subsidiaries, as applicable, reasonably could not be expected to result in a Material Adverse Change, and (c) matters arising on or prior to the Closing Date that, if decided adversely to Borrower, or any of its Subsidiaries, as applicable, would not result in liability to Borrower, or any of its Subsidiaries, as applicable, in an aggregate amount for all such matters in excess of \$1,000,000.

5.11 NO MATERIAL ADVERSE CHANGE. All financial statements relating to Borrower that have been delivered by Borrower to the Lender Group have been prepared in accordance with GAAP (except, in the case of unaudited financial statements, for the lack of footnotes and being subject to year-end audit adjustments) and present fairly in all material respects, Borrower's financial condition as of the date thereof and results of operations for the period then ended. There has not been a Material Adverse Change with respect to Borrower since the date of the latest financial statements submitted to the Lender Group on or before the Closing Date.

#### 5.12 FRAUDULENT TRANSFER.

(a) Borrower is Solvent.

(b) No transfer of property is being made by Borrower and no obligation is being incurred by Borrower in connection with the transactions contemplated by this Agreement or the other Loan Documents with the intent to hinder, delay, or defraud either present or future creditors of Borrower.

5.13 EMPLOYEE BENEFITS. Except as set forth on SCHEDULE 5.13 none of Borrower, any of its Subsidiaries, or any of their ERISA Affiliates maintains or contributes to any Benefit Plan. Except as set forth on SCHEDULE 5.13 no ERISA Event has occurred nor has any other event occurred that may result in an ERISA Event that reasonably could be expected to result in a Material Adverse Change. Except as set forth on SCHEDULE 5.13 neither Borrower nor any ERISA Affiliate is required to provide security to any Benefit Plan under Section 401(a)(29) of the IRC.

5.14 ENVIRONMENTAL CONDITION. Except as set forth on SCHEDULE 5.14, (a) to Borrower's knowledge, none of Borrower's assets has ever been used by Borrower or by previous owners or operators in the disposal of, or to produce, store, handle, treat, release, or transport, any Hazardous Materials, where such production, storage, handling, treatment, release or transport was in

violation, in any material respect, of applicable Environmental Law, (b) to Borrower's knowledge, none of Borrower's properties or assets has ever been designated or identified in any manner pursuant to any environmental protection statute as a Hazardous Materials disposal site, (c) Borrower has not received notice that a Lien arising under any Environmental Law has attached to any revenues or to any Real Property owned or operated by Borrower, and (d) Borrower has not received a summons, citation, notice, or directive from the Environmental Protection Agency or any other federal or state governmental agency concerning any action or omission by Borrower resulting in the releasing or disposing of Hazardous Materials into the environment.

5.15 BROKERAGE FEES. Borrower has not utilized the services of any broker or finder in connection with Borrower's obtaining financing from the Lender Group under this Agreement and no brokerage commission or finders fee is payable by Borrower in connection herewith.

5.16 INTELLECTUAL PROPERTY. Borrower owns, or holds licenses in, all Intellectual Property that is necessary to the conduct of its business as currently conducted. Attached hereto as SCHEDULE 5.16 is a true, correct, and complete listing of all material patents, patent applications, trademarks, trademark applications, copyrights, and copyright registrations as to which Borrower is the owner or is an exclusive licensee.

5.17 LEASES. Borrower enjoys peaceful and undisturbed possession under all leases material to the business of Borrower and to which it is a party or under which it is operating. All of such leases are valid and subsisting and no material default by Borrower exists under any of them.

5.18 DDAS. Set forth on SCHEDULE 5.18 are all of Borrower's DDAs, including, with respect to each depository (i) the name and address of such depository, and (ii) the account numbers of the accounts maintained with such depository.

5.19 COMPLETE DISCLOSURE. All factual information (taken as a whole) furnished by or on behalf of Borrower in writing to Agent or any Lender (including all information contained in the Schedules hereto or in the other Loan Documents) for purposes of or in connection with this Agreement, the other Loan Documents, or any transaction contemplated herein or therein is, and all other such factual information (taken as a whole) hereafter furnished by or on behalf of Borrower in writing to Agent or any Lender will be, true and accurate, in all material respects, on the date as of which such information is dated or certified and not incomplete by omitting to state any fact necessary to make such information (taken as a whole) not misleading in any material respect at such time in light of the circumstances under which such information was provided. On the Closing Date, the Closing Date Projections represent, and as of the date on which any other Projections are delivered to Agent, such additional Projections represent Borrower's good faith best estimate of its future performance for the periods covered thereby.

5.20 INDEBTEDNESS. Set forth on SCHEDULE 5.20 is a true and complete list of all Indebtedness of Borrower outstanding immediately prior to the Closing Date that is to remain outstanding after the Closing Date and such Schedule accurately reflects the aggregate principal amount of such Indebtedness and the principal terms thereof.

5.21 FDA COMPLIANCE; NOTICES, ETC. Except as set forth in SCHEDULE 5.21 hereto, Borrower and each of its Subsidiaries are, and the products sold by Borrower and each of its Subsidiaries are, in compliance in all respects with all current applicable statutes, rules, regulations, guides, policies, orders or directives administered or issued by the FDA and the Food and Drug Act, except (i) where in Borrower's reasonable opinion, Borrower and its Subsidiaries will not ultimately be found by the FDA or under the Food and Drug Act to be out of compliance with such statutes, rules, regulations, guides, policies, orders or directives, (ii) where failure to so comply could not reasonably be expected to have a Material Adverse Change, or (iii) with respect to any FDA Form 483-s or warning letters issued by the FDA or pursuant to the Food and Drug Act (the foregoing, together with any such notices as Borrower may at any time hereafter receive, collectively, the "FDA Notices"), so long as Borrower is diligently pursuing corrective action with respect to the same.

5.22 MATERIAL CONTRACTS. Set forth on SCHEDULE 5.22 is a complete and accurate list as of the Closing Date of all Material Contracts of Borrower, showing the parties thereto and subject matter thereof. Each such Material Contract (i) is in full force and effect and is binding upon and enforceable against Borrower and, to the best knowledge of Borrower, all other parties thereto in accordance with its terms, (ii) has not been otherwise amended or modified, and (iii) is not in default due to the action of Borrower or, to the best knowledge of Borrower, any other party thereto.

5.23 REGULATION U. Borrower is not nor will it be engaged in the business of extending credit for the purpose of purchasing or carrying margin stock (within the meaning of Regulations T, U or X of the Board of Governors of the Federal Reserve System), and no proceeds of any Advance or the Term Loan (or other extension of credit hereunder) will be used to purchase or carry any margin stock or to extend credit to others for the purpose of purchasing or carrying any margin stock.

5.24 PERMITS, ETC. Borrower has, and is in compliance with, all permits, licenses, authorizations, approvals, entitlements and accreditations required for Borrower lawfully to own, lease, manage or operate its business as currently conducted and the Real Property currently owned, leased, managed or operated by Borrower except for such permits, licenses, authorizations, approvals, entitlements and accreditations the absence of which could not reasonably be expected to result in a Material Adverse Change. No condition exists or event has occurred which, in itself or with the giving of notice or lapse of time or both, would result in the suspension, revocation, impairment, forfeiture or non-renewal of any such permit, license, authorization, approval, entitlement or accreditation, and to Borrower's knowledge, there is no claim that any thereof is not in full force and effect.

5.25 EMPLOYEE AND LABOR MATTERS. Except as set forth on SCHEDULE 5.25, there is (a) no unfair labor practice complaint pending or, to Borrower's knowledge, threatened against Borrower before any Governmental Authority and no grievance or arbitration proceeding pending or threatened against Borrower which arises out of or under any collective bargaining agreement, (b) no strike, labor dispute, slowdown, stoppage or similar action or

grievance pending or, to the best knowledge of Borrower, threatened against Borrower and (c) no union representation question existing with respect to the employees of Borrower and no union organizing activity taking place with respect to any of the employees of any of them. Except as set forth on SCHEDULE 5.25, neither Borrower nor any ERISA Affiliate of Borrower has incurred any liability or obligation under the Worker Adjustment and Retraining Notification Act ("WARN") or similar state law, which remains unpaid or unsatisfied. The hours worked and payments made to employees of Borrower have not been in violation of the Fair Labor Standards Act or any other applicable legal requirements which violation can reasonably be expected to result in a Material Adverse Change. All material payments due from Borrower on account of workers compensation, wages and employee health and welfare insurance and other benefits have been paid or accrued as a liability on the books of Borrower except where failure to do so cannot reasonably be expected to result in a Material Adverse Change.

5.26 LICENSORS. There exists no actual or, to Borrower's knowledge, threatened termination, cancellation or limitation of, or modification to or change in, the business relationship between Borrower, on the one hand, and any licensor under any Licensing Agreement, on the other hand, which termination, cancellation, limitation, modification or change in any such case could, individually or in the aggregate, reasonably be expected to result in a Material Adverse Change.

5.27 PROPERTIES. (a) Borrower has good and marketable title to, or valid leasehold interests in, all property and assets material to its business (collectively, the "Properties"), free and clear of all Liens except Permitted Liens. The Properties are in good working order and condition, ordinary wear and tear excepted.

(b) SCHEDULE 5.27 sets forth a complete and accurate list of the location, by state and street address, of all Real Property.

5.28 INACTIVE SUBSIDIARIES. The Inactive Subsidiaries do not own any assets with a value in excess of \$50,000, conduct any business or have any liabilities.

## 6. AFFIRMATIVE COVENANTS.

Borrower covenants and agrees that, so long as any credit hereunder shall be available and until full and final payment of the Obligations and the termination of this Agreement, Borrower shall and shall cause each of its Subsidiaries to do all of the following:

6.1 ACCOUNTING SYSTEM. Maintain a system of accounting that enables Borrower to produce financial statements in accordance with GAAP and maintain records pertaining to the Collateral that contain information as from time to time reasonably may be requested by Agent. Borrower also shall keep an inventory reporting system that shows all additions, sales, claims, returns, and allowances with respect to the Inventory.

6.2 COLLATERAL REPORTING. Provide Agent (and if so requested by Agent, with copies for each Lender) with the following documents at the following times in form reasonably satisfactory to Agent:

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| Weekly | (a) | a sales journal, collection journal, and credit register since the last such schedule and a calculation of the Borrowing Base as of such date,                                 |
|        | (b) | Inventory reports specifying Borrower's cost and the market value of its Inventory, by category, with additional detail showing additions to and deletions from the Inventory, |
|        | (c) | a detailed aging, by vendor, of Borrower's accounts payable and any book overdraft, and  |
|        | (d) | a detailed aging, by total, of the Accounts, together with a reconciliation to the detailed calculation of the Borrowing Base provided to Agent;                               |
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| Monthly (not later than the 10th day of each month) | (e) | notice of all returns, disputes, or claims,  |
|   | (f) | a detailed calculation of the Borrowing Base (including detail regarding those Accounts that are not Eligible Accounts), |
|   | (g) | a calculation of Dilution for the immediately prior twelve month period ending at the end of such month, and             |
|   | (h) | a detailed aging of Borrower's Inventory;  |
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| Quarterly | (i) | a detailed list of Borrower's customers,                             |
|           | (j) | a report regarding Borrower's accrued, but unpaid, AD VALOREM taxes; |
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| Semi-annually | (k) | a detailed report setting forth the sales and royalty and other payments made under each Licensing Agreements for WinRho SDF and Autoplex T for the prior six month period; |
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| Upon request by Agent | (l) | copies of invoices in connection with the Accounts, credit memos, remittance advices, deposit slips, shipping and delivery documents in connection with the Accounts and, for Inventory and Equipment acquired by Borrower, purchase orders and invoices, and |
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(m) such other reports as to the Collateral, or the financial condition of Borrower, as Agent may reasonably request;  
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As soon as available (n) copies of all documents executed in connection with any acquisition, any material notices that Borrower executes or receives in connection with any acquisition or any Material Contract (including, without limitation, any Licensing Agreement), and  
(o) copies of any reports or notices that Borrower issues to or receives from any Governmental Authority (including, without limitation, any Product Recall Notices or FDA Notices).  
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In addition, Borrower agrees to cooperate fully with Agent to facilitate and implement a system of electronic collateral reporting in order to provide electronic reporting of each of the items set forth above.

6.3 FINANCIAL STATEMENTS, REPORTS, CERTIFICATES. Deliver to Agent, with copies to each Lender:

(a) as soon as available, but in any event within 30 days (45 days in the case of a month that is the end of one of the first 3 fiscal quarters in a fiscal year) after the end of each month during each of Borrower's fiscal years,

(i) a company prepared consolidated balance sheet, income statement, and statement of cash flow covering Borrower's and its Subsidiaries' operations during such period,

(ii) a certificate signed by the chief financial officer of Borrower certifying, on behalf of Borrower, that:

(A) the financial statements delivered hereunder have been prepared in accordance with GAAP (consistent with the most recent audited, annual financial statements, except for the lack of footnotes and being subject to year-end audit adjustments) and fairly present in all material respects the financial condition of Borrower and its Subsidiaries,

(B) the representations and warranties of Borrower contained in this Agreement and the other Loan Documents are true and correct in all material respects on and as of the date of such certificate, as though made on and as of such date (except to the extent that such representations and warranties relate solely to an earlier date), and

(C) there does not exist any condition or event that constitutes a Default or Event of Default (or, to the extent of any non-compliance, describing such non-compliance as to which he or she may have knowledge and what action Borrower has taken, is taking, or proposes to take with respect thereto), and

(iii) for each month that is the date on which a financial covenant in SECTION 7.19 is to be tested, a Compliance Certificate demonstrating, in reasonable detail, compliance at the end of such period with the applicable financial covenants contained in SECTION 7.19, and

(b) as soon as available, but in any event within 90 days after the end of each of Borrower's fiscal years,

(i) financial statements of Borrower and its Subsidiaries for each such fiscal year, audited by independent certified public accountants reasonably acceptable to Agent and certified, without any qualifications (including, without limitation, (A) any going concern or like qualification or exception or (B) any qualification as to the scope of such audit), by such accountants to have been prepared in accordance with GAAP (such audited financial statements to include a balance sheet, income statement, and statement of cash flow and, if prepared, such accountants' letter to management),

(ii) a certificate of such accountants addressed to Agent and the Lenders stating that such accountants do not have knowledge of the existence of any Default or Event of Default under SECTION 7.19,

(c) as soon as available, but in any event within 30 days prior to the start of each of Borrower's fiscal years,

(i) copies of Borrower's Projections, in form and substance (including as to scope and underlying assumptions) satisfactory to Agent, in its sole discretion, for the forthcoming fiscal year, month by month, certified by the chief financial officer of Borrower, on behalf of Borrower, as being such officer's good faith best estimate of the financial performance of Borrower during the period covered thereby,

(d) if and when filed by Borrower,

(i) Form 10-Q quarterly reports, Form 10-K annual reports, and Form 8-K current reports,

(ii) any other filings made by Borrower with the SEC,

(iii) copies of Borrower's federal income tax returns, and any amendments thereto, filed with the Internal Revenue Service, and

(iv) any other information that is provided by Borrower to its shareholders generally,

(e) if and when filed by Borrower and as requested by Agent, satisfactory evidence of payment of applicable excise taxes in each jurisdiction in which (i) Borrower conducts business or is required to pay any such excise tax, (ii) where Borrower's failure to pay any such applicable excise tax would result in a Lien on the properties or assets of Borrower, or (iii) where Borrower's failure to pay any such applicable excise tax reasonably could be expected to result in a Material Adverse Change,

(f) promptly after the commencement thereof, but in any event within 5 days after the service of process with respect thereto on Borrower, notice of all actions, suits or proceedings brought by or against Borrower before any Governmental Authority,

(g) within three (3) Business Days of the occurrence of any event or condition that constitutes a Default or an Event of Default, notice thereof and a statement of the curative action that Borrower proposes to take with respect thereto, and

(h) upon the request of Agent, any other report reasonably requested relating to the financial condition of Borrower.

In addition to the financial statements referred to above, Borrower agrees to deliver fiscal year end financial statements prepared on both a consolidated and consolidating basis and agrees that no Subsidiary of Borrower will have a fiscal year different from that of Borrower. Borrower agrees that its independent certified public accountants are authorized to communicate with Agent and to release to Agent whatever financial information concerning Borrower Agent reasonably may request. Borrower waives the right to assert a confidential relationship, if any, it may have with any accounting firm or service bureau in connection with any information requested by Agent pursuant to or in accordance with this Agreement, and agrees that Agent may contact directly any such accounting firm or service bureau in order to obtain such information. Borrower shall have the opportunity to receive all financial information provided by its public accountants to Agent and to participate in all communications between such public accountants and Agent.

6.4 RETURN. Cause returns and allowances, as between Borrower and its Account Debtors, to be on the same basis and in accordance with the usual customary practices of Borrower, as they exist at the time of the execution and delivery of this Agreement. If, at a time when no Event of Default has occurred and is continuing, any Account Debtor returns any Inventory having an aggregate net book value in excess of \$250,000 to Borrower, Borrower promptly shall determine the reason for such return and, if Borrower accepts such return, issue a credit memorandum (with a copy to be sent to Agent) in the appropriate amount to such Account Debtor. If, at a time when an Event of Default has occurred and is continuing, any Account Debtor returns any Inventory having an aggregate net book value in excess of \$250,000 to Borrower, Borrower promptly shall determine the reason for such return and, if Agent consents (which consent shall not be unreasonably withheld), issue a credit memorandum (with a copy to be sent to Agent) in the appropriate amount to such Account Debtor.

6.5 MAINTENANCE OF PROPERTIES. Except as otherwise provided in SECTION 2.4(C)(IV), maintain and preserve all of its properties which are necessary in the proper conduct of its business in good working order and condition, ordinary wear and tear excepted, and comply at all times with the provisions of all leases to which it is a party as lessee so as to prevent any loss or forfeiture thereof or thereunder except, in the case of a failure to comply with the provisions of leases, where all such failures taken together do not result in a Material Adverse Change.

6.6 TAXES. Cause all assessments and taxes, whether real, personal, or otherwise, due or payable by, or imposed, levied, or assessed against Borrower or any of its assets to be paid in full, before delinquency or before the expiration of any extension period, except to the extent that (i) the validity of such assessment or tax shall be the subject of a Permitted Protest or (ii) all such unpaid assessments and taxes are not in excess of \$50,000 in the aggregate. Except as permitted in the prior sentence, Borrower will make timely payment or deposit of all tax payments and withholding taxes required of it by applicable laws, including those laws concerning F.I.C.A., F.U.T.A., state disability, and local, state, and federal income taxes, and will, upon request, furnish Agent with proof satisfactory to Agent indicating that Borrower has made such payments or deposits. Upon the reasonable request of Agent, Borrower shall deliver satisfactory evidence of payment of applicable excise taxes in each jurisdictions in which Borrower is required to pay any such excise tax.

6.7 INSURANCE.

(a) At Borrower's expense, maintain insurance respecting its assets wherever located, covering loss or damage by fire, theft, explosion, and all other hazards and risks as ordinarily are insured against by other Persons engaged in the same or similar businesses in similar locations. Borrower also shall maintain business interruption, public liability, and product liability insurance, as well as insurance against larceny, embezzlement, and criminal misappropriation. All such policies of insurance shall be in such amounts and with such insurance companies as are reasonably satisfactory to Agent. Borrower shall deliver copies of all such policies to Agent with a satisfactory lender's loss payable endorsement naming Agent as sole loss payee or additional insured, as appropriate. Each policy of insurance or endorsement shall contain a clause requiring the insurer to give not less than 30 days prior written notice to Agent in the event of cancellation of the policy for any reason whatsoever.

(b) Borrower shall give Agent prompt notice of any loss in excess of \$1,000,000 that is covered by such insurance. Agent shall have the exclusive right to adjust any losses in excess of \$1,000,000 (or in the case of the facility located in Boca Raton, Florida, \$2,000,000) payable under any such insurance policies, without any liability to Borrower whatsoever in respect of such adjustments. Except as provided in the proviso at the end of this sentence, any monies received as payment for any loss in excess of \$1,000,000 under any insurance policy mentioned above (other than liability insurance policies) or as payment of any award or compensation for condemnation or taking by eminent domain, shall be paid over to Agent to be applied at the option of the Required Lenders, in their Permitted Discretion, either to the prepayment of the Obligations or shall be disbursed to Borrower under staged payment terms reasonably satisfactory to the Required Lenders for application to the cost of

repairs, replacements, or restorations; PROVIDED that, so long as no Event of Default shall have occurred and be continuing, monies received as payment for any such loss with respect to the Boca Raton facility under any insurance policy or any such condemnation or taking in an amount not exceeding \$2,000,000 for any such occurrence may be used to replace, repair or restore the Boca Raton facility if such payments are immediately deposited in a DDA subject to a Control Agreement and used in accordance with SECTION 2.4(C)(IV). Any such repairs, replacements, or restorations shall be effected with reasonable promptness and shall be of a value at least equal to the value of the items of property destroyed prior to such damage or destruction.

(c) Borrower will not take out separate insurance concurrent in form or contributing in the event of loss with that required to be maintained under this SECTION 6.7, unless Agent is included thereon as named insured with the loss payable to Agent under a lender's loss payable endorsement or its equivalent. Borrower immediately shall notify Agent whenever such separate insurance is taken out, specifying the insurer thereunder and full particulars as to the policies evidencing the same, and copies of such policies promptly shall be provided to Agent.

6.8 LOCATION OF INVENTORY AND EQUIPMENT. Keep the Inventory (except in-transit Inventory) and Equipment only at the locations identified on SCHEDULE 5.5; PROVIDED, HOWEVER, that Borrower may amend SCHEDULE 5.5 so long as such amendment occurs by written notice to Agent not less than 30 days prior to the date on which Inventory or Equipment is moved to such new location, so long as such new location is within the continental United States, and so long as, at the time of such written notification, Borrower provides any financing statements or fixture filings necessary to perfect and continue perfected Agent's Liens on such assets and also provides to Agent a Collateral Access Agreement.

6.9 COMPLIANCE WITH LAWS. Comply with the requirements of all applicable laws, rules, regulations, and orders of any Governmental Authority, including the Food and Drug Act, the Fair Labor Standards Act and the Americans With Disabilities Act, other than laws, rules, regulations, and orders the non-compliance with which, individually or in the aggregate, would not result in and reasonably could not be expected to result in a Material Adverse Change.

6.10 LEASES. Pay when due all rents and other amounts payable under any leases to which Borrower is a party or by which Borrower's properties and assets are bound, unless such payments are the subject of a Permitted Protest, except, where all such failures to pay rents and such other amounts taken together do not result in a Material Adverse Change.

6.11 BROKERAGE COMMISSIONS. Pay any and all brokerage commission or finders fees incurred in connection with or as a result of Borrower's obtaining financing from the Lender Group under this Agreement. Borrower agrees and acknowledges that payment of all such brokerage commissions or finders fees shall be the sole responsibility of Borrower, and Borrower agrees to indemnify, defend, and hold Agent and the Lender Group harmless from and against any claim of any broker or finder arising out of Borrower's obtaining financing from the Lender Group under this Agreement.

6.12 EXISTENCE. At all times preserve and keep in full force and effect Borrower's valid existence and good standing and any rights and franchises material to Borrower's businesses.

#### 6.13 ENVIRONMENTAL.

(a) Keep any property either owned or operated by Borrower free of any Environmental Liens or post bonds or other financial assurances sufficient to satisfy the obligations or liability evidenced by such Environmental Liens, (b) comply, in all material respects, with Environmental Laws and provide to Agent documentation of such compliance which Agent reasonably requests, (c) promptly notify Agent of any release of a Hazardous Material in any reportable quantity from or onto property owned or operated by Borrower and take any Remedial Actions required to abate said release or otherwise to come into compliance with applicable Environmental Law, and (d) promptly provide Agent with written notice within 10 days of the receipt of any of the following: (i) notice that an Environmental Lien has been filed against any of the real or personal property of Borrower, (ii) commencement of any Environmental Action or notice that an Environmental Action will be filed against Borrower, and (iii) notice of a violation, citation, or other administrative order which reasonably could be expected to result in a Material Adverse Change.

6.14 DISCLOSURE UPDATES. Promptly and in no event later than 5 Business Days after obtaining knowledge thereof, (a) notify Agent if any written information, exhibit, or report furnished to the Lender Group contained any untrue statement of a material fact or omitted to state any material fact necessary to make the statements contained therein not misleading in light of the circumstances in which made, and (b) correct any defect or error that may be discovered therein or in any Loan Document or in the execution, acknowledgement, filing, or recordation thereof.

6.15 COMMERCIAL TORT CLAIMS; ORGANIZATIONAL ID NUMBER. Promptly but in no event later than three Business Days after obtaining any commercial tort claim, deliver to Agent an updated SCHEDULE 5.7 and the other documents required under SECTION 4.4. Immediately upon obtaining an organizational identification number (to the extent Borrower has not been issued such number on or prior to the Closing Date), notify Agent in writing and deliver to Agent an updated SCHEDULE 5.7.

6.16 FDA NOTICES, ETC. Borrower shall notify Agent promptly and in any event in writing within three (3) Business Days of any material violation, claim, complaint, charge or receipt of any violation, claim, complaint or charge of or under the Food and Drug Act or any material applicable statutes, rules, regulations, guides, policies orders or directives administered or issued by the FDA, including without limitation receipt by Borrower of any Product Recall Notice, or any other FDA Notice or amendment to a previous Product Recall Notice or FDA Notice, and in the case of a written document evidencing such event, within such three (3) Business Days Borrower shall provide Agent with a true, correct and complete copy of such Product Recall Notice, FDA Notice or amendment or other notice, as the case may be.

6.17 PAYMENTS CURRENT. Borrower shall make (a) all royalty and other payments due and payable under each Licensing Agreement prior to the time when the other party thereto may terminate any such Licensing Agreement and (b) all deferred payments when due in connection with any acquisition.

6.18 FORMATION OF SUBSIDIARIES. At the time that Borrower forms any direct or indirect Subsidiary organized under the laws of the United States or any state thereof or acquires any direct or indirect Subsidiary organized under the laws of the United States or any state thereof after the Closing Date, Borrower shall (a) cause such new Subsidiary to provide to Agent a Guaranty, security agreement, and such other security documents (including Mortgages with respect to any Real Property of such new Subsidiary), together with appropriate UCC-1 financing statements (and with respect to all property subject to a Mortgage, fixture filings), all in form and substance satisfactory to Agent, (b) provide to Agent a pledge agreement and appropriate certificates and powers or UCC-1 financing statements, pledging all (or in the case of a Subsidiary organized outside of the United States, 65%) of the direct or beneficial ownership interest in such new Subsidiary, in form and substance satisfactory to Agent, and (c) provide to Agent all other documentation, including one or more opinions of counsel satisfactory to Agent, which in its opinion is appropriate with respect to such formation and the execution and delivery of the applicable documentation referred to above (including policies of title insurance or other documentation with respect to all property subject to a Mortgage). Any document, agreement or instrument executed or issued pursuant to this SECTION 6.18 shall be a "Loan Document" for purposes of this Agreement.

#### 7. NEGATIVE COVENANTS.

Borrower covenants and agrees that, so long as any credit hereunder shall be available and until full and final payment of the Obligations and the termination of this Agreement, Borrower will not and will not permit any of its Subsidiaries to do any of the following:

7.1 INDEBTEDNESS. Create, incur, assume, permit, guarantee, or otherwise become or remain, directly or indirectly, liable with respect to any Indebtedness, except:

(a) Indebtedness evidenced by this Agreement and the other Loan Documents, together with Indebtedness owed to Underlying Issuers with respect to Underlying Letters of Credit,

(b) Indebtedness set forth on SCHEDULE 5.20,

(c) Permitted Purchase Money Indebtedness,

(d) refinancings, renewals, or extensions of Indebtedness permitted under clauses (b) and (c) of this SECTION 7.1 (and continuance or renewal of any Permitted Liens associated therewith) so long as: (i) the terms and conditions of such refinancings, renewals, or extensions do not, in Agent's judgment, materially impair the prospects of repayment of the Obligations by Borrower or materially impair Borrower's creditworthiness, (ii) such refinancings, renewals, or extensions do not result in an increase in the principal amount of, or interest rate with respect to, the Indebtedness so refinanced, renewed, or extended, (iii) such refinancings, renewals, or extensions do not result in a shortening of the average weighted maturity of the Indebtedness so refinanced, renewed, or extended, nor are they on terms or

conditions that, taken as a whole, are materially more burdensome or restrictive to Borrower, and (iv) if the Indebtedness that is refinanced, renewed, or extended was subordinated in right of payment to the Obligations, then the terms and conditions of the refinancing, renewal, or extension Indebtedness must include subordination terms and conditions that are at least as favorable to the Lender Group as those that were applicable to the refinanced, renewed, or extended Indebtedness;

(e) Indebtedness incurred by Borrower and/or its Subsidiaries in connection with acquisitions permitted by the terms of this Agreement, provided that such Indebtedness (i) is unsecured, (ii) is subordinate to the Obligations pursuant to an intercreditor agreement, in form and substance reasonably satisfactory to the Lenders, and (iii) does not exceed the principal amount of \$2,000,000 in the aggregate;

(f) Indebtedness composing Approved Acquisitions and other Permitted Investments other than acquisitions;

(g) Indebtedness of a Subsidiary of Borrower existing at the time such Subsidiary is acquired by, merged into, or consolidated with Borrower in a principal amount not in excess of \$2,000,000 in the aggregate; and

(h) Indebtedness incurred by Foreign Subsidiaries in a principal amount not to exceed \$2,000,000 in the aggregate.

7.2 LIENS. Create, incur, assume, or permit to exist, directly or indirectly, any Lien on or with respect to any of its assets, of any kind, whether now owned or hereafter acquired, or any income or profits therefrom, except for Permitted Liens (including Liens that are replacements of Permitted Liens to the extent that the original Indebtedness is refinanced, renewed, or extended under SECTION 7.1(D) and so long as the replacement Liens only encumber those assets that secured the refinanced, renewed, or extended Indebtedness).

#### 7.3 RESTRICTIONS ON FUNDAMENTAL CHANGES.

(a) Except in connection with (i) an acquisition constituting a Permitted Investment, if both before and after giving effect to such acquisition no Event of Default has occurred and is continuing, (ii) a reclassification of the Stock of Borrower, or (iii) a recapitalization of Borrower that solely effects the Stock of Borrower and is not otherwise adverse to the Lenders, enter into any merger, consolidation, reorganization, or recapitalization, or reclassify its Stock.

(b) Liquidate, wind up, or dissolve itself (or suffer any liquidation or dissolution), provided that nothing herein shall prohibit the liquidation, winding-up or dissolution of Borrower's Subsidiaries so long as all of the assets of any such Subsidiary shall be transferred to Borrower.

(c) Except for Permitted Dispositions, convey, sell, lease, license, assign, transfer, or otherwise dispose of, in one transaction or a series of transactions, all or any substantial part of its assets.

7.4 DISPOSAL OF ASSETS. Other than Permitted Dispositions, convey, sell, lease, license, assign, transfer, or otherwise dispose of any of Borrower's assets.



7.5 CHANGE NAME. Change its name, organizational identification number, state of incorporation, FEIN, corporate structure, or identity, or add any new fictitious name; PROVIDED, HOWEVER, that Borrower may change its name upon at least 30 days prior written notice to Agent of such change and so long as, at the time of such written notification, Borrower provides any financing statements or fixture filings necessary to perfect and continue perfected Agent's Liens.

7.6 GUARANTEE. Guarantee or otherwise become in any way liable with respect to the obligations of any third Person except (i) by endorsement of instruments or items of payment for deposit to the account of Borrower or which are transmitted or turned over to Agent and (ii) guarantees of Indebtedness permitted by SECTION 7.1.

7.7 NATURE OF BUSINESS. Make any material change in the principal nature of its business as it exists as of the Closing Date other than changes that result in Borrower and its Subsidiaries engaging in businesses reasonably related to the business of Borrower on the Closing Date.

7.8 PREPAYMENTS AND AMENDMENTS.

(a) Except in connection with a refinancing permitted by SECTION 7.1(D), prepay, redeem, defease, purchase, or otherwise acquire any Indebtedness of Borrower, other than the Obligations in accordance with this Agreement, provided that if (i) the Term Loan has been repaid in full and (ii) both immediately before and after giving effect to such prepayment, redemption, defeasance, purchase or acquisition of Indebtedness (x) no Event of Default shall have occurred and be continuing and (y) Borrower has Excess Availability of not less than \$5,000,000, Borrower may prepay, redeem, defease, purchase, or otherwise acquire any Indebtedness of Borrower, and

(b) Except in connection with a refinancing permitted by SECTION 7.1(D), directly or indirectly, amend, modify, alter, increase, or change any of the terms or conditions of any agreement, instrument, document, indenture, or other writing evidencing or concerning Indebtedness permitted under SECTIONS 7.1(B) OR (C).

7.9 CHANGE OF CONTROL. Cause, permit, or suffer, directly or indirectly, any Change of Control.

7.10 CONSIGNMENTS. Consign any Inventory or sell any Inventory on bill and hold, sale or return, sale on approval, or other conditional terms of sale.

7.11 DISTRIBUTIONS. Make any payment, distribution or declare or pay any dividends (in cash or other property, other than common Stock) on, or purchase, acquire, redeem, or retire any of Borrower's Stock, of any class, whether now or hereafter outstanding, provided that if both immediately before and after giving effect to such transaction (x) no Event of Default shall have occurred and be continuing and (y) Borrower has Excess Availability of not less than \$5,000,000, Borrower may purchase Stock of employees who have terminated their employment with Borrower for consideration not to exceed \$3,500,000 in the aggregate.

7.12 ACCOUNTING METHODS. Modify or change its method of accounting (other than as may be required to conform to GAAP) or enter into, modify, or terminate any agreement currently existing, or at any time hereafter entered into with any third party accounting firm or service bureau for the preparation or storage of Borrower's accounting records without said accounting firm or service bureau agreeing to (a) provide Agent information regarding the Collateral or Borrower's financial condition, (b) provide Borrower with all financial information provided by such accounting firm or service bureau to Agent and (c) allow Borrower to participate in all communications between such accounting firm or service bureau and Agent.

7.13 INVESTMENTS. Except for Permitted Investments, directly or indirectly, make or acquire any Investment or incur any liabilities (including contingent obligations) for or in connection with any Investment; PROVIDED, HOWEVER, that, from and after the date that Agent delivers an Activation Notice pursuant to SECTION 2.7(C) (with a copy to Borrower), Borrower and its Subsidiaries shall not have Permitted Investments in an aggregate amount in excess of \$100,000 at any time (other than in the Cash Management Accounts) in deposit accounts or Securities Accounts unless Borrower or its Subsidiary, as applicable, and the applicable securities intermediary or bank have entered into Control Agreements governing such Permitted Investments, as Agent shall determine in its Permitted Discretion, to perfect (and further establish) Agent's Liens in such Permitted Investments.

7.14 TRANSACTIONS WITH AFFILIATES. Directly or indirectly enter into or permit to exist any transaction with any Affiliate of Borrower except for transactions that are in the ordinary course of Borrower's business, upon fair and reasonable terms, that are fully disclosed to Agent, and that are no less favorable to Borrower than would be obtained in an arm's length transaction with a non-Affiliate; PROVIDED, HOWEVER, that nothing contained in this SECTION 7.14 shall prohibit employment agreements and amendments thereto entered into in the ordinary course of business of Borrower that have been approved by the compensation committee of Borrower's board of directors.

7.15 SUSPENSION. Suspend or go out of a substantial portion of its business

7.16 USE OF PROCEEDS. Use the proceeds of the Advances and the Term Loan for any purpose other than (a) (i) to pay up to \$35,000,000 of the purchase price for acquisitions permitted by the terms of this Agreement, and (ii) on the Closing Date to pay transactional fees, costs, and expenses incurred in connection with this Agreement, the other Loan Documents, and the transactions contemplated hereby and thereby, and (b) after the Closing Date, general business purposes and such uses as are consistent with the terms and conditions hereof, for its lawful and permitted purposes.

7.17 CHANGE IN LOCATION OF CHIEF EXECUTIVE OFFICE; INVENTORY AND EQUIPMENT WITH BAILEES. Relocate its chief executive office to a new location without providing 30 days prior written notification thereof to Agent and so long as, at the time of such written notification, if requested by Agent, Borrower provides any financing statements or fixture filings necessary to perfect and continue perfected Agent's Liens and also provides to Agent a Collateral Access Agreement with respect to such new location. The Inventory and Equipment shall not at any time now or hereafter be stored with a bailee, warehouseman, or similar party without Agent's prior written consent.

7.18 SECURITIES ACCOUNTS. From and after the date that Agent delivers an Activation Notice pursuant to SECTION 2.7(C) (with a copy to Borrower) establish or maintain any Securities Account unless Agent shall have received a Control Agreement in respect of such Securities Account. Borrower shall not transfer assets out of any Securities Account; provided, however, that, so long as no Event of Default has occurred and is continuing or would result therefrom, Borrower may use such assets (and the proceeds thereof) to the extent not prohibited by this Agreement.

7.19 FINANCIAL COVENANTS.

(a) Fail to maintain:

(i) MINIMUM EBITDA. EBITDA, measured on a fiscal quarter-end basis, of not less than the required amount set forth in the following table for the trailing four fiscal quarters of Borrower ending on the last Saturday of the month set forth opposite thereto;

Applicable Amount	Date
[***]	September, 2003
[***]	December, 2003
[***]	March, 2004
[***]	June, 2004
[***]	September, 2004
[***]	December, 2004

, PROVIDED that, upon receipt of the Projections for the 2005 Fiscal Year of Borrower required to be delivered to Agent and Lenders pursuant to SECTION 6.3(C)(I), Borrower and Agent shall negotiate in good faith to determine the minimum EBITDA for each trailing four fiscal quarter period of Borrower in the 2005 Fiscal Year of Borrower and, in the event Borrower and Agent are unable to agree upon such amounts on or before November 30, 2004, the minimum EBITDA for each trailing four fiscal quarter period of Borrower ending in the 2005 Fiscal Year of Borrower shall remain unchanged from that set forth above for the trailing four fiscal quarter period in the 2004 Fiscal Year of Borrower.

(b) Commencing with June 2003 and for each month thereafter, permit:

(i) TOTAL LEVERAGE RATIO. The ratio of (x) Total Funded Debt outstanding at the end of each month, to (y) EBITDA for the trailing four fiscal quarters ending at the end of such month, to exceed [\*\*\*].

(ii) DEBT TO CASH COLLECTIONS. Total Funded Debt outstanding at the end of each month to exceed the aggregate Collections of Borrower for the previous 120 day period ending on the last day of each such month.

(iii) DEBT TO ENTERPRISE VALUE. Total Funded Debt outstanding at the end of each month to exceed [\*\*\*] of the most recent Enterprise Value of Borrower, provided that Agent shall have the right to redetermine the Enterprise Value of Borrower and intends to redetermine such Enterprise Value not less than once each calendar year.

(c) CAPITAL EXPENDITURES. Make capital expenditures in any Fiscal Year in excess of (A) [\*\*\*] for the 2003 Fiscal Year, (B) [\*\*\*] for the 2004 Fiscal Year, and (C) [\*\*\*] for the 2005 Fiscal Year, plus, in the case of clauses (B) and (C) above, the Carryforward Amount (if any). Borrower shall be entitled to carry forward the unused capital expenditure amount from the prior year in an amount (the "CARRYFORWARD AMOUNT") equal to (I) in the 2004 Fiscal Year, the lesser of (x) the unused portion of capital expenditures permitted to be expended by Borrower for the immediately preceding Fiscal Year and (y) [\*\*\*] and (II) in the 2005 Fiscal Year, the lesser of (x) the unused portion of capital expenditures permitted to be expended by Borrower for the immediately preceding Fiscal Year and (y) [\*\*\*]. Capital expenditures during any Fiscal Year shall be applied, first, to the applicable amount of the capital expenditures permitted for such Fiscal Year (without giving effect to the Carryforward Amount) and, second, to the Carryforward Amount for the immediately preceding Fiscal Year.

7.20 INACTIVE SUBSIDIARIES. In the case of the Inactive Subsidiaries, own any assets with a value in excess of \$50,000, conduct any business or have any liabilities.

#### 8. EVENTS OF DEFAULT.

Any one or more of the following events shall constitute an event of default (each, an "Event of Default") under this Agreement:

8.1 If Borrower fails to pay when due and payable, or when declared due and payable, all or any portion of the Obligations (whether of principal, interest (including any interest which, but for the provisions of the Bankruptcy Code, would have accrued on such amounts), fees and charges due the Lender Group, reimbursement of Lender Group Expenses, or other amounts constituting Obligations) and, in the case of any Obligation constituting interest, fees, expenses, changes or reimbursements only, such failure shall continue for 3 days;

8.2 (i) If Borrower fails to perform, keep, or observe any term, provision, condition, covenant, or agreement contained in SECTIONS 6.1, 6.4, 6.5, and 6.13 of this Agreement, or comparable provisions of the other Loan Documents, and such failure continues for 15 days, (ii) if Borrower fails to perform, keep, or observe any term, provision, condition, covenant or agreement contained in SECTIONS 6.2 (but only up to three times during any 12-month period), 6.3, 6.6, 6.8, 6.9, 6.10, 6.12 (but solely with respect to failure to remain in good standing), 6.14, 6.15, and 6.17 of this Agreement, or comparable provisions of the other Loan Documents, and such failure continues for 5 days, or (iii) if Borrower otherwise fails to perform, keep, or observe any other term, provision, condition, covenant, or agreement contained in this Agreement or in any of the other Loan Documents;

8.3 If any material portion of Borrower's or any of its Subsidiaries' assets is attached, seized, subjected to a writ or distress warrant, levied upon, or comes into the possession of any third Person;

8.4 If an Insolvency Proceeding is commenced by Borrower or any of its Subsidiaries;

8.5 If an Insolvency Proceeding is commenced against Borrower, or any of its Subsidiaries, and any of the following events occur: (a) Borrower or the Subsidiary consents to the institution of such Insolvency Proceeding against it, (b) the petition commencing the Insolvency Proceeding is not timely controverted, (c) the petition commencing the Insolvency Proceeding is not dismissed within 60 calendar days of the date of the filing thereof; PROVIDED, HOWEVER, that, during the pendency of such period, Agent (including any successor agent) and each other member of the Lender Group shall be relieved of their obligations to extend credit hereunder, (d) an interim trustee is appointed to take possession of all or any substantial portion of the properties or assets of, or to operate all or any substantial portion of the business of, Borrower or any of its Subsidiaries, or (e) an order for relief shall have been entered therein;

8.6 If Borrower or any of its Subsidiaries is enjoined, restrained, or in any way prevented by court order from continuing to conduct all or any material part of its business affairs;

8.7 If a notice of Lien, levy, or assessment is filed of record with respect to any of Borrower's or any of its Subsidiaries' assets by the United States, or any department, agency, or instrumentality thereof, or by any state, county, municipal, or governmental agency, or if any taxes or debts owing at any time hereafter to any one or more of such entities becomes a Lien, whether choate or otherwise, upon any of Borrower's or any of its Subsidiaries' assets and the same is not paid before such payment is delinquent;

8.8 If a judgment or other claim becomes a Lien or encumbrance upon any material portion of Borrower's or any of its Subsidiaries' assets;

8.9 If there is a default in any Material Contract to which Borrower or any of its Subsidiaries is a party and such default (a) occurs at the final maturity of the obligations thereunder, or (b) results in a right by the other party thereto, irrespective of whether exercised, to accelerate the maturity of

Borrower's or its Subsidiaries' obligations thereunder, to terminate such agreement, or to refuse to renew such agreement pursuant to an automatic renewal right therein;

8.10 If Borrower or any of its Subsidiaries makes any payment on account of Indebtedness that has been contractually subordinated in right of payment to the payment of the Obligations, except to the extent such payment is permitted by the terms of the subordination provisions applicable to such Indebtedness;

8.11 If any material misstatement or material misrepresentation exists now or hereafter in any warranty, representation, statement, or Record made to the Lender Group by Borrower, its Subsidiaries, or any officer, employee, agent, or director of Borrower or any of its Subsidiaries;

8.12 If there is a loss, suspension or revocation of, or failure to renew, any license or permit now held or hereafter acquired by Borrower or any of its Subsidiaries and such loss, suspension, revocation or failure to renew could reasonably be expected to have a Material Adverse Change;

8.13 If this Agreement or any other Loan Document that purports to create a Lien, shall, for any reason, fail or cease to create a valid and perfected and, except to the extent permitted by the terms hereof or thereof, first priority Lien on or security interest in the Collateral covered hereby or thereby;

8.14 If Borrower shall (i) receive a Product Recall Notice or (ii) fail to be in substantial compliance with the Food and Drug Act and all current applicable statutes, rules, regulations, guides, policies, orders or directives administered or issued by the FDA, to the extent that such failure would reasonably be anticipated to (a) result in a Material Adverse Change or (b) result in or account for a 10% or greater decrease in Borrower's total sales from the preceding Fiscal Year; or

8.15 Any provision of any Loan Document shall at any time for any reason be declared to be null and void, or the validity or enforceability thereof shall be contested by Borrower, or a proceeding shall be commenced by Borrower, or by any Governmental Authority having jurisdiction over Borrower, seeking to establish the invalidity or unenforceability thereof, or Borrower shall deny that Borrower has any liability or obligation purported to be created under any Loan Document;

provided that, notwithstanding anything to the contrary contained herein, if any one or more of the events set forth in SECTIONS 8.1 through 8.15 above shall occur at a time when there are no outstanding Obligations for the payment of money, (x) such events set forth in SECTIONS 8.1 through 8.15 above shall not result in an Event of Default and (y) no Advances, Letters of Credit or other extensions of credit under this Agreement shall be permitted until any such event set forth in SECTIONS 8.1 through 8.15 above is cured to the satisfaction of the Required Lenders or waived in writing by the Required Lenders.

9. THE LENDER GROUP'S RIGHTS AND REMEDIES.

9.1 RIGHTS AND REMEDIES. Upon the occurrence, and during the continuation, of an Event of Default, the Required Lenders (at their election but without notice of their election and without demand) may authorize and instruct Agent to do any one or more of the following on behalf of the Lender Group (and Agent, acting upon the instructions of the Required Lenders, shall do the same on behalf of the Lender Group), all of which are authorized by Borrower:

(a) Declare all Obligations, whether evidenced by this Agreement, by any of the other Loan Documents, or otherwise, immediately due and payable (provided, that upon the occurrence of any Event of Default arising under SECTION 8.4, SECTION 8.5(A) or SECTION 8.5(C) in respect of Borrower, all Obligations evidenced by this Agreement or by any other Loan Documents shall automatically become due and payable and the obligation of each Lender to advance money or extend credit to or for the benefit of Borrower under this Agreement, under any of the Loan Documents, or under any other agreement between Borrowers and the Lender Group shall automatically terminate, in each case without the need for any act of Agent or any Lender);

(b) Cease advancing money or extending credit to or for the benefit of Borrower under this Agreement, under any of the Loan Documents, or under any other agreement between Borrower and the Lender Group;

(c) Terminate this Agreement and any of the other Loan Documents as to any future liability or obligation of the Lender Group, but without affecting any of Agent's Liens in the Collateral and without affecting the Obligations;

(d) Settle or adjust disputes and claims directly with Account Debtors for amounts and upon terms which Agent considers advisable, and in such cases, Agent will credit Borrower's Loan Account with only the net amounts received by Agent in payment of such disputed Accounts after deducting all Lender Group Expenses incurred or expended in connection therewith;

(e) Cause Borrower to hold all returned Inventory in trust for the Lender Group, segregate all returned Inventory from all other assets of Borrower or in Borrower's possession and conspicuously label said returned Inventory as the property of the Lender Group;

(f) Without notice to or demand upon Borrower, make such payments and do such acts as Agent considers necessary or reasonable to protect its security interests in the Collateral. Borrower agrees to assemble the Personal Property Collateral if Agent so requires, and to make the Personal Property Collateral available to Agent at a place that Agent may designate which is reasonably convenient to both parties. Borrower authorizes Agent to enter the premises where the Personal Property Collateral is located, to take and maintain possession of the Personal Property Collateral, or any part of it, and to pay, purchase, contest, or compromise any Lien that in Agent's determination appears to conflict with Agent's Liens and to pay all expenses incurred in connection

therewith and to charge Borrower's Loan Account therefor. With respect to any of Borrower's owned or leased premises, Borrower hereby grants Agent a license to enter into possession of such premises and to occupy the same, without charge, in order to exercise any of the Lender Group's rights or remedies provided herein, at law, in equity, or otherwise;

(g) Without notice to Borrower (such notice being expressly waived), and without constituting a retention of any collateral in satisfaction of an obligation (within the meaning of the Code), set off and apply to the Obligations any and all (i) balances and deposits of Borrower held by the Lender Group (including any amounts received in the Cash Management Accounts), or (ii) Indebtedness at any time owing to or for the credit or the account of Borrower held by the Lender Group;

(h) Hold, as cash collateral, any and all balances and deposits of Borrower held by the Lender Group, and any amounts received in the Cash Management Accounts, to secure the full and final repayment of all of the Obligations;

(i) Ship, reclaim, recover, store, finish, maintain, repair, prepare for sale, advertise for sale, and sell (in the manner provided for herein) the Personal Property Collateral in accordance with all applicable laws. Borrower hereby grants to Agent a license or other right to use, without charge, Borrower's labels, patents, copyrights, trade secrets, trade names, trademarks, service marks, and advertising matter, or any property of a similar nature, as it pertains to the Personal Property Collateral, in completing production of, advertising for sale, and selling any Personal Property Collateral and Borrower's rights under all licenses and all franchise agreements shall inure to the Lender Group's benefit;

(j) Sell the Personal Property Collateral at either a public or private sale, or both, by way of one or more contracts or transactions, for cash or on terms, in such manner and at such places (including Borrower's premises) as Agent determines is commercially reasonable. It is not necessary that the Personal Property Collateral be present at any such sale;

(k) Agent shall give notice of the disposition of the Personal Property Collateral as follows:

(i) Agent shall give Borrower a notice in writing of the time and place of public sale, or, if the sale is a private sale or some other disposition other than a public sale is to be made of the Personal Property Collateral, the time on or after which the private sale or other disposition is to be made; and

(ii) The notice shall be personally delivered or mailed, postage prepaid, to Borrower as provided in SECTION 12, at least 10 days before the earliest time of disposition set forth in the notice; no notice needs to be given prior to the disposition of any portion of the Personal Property Collateral that is perishable or threatens to decline speedily in value or that is of a type customarily sold on a recognized market;

(l) Agent, on behalf of the Lender Group, may credit bid and purchase at any public sale; and

(m) Agent may seek the appointment of a receiver or keeper to take possession of all or any portion of the Collateral or to operate



same and, to the maximum extent permitted by law, may seek the appointment of such a receiver without the requirement of prior notice or a hearing;

(n) Agent, on behalf of the Lender Group, may foreclose any or all of the Mortgages and sell the Real Property or cause the Real Property to be sold in accordance with the provisions of the Mortgages and applicable law, and exercise any and all other rights or remedies available to Agent, on behalf of the Lender Group, under the Mortgages, any of the other Loan Documents, at law or in equity with respect to the Collateral encumbered by the Mortgages;

(o) The Lender Group shall have all other rights and remedies available at law or in equity or pursuant to any other Loan Document; and

(p) Any deficiency that exists after disposition of the Personal Property Collateral as provided above will be paid immediately by Borrower. Any excess will promptly be returned, without interest and subject to the rights of third Persons, by Agent to Borrower.

9.2 REMEDIES CUMULATIVE. The rights and remedies of the Lender Group under this Agreement, the other Loan Documents, and all other agreements shall be cumulative. The Lender Group shall have all other rights and remedies not inconsistent herewith as provided under the Code, by law, or in equity. No exercise by the Lender Group of one right or remedy shall be deemed an election, and no waiver by the Lender Group of any Event of Default shall be deemed a continuing waiver. No delay by the Lender Group shall constitute a waiver, election, or acquiescence by it.

#### 10. TAXES AND EXPENSES.

If Borrower fails to pay any monies (whether taxes, assessments, insurance premiums, or, in the case of leased properties or assets, rents or other amounts payable under such leases) due to third Persons which are not the subject of a Permitted Protest or fails to make any deposits or furnish any required proof of payment or deposit, all as required under the terms of this Agreement, then, Agent, in its sole and reasonable discretion and without prior notice to Borrower, may do any or all of the following: (a) make payment of the same or any part thereof, (b) set up such reserves in Borrower's Loan Account as Agent deems necessary to protect the Lender Group from the exposure created by such failure, or (c) in the case of the failure to comply with SECTION 6.7 hereof, obtain and maintain insurance policies of the type described in SECTION 6.7 and take any action with respect to such policies as Agent deems prudent. Any such amounts paid by Agent shall constitute Lender Group Expenses and any such payments shall not constitute an agreement by the Lender Group to make similar payments in the future or a waiver by the Lender Group of any Event of Default under this Agreement. Agent need not inquire as to, or contest the validity of, any such expense, tax, or Lien and the receipt of the usual official notice for the payment thereof shall be conclusive evidence that the same was validly due and owing. Agent shall provide Borrower with written notice of payments made by Agent on behalf of Borrower promptly after such payments are made by Agent.

11. WAIVERS; INDEMNIFICATION.

11.1 DEMAND; PROTEST; ETC. Borrower waives demand, protest, notice of protest, notice of default or dishonor, notice of payment and nonpayment, nonpayment at maturity, release, compromise, settlement, extension, or renewal of documents, instruments, chattel paper, and guarantees at any time held by the Lender Group on which Borrower may in any way be liable.

11.2 THE LENDER GROUP'S LIABILITY FOR COLLATERAL. Borrower hereby agrees that: (a) so long as Agent complies with its obligations, if any, under the Code, the Lender Group shall not in any way or manner be liable or responsible for: (i) the safekeeping of the Collateral, (ii) any loss or damage thereto occurring or arising in any manner or fashion from any cause, (iii) any diminution in the value thereof, or (iv) any act or default of any carrier, warehouseman, bailee, forwarding agency, or other Person, and (b) all risk of loss, damage, or destruction of the Collateral shall be borne by Borrower.

11.3 INDEMNIFICATION. (a) GENERAL. Borrower shall pay, indemnify, defend, and hold the Agent-Related Persons, the Lender-Related Persons with respect to each Lender, each Participant, and each of their respective officers, directors, employees, agents, and attorneys-in-fact (each, an "Indemnified Person") harmless (to the fullest extent permitted by law) from and against any and all claims, demands, suits, actions, investigations, proceedings, and damages, and all reasonable attorneys fees and disbursements and other costs and expenses actually incurred in connection therewith (as and when they are incurred and irrespective of whether suit is brought), at any time asserted against, imposed upon, or incurred by any of them (a) in connection with or as a result of or related to the execution, delivery, enforcement, performance, or administration of this Agreement, any of the other Loan Documents, or the transactions contemplated hereby or thereby, and (b) with respect to any investigation, litigation, or proceeding related to this Agreement, any other Loan Document, or the use of the proceeds of the credit provided hereunder (irrespective of whether any Indemnified Person is a party thereto), or any act, omission, event, or circumstance in any manner related thereto (all the foregoing, collectively, the "Indemnified Liabilities"). The foregoing to the contrary notwithstanding, Borrower shall have no obligation to any Indemnified Person under this SECTION 11.3 with respect to any Indemnified Liability that a court of competent jurisdiction finally determines to have resulted from the gross negligence or willful misconduct of such Indemnified Person. This provision shall survive the termination of this Agreement and the repayment of the Obligations. If any Indemnified Person makes any payment to any other Indemnified Person with respect to an Indemnified Liability as to which Borrower was required to indemnify the Indemnified Person receiving such payment, the Indemnified Person making such payment is entitled to be indemnified and reimbursed by Borrower with respect thereto. WITHOUT LIMITATION, THE FOREGOING INDEMNITY SHALL APPLY TO EACH INDEMNIFIED PERSON WITH RESPECT TO INDEMNIFIED LIABILITIES WHICH IN WHOLE OR IN PART CAUSED BY OR ARISE OUT OF ANY NEGLIGENT ACT OR OMISSION OF SUCH INDEMNIFIED PERSON OR OF ANY OTHER PERSON.

(b) ENVIRONMENTAL INDEMNITY. Without limiting Section 11.3(a) hereof, Borrower shall pay, indemnify, defend, and hold harmless each Indemnified Person against any and all Environmental Liabilities and Costs and all other claims, demands, penalties, fines, liability (including strict liability), losses, damages, costs and expenses (including reasonable legal fees

and expenses, consultant fees and laboratory fees), arising out of (i) any releases or threatened releases of any Hazardous Materials (x) at any property presently or formerly owned or operated by Borrower or any Subsidiary of Borrower, or any predecessor in interest, or (y) generated and disposed of by Borrower or any Subsidiary of Borrower, or any predecessor in interest; (ii) any violations of Environmental Laws; (iii) any Environmental Action relating to Borrower or any Subsidiary of Borrower, or any predecessor in interest; (iv) any personal injury (including wrongful death) or property damage (real or personal) arising out of exposure to Hazardous Materials used, handled, generated, transported or disposed of by Borrower or any Subsidiary of Borrower, or any predecessor in interest; and (v) any breach of any warranty or representation regarding environmental matters made by Borrower in SECTION 5.14 or the breach of any covenant made by Borrower in SECTION 6.14.

## 12. NOTICES.

Unless otherwise provided in this Agreement, all notices or demands by Borrower or Agent to the other relating to this Agreement or any other Loan Document shall be in writing and (except for financial statements and other informational documents which may be sent by first-class mail, postage prepaid) shall be personally delivered or sent by registered or certified mail (postage prepaid, return receipt requested), overnight courier, electronic mail (at such email addresses as Borrower or Agent, as applicable, may designate to each other in accordance herewith), or telefacsimile to Borrower or Agent, as the case may be, at its address set forth below:

If to Borrower:	NABI BIOPHARMACEUTICALS 5800 Park of Commerce Boulevard, N.W. Boca Raton, Florida 33487 Attn: Mark Smith Fax No.: 561.989.5801
with copies to:	NUTTER, MCCLENNEN & FISH, LLP World Trade Center West 155 Seaport Boulevard Boston, Massachusetts 02210 Attn: Constantine Alexander, Esq. Fax No.: 617.310.9595
If to Agent:	WELLS FARGO FOOTHILL, INC. 2450 Colorado Avenue Suite 3000 West Santa Monica, California 90404 Attn: Business Finance Division Manager Fax No.: 310.478.9788

WELLS FARGO FOOTHILL, INC.  
400 North Park Town Center  
1000 Abernathy Road, Suite 1450  
Atlanta, Georgia 30328  
Attn: Business Finance Division Manager  
Fax No.: 770.408.1370

with copies to: SCHULTE ROTH & ZABEL LLP  
919 Third Avenue  
New York, New York 10022  
Attn: Frederic L. Ragucci, Esq.  
Fax No.: 212.593.5955

Agent and Borrower may change the address at which they are to receive notices hereunder, by notice in writing in the foregoing manner given to the other party. All notices or demands sent in accordance with this SECTION 12, other than notices by Agent in connection with enforcement rights against the Collateral under the provisions of the Code, shall be deemed received on the earlier of the date of actual receipt or 3 Business Days after the deposit thereof in the mail. Borrower acknowledges and agrees that notices sent by the Lender Group in connection with the exercise of enforcement rights against Collateral under the provisions of the Code shall be deemed received on the earlier of the date of actual receipt or 3 Business Days after the deposit thereof in the mail or, under any method permitted by applicable law, at such time as provided under such applicable law.

13. CHOICE OF LAW AND VENUE; JURY TRIAL WAIVER.

(a) THE VALIDITY OF THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS (UNLESS EXPRESSLY PROVIDED TO THE CONTRARY IN ANOTHER LOAN DOCUMENT IN RESPECT OF SUCH OTHER LOAN DOCUMENT), THE CONSTRUCTION, INTERPRETATION, AND ENFORCEMENT HEREOF AND THEREOF, AND THE RIGHTS OF THE PARTIES HERETO AND THERETO WITH RESPECT TO ALL MATTERS ARISING HEREUNDER OR THEREUNDER OR RELATED HERETO OR THERETO SHALL BE DETERMINED UNDER, GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

(b) THE PARTIES AGREE THAT ALL ACTIONS OR PROCEEDINGS ARISING IN CONNECTION WITH THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS SHALL BE TRIED AND LITIGATED ONLY IN THE STATE AND FEDERAL COURTS LOCATED IN THE COUNTY OF NEW YORK, STATE OF NEW YORK, PROVIDED, HOWEVER, THAT ANY SUIT SEEKING ENFORCEMENT AGAINST ANY COLLATERAL OR OTHER PROPERTY MAY BE BROUGHT, AT AGENT'S OPTION, IN THE COURTS OF ANY JURISDICTION WHERE AGENT ELECTS TO BRING SUCH ACTION OR WHERE SUCH COLLATERAL OR OTHER PROPERTY MAY BE FOUND. BORROWER AND THE LENDER GROUP

WAIVE, TO THE EXTENT PERMITTED UNDER APPLICABLE LAW, ANY RIGHT EACH MAY HAVE TO ASSERT THE DOCTRINE OF FORUM NON CONVENIENS OR TO OBJECT TO VENUE TO THE EXTENT ANY PROCEEDING IS BROUGHT IN ACCORDANCE WITH THIS SECTION 13(B).

(c) BORROWER AND THE LENDER GROUP HEREBY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF ANY OF THE LOAN DOCUMENTS OR ANY OF THE TRANSACTIONS CONTEMPLATED THEREIN, INCLUDING CONTRACT CLAIMS, TORT CLAIMS, BREACH OF DUTY CLAIMS, AND ALL OTHER COMMON LAW OR STATUTORY CLAIMS. BORROWER AND THE LENDER GROUP REPRESENT THAT EACH HAS REVIEWED THIS WAIVER AND EACH KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS FOLLOWING CONSULTATION WITH LEGAL COUNSEL. IN THE EVENT OF LITIGATION, A COPY OF THIS AGREEMENT MAY BE FILED AS A WRITTEN CONSENT TO A TRIAL BY THE COURT.

#### 14. ASSIGNMENTS AND PARTICIPATIONS; SUCCESSORS.

##### 14.1 ASSIGNMENTS AND PARTICIPATIONS.

(a) Any Lender may, with the written consent of Agent (provided that no written consent of Agent shall be required in connection with any assignment and delegation by a Lender to an Eligible Transferee), assign and delegate to one or more assignees (each an "Assignee") all, or any ratable part of all, of the Obligations, the Commitments and the other rights and obligations of such Lender hereunder and under the other Loan Documents, in a minimum amount of \$5,000,000; PROVIDED, HOWEVER, that Borrower and Agent may continue to deal solely and directly with such Lender in connection with the interest so assigned to an Assignee until (i) written notice of such assignment, together with payment instructions, addresses, and related information with respect to the Assignee, have been given to Borrower and Agent by such Lender and the Assignee, (ii) such Lender and its Assignee have delivered to Borrower and Agent an Assignment and Acceptance in form and substance satisfactory to Agent, and (iii) the assignor Lender or Assignee has paid to Agent for Agent's separate account a processing fee in the amount of \$5,000. Anything contained herein to the contrary notwithstanding (x) the consent of Agent shall not be required (and payment of any fees shall not be required) if such assignment is in connection with any merger, consolidation, sale, transfer, or other disposition of all or any substantial portion of the business or loan portfolio of such Lender so long as an assignee under such circumstances shall be an Eligible Transferee and (y) no assignment of any portion of the Obligations, Commitments, or other rights and obligations of any Lender hereunder shall be made to any Person listed on the letter designated as the "Section 14.1 Side Letter" delivered by Borrower to Agent on or prior to the Closing Date, which "Section 14.1 Side Letter" may be updated by Borrower from time to time (in a writing delivered by Borrower to each Lender) to include the name of any Person that conducts a substantial portion of its business in the biopharmaceutical industry.

(b) From and after the date that Agent notifies the assignor Lender (with a copy to Borrower) that it has received an executed Assignment and Acceptance and payment of the above-referenced processing fee, (i) the Assignee thereunder shall be a party hereto and, to the extent that rights and obligations hereunder have been assigned to it pursuant to such Assignment and Acceptance, shall have the rights and obligations of a Lender under the Loan Documents, and (ii) the assignor Lender shall, to the extent that rights and obligations hereunder and under the other Loan Documents have been assigned by it pursuant to such Assignment and Acceptance, relinquish its rights (except with respect to SECTION 11.3 hereof) and be released from its obligations under

this Agreement (and in the case of an Assignment and Acceptance covering all or the remaining portion of an assigning Lender's rights and obligations under this Agreement and the other Loan Documents, such Lender shall cease to be a party hereto and thereto), and such assignment shall affect a novation between Borrower and the Assignee.

(c) By executing and delivering an Assignment and Acceptance, the assigning Lender thereunder and the Assignee thereunder confirm to and agree with each other and the other parties hereto as follows: (1) other than as provided in such Assignment and Acceptance, such assigning Lender makes no representation or warranty and assumes no responsibility with respect to any statements, warranties or representations made in or in connection with this Agreement or the execution, legality, validity, enforceability, genuineness, sufficiency or value of this Agreement or any other Loan Document furnished pursuant hereto, (2) such assigning Lender makes no representation or warranty and assumes no responsibility with respect to the financial condition of Borrower or the performance or observance by Borrower of any of its obligations under this Agreement or any other Loan Document furnished pursuant hereto, (3) such Assignee confirms that it has received a copy of this Agreement, together with such other documents and information as it has deemed appropriate to make its own credit analysis and decision to enter into such Assignment and Acceptance, (4) such Assignee will, independently and without reliance upon Agent, such assigning Lender or any other Lender, and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit decisions in taking or not taking action under this Agreement, (5) such Assignee appoints and authorizes Agent to take such actions and to exercise such powers under this Agreement as are delegated to Agent, by the terms hereof, together with such powers as are reasonably incidental thereto, and (6) such Assignee agrees that it will perform all of the obligations which by the terms of this Agreement are required to be performed by it as a Lender.

(d) Immediately upon each Assignee's making its processing fee payment under the Assignment and Acceptance and receipt and acknowledgment by Agent of such fully executed Assignment and Acceptance, this Agreement shall be deemed to be amended to the extent, but only to the extent, necessary to reflect the addition of the Assignee and the resulting adjustment of the Commitments arising therefrom. The Commitment allocated to each Assignee shall reduce such Commitments of the assigning Lender PRO TANTO.

(e) Any Lender may at any time, with the written consent of Agent, sell to one or more commercial banks, financial institutions, or other Persons not Affiliates of such Lender (a "Participant") participating interests in its Obligations, the Commitment, and the other rights and interests of that Lender (the "Originating Lender") hereunder and under the other Loan Documents (provided that no written consent of Agent shall be required in connection with any sale of any such participating interests by a Lender to an Eligible Transferee); PROVIDED, HOWEVER, that (i) the Originating Lender shall remain a "Lender" for all purposes of this Agreement and the other Loan Documents and the Participant receiving the participating interest in the Obligations, the

Commitments, and the other rights and interests of the Originating Lender hereunder shall not constitute a "Lender" hereunder or under the other Loan Documents and the Originating Lender's obligations under this Agreement shall remain unchanged, (ii) the Originating Lender shall remain solely responsible for the performance of such obligations, (iii) Borrower, Agent, and the Lenders shall continue to deal solely and directly with the Originating Lender in connection with the Originating Lender's rights and obligations under this Agreement and the other Loan Documents, (iv) no Lender shall transfer or grant any participating interest under which the Participant has the right to approve any amendment to, or any consent or waiver with respect to, this Agreement or any other Loan Document, except to the extent such amendment to, or consent or waiver with respect to this Agreement or of any other Loan Document would (A) extend the final maturity date of the Obligations hereunder in which such Participant is participating, (B) reduce the interest rate applicable to the Obligations hereunder in which such Participant is participating, (C) release all or a material portion of the Collateral or guaranties (except to the extent expressly provided herein or in any of the Loan Documents) supporting the Obligations hereunder in which such Participant is participating, (D) postpone the payment of, or reduce the amount of, the interest or fees payable to such Participant through such Lender, (E) change the amount or due dates of scheduled principal repayments or prepayments or premiums, or (F) subordinate Agent's Liens to the Liens of any other creditor of Borrower, and (v) all amounts payable by Borrower hereunder shall be determined as if such Lender had not sold such participation, except that, if amounts outstanding under this Agreement are due and unpaid, or shall have been declared or shall have become due and payable upon the occurrence of an Event of Default, each Participant shall be deemed to have the right of set-off in respect of its participating interest in amounts owing under this Agreement to the same extent as if the amount of its participating interest were owing directly to it as a Lender under this Agreement. The rights of any Participant only shall be derivative through the Originating Lender with whom such Participant participates and no Participant shall have any rights under this Agreement or the other Loan Documents or any direct rights as to the other Lenders, Agent, Borrower, the Collections, the Collateral, or otherwise in respect of the Obligations. No Participant shall have the right to participate directly in the making of decisions by the Lenders among themselves. The provisions of this SECTION 14.4(E) are solely for the benefit of the Lender Group, and Borrower shall not have any rights as a third party beneficiary of such provisions.

(f) In connection with any such assignment or participation or proposed assignment or participation, a Lender may disclose all documents and information which it now or hereafter may have relating to Borrower or Borrower's business.

(g) Any other provision in this Agreement notwithstanding, any Lender may at any time create a security interest in, or pledge, all or any portion of its rights under and interest in this Agreement in favor of any Federal Reserve Bank in accordance with Regulation A of the Federal Reserve Bank or U.S. Treasury Regulation 31 CFR ss.203.14, and such Federal Reserve Bank may enforce such pledge or security interest in any manner permitted under applicable law.

14.2 SUCCESSORS. This Agreement shall bind and inure to the benefit of the respective successors and assigns of each of the parties; PROVIDED, HOWEVER, that Borrower may not assign this Agreement or any rights or duties hereunder without the Lenders' prior written consent and any prohibited assignment shall be absolutely void AB INITIO. No consent to assignment by the Lenders shall release Borrower from its Obligations. A Lender may assign this Agreement and

the other Loan Documents and its rights and duties hereunder and thereunder pursuant to SECTION 14.1 hereof and, except as expressly required pursuant to SECTION 14.1 hereof, no consent or approval by Borrower is required in connection with any such assignment.

15. AMENDMENTS; WAIVERS.

15.1 AMENDMENTS AND WAIVERS. No amendment or waiver of any provision of this Agreement or any other Loan Document, and no consent with respect to any departure by Borrower therefrom, shall be effective unless the same shall be in writing and signed by the Required Lenders (or by Agent at the written request of the Required Lenders) and Borrower and then any such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given; PROVIDED, HOWEVER, that no such waiver, amendment, or consent shall, unless in writing and signed by all of the Lenders affected thereby and Borrower, do any of the following:

(a) increase or extend any Commitment of any Lender,

(b) postpone or delay any date fixed by this Agreement or any other Loan Document for any payment of principal, interest, fees, or other amounts due hereunder or under any other Loan Document,

(c) reduce the principal of, or the rate of interest on, any loan or other extension of credit hereunder, or reduce any fees or other amounts payable hereunder or under any other Loan Document,

(d) change the percentage of the Commitments that is required to take any action hereunder,

(e) amend, modify or waive this Section or any provision of the Agreement providing for consent or other action by all Lenders,

(f) release Collateral other than as permitted by SECTION

16.12,

(g) change the definition of "Required Lenders" or "Pro Rata

Share",

(h) contractually subordinate any of Agent's Liens,

(i) release Borrower from any obligation for the payment of

money, or

(j) change, modify or waive the definition of Borrowing Base or the definitions of Eligible Accounts, Eligible Inventory, Eligible Real Property Collateral, Eligible Equipment, Maximum Revolver Amount, Net Liquidation Percentage, Term Loan Amount, or change, modify or waive SECTION 2.1(B), or SECTION 2.4(B), or

(k) amend, modify or waive any of the provisions of SECTION

16,



and, PROVIDED FURTHER, HOWEVER, that no amendment, waiver or consent shall, unless in writing and signed by Agent, Issuing Lender, or Swing Lender, as applicable, affect the rights or duties of Agent, Issuing Lender, or Swing Lender, as applicable, under this Agreement or any other Loan Document. The foregoing notwithstanding, any amendment, modification, waiver, consent, termination, or release of, or with respect to, any provision of this Agreement or any other Loan Document that relates only to the relationship of the Lender Group among themselves, and that does not affect the rights or obligations of Borrower, shall not require consent by or the agreement of Borrower.

#### 15.2 REPLACEMENT OF HOLDOUT LENDER.

(a) If any action to be taken by the Lender Group or Agent hereunder requires the unanimous consent, authorization, or agreement of all Lenders, and a Lender ("Holdout Lender") fails to give its consent, authorization, or agreement, then Agent, upon at least 5 Business Days prior irrevocable notice to the Holdout Lender, may permanently replace the Holdout Lender with one or more substitute Lenders (each, a "Replacement Lender"), and the Holdout Lender shall have no right to refuse to be replaced hereunder. Such notice to replace the Holdout Lender shall specify an effective date for such replacement, which date shall not be later than 15 Business Days after the date such notice is given.

(b) Prior to the effective date of such replacement, the Holdout Lender and each Replacement Lender shall execute and deliver an Assignment and Acceptance Agreement, subject only to the Holdout Lender being repaid its share of the outstanding Obligations (including an assumption of its Pro Rata Share of the Risk Participation Liability) without any premium or penalty of any kind whatsoever. If the Holdout Lender shall refuse or fail to execute and deliver any such Assignment and Acceptance Agreement prior to the effective date of such replacement, the Holdout Lender shall be deemed to have executed and delivered such Assignment and Acceptance Agreement. The replacement of any Holdout Lender shall be made in accordance with the terms of SECTION 14.1. Until such time as the Replacement Lenders shall have acquired all of the Obligations, the Commitments, and the other rights and obligations of the Holdout Lender hereunder and under the other Loan Documents, the Holdout Lender shall remain obligated to make the Holdout Lender's Pro Rata Share of Advances and to purchase a participation in each Letter of Credit, in an amount equal to its Pro Rata Share of the Risk Participation Liability of such Letter of Credit.

15.3 NO WAIVERS; CUMULATIVE REMEDIES. No failure by Agent or any Lender to exercise any right, remedy, or option under this Agreement or any other Loan Document, or delay by Agent or any Lender in exercising the same, will operate as a waiver thereof. No waiver by Agent or any Lender will be effective unless it is in writing, and then only to the extent specifically stated. No waiver by Agent or any Lender on any occasion shall affect or diminish Agent's and each Lender's rights thereafter to require strict performance by Borrower of any provision of this Agreement. Agent's and each Lender's rights under this Agreement and the other Loan Documents will be cumulative and not exclusive of any other right or remedy that Agent or any Lender may have.

16. AGENT; THE LENDER GROUP.

16.1 APPOINTMENT AND AUTHORIZATION OF AGENT. Each Lender hereby designates and appoints Foothill as its representative under this Agreement and the other Loan Documents and each Lender hereby irrevocably authorizes Agent to take such action on its behalf under the provisions of this Agreement and each other Loan Document and to exercise such powers and perform such duties as are expressly delegated to Agent by the terms of this Agreement or any other Loan Document, together with such powers as are reasonably incidental thereto. Agent agrees to act as such on the express conditions contained in this SECTION 16. The provisions of this SECTION 16 are solely for the benefit of Agent, and the Lenders, and Borrower shall have no rights as a third party beneficiary of any of the provisions contained herein. Any provision to the contrary contained elsewhere in this Agreement or in any other Loan Document notwithstanding, Agent shall not have any duties or responsibilities, except those expressly set forth herein, nor shall Agent have or be deemed to have any fiduciary relationship with any Lender, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement or any other Loan Document or otherwise exist against Agent; it being expressly understood and agreed that the use of the word "Agent" is for convenience only, that Foothill is merely the representative of the Lenders, and only has the contractual duties set forth herein. Except as expressly otherwise provided in this Agreement, Agent shall have and may use its sole discretion with respect to exercising or refraining from exercising any discretionary rights or taking or refraining from taking any actions that Agent expressly is entitled to take or assert under or pursuant to this Agreement and the other Loan Documents. Without limiting the generality of the foregoing, or of any other provision of the Loan Documents that provides rights or powers to Agent, Lenders agree that Agent shall have the right to exercise the following powers as long as this Agreement remains in effect: (a) maintain, in accordance with its customary business practices, ledgers and records reflecting the status of the Obligations, the Collateral, the Collections, and related matters, (b) execute or file any and all financing or similar statements or notices, amendments, renewals, supplements, documents, instruments, proofs of claim, notices and other written agreements with respect to the Loan Documents, (c) make Advances, for itself or on behalf of Lenders as provided in the Loan Documents, (d) exclusively receive, apply, and distribute the Collections as provided in the Loan Documents, (e) open and maintain such bank accounts and cash management arrangements as Agent deems necessary and appropriate in accordance with the Loan Documents for the foregoing purposes with respect to the Collateral and the Collections, (f) perform, exercise, and enforce any and all other rights and remedies of the Lender Group with respect to Borrower, the Obligations, the Collateral, the Collections, or otherwise related to any of same as provided in the Loan Documents, and (g) incur and pay such Lender Group Expenses as Agent may deem necessary or appropriate for the performance and fulfillment of its functions and powers pursuant to the Loan Documents.

16.2 DELEGATION OF DUTIES. Agent may execute any of its duties under this Agreement or any other Loan Document by or through agents, employees or attorneys-in-fact and shall be entitled to advice of counsel concerning all matters pertaining to such duties. Agent shall not be responsible for the negligence or misconduct of any agent or attorney-in-fact that it selects as long as such selection was made without gross negligence or willful misconduct.

16.3 LIABILITY OF AGENT. None of the Agent-Related Persons shall (i) be liable for any action taken or omitted to be taken by any of them under or in connection with this Agreement or any other Loan Document or the transactions contemplated hereby (except for its own gross negligence or willful misconduct), or (ii) be responsible in any manner to any of the Lenders for any recital, statement, representation or warranty made by Borrower or any Subsidiary or Affiliate of Borrower, or any officer or director thereof, contained in this Agreement or in any other Loan Document, or in any certificate, report, statement or other document referred to or provided for in, or received by Agent under or in connection with, this Agreement or any other Loan Document, or the validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement or any other Loan Document, or for any failure of Borrower or any other party to any Loan Document to perform its obligations hereunder or thereunder. No Agent-Related Person shall be under any obligation to any Lender to ascertain or to inquire as to the observance or performance of any of the agreements contained in, or conditions of, this Agreement or any other Loan Document, or to inspect the Books or properties of Borrower or the books or records or properties of any of Borrower's Subsidiaries or Affiliates.

16.4 RELIANCE BY AGENT. Agent shall be entitled to rely, and shall be fully protected in relying, upon any writing, resolution, notice, consent, certificate, affidavit, letter, telegram, facsimile, telex or telephone message, statement or other document or conversation believed by it to be genuine and correct and to have been signed, sent, or made by the proper Person or Persons, and upon advice and statements of legal counsel (including counsel to Borrower or counsel to any Lender), independent accountants and other experts selected by Agent. Agent shall be fully justified in failing or refusing to take any action under this Agreement or any other Loan Document unless Agent shall first receive such advice or concurrence of the Lenders as it deems appropriate and until such instructions are received, Agent shall act, or refrain from acting, as it deems advisable. If Agent so requests, it shall first be indemnified to its reasonable satisfaction by Lenders against any and all liability and expense that may be incurred by it by reason of taking or continuing to take any such action. Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement or any other Loan Document in accordance with a request or consent of the Lenders and such request and any action taken or failure to act pursuant thereto shall be binding upon all of the Lenders.

16.5 NOTICE OF DEFAULT OR EVENT OF DEFAULT. Agent shall not be deemed to have knowledge or notice of the occurrence of any Default or Event of Default, except with respect to defaults in the payment of principal, interest, fees, and expenses required to be paid to Agent for the account of the Lenders, except with respect to Defaults and Events of Default of which Agent has actual knowledge, unless Agent shall have received written notice from a Lender or Borrower referring to this Agreement, describing such Default or Event of Default, and stating that such notice is a "notice of default." Agent promptly will notify the Lenders of its receipt of any such notice or of any Event of Default of which Agent has actual knowledge. If any Lender obtains actual knowledge of any Event of Default, such Lender promptly shall notify the other Lenders and Agent of such Event of Default. Each Lender shall be solely responsible for giving any notices to its Participants, if any. Subject to SECTION 16.4, Agent shall take such action with respect to such Default or Event of Default as may be requested by the Required Lenders in accordance with SECTION 9; PROVIDED, HOWEVER, that unless and until Agent has received any such

request, Agent may (but shall not be obligated to) take such action, or refrain from taking such action, with respect to such Default or Event of Default as it shall deem advisable.

16.6 CREDIT DECISION. Each Lender acknowledges that none of the Agent-Related Persons has made any representation or warranty to it, and that no act by Agent hereinafter taken, including any review of the affairs of Borrower and its Subsidiaries or Affiliates, shall be deemed to constitute any representation or warranty by any Agent-Related Person to any Lender. Each Lender represents to Agent that it has, independently and without reliance upon any Agent-Related Person and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into the business, prospects, operations, property, financial and other condition and creditworthiness of Borrower and any other Person (other than the Lender Group) party to a Loan Document, and all applicable bank regulatory laws relating to the transactions contemplated hereby, and made its own decision to enter into this Agreement and to extend credit to Borrower. Each Lender also represents that it will, independently and without reliance upon any Agent-Related Person and based on such documents and information as it shall deem appropriate at the time, continue to make its own credit analysis, appraisals and decisions in taking or not taking action under this Agreement and the other Loan Documents, and to make such investigations as it deems necessary to inform itself as to the business, prospects, operations, property, financial and other condition and creditworthiness of Borrower and any other Person (other than the Lender Group) party to a Loan Document. Except for notices, reports, and other documents expressly herein required to be furnished to the Lenders by Agent, Agent shall not have any duty or responsibility to provide any Lender with any credit or other information concerning the business, prospects, operations, property, financial and other condition or creditworthiness of Borrower and any other Person party to a Loan Document that may come into the possession of any of the Agent-Related Persons.

16.7 COSTS AND EXPENSES; INDEMNIFICATION. Agent may incur and pay Lender Group Expenses to the extent Agent reasonably deems necessary or appropriate for the performance and fulfillment of its functions, powers, and obligations pursuant to the Loan Documents, including court costs, reasonable attorneys fees and expenses, costs of collection by outside collection agencies and auctioneer fees and costs of security guards or insurance premiums paid to maintain the Collateral, whether or not Borrower is obligated to reimburse Agent or Lenders for such expenses pursuant to the Loan Agreement or otherwise. Agent is authorized and directed to deduct and retain sufficient amounts from Collections received by Agent to reimburse Agent for such out-of-pocket costs and expenses prior to the distribution of any amounts to Lenders. In the event Agent is not reimbursed for such costs and expenses from Collections received by Agent, each Lender hereby agrees that it is and shall be obligated to pay to or reimburse Agent for the amount of such Lender's Pro Rata Share thereof. Whether or not the transactions contemplated hereby are consummated, the Lenders shall indemnify upon demand the Agent-Related Persons (to the extent not reimbursed by or on behalf of Borrower and without limiting the obligation of Borrower to do so), according to their Pro Rata Shares, from and against any and all Indemnified Liabilities; PROVIDED, HOWEVER, that no Lender shall be liable for the payment to any Agent-Related Person of any portion of such Indemnified Liabilities resulting solely from such Person's gross negligence or willful

misconduct nor shall any Lender be liable for the obligations of any Defaulting Lender in failing to make an Advance or other extension of credit hereunder. Without limitation of the foregoing, each Lender shall reimburse Agent upon demand for such Lender's ratable share of any costs or out-of-pocket expenses (including attorneys fees and expenses) incurred by Agent in connection with the preparation, execution, delivery, administration, modification, amendment, or enforcement (whether through negotiations, legal proceedings or otherwise) of, or legal advice in respect of rights or responsibilities under, this Agreement, any other Loan Document, or any document contemplated by or referred to herein, to the extent that Agent is not reimbursed for such expenses by or on behalf of Borrower. The undertaking in this Section shall survive the payment of all Obligations hereunder and the resignation or replacement of Agent.

16.8 AGENT IN INDIVIDUAL CAPACITY. Foothill and its Affiliates may make loans to, issue letters of credit for the account of, accept deposits from, acquire equity interests in, and generally engage in any kind of banking, lending, trust, financial advisory, underwriting, or other business with Borrower and its Subsidiaries and Affiliates and any other Person (other than the Lender Group) party to any Loan Documents as though Foothill were not Agent hereunder, and, in each case, without notice to or consent of the other members of the Lender Group. The other members of the Lender Group acknowledge that, pursuant to such activities, Foothill or its Affiliates may receive information regarding Borrower or its Affiliates and any other Person (other than the Lender Group) party to any Loan Documents that is subject to confidentiality obligations in favor of Borrower or such other Person and that prohibit the disclosure of such information to the Lenders, and the Lenders acknowledge that, in such circumstances (and in the absence of a waiver of such confidentiality obligations, which waiver Agent will use its reasonable best efforts to obtain), Agent shall not be under any obligation to provide such information to them. The terms "Lender" and "Lenders" include Foothill in its individual capacity.

16.9 SUCCESSOR AGENT. Agent may resign as Agent upon 45 days notice to the Lenders. If Agent resigns under this Agreement, the Required Lenders shall appoint a successor Agent for the Lenders. If no successor Agent is appointed prior to the effective date of the resignation of Agent, Agent may appoint, after consulting with the Lenders, a successor Agent, which successor Agent shall be a then current Lender or an Eligible Transferee. If Agent has materially breached or failed to perform any material provision of this Agreement or of applicable law, the Required Lenders may agree in writing to remove and replace Agent with a successor Agent from among the Lenders. In any such event, upon the acceptance of its appointment as successor Agent hereunder, such successor Agent shall succeed to all the rights, powers, and duties of the retiring Agent and the term "Agent" shall mean such successor Agent and the retiring Agent's appointment, powers, and duties as Agent shall be terminated. After any retiring Agent's resignation hereunder as Agent, the provisions of this SECTION 16 shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Agent under this Agreement. If no successor Agent has accepted appointment as Agent by the date which is 45 days following a retiring Agent's notice of resignation, the retiring Agent's resignation shall nevertheless thereupon become effective and the Lenders shall perform all of the duties of Agent hereunder until such time, if any, as the Lenders appoint a successor Agent as provided for above.

16.10 LENDER IN INDIVIDUAL CAPACITY. Any Lender and its respective Affiliates may make loans to, issue letters of credit for the account of, accept deposits from, acquire equity interests in and generally engage in any kind of banking, trust, financial advisory, underwriting or other business with Borrower and its Subsidiaries and Affiliates and any other Person (other than the Lender

Group) party to any Loan Documents as though such Lender were not a Lender hereunder without notice to or consent of the other members of the Lender Group. The other members of the Lender Group acknowledge that, pursuant to such activities, such Lender and its respective Affiliates may receive information regarding Borrower or its Affiliates and any other Person (other than the Lender Group) party to any Loan Documents that is subject to confidentiality obligations in favor of Borrower or such other Person and that prohibit the disclosure of such information to the Lenders, and the Lenders acknowledge that, in such circumstances (and in the absence of a waiver of such confidentiality obligations, which waiver such Lender will use its reasonable best efforts to obtain), such Lender not shall be under any obligation to provide such information to them. With respect to the Swing Loans and Agent Advances, Swing Lender shall have the same rights and powers under this Agreement as any other Lender and may exercise the same as though it were not the sub-agent of Agent.

#### 16.11 WITHHOLDING TAXES.

(a) If any Lender is a "foreign corporation, partnership or trust" within the meaning of the IRC and such Lender claims exemption from, or a reduction of, U.S. withholding tax under Sections 1441 or 1442 of the IRC, such Lender agrees with and in favor of Agent and Borrower, to deliver to Agent and Borrower:

(i) if such Lender claims an exemption from withholding tax pursuant to its portfolio interest exception, (a) a statement of the Lender, signed under penalty of perjury, that it is not a (I) a "bank" as described in Section 881(c)(3)(A) of the IRC, (II) a 10% shareholder (within the meaning of Section 881(c)(3)(B) of the IRC), or (III) a controlled foreign corporation described in Section 881(c)(3)(C) of the IRC, and (B) a properly completed IRS Form W-8BEN, before the first payment of any interest under this Agreement and at any other time reasonably requested by Agent or Borrower;

(ii) if such Lender claims an exemption from, or a reduction of, withholding tax under a United States tax treaty, properly completed IRS Form W-8BEN before the first payment of any interest under this Agreement and at any other time reasonably requested by Agent or Borrower;

(iii) if such Lender claims that interest paid under this Agreement is exempt from United States withholding tax because it is effectively connected with a United States trade or business of such Lender, two properly completed and executed copies of IRS Form W-8ECI before the first payment of any interest is due under this Agreement and at any other time reasonably requested by Agent or Borrower;

(iv) such other form or forms as may be required under the IRC or other laws of the United States as a condition to exemption from, or reduction of, United States withholding tax.

Such Lender agrees promptly to notify Agent and Borrower of any change in circumstances which would modify or render invalid any claimed exemption or reduction.

(b) If any Lender claims exemption from, or reduction of, withholding tax under a United States tax treaty by providing IRS Form W-8BEN and such Lender sells, assigns, grants a participation in, or otherwise transfers all or part of the Obligations of Borrower to such Lender, such Lender agrees to notify Agent of the percentage amount in which it is no longer the beneficial owner of Obligations of Borrower to such Lender. To the extent of such percentage amount, Agent will treat such Lender's IRS Form W-8BEN as no longer valid.

(c) If any Lender is entitled to a reduction in the applicable withholding tax, Agent may withhold from any interest payment to such Lender an amount equivalent to the applicable withholding tax after taking into account such reduction. If the forms or other documentation required by subsection (a) of this Section are not delivered to Agent, then Agent may withhold from any interest payment to such Lender not providing such forms or other documentation an amount equivalent to the applicable withholding tax.

(d) If the IRS or any other Governmental Authority of the United States or other jurisdiction asserts a claim that Agent did not properly withhold tax from amounts paid to or for the account of any Lender (because the appropriate form was not delivered, was not properly executed, or because such Lender failed to notify Agent of a change in circumstances which rendered the exemption from, or reduction of, withholding tax ineffective, or for any other reason) such Lender shall indemnify and hold Agent harmless for all amounts paid, directly or indirectly, by Agent as tax or otherwise, including penalties and interest, and including any taxes imposed by any jurisdiction on the amounts payable to Agent under this Section, together with all costs and expenses (including attorneys fees and expenses). The obligation of the Lenders under this subsection shall survive the payment of all Obligations and the resignation or replacement of Agent.

(e) All payments made by Borrower hereunder or under any note will be made without setoff, counterclaim, or other defense, except as required by applicable law other than for Taxes (as defined below). All such payments will be made free and clear of, and without deduction or withholding for, any present or future taxes, levies, imposts, duties, fees, assessments or other charges of whatever nature now or hereafter imposed by any jurisdiction (other than the United States) or by any political subdivision or taxing authority thereof or therein (other than of the United States) with respect to such payments (but excluding, any tax imposed by any jurisdiction or by any political subdivision or taxing authority thereof or therein (i) measured by or based on the net income or net profits of a Lender, or (ii) to the extent that such tax results from a change in the circumstances of the Lender, including a change in the residence, place of organization, or principal place of business of the Lender, or a change in the branch or lending office of the Lender participating in the transactions set forth herein) and all interest, penalties or similar liabilities with respect thereto (all such non-excluded taxes, levies, imposts, duties, fees, assessments or other charges being referred to collectively as "Taxes"). If any Taxes are so levied or imposed, Borrower agrees to pay the full amount of such Taxes, and such additional amounts as may be necessary so that every payment of all amounts due under this Agreement or under any note, including any amount paid pursuant to this SECTION 16.11(E) after withholding or deduction for or on account of any Taxes, will not be less than the amount provided for herein; PROVIDED, HOWEVER, that Borrower shall not be required to increase any such amounts payable to Agent or any Lender (i) that is not

organized under the laws of the United States, if such Person fails to comply with the other requirements of this SECTION 16.11, or (ii) if the increase in such amount payable results from Agent's or such Lender's own willful misconduct or gross negligence. Borrower will furnish to Agent as promptly as possible after the date the payment of any Taxes is due pursuant to applicable law certified copies of tax receipts evidencing such payment by Borrower.

#### 16.12 COLLATERAL MATTERS.

(a) The Lenders hereby irrevocably authorize Agent, at its option and in its sole discretion, to release any Lien on any Collateral (i) upon the termination of the Commitments and payment and satisfaction in full by Borrower of all Obligations, (ii) constituting property being sold or disposed of if a release is required or desirable in connection therewith and if Borrower certifies to Agent that the sale or disposition is permitted under SECTION 7.4 of this Agreement or the other Loan Documents (and Agent may rely conclusively on any such certificate, without further inquiry), (iii) constituting property in which Borrower owned no interest at the time the security interest was granted or at any time thereafter, or (iv) constituting property leased to Borrower under a lease that has expired or is terminated in a transaction permitted under this Agreement. Except as provided above, Agent will not execute and deliver a release of any Lien on any Collateral without the prior written authorization of (y) if the release is of all or any material portion of the Collateral, all of the Lenders, or (z) otherwise, the Required Lenders. Upon request by Agent or Borrower at any time, the Lenders will confirm in writing Agent's authority to release any such Liens on particular types or items of Collateral pursuant to this SECTION 16.12; PROVIDED, HOWEVER, that (1) Agent shall not be required to execute any document necessary to evidence such release on terms that, in Agent's opinion, would expose Agent to liability or create any obligation or entail any consequence other than the release of such Lien without recourse, representation, or warranty, and (2) such release shall not in any manner discharge, affect, or impair the Obligations or any Liens (other than those expressly being released) upon (or obligations of Borrower in respect of) all interests retained by Borrower, including, the proceeds of any sale, all of which shall continue to constitute part of the Collateral.

(b) Agent shall have no obligation whatsoever to any of the Lenders to assure that the Collateral exists or is owned by Borrower or is cared for, protected, or insured or has been encumbered, or that Agent's Liens have been properly or sufficiently or lawfully created, perfected, protected, or enforced or are entitled to any particular priority, or to exercise at all or in any particular manner or under any duty of care, disclosure or fidelity, or to continue exercising, any of the rights, authorities and powers granted or available to Agent pursuant to any of the Loan Documents, it being understood and agreed that in respect of the Collateral, or any act, omission, or event related thereto, subject to the terms and conditions contained herein, Agent may act in any manner it may deem appropriate, in its sole discretion given Agent's own interest in the Collateral in its capacity as one of the Lenders and that Agent shall have no other duty or liability whatsoever to any Lender as to any of the foregoing, except as otherwise provided herein.

#### 16.13 RESTRICTIONS ON ACTIONS BY LENDERS; SHARING OF PAYMENTS.

(a) Each of the Lenders agrees that it shall not, without the express consent of Agent, and that it shall, to the extent it is lawfully entitled to do so, upon the request of Agent, set off against the Obligations, any amounts owing by such Lender to Borrower or any deposit accounts of Borrower now or hereafter maintained with such Lender. Each of the Lenders further agrees



that it shall not, unless specifically requested to do so by Agent, take or cause to be taken any action, including, the commencement of any legal or equitable proceedings, to foreclose any Lien on, or otherwise enforce any security interest in, any of the Collateral the purpose of which is, or could be, to give such Lender any preference or priority against the other Lenders with respect to the Collateral.

(b) If, at any time or times any Lender shall receive (i) by payment, foreclosure, setoff, or otherwise, any proceeds of Collateral or any payments with respect to the Obligations arising under, or relating to, this Agreement or the other Loan Documents, except for any such proceeds or payments received by such Lender from Agent pursuant to the terms of this Agreement, or (ii) payments from Agent in excess of such Lender's Pro Rata Share portion of all such distributions by Agent, such Lender promptly shall (1) turn the same over to Agent, in kind, and with such endorsements as may be required to negotiate the same to Agent, or in immediately available funds, as applicable, for the account of all of the Lenders and for application to the Obligations in accordance with the applicable provisions of this Agreement, or (2) purchase, without recourse or warranty, an undivided interest and participation in the Obligations owed to the other Lenders so that such excess payment received shall be applied ratably as among the Lenders in accordance with their Pro Rata Shares; provided, however, that if all or part of such excess payment received by the purchasing party is thereafter recovered from it, those purchases of participations shall be rescinded in whole or in part, as applicable, and the applicable portion of the purchase price paid therefor shall be returned to such purchasing party, but without interest except to the extent that such purchasing party is required to pay interest in connection with the recovery of the excess payment.

16.14 AGENCY FOR PERFECTION. Agent hereby appoints each other Lender as its agent (and each Lender hereby accepts such appointment) for the purpose of perfecting Agent's Liens in assets which, in accordance with Article 9 of the Code can be perfected only by possession. Should any Lender obtain possession of any such Collateral, such Lender shall notify Agent thereof, and, promptly upon Agent's request therefor shall deliver such Collateral to Agent or in accordance with Agent's instructions.

16.15 PAYMENTS BY AGENT TO THE LENDERS. All payments to be made by Agent to the Lenders shall be made by bank wire transfer or internal transfer of immediately available funds pursuant to such wire transfer instructions as each party may designate for itself by written notice to Agent. Concurrently with each such payment, Agent shall identify whether such payment (or any portion thereof) represents principal, premium, or interest of the Obligations.

16.16 CONCERNING THE COLLATERAL AND RELATED LOAN DOCUMENTS. Each member of the Lender Group authorizes and directs Agent to enter into this Agreement and the other Loan Documents relating to the Collateral, for the benefit of the Lender Group. Each member of the Lender Group agrees that any action taken by Agent in accordance with the terms of this Agreement or the other Loan Documents relating to the Collateral and the exercise by Agent of its powers set forth therein or herein, together with such other powers that are reasonably incidental thereto, shall be binding upon all of the Lenders.

16.17 FIELD AUDITS AND EXAMINATION REPORTS; CONFIDENTIALITY; DISCLAIMERS BY LENDERS; OTHER REPORTS AND INFORMATION. By becoming a party to this Agreement, each Lender:

(a) is deemed to have requested that Agent furnish such Lender, promptly after it becomes available, a copy of each field audit or examination report (each a "Report" and collectively, "Reports") prepared by or at the request of Agent, and Agent shall so furnish each Lender with such Reports,

(b) expressly agrees and acknowledges that Agent does not (i) make any representation or warranty as to the accuracy of any Report, and (ii) shall not be liable for any information contained in any Report,

(c) expressly agrees and acknowledges that the Reports are not comprehensive audits or examinations, that Agent or other party performing any audit or examination will inspect only specific information regarding Borrower and will rely significantly upon the Books, as well as on representations of Borrower's personnel,

(d) agrees to keep all Reports and other material, non-public information regarding Borrower and its Subsidiaries and their operations, assets, and existing and contemplated business plans in a confidential manner; it being understood and agreed by Borrower that in any event such Lender may make disclosures (a) to counsel for and other advisors, accountants, and auditors to such Lender, (b) reasonably required by any bona fide potential or actual Assignee or Participant in connection with any contemplated or actual assignment or transfer by such Lender of an interest herein or any participation interest in such Lender's rights hereunder, (c) of information that has become public by disclosures made by Persons other than such Lender, its Affiliates, assignees, transferees, or Participants, or (d) as required or requested by any court, governmental or administrative agency, pursuant to any subpoena or other legal process, or by any law, statute, regulation, or court order; provided, however, that, unless prohibited by applicable law, statute, regulation, or court order, such Lender shall notify Borrower of any request by any court, governmental or administrative agency, or pursuant to any subpoena or other legal process for disclosure of any such non-public material information concurrent with, or where practicable, prior to the disclosure thereof, and

(e) without limiting the generality of any other indemnification provision contained in this Agreement, agrees: (i) to hold Agent and any other Lender preparing a Report harmless from any action the indemnifying Lender may take or conclusion the indemnifying Lender may reach or draw from any Report in connection with any loans or other credit accommodations that the indemnifying Lender has made or may make to Borrower, or the indemnifying Lender's participation in, or the indemnifying Lender's purchase of, a loan or loans of Borrower, and (ii) to pay and protect, and indemnify, defend and hold Agent, and any such other Lender preparing a Report harmless from and against, the claims, actions, proceedings, damages, costs, expenses, and other amounts (including, attorneys fees and costs) incurred by Agent and any such other Lender preparing a Report as the direct or indirect result of any third parties who might obtain all or part of any Report through the indemnifying Lender.

In addition to the foregoing: (x) any Lender may from time to time request of Agent in writing that Agent provide to such Lender a copy of any report or document provided by Borrower to Agent that has not been contemporaneously provided by Borrower to such Lender, and, upon receipt of such request, Agent promptly shall provide a copy of same to such Lender, (y) to the extent that Agent is entitled, under any provision of the Loan Documents, to request additional reports or information from Borrower, any Lender may, from time to time, reasonably request Agent to exercise such right as specified in such Lender's notice to Agent, whereupon Agent promptly shall request of Borrower the additional reports or information reasonably specified by such Lender, and, upon receipt thereof from Borrower, Agent promptly shall provide a copy of same to such Lender, and (z) any time that Agent renders to Borrower a statement regarding the Loan Account, Agent shall send a copy of such statement to each Lender.

16.18 SEVERAL OBLIGATIONS; NO LIABILITY. Notwithstanding that certain of the Loan Documents now or hereafter may have been or will be executed only by or in favor of Agent in its capacity as such, and not by or in favor of the Lenders, any and all obligations on the part of Agent (if any) to make any credit available hereunder shall constitute the several (and not joint) obligations of the respective Lenders on a ratable basis, according to their respective Commitments, to make an amount of such credit not to exceed, in principal amount, at any one time outstanding, the amount of their respective Commitments. Nothing contained herein shall confer upon any Lender any interest in, or subject any Lender to any liability for, or in respect of, the business, assets, profits, losses, or liabilities of any other Lender. Each Lender shall be solely responsible for notifying its Participants of any matters relating to the Loan Documents to the extent any such notice may be required, and no Lender shall have any obligation, duty, or liability to any Participant of any other Lender. Except as provided in SECTION 16.7, no member of the Lender Group shall have any liability for the acts or any other member of the Lender Group. No Lender shall be responsible to Borrower or any other Person for any failure by any other Lender to fulfill its obligations to make credit available hereunder, nor to advance for it or on its behalf in connection with its Commitment, nor to take any other action on its behalf hereunder or in connection with the financing contemplated herein.

#### 17. GENERAL PROVISIONS.

17.1 EFFECTIVENESS. This Agreement shall be binding and deemed effective when executed by Borrower, Agent, and each Lender whose signature is provided for on the signature pages hereof.

17.2 SECTION HEADINGS. Headings and numbers have been set forth herein for convenience only. Unless the contrary is compelled by the context, everything contained in each Section applies equally to this entire Agreement.

17.3 INTERPRETATION. Neither this Agreement nor any uncertainty or ambiguity herein shall be construed against the Lender Group or Borrower, whether under any rule of construction or otherwise. On the contrary, this Agreement has been reviewed by all parties and shall be construed and interpreted according to the ordinary meaning of the words used so as to accomplish fairly the purposes and intentions of all parties hereto.

17.4 SEVERABILITY OF PROVISIONS. Each provision of this Agreement shall be severable from every other provision of this Agreement for the purpose of determining the legal enforceability of any specific provision.

17.5 AMENDMENTS IN WRITING. This Agreement only can be amended by a writing signed by Agent (on behalf of the requisite Lenders) and Borrower.

17.6 COUNTERPARTS; TELEFACSIMILE EXECUTION. This Agreement may be executed in any number of counterparts and by different parties on separate counterparts, each of which, when executed and delivered, shall be deemed to be an original, and all of which, when taken together, shall constitute but one and the same Agreement. Delivery of an executed counterpart of this Agreement by telefacsimile shall be equally as effective as delivery of an original executed counterpart of this Agreement. Any party delivering an executed counterpart of this Agreement by telefacsimile also shall deliver an original executed counterpart of this Agreement but the failure to deliver an original executed counterpart shall not affect the validity, enforceability, and binding effect of this Agreement. The foregoing shall apply to each other Loan Document mutatis mutandis.

17.7 REVIVAL AND REINSTATEMENT OF OBLIGATIONS. If the incurrence or payment of the Obligations by Borrower or any Guarantor or the transfer to the Lender Group of any property should for any reason subsequently be declared to be void or voidable under any state or federal law relating to creditors' rights, including provisions of the Bankruptcy Code relating to fraudulent conveyances, preferences, or other voidable or recoverable payments of money or transfers of property (collectively, a "Voidable Transfer"), and if the Lender Group is required to repay or restore, in whole or in part, any such Voidable Transfer, or elects to do so upon the reasonable advice of its counsel, then, as to any such Voidable Transfer, or the amount thereof that the Lender Group is required or elects to repay or restore, and as to all reasonable costs, expenses, and attorneys fees of the Lender Group related thereto, the liability of Borrower or such Guarantor automatically shall be revived, reinstated, and restored and shall exist as though such Voidable Transfer had never been made.

17.8 INTEGRATION. This Agreement, together with the other Loan Documents, reflects the entire understanding of the parties with respect to the transactions contemplated hereby and shall not be contradicted or qualified by any other agreement, oral or written, before the date hereof.

[Signature page to follow.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and delivered as of the date first above written.

NABI BIOPHARMACEUTICALS,  
a Delaware corporation

By: /s/ MARK L. SMITH  
-----  
Name: Mark L. Smith  
Title: Chief Financial Officer

WELLS FARGO FOOTHILL, INC.,  
a California corporation, as Agent and as a Lender

By: /s/ RONALD J. BANKS  
-----  
Name: Ronald J. Banks  
Title: Vice President

[\*\*\*] A CONFIDENTIAL PORTION OF THE MATERIAL HAS BEEN OMITTED AND FILED SEPARATELY WITH THE SECURITIES AND EXCHANGE COMMISSION.

ASSET PURCHASE AGREEMENT

BY AND BETWEEN

BRAINTREE LABORATORIES, INC.

and

NABI BIOPHARMACEUTICALS

JUNE 23, 2003

## ASSET PURCHASE AGREEMENT

This ASSET PURCHASE AGREEMENT (the "Agreement") is entered into as of June 23, 2003 by and between Braintree Laboratories, Inc., a Massachusetts corporation (the "Seller"), and Nabi Biopharmaceuticals, a Delaware corporation (the "Buyer"). The Seller and the Buyer are referred to collectively herein as the "Parties."

### INTRODUCTION

The Seller is engaged, among other matters, in the business of manufacturing, marketing and selling a line of phosphate binder calcium acetate products known as the Phos-Lo product line (such business being referred to as the "Product Line Operations "); and

The Buyer desires to purchase from the Seller, and the Seller desires to sell to the Buyer, the Seller's right, title and interest in and/or the right to use certain assets and properties of the Seller relating to the Product Line Operations, subject to the assumption by the Buyer of specified related liabilities, upon the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements contained in this Agreement and other good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

### ARTICLE I- DEFINITIONS

1.1 DEFINITIONS. Whenever used in this Agreement, the terms defined below shall have the indicated meaning:

"ACQUIRED ASSETS" shall have the meaning set forth in Section 2.1(a).

"ACQUISITION PROPOSAL" shall have the meaning set forth in Section 5.4.

"ACT" means the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 321, et seq., as amended, and the rules and regulations promulgated thereunder.

"ADDITIONAL CASH PAYMENTS" shall have the meaning set forth in Section 2.2(a)(ii).

"AGREED AMOUNT" shall have the meaning set forth in Section 7.3(b).

"AGREEMENT" shall have the meaning set forth in the first paragraph of this Agreement.

"AFFILIATE" shall mean, with respect to any Person, any Person which directly or indirectly through stock ownership or otherwise either controls, or is controlled by or under common control with, such Person.

"ANCILLARY AGREEMENTS" shall have the meaning set forth in Section 2.3(b).

"APPLICABLE PERMITS" shall have the meaning set forth in Section 3.13.

"ASSIGNED CONTRACTS" shall have the meaning set forth in Section 2.1(a)(ii).

"ASSIGNED PERMITS" shall mean the Applicable Permits which are identified on Section 3.13 of the Seller's Disclosure Schedule as Assigned Permits.

"ASSUMED LIABILITIES" shall have the meaning set forth in Section 2.1(c).

"ASSUMPTION AGREEMENT" shall have the meaning set forth in Section 2.3(b)(vi).

"BUNDLED CONTRACTS" shall mean those contracts, agreements or arrangements (oral or written) pursuant to which the Seller is either (a) selling to third parties Phos-Lo Products together with other products of the Seller not included in the Acquired Assets, or (b) receiving from third parties services related to the Product Line Operations together with services related to other businesses of the Seller, including without limitation agreements between the Seller and group purchasing organizations and rebate agreements, including those contracts, agreements and arrangements identified as Bundled Contracts on SCHEDULE 2.1(B)(VII) hereto.

"BUSINESS DAY" shall have the meaning set forth in Section 2.3(a).

"BUYER" shall have the meaning set forth in the first paragraph of this Agreement..

"BUYER CERTIFICATE" shall have the meaning set forth in Section 6.2(d).

"BUYER COMMON STOCK" shall have the meaning set forth in Section 2.2(a)(i).

"BUYER INDEMNITEES" shall have the meaning set forth in Section 7.1.

"BUYER MATERIAL ADVERSE EFFECT" means any change, effect or circumstance that, individually or in the aggregate (unless otherwise noted), (a) is materially adverse to the business, financial condition or results of operations of the Buyer (other than changes, effects or circumstances that are the result of economic factors affecting the economy as a whole or that are the result of factors generally affecting the industry or specific markets in which the Buyer competes which factors do not substantially disproportionately affect the Buyer) or (b) materially impairs the ability of the Buyer to consummate the transactions contemplated by this Agreement; PROVIDED, HOWEVER, that a "Buyer Material Adverse Effect" shall not include any adverse change, effect or circumstance (i) arising out of or resulting from acts or omissions by the Buyer as contemplated by or pursuant to this Agreement, (ii) arising out of or resulting from acts or omissions of the Seller, including without limitation acts or omissions contemplated by or pursuant to this Agreement, or (iii) that is attributable to the announcement or performance of this Agreement or the transactions contemplated by this Agreement.

"BUYER PREFERRED STOCK" shall have the meaning set forth in Section 4.2.

"BUYER REPORTS" shall have the meaning set forth in Section 4.5.

"BUYER'S DISCLOSURE SCHEDULE" means the Disclosure Schedule provided by the Buyer to the Seller on the date hereof.



"CLAIM NOTICE" shall have the meaning set forth in Section 7.3(b).

"CLAIMED AMOUNT" shall have the meaning set forth in Section 7.3(b).

"CLOSING" shall have the meaning set forth in Section 2.3(a).

"CLOSING DATE" shall have the meaning set forth in Section 2.3(a).

"CLOSING CASH PAYMENT" shall have the meaning set forth in Section 2.2(a)(i).

"CLOSING RESTRICTED PERIOD" shall have the meaning set forth in Section 9.2.

"CLOSING STOCK PAYMENT" shall have the meaning set forth in Section 2.2(a)(i).

"CONFIDENTIALITY AGREEMENT" shall have the meaning set forth in Section 5.3(a).

"DAMAGES" shall have the meaning set forth in Section 7.1.

"DEFERRED PAYMENT PERIOD" shall have the meaning set forth in Section 2.4.

"DEFERRED PAYMENTS" shall have the meaning set forth in Section 2.4.

"DESIGNATED INTELLECTUAL PROPERTY" shall have the meaning set forth in Section 3.8(a).

"DISCOUNTS" means amounts claimed as discounts with respect to Phos-Lo Products sold (a) on or before the Closing Date or (b) under any Excluded Contract.

"ENVIRONMENT" means any surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient or indoor air.

"ENVIRONMENTAL LAW" means any federal, state, provincial, or municipal statute, rule or regulation as in effect as of the date of this Agreement relating to the protection of the Environment or occupational health and safety, including without limitation any statute or regulation pertaining to (a) the presence, manufacture, processing, use, treatment, storage, disposal, transportation, handling or generation of Materials of Environmental Concern; (b) air, water and noise pollution; (c) groundwater and soil contamination; or (d) the Release or threatened Release of Materials of Environmental Concern to the Environment.

"ENVIRONMENTAL LIABILITIES" means regardless of whether any of the following are contained in any Disclosure Schedule to this Agreement or otherwise disclosed to the Buyer prior to the Closing, any and all costs (including without limitation the costs of investigation, clean up actions, remedial actions or other response costs) (whether known or unknown, foreseen or unforeseen, contingent or otherwise, fixed or absolute or present or arising in the future), asserted against or incurred by the Buyer arising out of or relating to any of the following conditions or events, first occurring on or before the Closing Date: (a) the presence, Release, or exposure to Materials of Environmental Concern in connection with the operation of the Product Line Operations at, on, in, or from any property currently or formerly owned, leased

or operated by the Seller or its predecessors on which the Product Line Operations were conducted, (b) any Off-Site Liability, and (c) any violation of any Environmental Law in connection with the Product Line Operations (including any costs and expenses incurred after the Closing to come into compliance with such Environmental Law).

"ENVIRONMENTAL MATTERS" means any legal obligation or liability arising under Environmental Law.

"ENVIRONMENTAL PERMITS" shall have the meaning set forth in Section 3.11(c).

"EXCHANGE ACT" means the Securities Exchange Act of 1934, as amended.

"EXCLUDED ASSETS" shall have the meaning set forth in Section 2.1(b).

"EXCLUDED CONTRACTS" shall have the meaning set forth in Section 2.1(b)(vii).

"EXCLUDED LIABILITIES" shall have the meaning set forth in Section 2.1(d).

"EXCLUDED PERMITS" shall mean the Applicable Permits which are identified on Section 3.13 of the Seller's Disclosure Schedule as Excluded Permits.

"FDA" shall have the meaning set forth in Section 2.1(a)(i).

"FDA APPROVAL" means the definitive approval, clearance or authorization of the FDA that allows Seller to make, sell, promote, market and distribute the Products for therapeutic use in humans on a lawful and commercial basis in the United States.

"FINISHED GOODS INVENTORY" shall have the meaning set forth in Section 2.1(a)(xii).

"GAAP" means generally accepted accounting principles as used in the United States of America, consistently applied.

"GOOD PRACTICES" means compliance in all material respects with the applicable requirements contained in "Good Laboratory Practices," "Investigational New Drug" and/or "current Good Manufacturing Practices" regulations as promulgated by the FDA.

"GOVERNMENTAL AUTHORITY" shall mean any governmental department, commission, board, bureau, agency, court or other instrumentality of the United States, or any county, jurisdiction, municipality or other political subdivision thereof.

"GOVERNMENTAL FILINGS" shall have the meaning set forth in Section 5.1(a).

"HART-SCOTT-RODINO ACT" shall have the meaning set forth in Section 3.3.

"INDEMNIFIED PARTY" shall have the meaning set forth in Section 7.3(a).

"INDEMNIFYING PARTY" shall have the meaning set forth in Section 7.3(a).

"INFORMATION" shall have the meaning set forth in Section 9.1(a).

"INTANGIBLE PROPERTY RIGHTS" shall mean those set forth in Section 2.1(a)(v).

"KNOWLEDGE OF THE SELLER" shall have the meaning set forth in Article III.

"KNOWLEDGE OF THE BUYER" shall have the meaning set forth in Article IV.

"LIEN" shall mean any lien, charge, claim, pledge, security interest, conditional sale agreement or other title retention agreement, lease, mortgage, security agreement, right of first refusal, option, restriction, license, covenant, or other encumbrance (including the filing of, or agreement to give any financing statement under the Uniform Commercial Code or statute or law of any jurisdiction).

"MANUFACTURING AGREEMENT" shall have the meaning set forth in Section 2.3(b)(viii).

"MASTER FORMULATIONS" shall have the meaning set forth in Section 2.1(a)(v).

"MATERIALS OF ENVIRONMENTAL CONCERN" means any hazardous substance, pollutant or contaminant, as those terms are defined under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA") or similar Environmental Laws; solid waste and hazardous waste, as those terms are defined in the Federal Resource Conservation and Recovery Act or similar Environmental Laws; oil, petroleum and petroleum products; asbestos or asbestos-containing materials, polychlorinated byphenyls ("PCBs"), radioactive materials and any other hazardous or toxic substances, materials or wastes.

"MEDICAL PRODUCT REGULATORY AUTHORITY" means any Governmental Authority that is concerned with the safety, efficacy, reliability, manufacture, investigation, sale or marketing of pharmaceuticals, medical products, biologics or biopharmaceuticals, including, without limitation, the FDA.

"NDA FILING DATE" shall have the meaning set forth in Section 3.5(a).

"NDAS" shall have the meaning set forth in Section 2.1(a)(i).

"OFF-SITE LIABILITIES" means Environmental Matters resulting from any transportation, treatment, storage, disposal or Release, or the arrangement therefor, in connection with the Product Line Operations, of any Materials of Environmental Concern, to or at any property, location, site or facility other than a Product Line Property.

"PARTIES" shall have the meaning set forth in the first paragraph of this Agreement.

"PATENT AGREEMENT" shall have the meaning set forth in Section 2.3(b)(v).

"PATENT RIGHTS" shall have the meaning set forth in Section 2.1(a)(iv).

"PERSON" shall mean an individual, a corporation, a limited liability company, a partnership, an association, a trust or other entity or organization, including a federal, state, local or foreign government or regulatory entity or political subdivision or an agency or instrumentality thereof.

"PHOS-LO GELCAP" means the size 0 capsule dose of Phos-Lo (667 mg) or the size 2 (333.5 mg) capsule dose of Phos-Lo as approved in NDA 21-160.

"PHOS-LO NET SALES" means the excess of (a) the gross amount invoiced by the Buyer or its subsidiaries or Affiliates from or on account of sales or other dispositions of any Phos-Lo Products over (b) any Phos Lo Net Sales Deductions. The Buyer shall allocate Phos-Lo Net Sales Deductions to the Phos-Lo Products in a manner consistent with the manner in which it allocates similar deductions to products in the balance of its business. Phos-Lo Net Sales shall not result from any transfer among the Buyer and any of its subsidiaries or Affiliates for resale, but shall result from the resale by the subsidiary or Affiliate.

"PHOS-LO NET SALES DEDUCTIONS" means with respect to invoiced sales of Phos-Lo Products:

[\*\*\*].

"PHOS-LO NET SALES STATEMENT" shall have the meaning set forth in Section 2.4(b).

"PHOS-LO PRODUCTS" means the products set forth on SCHEDULE A hereto. For purposes of Phos-Lo Net Sales, (i) any similar calcium acetate phosphate binder products, in any variation, in any dosage form or by any name and (ii) any other product marketed under the Phos-Lo trademark or under any other trademark that is confusingly similar to the Phos-Lo trademark.

"PHOS-LO SUBLICENSE INCOME" means all amounts, monetary or non-monetary, collected or received by or paid or credited to or for the benefit of the Buyer or its Affiliates from non-Affiliate third parties in connection with or related to the licensing or sublicensing to such third parties of rights to the Phos-Lo Products in the United States, including without limitation all upfront fees, milestone payments and royalties but excluding transfer pricing amounts paid in respect of Phos-Lo Products supplied to such third parties.

"PHOS-LO TABLETS" means the round tablet dose of Phos-Lo (667 mg) as approved by NDA 19-976.

"PRODUCT LINE OPERATIONS" shall have the meaning set forth in the Introduction.

"PRODUCT LINE PROPERTIES" means all real property that is used in the Product Line Operations.

"REBATE CHARGES" means amounts claimed by or under Medicaid, state rebate programs, pharmaceutical benefit management organizations, managed care organizations, and other Persons (collectively, "Rebate Parties") as rebates under contracts between the Rebate Parties and the Seller (it being agreed that, with respect to Medicaid and state rebate programs, such amounts shall be limited to claims with respect to the Seller's NDC numbers).

"REGISTRATIONS" shall have the meaning set forth in Section 2.1(a)(i).

"REGISTRATION INDEMNIFIED PARTY" shall have the meaning set forth in Section 9.8(d)(iii).

"REGISTRATION INDEMNIFYING PARTY" shall have the meaning set forth in Section 9.8(d)(iii).

"REGISTRATION STATEMENT" shall have the meaning set forth in Section 9.8(a).

"RELEASE" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the Environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any Materials of Environmental Concern).

"RESTRICTED BUSINESS" shall have the meaning set forth in Section 9.2.

"RETAINED MARKS" shall have the meaning set forth in Section 9.3(a).

"SCIENTIFIC DATA" shall have the meaning set forth in Section 3.19(a).

"SEC" shall have the meaning set forth in Section 4.5.

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

"SELLER" shall have the meaning set forth in the first paragraph of this Agreement.

"SELLER MATERIAL ADVERSE EFFECT" shall have the meaning set forth in Section 3.1.

"SELLER CERTIFICATE" shall have the meaning set forth in Section 6.1(d).

"SELLER INDEMNITEES" shall have the meaning set forth in Section 7.2.

"SELLER'S DISCLOSURE SCHEDULE" shall have the meaning set forth in Article III.

"SHARES" shall have the meaning set forth in Section 2.2(a)(i).

"SPECIFICATIONS" shall have the meaning set forth in Section 3.18.

"TAXES" (and with correlative meanings, "TAX" and "TAXABLE") shall mean all taxes of any kind imposed by a Governmental Authority, including but not limited to those on, or measured by or referred to as income, gross receipts, financial operation, sales, use, AD VALOREM, value added, alternative or add-on minimum, franchise, profits, license, withholding, payroll (including all contributions or premiums pursuant to governmental social security laws or pursuant to other tax laws and regulations), employment, excise, or severance.

"TAX RETURNS" shall mean all reports, returns, schedules and any other documents required to be filed with a Governmental Authority with respect to Taxes.

"THIRD PARTY CLAIM" shall have the meaning set forth in Section 7.3(a).

"THIRD PARTY CONSENTS" shall have the meaning set forth in Section 5.1(a).

"TRADEMARK AGREEMENT" shall have the meaning set forth in Section 2.3(b)(v).

"TRADEMARK RIGHTS" shall have the meaning set forth in Section 2.1(a)(iii).

"TRANSITION SERVICES AGREEMENT" shall have the meaning set forth in Section 2.3(b)(viii).

"WHOLESALE CHARGES" means amounts claimed by wholesalers of the Phos-Lo Products as chargebacks under contracts between group purchasing organizations, FSS and PHS (collectively, "GPOs") and the Seller and amounts claimed by GPOs as administrative or marketing fees under contracts between GPOs and the Seller.

ARTICLE II-  
ASSET PURCHASE

2.1 PURCHASE AND SALE OF ASSETS; ASSUMPTION OF LIABILITIES.

(a) TRANSFER OF ASSETS. On the basis of the representations, warranties, covenants and agreements and subject to the satisfaction or waiver of the conditions set forth in this Agreement, at the Closing, the Seller shall sell, convey, assign, transfer and deliver to the Buyer (or one or more of its assignees), and the Buyer shall purchase and acquire from the Seller, all of the Seller's right, title and interest in and to the following specifically identified assets, properties and rights of the Seller used in connection with and relating to the Product Line Operations (the "Acquired Assets"), free and clear of all Liens other than Liens for Taxes that are not yet due and payable and Liens arising solely by action of the Buyer.

(i) the regulatory approvals, registrations and associated materials (including the product dossier) relating to Phos-Lo Products and the Product Line Operations (the "Registrations"), including without limitation the New Drug Applications (No. 19-976 and No. 21-160) issued by the United States Food and Drug Administration (the "FDA") (together with all amendments, supplements and updates thereto (the "NDAs")), and the other approvals, registrations, and associated materials set forth on SCHEDULE 2.1(A)(I) hereto, but excluding any manufacturing registrations;

(ii) the oral and written contracts, licenses, agreements and other instruments related to the Product Line Operations set forth or described on SCHEDULE 2.1(A)(II) hereto (the "Assigned Contracts");

(iii) the name "Phos-Lo" and any variant thereof, the trademarks and trade names and all registrations thereof and all related registration applications set forth on SCHEDULE 2.1(A)(III) hereto (the "Trademark Rights"), and all domain names owned and used by the Seller solely in connection with sales of Phos-Lo Products and the Product Line Operations set forth on SCHEDULE 2.1(A)(III) hereto;

(iv) the patents and patent applications set forth on SCHEDULE 2.1(A)(IV) hereto (the "Patent Rights");

(v) intangible property rights (other than the Trademark Rights and the Patent Rights) to the extent that such intangible property rights relate primarily to the Phos-Lo Products or the Product Line Operations, whether or not patentable, including but not limited to inventions,

discoveries, trade secrets, technical information, master formulations for the Phos-Lo Products ("Master Formulations"), master processes used by the Seller for manufacturing the Phos-Lo Products from the Master Formulations, know-how, copyrights and other confidential business information (collectively, the "Intangible Property Rights");

(vi) the exclusive right to satisfy all unfilled purchase orders relating to the Phos-Lo Products as of the Closing Date;

(vii) all brochures and other promotional and printed materials, trade show materials (including displays), videos, web pages, advertising and/or marketing materials, including without limitation materials containing post-marketing clinical data, in the Seller's possession or under its control used primarily in connection with the sale of the Phos-Lo Products and/or the conduct of the Product Line Operations;

(viii) all warranties and guarantees and other similar contractual rights made by third parties in favor of the Seller with respect to the Phos-Lo Products or the Product Line Operations;

(ix) copies of all customer and supplier lists, account lists, call data, sales history, call notes, marketing studies, consultant reports, physician databases, and correspondence (excluding invoices) with respect to the Phos-Lo Products or the Product Line Operations to the extent maintained by the Seller, and all complaint files and adverse event files with respect to the Phos-Lo Products or the Product Line Operations;

(x) all training materials used primarily in connection with the Product Line Operations, including an outline of training, quizzes and answers that accompany the written training materials;

(xi) the Assigned Permits;

(xii) all Phos-Lo Products held in inventory as finished goods as of the Closing Date, which shall include not less than [\*\*\*] bottles of Phos-Lo Tablets and [\*\*\*] bottles of Phos-Lo Gel Caps (the "Finished Goods Inventory");

(xiii) the Scientific Data, including without limitation any rights of access that the Seller has to the Scientific Data;

(xiv) all the goodwill of the Product Line Operations;

(xv) rights of access (which shall include the right to copy) to all financial records maintained by the Seller in connection with the sale of Phos-Lo Products relating to sales, accounts receivable, returns, chargebacks, rebates and discounts; and

(xvi) all rights of the Seller and its Affiliates to develop, manufacture, sell, distribute, promote, and use the Phos-Lo Products worldwide.

The Seller shall deliver to the Buyer two (2) Business Days prior to the Closing Date a proposed updated SCHEDULE 2.1(A)(II) covering contracts, licenses,

agreements and other instruments entered into subsequent to the date hereof that would have otherwise been included on SCHEDULE 2.1(A)(II) if entered into prior to the date hereof, which shall become Assigned Contracts hereunder only to the extent that the Buyer agrees at the Closing that they shall be treated as such.

(b) EXCLUDED ASSETS. Notwithstanding anything to the contrary in this Agreement, the Seller is not selling, conveying, assigning, transferring or delivering to the Buyer any assets, properties or rights of the Seller other than those specifically identified in Section 2.1(a). The assets, properties and rights of the Seller not being sold, conveyed, assigned, transferred or delivered to the Buyer hereunder (the "Excluded Assets"), include without limitation the following assets, properties and rights of the Seller, whether or not related to the Product Line Operations:

(i) all cash and cash equivalents or similar investments, bank accounts, Tax deposits, commercial paper, certificates of deposit, Treasury bills and other marketable securities;

(ii) accounts receivable and other receivables, whether or not billed;

(iii) inventories of raw materials, work in process and packaging materials;

(iv) rights to insurance claims, related refunds and proceeds;

(v) all actions, claims, causes of action, rights of recovery, choses in action and rights of setoff except as described in Section 2.1(a)(viii);

(vi) all machinery, equipment, tools, tooling, dies and production fixtures;

(vii) the Bundled Contracts and the contracts, licenses and other instruments set forth on SCHEDULE 2.1(B)(VII) hereto (the "Excluded Contracts"); and

(viii) the Excluded Permits.

(c) ASSUMED LIABILITIES. On the basis of the representations, warranties, covenants and agreements and subject to the satisfaction or waiver of the conditions set forth in this Agreement, at the Closing, the Buyer shall assume and agree to pay, perform and discharge when due the following liabilities and obligations of the Seller (whether known or unknown, whether absolute or contingent, whether liquidated or unliquidated and whether due or to become due) (the "Assumed Liabilities"):

(i) all obligations to be performed after the Closing Date under the Assigned Contracts, if any, except that the Buyer shall not assume or agree to pay, discharge or perform any liabilities or obligations arising out of any pre-Closing Date breach or default (including for this purpose any event which, with notice of time would constitute such a breach or default and any breach or default that occurs as a result of the Closing) by the Seller of any provision of any Assigned Contract;



(ii) all liabilities and obligations under the Registrations to the extent to be performed after the Closing Date;

(iii) all liabilities with respect to all actions, suits, proceedings, disputes, claims or investigations arising out of or related to the operation of the Acquired Assets or the Product Line Operations after the Closing Date, other than those liabilities arising out of or related to the manufacture of Phos-Lo Products under the Manufacturing Agreement for which the Seller is liable thereunder;

(iv) all liabilities and obligations arising out of or relating to the replacement or return of, or any claim for breach of warranty in respect of or refund of the purchase price of, Phos-Lo Products sold after the Closing Date;

(v) all liabilities and obligations arising out of or relating to any product liability claim, including without limitation injury to or death of persons or damage to or destruction of property, relating to Phos-Lo Products sold after the Closing Date; and

(vi) all other liabilities and obligations in respect of the Product Line Operations or the Acquired Assets arising or incurred after the Closing Date other than Excluded Liabilities.

Nothing in this Section 2.1(c), however, shall limit the Seller's obligations or the Buyer's rights and remedies under the Manufacturing Agreement.

(d) EXCLUDED LIABILITIES. Notwithstanding anything to the contrary in this Agreement, the Buyer shall not, at the Closing or at any time thereafter, assume or agree to pay, perform or discharge, and the Seller shall remain liable for and shall pay, perform and discharge when due, all liabilities and obligations of the Seller relating to the Product Line Operations (whether known or unknown, whether absolute or contingent, whether liquidated or unliquidated and whether due or to become due) other than the Assumed Liabilities (the "Excluded Liabilities"). All liabilities and obligations of the Product Line Operations not being expressly assumed by the Buyer under this Agreement shall be retained by the Seller and are included in Excluded Liabilities. The Excluded Liabilities, include without limitation the following liabilities and obligations of the Seller and the Product Line Operations:

(i) all liabilities and obligations to be performed on or prior to the Closing Date under the Assigned Contracts, if any;

(ii) all liabilities and obligations to be performed under the Excluded Contracts and any other contracts to which the Seller is a party other than the Assigned Contracts;

(iii) all liabilities and obligations under the Registrations to the extent to be performed on or prior to the Closing Date;

(iv) all liabilities and obligations arising out of or relating to any product liability claim, including without limitation injury to or death of persons or damage to or destruction of property, relating to the Phos-Lo Products sold on or prior to the Closing Date;

(v) all liabilities and obligations with respect to the Wholesaler Charges, the Rebate Charges and Discounts;

(vi) all liabilities and obligations arising out of or relating to the replacement or return of, or any claim for breach of warranty in respect of or refund of the purchase price of, the Phos-Lo Products sold on or prior to the Closing Date;

(vii) all Environmental Liabilities of the Seller or its predecessors relating to the Product Line Operations;

(viii) except as otherwise expressly provided herein, all costs and expenses incurred by the Seller incident to the negotiation and preparation of this Agreement and its performance and compliance with the agreements and conditions contained herein;

(ix) all liabilities and obligations in respect of any Excluded Assets;

(x) any obligations of the Seller to indemnify any Person in connection with the operation of the Product Line Operations by reason of the fact that such Person was a director, officer or employee of the Seller or was serving at the request of the Seller as a partner, trustee, director, officer or employee of another entity, whether arising under contract, common law or otherwise; and

(xi) except as set forth in Section 10.17, all Tax liabilities arising out of the conduct of the Product Line Operations on or before the Closing Date.

(e) CONSENT OF THIRD PARTIES. On the Closing Date, the Seller shall assign to the Buyer, and the Buyer will assume, the Assigned Contracts to the extent provided in this Agreement. To the extent that the assignment of all or any portion of any Assigned Contract shall require the consent of the other party thereto or any other third party, this Agreement shall not constitute an agreement to assign any such Assigned Contract if an attempted assignment without any such consent would constitute a breach or violation thereof. In order, however, to seek to provide the Buyer the full realization and value of every Assigned Contract of the character described in the immediately preceding sentence (a) as soon as practicable after the Closing, the Seller and the Buyer shall cooperate, in all reasonable respects, to obtain any necessary consents to the assignment of the Assigned Contracts, provided that neither Party shall be required to make any payments or agree to any material undertakings in connection therewith, and (b) until all such consents are obtained or all such Assigned Contracts expire or are terminated, the Seller and the Buyer shall cooperate, in all reasonable respects, to provide to the Buyer the benefits under the Assigned Contracts (with the Buyer entitled to all the gains and responsible for all the losses, Taxes, liabilities and/or obligations thereunder). In connection with clause (b) of this Section 2.1(e), the Seller shall seek to enforce at the cost of and for the benefit of the Buyer all claims or rights of the Seller arising under the Assigned Contracts, and the Buyer shall perform and comply with, at the Buyer's cost, all of the Seller's

obligations under the Assigned Contracts as if the Buyer was the Seller thereunder. Nothing in this Section 2.1(e) shall in any way diminish the condition in Section 6.1(f) of this Agreement.

(f) BUNDLED CONTRACTS. The Parties recognize and agree that the Bundled Contracts cover both the Phos-Lo Products and other products of the Seller and that the Bundled Contracts are not being assigned to the Buyer under this Agreement. [\*\*\*]

(g) REGISTRATIONS AND APPLICABLE PERMITS. On the Closing Date, the Seller shall assign or transfer to the Buyer, and the Buyer will assume, the Registrations and Applicable Permits to the extent provided in this Agreement. To the extent that the assignment or transfer of all or any portion of any Registration or Applicable Permit shall require the consent of the other party thereto or any other third party, this Agreement shall not constitute any agreement to assign or transfer any such Registration and Applicable Permits if an attempted assignment or transfer without any such consent would constitute a breach or violation thereof. In order, however, to seek to provide the Buyer the full realization and value of every Registration and Applicable Permit of the character described in the immediately preceding sentence (a) as soon as practicable after the Closing, the Seller and the Buyer shall cooperate, in all reasonable respects, and use best efforts to obtain, at the earliest possible date, any necessary consents to the assignment or transfer of the Registrations and Applicable Permits, provided that neither Party shall be required to make any payments or agree to any material undertakings in connection therewith, and (b) until all such consents are obtained or all such Registrations and Applicable Permits expire or are terminated, the Seller and the Buyer shall cooperate, in all reasonable respects, to provide to the Buyer the benefits under the Registration and Applicable Permits (with the Buyer entitled to all the gains and responsible for all the losses, Taxes, liabilities and/or obligations thereunder). In such event, the Buyer shall perform and comply with, at the Buyer's cost, all of the Seller's obligations under the Registrations and Applicable Permits, as if the Buyer was the Seller thereunder. Nothing in this Section 2.1(g) shall in any way diminish the Seller's obligations under Section 6.1(f) of this Agreement.

## 2.2 PURCHASE PRICE AND RELATED MATTERS.

(a) PURCHASE PRICE. In consideration of the sale and transfer of the Acquired Assets, the Buyer shall assume the Assumed Liabilities as provided in Section 2.1(c) and shall make the payments contemplated by clauses (i), (ii) and (iii) of this Section 2.2(a) to the Seller. All cash payments under this Agreement shall be made by wire transfer of immediately available funds to an account designated by the Seller.

(i) CLOSING PAYMENT. At the Closing, the Buyer shall (A) pay to the Seller \$60,325,000 in cash (the "Closing Cash Payment") and (B) issue to the Seller 1,500,000 shares (the "Shares") of its common stock, \$.10 par value per share ("Buyer Common Stock") (the "Closing Stock Payment").

(ii) ADDITIONAL CASH PAYMENTS. In addition to the Closing Cash Payment, after the Closing, the Buyer shall pay in cash to the Seller a total of \$5,000,000, payable in four equal installments of \$1,250,000 on or before the date that is six months after the Closing Date, the first anniversary of the Closing Date, the date that is six months after the first anniversary of the Closing Date and the second anniversary of the Closing Date (collectively, the "Additional Cash Payments").

(iii) PROMISSORY NOTE. At the Closing, the Buyer shall deliver to the Seller a non-interest bearing, non-negotiable, unsecured promissory note of the Buyer, in the form attached hereto as EXHIBIT A (the "Promissory Note"), in the original principal amount of \$25,000,000. Under the Promissory Note, the Buyer shall pay to the Seller in cash the full \$25,000,000 of principal on or before March 1, 2007, provided however, that the Buyer may set off against such payment obligation any Deferred Payments made by it to the Seller pursuant to Sections 2.4(a) and (b) below.

(b) ALLOCATION OF PURCHASE PRICE. The aggregate amount of the purchase price paid by the Buyer hereunder and the Assumed Liabilities shall be allocated among the Acquired Assets and the covenant contained in Section 9.2 for all purposes, including without limitation Tax and financial accounting purposes, as set forth on SCHEDULE 2.2(B) hereto. The Parties acknowledge that SCHEDULE 2.2(B) was prepared in compliance with Section 1060 of the Internal Revenue Code of 1986, as amended, and any comparable provisions of state, local, foreign or other applicable Tax laws.

### 2.3 THE CLOSING.

(a) TIME AND LOCATION. The closing of the transactions contemplated by this Agreement (the "Closing") shall take place at the offices of Hale and Dorr LLP in Boston, Massachusetts, commencing at 10:00 a.m., Boston time, on August 4, 2003 or, if all of the conditions to the obligations of the Parties to consummate the transactions contemplated hereby (excluding the delivery of any documents to be delivered at the Closing by any of the Parties, it being understood that the occurrence of the Closing shall remain subject to the delivery of such documents) have not been satisfied in full or waived by such date, on such mutually agreeable later date as soon as practicable (but in no event more than three (3) Business Days) after the first date on which the conditions to the obligations of the Parties to consummate the transactions contemplated hereby (excluding the delivery of any documents to be delivered at the Closing by any of the Parties, it being understood that the occurrence of the Closing shall remain subject to the delivery of such documents) have been satisfied or waived (the "Closing Date"). For purposes of this Agreement, a "Business Day" shall be any day other than (i) a Saturday or Sunday or (ii) a day on which banking institutions located in New York, New York are permitted or required by law, executive order or governmental decree to remain closed. The transfer of the Acquired Assets by the Seller to the Buyer shall be deemed to have occurred at 11:59 p.m., Boston time, on the Closing Date.

(b) ACTIONS AT THE CLOSING. At the Closing:

(i) the Seller shall deliver (or cause to be delivered) to the Buyer the various certificates, instruments and documents required to be delivered under Section 6.1;

(ii) the Buyer shall deliver (or cause to be delivered) to the Seller the various certificates, instruments and documents required to be delivered under Section 6.2;

(iii) the Buyer shall execute and deliver to the Seller the Promissory Note;

(iv) the Seller shall execute and deliver a Bill of Sale in the form attached hereto as EXHIBIT B;

(v) the Seller shall execute and deliver a Patent Assignment Agreement in the form attached hereto as EXHIBIT C (the "Patent Agreement");

(vi) the Seller shall execute and deliver a Trademark Assignment Agreement in the form attached hereto as EXHIBIT D (the "Trademark Agreement");

(vii) the Buyer shall execute and deliver to the Seller an Assignment and Assumption Agreement in the form attached hereto as EXHIBIT E (the "Assumption Agreement");

(viii) the Buyer and the Seller shall execute and deliver a Manufacturing Agreement (the "Manufacturing Agreement") and a Quality Agreement appended thereto, in the forms attached hereto as EXHIBIT F;

(ix) the Buyer and the Seller shall execute and deliver the Transition Services Agreement in the form attached hereto as EXHIBIT G (the "Transition Services Agreement");

(x) the Buyer shall pay to the Seller the Closing Cash Payment by wire transfer of immediately available funds into an account designated by the Seller;

(xi) the Buyer shall deliver to the Seller a certificate representing the Shares as the Closing Stock Payment;

(xii) the Buyer's counsel shall deliver to the Seller a legal opinion in the form attached hereto as EXHIBIT H;

(xiii) the Seller's corporate counsel shall deliver to the Buyer a legal opinion in the form attached hereto as EXHIBIT I;

(xiv) the Seller's patent counsel shall deliver to the Buyer a legal opinion in the form attached hereto as EXHIBIT J;

(xv) the Seller shall deliver to the Buyer, or otherwise put the Buyer in possession and control of, all of the Acquired Assets of a tangible nature, including documents and data in electronic formats, to the extent that such documents and data are in electronic formats;

(xvi) the Seller shall deliver to the Buyer original executed versions of the documents referenced in items 1, 2, 5 and 6 of Section 3.3(b) of the Seller's Disclosure Schedule;

(xvii) the Buyer and the Seller shall execute and deliver to each other a cross-receipt evidencing the transactions referred to above; and

(xviii) the Seller shall deliver to the Buyer an agreement executed by the Seller for delivery to the Buyer's designated lenders concerning access to and ownership of the Acquired Assets and the Phos-Lo Products and such other matters as the lenders may reasonably require in a form reasonably satisfactory to the Seller and the Buyer.

The agreements and instruments referred to in clauses (iii), (iv), (v), (vi), (vii), (viii), (ix) and (xviii) above are referred to herein as the "Ancillary Agreements."

(c) [\*\*\*].

#### 2.4 DEFERRED PAYMENTS.

(a) PAYMENT RATE Subject to the terms set forth herein, the Buyer shall pay to the Seller, on an annual basis as provided below, an amount equal to [\*\*\*] of Phos-Lo Net Sales and Phos-Lo Sublicense Income during the period commencing on the Closing Date and ending on December 31, 2006 (the "Deferred Payment Period") (such payment being referred to as a "Deferred Payment").

(b) REPORTS; PAYMENTS. The Buyer shall deliver to the Seller, within 60 days after the last day of each calendar year that ends during the Deferred Payment Period, a statement in the form attached hereto as SCHEDULE 2.4(B) (each, a "Phos-Lo Net Sales Statement"), setting forth (i) the aggregate amount of invoiced sales for each Phos-Lo Product (including unit quantities), (ii) the Phos-Lo Net Sales Deductions for the year (which deductions shall be aggregated by category), (iii) the Phos-Lo Sublicense Income for the year and (iv) the calculation of the related Deferred Payment. At such time as the Buyer delivers such Phos-Lo Net Sales Statement to the Seller, the Buyer shall also deliver to the Seller the Deferred Payment due hereunder for the applicable year. The Parties agree that the first Deferred Payment hereunder and the associated statement shall be made by the Buyer with respect to the period commencing on the Closing Date and ending on December 31, 2003.

(c) MAXIMUM AGGREGATE DEFERRED PAYMENTS. Notwithstanding anything in this Agreement to the contrary, the Buyer shall not be required hereunder to make Deferred Payments to the Seller that exceed, in the aggregate, \$25,000,000.

(d) LATE PAYMENTS; COLLECTIONS. Any amount not paid when due under Section 2.2(a)(ii) or this Section 2.4 shall bear interest at the lesser of (i) the rate equal to the prime lending rate as published in THE WALL STREET JOURNAL on the date such amount was due, plus 3% per annum, and (ii) the highest rate permitted by law; provided that no interest shall continue to accrue on any such amount after March 1, 2007.

(e) BOOKS AND RECORDS; AUDITS. Notwithstanding Section 9.1 to the contrary, for a period of not less than three (3) years after the relevant calendar year, the Buyer and its subsidiaries and Affiliates, that sell Phos-Lo Products shall keep full, true and accurate books of account sufficient to determine the amounts payable pursuant to this Section 2.4. The Seller shall have the right, not more than once during any calendar year, to have the books and records of the Buyer, its subsidiaries and Affiliates audited by a qualified independent accounting firm of the Seller's choosing, subject to the Buyer's approval, which approval shall not be unreasonably withheld or delayed, under appropriate confidentiality provisions, to ascertain the accuracy of the reports and payments under this Section 2.4 and compliance by the Buyer, its subsidiaries and Affiliates with their respective obligations under this Section 2.4. Such audit shall be conducted upon at least ten (10) days' advance notice during normal business hours and in a manner that does not interfere unreasonably with the business of the audited entity. Subject to the Buyer's right to dispute such amounts, any underpayment determined by such audit shall promptly be paid by the Buyer. If the Buyer has underpaid an amount due under this Section 2.4 by more than 5%, the Buyer shall reimburse the Seller for the cost of such audit (with the cost of the audit to be borne by the Seller in all other cases).

(f) FREEDOM TO CONDUCT BUSINESS UNIMPAIRED. The Seller acknowledges and agrees that the Buyer and its Affiliates shall be free to pursue their respective business goals and that Phos-Lo Net Sales may be affected thereby. This Agreement shall not be deemed to impose any express or implied obligation on the Buyer or any of its Affiliates to maximize Phos-Lo Net Sales for all or any portion of the Deferred Payment Period or to impair the freedom of the Buyer and its Affiliates to conduct their respective businesses as they deem appropriate.

2.5 FURTHER ASSURANCES. At any time and from time to time after the Closing Date, as and when requested by any Party hereto and at such Party's expense, the other Party shall promptly execute and deliver, or cause to be executed and delivered, all such documents, instruments and certificates and shall take, or cause to be taken, all such further or other actions as are reasonably necessary to evidence and effectuate the transactions contemplated by this Agreement.

#### ARTICLE III- REPRESENTATIONS AND WARRANTIES OF THE SELLER

The Seller represents and warrants to the Buyer that the statements contained in this Article III are true and correct as of the date hereof, except as set forth in the Disclosure Schedule provided by the Seller to the Buyer on the date hereof (the "Seller's Disclosure Schedule"). The Seller's Disclosure Schedule shall be arranged in sections and subsections corresponding to the numbered and lettered sections and subsections contained in this Article III. The disclosures in any section or subsection of the Seller's Disclosure Schedule shall qualify other sections and subsections in this Article III to the extent

it is reasonably clear from a reading of the disclosure that such disclosure is applicable to such other sections and subsections. The inclusion of any information in the Seller's Disclosure Schedule shall not be deemed to be an admission or acknowledgment, in and of itself, that such information is required by the terms hereof to be disclosed, is material to the Product Line Operations, has resulted in or would reasonably be expected to result in a Seller Material Adverse Effect, or is outside the ordinary course of business. For purposes of this Agreement, the phrase "to the knowledge of the Seller" or any phrase of similar import shall mean and be limited to the actual knowledge of the following individuals: [\*\*\*].

3.1 ORGANIZATION, QUALIFICATION AND CORPORATE POWER. The Seller is a corporation duly organized, validly existing and in good standing under the laws of the Commonwealth of Massachusetts and is duly qualified to conduct business under the laws of each jurisdiction where the character of the properties owned, leased or operated by it or the nature of its activities, in each case as they relate exclusively to the Product Line Operations, makes such qualification necessary, except for any such failure to be qualified that would not reasonably be expected to result in a Seller Material Adverse Effect (as defined below). The Seller has all requisite corporate power and authority to carry on the business in which it is now engaged and to own and use the properties now owned and used by it. For purposes of this Agreement, "Seller Material Adverse Effect" means any change, effect or circumstance that, individually or in the aggregate (unless otherwise noted), (a) is materially adverse to the business, financial condition or results of operations of the Product Line Operations (other than changes, effects or circumstances that are the result of economic factors affecting the economy as a whole or that are the result of factors generally affecting the industry or specific markets in which the Product Line Operations compete which factors do not substantially disproportionately affect the Product Line Operations ), or (b) materially impairs the ability of the Seller to consummate the transactions contemplated by this Agreement; PROVIDED, HOWEVER, that a "Seller Material Adverse Effect" shall not include any adverse change, effect or circumstance (i) arising out of or resulting from acts or omissions by the Seller as contemplated by or pursuant to this Agreement, (ii) arising out of or resulting from acts or omissions of the Buyer, including without limitation acts or omissions contemplated by or pursuant to this Agreement, or (iii) that is attributable to the announcement or performance of this Agreement or the transactions contemplated by this Agreement.

3.2 AUTHORITY. The Seller has all requisite corporate power and authority to execute and deliver this Agreement and the Ancillary Agreements and to perform its obligations hereunder and thereunder. The execution and delivery by the Seller of this Agreement and the Ancillary Agreements and the consummation by the Seller of the transactions contemplated hereby and thereby have been duly authorized by all necessary corporate action on the part of the Seller and no other further authorization or consent of the Seller or its board of directors, lenders or stockholders will be necessary. This Agreement has been, and such Ancillary Agreements will be, duly executed and delivered by the Seller and, assuming this Agreement and each such Ancillary Agreement constitute the valid and binding obligation of the Buyer, this Agreement constitutes, and each such Ancillary Agreement will constitute, a valid and binding obligation of the Seller, enforceable against the Seller in accordance with its respective terms.



3.3 NONCONTRAVENTION. Subject to compliance with the applicable requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "Hart-Scott-Rodino Act"), neither the execution and delivery by the Seller of this Agreement or the Ancillary Agreements to which the Seller will be a party, nor the consummation by the Seller of the transactions contemplated hereby or thereby, will:

(a) conflict with or violate any provision of the charter or bylaws of the Seller;

(b) require on the part of the Seller any filing with, or any permit, authorization, consent or approval of, any Governmental Authority;

(c) conflict with, result in a breach of, constitute (with or without due notice or lapse of time or both) a default under, result in the acceleration of obligations under, create in any party the right to terminate or modify, or require any notice, consent or waiver under, any contract, lease, sublease, license, sublicense, franchise, permit, indenture, agreement or mortgage for borrowed money or instrument of indebtedness (i) primarily relating to the Product Line Operations to which the Seller is a party or by which the Seller is bound or (ii) to which any of the Acquired Assets are subject;

(d) violate any order, writ, injunction or decree specifically naming the Seller or any of its properties or assets; or

(e) violate any statute, rule or regulation applicable to the Seller or any of its properties or assets.

#### 3.4 AVAILABILITY OF ACQUIRED ASSETS.

(a) The Seller has the right to sell and transfer to the Buyer good title to the Acquired Assets, free and clear of all Liens except for Liens for Taxes not yet due and payable and Liens arising solely by actions of the Buyer. The delivery to the Buyer of the instruments of transfer of ownership contemplated by this Agreement will vest good title to the Acquired Assets in the Buyer, free and clear of all Liens except for Liens for Taxes not yet due and payable and Liens arising solely by action of the Buyer.

(b) Except for the Excluded Assets and the products and services to be provided by the Seller under the Manufacturing Agreement and the Transition Services Agreement, the Acquired Assets are, when utilized by a labor force substantially similar to that employed by the Seller in connection with the Product Line Operations on the date hereof, sufficient to enable the Buyer to continue to conduct the Product Line Operations after the Closing in all material respects as the Seller conducts the Product Line Operations on the date hereof.

#### 3.5 REGULATORY COMPLIANCE.

(a) The Seller has delivered to the Buyer true and correct copies of the NDAs and has made available to the Buyer copies of material written communications between the Seller or the third party manufacturer of the Phos-Lo Products, on the one hand, and the FDA or any other applicable Medical

Product Regulatory Authority, on the other hand, since May 8, 1989 (the "NDA Filing Date"), and any existing written summaries of material discussions between such parties since the NDA Filing Date, that describe matters that are material to assessing compliance of the Seller's operation of the Product Line Operations or the third party manufacturer's production of the Phos-Lo Products with the Act and its implementing regulations, including without limitation, copies of (i) all warning letters, notices of adverse findings and similar correspondence received by the Seller or such third party manufacturer from the FDA since the NDA Filing Date, (ii) all audit reports relating to audits for compliance with the Act performed since the NDA Filing Date and submitted to the FDA and (iii) any document concerning any significant oral or written communication received from the FDA by the Seller or the third party manufacturer since the NDA Filing Date; PROVIDED, that the Seller's representations hereby with respect to the third party manufacturer are limited to matters as to which the Seller has knowledge.

(b) The Seller's operation of the Product Line Operations is in compliance in all material respects with all FDA and other comparable state and local statutes, rules and regulations applicable to the Product Line Operations, including, but not limited to, FDA and comparable state and local rules and regulations relating to clinical investigations, Good Practices, advertising and promotion, pre- and post-marketing adverse drug experience and adverse drug reaction reporting, and all other pre- and post-marketing reporting requirements, as applicable. The Seller knows of no material adverse effects from the use of the Phos-Lo Products which are not disclosed in the package insert for the Phos-Lo Products which are required to be disclosed in the package insert for the Phos-Lo Products under the Act.

(c) Neither the Seller nor, to its knowledge, any third party manufacturer of the Phos-Lo Products, is in receipt of written notice of, or is known by the Seller to be subject to any written, adverse inspection, finding of deficiency, finding of non-compliance, compelled or voluntary recall, investigation, penalty for corrective or remedial action or other compliance or enforcement action, in each case relating to the Phos-Lo Products or to the facilities in which such products are developed, manufactured, collected or handled, by any applicable Medical Product Regulatory Authority. There are no pending or, to the Seller's knowledge, threatened actions, proceedings or complaints by any applicable Medical Product Regulatory Authority related to the Seller or any third party manufacturer which would prohibit or materially impede the conduct of the Product Line Operations as it is currently conducted or would reasonably be expected to result in a Seller Material Adverse Effect.

(d) The Seller has not made any materially false statements on, or material omissions from, any applications, approvals, reports and other submissions to any applicable Medical Product Regulatory Authority or in or from any other records and documentation prepared or maintained to comply with the requirements of any applicable Medical Product Regulatory Authority relating to its Phos-Lo Products, which false statements or omissions would reasonably be expected to result in a Seller Material Adverse Effect.

(e) Since January 1, 1999, the Seller has not received any written notification from the FDA or any other applicable Medical Product Regulatory Authority indicating that any of its Phos-Lo Products is misbranded or adulterated as defined in the Act.

(f) The Phos-Lo Products have been approved for sale by the FDA in the United States and by Health Canada in Canada. The Phos-Lo Products marketed and sold by the Seller in the United States during the twelve (12) month period immediately preceding the Closing Date have been manufactured and sold in compliance, in all material respects, with the FDA Approval criteria for Phos-Lo Products. The Phos-Lo Products marketed and sold by the Seller in Canada during the twelve (12) month period immediately preceding the Closing Date have been manufactured and sold in compliance, in all material respects, with the Clinical Trials and Special Access Program, Therapeutic Products Directorate.

(g) The Seller has not received any material adverse events reports pertaining to the Phos-Lo Products since January 1, 1999.

(h) The Seller has completed and timely filed all annual or other reports required by the FDA or other Medical Product Regulatory Authority in order to maintain the Registrations, except where the failure to complete and timely file such reports would not reasonably be expected to result in a Seller Material Adverse Effect.

3.6 FINANCIAL INFORMATION. The unaudited financial information for the Product Line Operations for the fiscal year ended December 31, 2002 and for the five months ended May 31, 2003 set forth on Section 3.6 of the Seller's Disclosure Schedule hereto has been derived from the books of account of the Seller kept by the Seller in the ordinary course of business. These books of account have been prepared in accordance with the Seller's regular accounting practices and procedures and are accurate and complete in all material respects. The financial information on SECTION 3.6 was taken from financial statements for the Seller's entire business that have been prepared in accordance with GAAP, and present the Product Line Operations' pro rata share of certain expenses incurred by the Seller during the stated periods, based on various assumptions and methodologies, as set forth on Section 3.6 of the Seller's Disclosure Schedule, consistently applied. The financial information does not represent the results of operations of the Product Line Operations had it operated as a stand-alone entity.

3.7 ABSENCE OF CERTAIN CHANGES. Except as contemplated by this Agreement, between May 31, 2003 and the date of this Agreement, there have not been any changes in the financial condition or results of operations of the Product Line Operations, except for any changes that would not reasonably be expected to result in a Seller Material Adverse Effect. Without limiting the foregoing, between May 31, 2003 and the date of this Agreement, there has not been with respect to the Product Line Operations:

(a) any material change in the business, assets, liabilities, conditions (financial or otherwise) or results of operations of the Product Line Operations, other than changes in the ordinary course of business consistent with past practice;

(b) any incurrence, assumption or guarantee of any material obligation or liability (absolute, accrued, contingent or otherwise) other than any of the foregoing in the ordinary course of business consistent with past practice;

(c) any materially adverse change in any of its relations with, or any loss of the material suppliers, clients or customers of the Product Line Operations;

(d) any disposition of or failure to keep in effect any rights in, to or for the use of any Applicable Permit or any Acquired Asset, other than inventory sold in the ordinary course of business; or

(e) any material transaction, agreement or event outside the ordinary course of the conduct of the Product Line Operations.

### 3.8 INTELLECTUAL PROPERTY.

(a) Section 3.8(a) of the Seller's Disclosure Schedule lists all patents, patent applications, copyright registrations, registered trademarks, trademark applications and trade names that are owned or used by the Seller and that are material to the Product Line Operations (the "Designated Intellectual Property"). The Seller owns, or is licensed or otherwise possesses valid rights to use, the Designated Intellectual Property. The Acquired Assets include all of the Designated Intellectual Property.

(b) The Seller has the sole and exclusive right to bring actions for infringement, misappropriation or unauthorized use of Designated Intellectual Property owned by the Seller. All patents included in the Patent Rights and all registered trademarks included in the Trademark Rights are valid and in force, and all patent applications included in the Patent Rights and all trademark registration applications included in Trademark Rights are pending and in good standing. No third person has asserted in writing to the Seller or, to the Seller's knowledge, to any Governmental Authority that any of the Designated Intellectual Property owned by the Seller is invalid or unenforceable. The Seller has taken all steps reasonably necessary to protect and preserve the confidentiality of the trade secrets and other confidential information included in the Acquired Assets, which if not taken would reasonably be expected to have a Seller Material Adverse Effect. Neither the Seller nor, to the Seller's knowledge, anyone acting on its behalf in a representative capacity before any patent or other governmental office in connection with the Patent Rights or the Trademark Rights, has any knowledge of any material misrepresentation made to such patent or other governmental office in connection with the procurement of any Patent Right or Trademark Right.

(c) The Product Line Operations do not conflict with, infringe upon, contribute to or induce the infringement of, or misappropriate or violate any patent, trademark, service mark, trade name, copyright, trade secret or other proprietary right of a third party. The Seller has not received notice of a pleading or threatened claim, interference action or other judicial or adversarial proceeding that (i) the development, manufacture, marketing, sale, distribution, promotion and use of the Phos-Lo Products infringes any patent, trademark, service mark, trade name, copyright, trade secret or other proprietary right of a third party, or (ii) the Seller has misappropriated or is misappropriating or otherwise improperly using the trade secrets, formulae or proprietary rights of a third party with respect to the development, manufacture, marketing, sale, distribution, promotion or use of the Phos-Lo Products. To the Seller's knowledge, there is no existing or threatened infringement, misuse, violation or misappropriation of the Designated Intellectual Property by others. There is no pending or threatened claim by the Seller against a third party for infringement, misuse, violation or misappropriation of the Designated Intellectual Property.

(d) The Seller has performed the obligations required to be performed by it under the terms of any agreement pursuant to which the Seller has rights in any Designated Intellectual Property, and neither the Seller nor, to the knowledge of the Seller, any third party is in default under any such agreement.

(e) The Seller has not granted to any third party a license to commercially use any of the Designated Intellectual Property that is in effect as of the date hereof or will be in effect after the Closing Date. The Seller is not required to pay any royalty or other recurring payment to any third parties in connection with developing, making, having made, using, importing, distributing, offering for sale or selling the Phos-Lo Products, except for (i) payments to Governmental Authorities pursuant to requirements of general application to Persons engaged in developing, making, having made, using, importing, distributing, offering for sale or selling pharmaceutical products, and (ii) administrative payments made to Governmental Authorities in the ordinary course, such as patent maintenance fees.

(f) [\*\*\*].

(g) After the Closing, [\*\*\*] will not have any right, title or interest of any kind, reversionary or otherwise, in the Designated Intellectual Property or other Acquired Assets. The Acquired Assets include the "Confidential Information" to be assigned to the Buyer as the "Information Assignment" pursuant to the Payoff Agreement dated January 14, 2003 between [\*\*\*] and the Buyer, as amended (as such terms are defined therein).

3.9 CONTRACTS. The Seller has made available or delivered to the Buyer a complete and accurate copy of each Assigned Contract. The Assigned Contracts include all of the contracts and agreements to which the Seller is a party that relate primarily to the Product Line Operations, other than the Bundled Contracts and the Excluded Contracts. The Seller is not a party to or bound by any contract, agreement or arrangement (written or oral) that is material to the Product Line Operations, except for the Excluded Contracts, the Bundled Contracts and the Assigned Contracts. All of the Assigned Contracts (i) are in full force and effect, (ii) are valid and binding and are enforceable in accordance with their terms against the Seller and, to the Seller's knowledge, all other parties thereto, and (iii) are freely assignable to the Buyer pursuant to this Agreement without the consent of any party thereto. No condition exists or event has occurred as a result of action or inaction by the Seller or any other person that, with notice or lapse of time or both, would constitute a material default of any Assigned Contract by the Seller, or to the knowledge of the Seller, by any other party thereto or a basis for FORCE MAJEURE or other claim of excusable delay or non-performance under any Assigned Contract against the Seller, or to the knowledge of the Seller, against any other party thereto.

3.10 PRODUCT LIABILITY; LITIGATION. Section 3.10 of the Seller's Disclosure Schedule lists each (a) product liability claim (including any claim based on strict products liability, negligence, other tort theories, breach of express or implied warranty) which has been asserted in writing against the Seller relating to the Phos-Lo Products since January 1, 1993; (b) judgment, order, decree, stipulation or injunction of any Governmental Authority, or any formal investigation conducted by any Governmental Authority and any subpoena in connection therewith, since January 1, 1999 that specifically names the Seller

and relates to the Product Line Operations; and (c) action, suit or proceeding by or before any Governmental Authority to which the Seller is or has been a party since January 1, 1999 that relates to the Product Line Operations. Since January 1, 1999, the Seller has received no written notice alleging the need for any recall arising out of, and the Seller has not been held liable for, any injury to individuals or property as a result of the ownership, possession or use of any Phos-Lo Product developed, manufactured, sold, leased or delivered in connection with the Product Line Operations.

### 3.11 ENVIRONMENTAL MATTERS.

(a) The Seller and the operation of the Product Line Operations are and have been in material compliance with applicable Environmental Laws, except for any failure to comply with Environmental Laws that would not reasonably be expected to result in a Seller Material Adverse Effect.

(b) There is no pending or, to the knowledge of the Seller, threatened action, suit, hearing, demand or litigation, notice of violation or judicial or administrative proceeding, investigation or claim relating to Environmental Matters, including Off-Site Liabilities or any material violation of Environmental Law, involving the Seller or its predecessors, the Product Line Operations, any of the Product Line Properties, or any other property currently, or, to the knowledge of Seller, formerly owned or operated by the Seller in connection with the Product Line Operations.

(c) The Seller has those permits, licenses and approvals ("Environmental Permits") required under Environmental Law to operate the Product Line Operations and the Product Line Properties as currently operated by the Seller, except where the failure to have such Environmental Permits would not reasonably be expected to have a Seller Material Adverse Effect; such Environmental Permits are in full force and effect; the Seller is not in violation or default of any such Environmental Permits, except where such violation or default would not reasonably be expected to have a Seller Material Adverse Effect; and the Seller has made timely application for renewal of all such Environmental Permits as are to expire, such that all such Environmental Permits will remain in full force and effect, except where such failure to make timely application would not reasonably be expected to have a Seller Material Adverse Effect.

(d) To the knowledge of Seller, no Materials of Environmental Concern have been Released at any property currently or formerly owned, operated or leased by the Seller in connection with the Product Line Operations in violation of applicable Environmental Law or in a manner that would reasonably be expected to result in Environmental Matters, where such Release would reasonably be expected to have a Seller Material Adverse Effect.

(e) To the knowledge of Seller, the Product Line Properties do not contain any underground storage tanks, surface impoundments containing Materials of Environmental Concern, PCB-containing materials or any asbestos containing materials.

(f) The Parties agree that the only representations and warranties of the Seller herein as to any Environmental Matters, Environmental Liabilities, Releases, Environmental Laws and Off-Site Liabilities are those contained in this Section 3.11. Without limiting the generality of the foregoing, the Buyer specifically acknowledges that the representations and warranties contained in Sections 3.9, 3.12 and 3.13 do not relate to such matters.

3.12 LEGAL COMPLIANCE. The Seller is in compliance with all applicable laws (including rules and regulations thereunder) of any federal or state government, or any Governmental Authority, relating to the Product Line Operations, the Acquired Assets and the uses of the Acquired Assets, except for such failures to comply that would not reasonably be expected to result in a Seller Material Adverse Effect. The Seller has not received written notice of any pending action, suit, proceeding, hearing, investigation, claim or demand relating to the Product Line Operations alleging any failure to so comply.

3.13 PERMITS. Section 3.13 of the Seller's Disclosure Schedule lists all permits, licenses, franchises or authorizations from any Governmental Authority that are material to the Product Line Operations (collectively, the "Applicable Permits"). Each Applicable Permit is in full force and effect and the Seller is not in material violation of or material default under any Applicable Permit. No suspension or cancellation of any such Applicable Permit has been threatened in writing.

3.14 BROKERS' FEES. Except for payments due to [\*\*\*], the Seller has no liability or obligation to pay any fees or commissions to any broker, finder or agent with respect to the transactions contemplated by this Agreement.

3.15 CUSTOMERS AND SUPPLIERS. Section 3.15 of the Seller's Disclosure Schedule sets forth a list of (i) the top ten (10) customers, by revenue, of the Product Line Operations during the fiscal year ended December 31, 2002 and the five-month period ended May 31, 2003 and the amount and percentage of revenues accounted for by each such customer during each such period; (ii) the top five (5) suppliers, by volume of purchases, of the Product Line Operations during the fiscal year ended December 31, 2002 and the five-month period ended May 31, 2003; and (iii) each supplier that is the sole supplier of any significant product or service to the Product Line Operations.

3.16 WARRANTY CLAIMS. Section 3.16 of the Seller's Disclosure Schedule sets forth Seller's current product warranty and the aggregate amounts incurred by the Seller in fulfilling warranty obligations in respect of the Phos-Lo Products in each full fiscal year since January 1, 1999 and during the five-month period ended May 31, 2003. There are no outstanding material warranty claims. The Seller is not aware of any reason to believe that amounts expensed in fulfilling warranty obligations in respect of the Phos- Lo Products will materially increase as a percentage of sales of such products in future years.

3.17 TAXES. There are no liens for Taxes upon the Acquired Assets except Liens relating to current Taxes not yet due and payable. The Seller shall pay all Taxes payable by it that are not yet due and payable and for which there are Liens on the Acquired Assets; provided, however, that the Seller shall not be required to pay any Tax if such Tax is being contested in good faith by appropriate proceedings.

3.18 SPECIFICATIONS. The specifications attached hereto as SECTION 3.18 (the "Specifications"), are the specifications that are used by the Seller to manufacture the Phos-Lo Products as of the date hereof, and comply in all material respects with applicable laws relating to the manufacture of the Phos-Lo Products, and no other specifications are needed to manufacture the Phos-Lo Products. The Specifications comply with the NDAs. [\*\*\*].

### 3.19 CLINICAL AND SCIENTIFIC DATA; GOOD PRACTICES.

(a) The Seller has made available to the Buyer all available laboratory and all clinical data, including raw data and reports ("Scientific Data"), created by the Seller or any third party on behalf of the Seller in connection with the Phos-Lo Products. Section 3.19(a) of the Seller's Disclosure Schedule identifies each clinical study of the Phos-Lo Products conducted or sponsored by the Seller indicating, in each case, the location of the study, the principal investigator, the number of patients included in the study, the period covered by the study and a brief description of the study design.

(b) The Seller either owns or has full rights of access to and possession of all Scientific Data created by the Seller or any third party on behalf of the Seller in connection with the Phos-Lo Products.

(c) To the knowledge of the Seller, (i) the clinical studies conducted, and all Scientific Data created from such studies, by the Seller in connection with the Phos-Lo Products have been conducted, kept and maintained by the Seller in a manner that complies in all material respects with Good Practices and, (ii) all clinical studies conducted, and all Scientific Data created in such studies, in connection with Phos-Lo Products by any third party on behalf of the Seller have been conducted, kept and maintained in a manner that complies in all material respects with Good Practices.

(d) The Scientific Data is (i) not materially and adversely different from the presentation thereof contained in the NDA and (ii) does not identify any adverse event reports that are materially more adverse than those adverse event reports documented as a result of commercialization of the Phos-Lo Products.

3.20 EXPORTS AND CUSTOMS. The Seller is in compliance in all material respects with applicable export and customs statutes, rules and regulations of the United States and any applicable Canadian Governmental Authority relating to the Phos-Lo Products. Except in connection with its sales in Canada, the Seller is not the exporter of record of any products or merchandise of the Product Line Operations presently produced, distributed or sold by the Seller.

3.21 INSURANCE. Section 3.21 of the Seller's Disclosure Schedule contains a complete and correct list of all material policies of insurance covering the Acquired Assets, true and complete copies of which have been delivered or made available to the Buyer. All such policies are in full force and effect. The Seller is not in default under any provision contained in any such material insurance policy relating to the Product Line Operations which would reasonably be expected to have a material adverse effect upon the ability of the insured to collect insurance proceeds under such policy. No written notice of cancellation or non-renewal with respect to such policy has been received by the Seller.

### 3.22 INVESTMENT REPRESENTATIONS.

(a) The Seller is acquiring the Shares for its own account for investment only, and not with a view to or for sale in connection with, any distribution of the Shares in violation of the Securities Act or any rule or regulation under the Securities Act.



(b) The Seller has had adequate opportunity to obtain from representatives of the Buyer such information, in addition to the representations set forth in the Agreement, as is necessary to evaluate the merits and risks of its acquisition of the Shares.

(c) The Seller has sufficient expertise in business and financial matters to be able to evaluate the risks involved in the acquisition of the Shares and to make an informed decision with respect to such acquisition.

(d) The Seller is an Accredited Investor within the definition set forth in Rule 501(a) of the Securities Act.

(e) The Seller understands that because the Shares have not been registered, it cannot dispose of any or all of the Shares unless the Shares are subsequently registered under the Securities Act or exemptions from such registration are available. The Seller acknowledges and understands that, except as provided in Section 9.8 hereof, it has no independent right to require the Buyer to register the Shares.

### 3.23 FINISHED GOODS INVENTORY; PRICING.

(a) The Finished Goods Inventory as of the Closing Date will have been manufactured in accordance with the Specifications (as defined in the Manufacturing Agreement).

(b) The Seller's ex-factory sales price per bottle (200 ct.) of Phos-Lo Product is \$29.63.

3.24 NO OTHER REPRESENTATIONS OR WARRANTIES. Except for the representations and warranties of the Seller expressly set forth in this Agreement or in the Ancillary Agreements, neither the Seller nor any other Person makes any other express or implied representation or warranty on behalf of the Seller, or otherwise in respect of the Product Line Operations.

### ARTICLE IV- REPRESENTATIONS AND WARRANTIES OF THE BUYER

The Buyer represents and warrants to the Seller that the statements contained in this Article IV are true and correct as of the date hereof. For purposes of this Agreement, the phrase, "to the knowledge of the Buyer" or any phrase of similar import shall mean and be limited to the actual knowledge of the following individuals: [\*\*\*].

4.1 ORGANIZATION. The Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware and is duly qualified to conduct business under the laws of each jurisdiction where the character of the properties owned, leased or operated by it or the nature of its activities makes such qualification necessary, except for any such failure to be qualified that would not reasonably be expected to result in a Buyer Material Adverse Effect. The Buyer has all requisite corporate power and authority to carry on the business in which it is now engaged and to own and use the properties now owned and used by it.

4.2 CAPITALIZATION. The authorized capital stock of the Buyer consists of 75,000,000 shares of Buyer Common Stock and 5,000,000 shares of preferred stock, \$.10 par value per share ("Buyer Preferred Stock"). As of the close of business on May 30, 2003, 38,708,824 shares of Buyer Common Stock were issued and outstanding and no shares of Buyer Preferred Stock were issued or outstanding. No material change in such capitalization has occurred since January 1, 2003. The rights and privileges of Buyer Common Stock are set forth in the Buyer's Certificate of Incorporation and the Rights Agreement dated as of August 1, 1997, between the Buyer and Registrar and Transfer Company, as amended. All of the issued and outstanding shares of Buyer Common Stock have been duly authorized and validly issued and are fully paid and nonassessable.

4.3 AUTHORITY. The Buyer has all requisite corporate power and authority to execute and deliver this Agreement and the Ancillary Agreements and to perform its obligations hereunder, and thereunder, including without limitation the issuance of the Shares. The execution and delivery by the Buyer of this Agreement and the Ancillary Agreements and the consummation by the Buyer of the transactions contemplated hereby and thereby, including without limitation the issuance of Shares, have been duly authorized by all necessary corporate action on the part of the Buyer and no other further authorization or consent of the Buyer or its board of directors, lenders or stockholders will be necessary. This Agreement has been, and such Ancillary Agreements will be, duly executed and delivered by the Buyer and, assuming this Agreement and each such Ancillary Agreement constitute the valid and binding obligation of the Seller, this Agreement constitutes, and each such Ancillary Agreement will constitute, a valid and binding obligation of the Buyer, enforceable against the Buyer in accordance with its respective terms.

4.4 NONCONTRAVENTION. Subject to compliance with the applicable requirements of (i) the Hart-Scott-Rodino Act and (ii) the Securities Act and any applicable state securities laws, neither the execution and delivery by the Buyer of this Agreement or the Ancillary Agreements to which the Buyer will be a party, nor the consummation by the Buyer of the transactions contemplated hereby or thereby, including without limitation the issuance of the Shares, will:

- (a) conflict with or violate any provision of the charter or bylaws of the Buyer;
- (b) require on the part of the Buyer any filing with, or permit, authorization, consent or approval of, any Governmental Authority;
- (c) conflict with, result in a breach of, constitute (with or without due notice or lapse of time or both) a default under, result in the acceleration of obligations under, create in any party any right to terminate or modify, or require any notice, consent or waiver under, any contract or agreement to which the Buyer is a party or by which the Buyer is bound;
- (d) violate any order, writ, injunction or decree specifically naming the Buyer or any of its properties or assets; or
- (e) violate any statute, rule or regulation applicable to the Buyer or any of its properties or assets.

4.5 REPORTS AND FINANCIAL STATEMENTS. The Buyer has previously furnished (via EDGAR or otherwise) to the Seller complete and accurate copies, as amended or supplemented, of its (a) Annual Report on Form 10-K for the fiscal year ended December 29, 2002, as filed with the Securities and Exchange Commission (the "SEC"), and (b) all other reports filed by the Buyer under Section 13 or subsections (a) or (c) of Section 14 of the Exchange Act with the SEC since January 1, 2003 (such reports, together with any amendments or supplements thereto, are collectively referred to herein as the "Buyer Reports"). As of their respective dates, the Buyer Reports did not contain any untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading. The audited financial statements and unaudited interim financial statements of the Buyer included in the Buyer Reports (i) complied as to form in all material respects with applicable accounting requirements and the published rules and regulations of the SEC with respect thereto, when filed, (ii) have been prepared in accordance with GAAP applied on a consistent basis throughout the periods covered thereby (except as may be indicated therein or in the notes thereto, and in the case of quarterly financial statements, as permitted by Form 10-Q under the Exchange Act), (iii) fairly present the consolidated financial condition, results of operations and cash flows of the Buyer as of the respective dates thereof and for the periods referred to therein, and (iv) are consistent with the books and records of the Buyer.

4.6 ABSENCE OF MATERIAL ADVERSE CHANGE. Since March 29, 2003, there has not occurred any Buyer Material Adverse Effect.

4.7 LITIGATION. There are no actions, suits, claims or legal, administrative or arbitratorial proceedings pending against, or, to the knowledge of the Buyer, threatened against, the Buyer which would reasonably be expected to have a Buyer Material Adverse Effect, other than any litigation disclosed in the Buyer Reports.

4.8 BROKERS' FEES. Except for payments due to Stonebridge Associates, LLC, the Buyer has no liability or obligation to pay any fees or commissions to any broker, finder or agent with respect to the transaction contemplated by this Agreement.

4.9 ISSUANCE OF SHARES. The issuance, sale and delivery of the Shares in accordance with this Agreement have been duly authorized by all necessary corporate action on the part of the Buyer, and the Shares have been duly reserved for issuance. The Shares when issued in accordance with the provisions of this Agreement will be duly authorized, validly issued, fully paid and nonassessable and not subject to or issued in violation of any purchase option, call option, right of first refusal, preemptive right, subscription right or any similar right.

4.10 NO OTHER REPRESENTATIONS OR WARRANTIES. Except for the representations and warranties of the Buyer expressly set forth in this Agreement or in the Ancillary Agreements, neither the Buyer nor any other Person makes any other express or implied representation or warranty on behalf of the Buyer.

ARTICLE V-  
PRE-CLOSING COVENANTS

5.1 CLOSING EFFORTS; HART-SCOTT-RODINO ACT.

(a) Subject to the terms hereof, including Section 5.1(b), each of the Parties shall use commercially reasonable efforts to take all actions and to do all things reasonably necessary or advisable to consummate the transactions contemplated by this Agreement, including using reasonable commercial efforts to: (i) obtain all waivers, permits, consents, approvals or other authorizations from Governmental Authorities and from other third parties (the "Third Party Consents"), (ii) effect all registrations, filings and notices with or to Governmental Entities (the "Governmental Filings"), (iii) list the Shares on the Nasdaq National Market and (iv) otherwise comply in all material respects with all applicable laws and regulations in connection with the consummation of the transactions contemplated by this Agreement. The Seller shall not, without the prior consent of the Buyer, agree to any condition for obtaining any of the Third Party Consents that would reasonably be expected to have a material adverse effect on the Acquired Assets or the Product Line Operations. Each of the Parties shall promptly notify the other Party in writing of any fact, condition or event known to it that would reasonably be expected to prohibit, make unlawful or delay the consummation of the transactions contemplated by this Agreement, including without limitation (i) any written notice or other written communication from any third Person alleging that a Third Party Consent is or may be required in connection with the transactions described in this Agreement, and (ii) any material default under any material Assigned Contract to which the Seller is party and which relates to the Product Line Operations that with notice or lapse of time or both, would become a material default.

(b) Without limiting the generality of the foregoing, each of the Parties shall (i) promptly file any notification and report forms and related material that it may be required to file with the Federal Trade Commission and/or the Antitrust Division of the United States Department of Justice under the Hart-Scott-Rodino Act, (ii) use commercially reasonable efforts to obtain an early termination of the applicable waiting period under the Hart-Scott-Rodino Act, (iii) make any further filings or information submissions pursuant thereto that may be reasonably necessary or advisable and (iv) promptly make any filings or submissions required under any applicable foreign antitrust or trade regulation law. The Seller and the Buyer will act diligently and reasonably, and will cooperate with each other, to transfer all licenses from any Governmental Authority relating to the Acquired Assets and secure any approvals of any Governmental Authority required to be obtained by them that relate to the transactions contemplated by this Agreement. Each of the Parties shall use reasonable best efforts to resolve any objections that may be asserted by any Governmental Authority with respect to the transactions contemplated hereby, and shall cooperate with each other to contest any challenges to the transactions contemplated hereby by any Governmental Authority. Each of the Parties shall promptly inform the other Party of any material communication received by such Party from the Federal Trade Commission, the Antitrust Division of the Department of Justice or any other Governmental Authority regarding any of the transactions contemplated hereby (unless the provision of such information would (A) violate the provisions of any applicable

laws or regulations (including without limitation those relating to security clearance or export controls) or any confidentiality agreement or (B) cause the loss of the attorney-client privilege with respect thereto).

(c) Notwithstanding the foregoing, nothing contained in this Agreement will require or obligate the Buyer or its Affiliates (i) to initiate, pursue or defend any litigation brought by the Antitrust Division of the Department of Justice and the Federal Trade Commission, provided that if the Buyer determines not to initiate, pursue or defend such litigation, it shall notify the Seller in writing immediately and the Seller shall have the right to terminate this Agreement immediately upon written notice to the Buyer; (ii) to agree with any Governmental Authority or otherwise become subject to any material limitations imposed by a Governmental Authority on (A) the right of the Buyer effectively to control or operate the Product Line Operations or the Acquired Assets, (B) the right of the Buyer or its Affiliates to acquire or hold the Product Line Operations, or (C) the right of the Buyer to exercise full rights of ownership of the Product Line Operations or all or any material portion of the Acquired Assets; or (iii) to agree with any Governmental Authority or otherwise be required by any Governmental Authority to sell or otherwise dispose of, hold separate (through the establishment of a trust or otherwise), or divest itself of all or any portion of the business, assets or operations of Buyer, any Affiliate of Buyer or the Product Line Operations.

5.2 OPERATION OF PRODUCT LINE. Except as contemplated by this Agreement as set forth on Section 5.2 of the Seller's Disclosure Schedule, during the period from the date of this Agreement until the Closing Date, the Seller and the Buyer agree that, prior to the Closing, unless the Buyer shall otherwise consent in writing, the following provisions shall apply as to the Product Line Operations:

(a) the Seller shall carry on the Product Line Operations in the ordinary course and substantially consistent with past practice.

(b) the Seller shall comply in all material respects with all laws applicable to the Product Line Operations, and use commercially reasonable efforts to preserve the goodwill of suppliers, customers and others having business relations with the Product Line Operations and to maintain the Product Line Operations;

(c) the Seller shall inform the Buyer in writing of any event or circumstance that has or would reasonably be expected to have a Seller Material Adverse Effect promptly after the Seller learns of such an event or circumstance;

(d) except as expressly described in this Agreement, or except with the Buyer's express written approval, the Seller will not:

(i) enter into any contract, agreement or arrangement (oral or written) that requires the consent or approval of any third party to consummate the transactions described in this Agreement or any Ancillary Agreement, where the failure to obtain such consent or approval would reasonably be expected to have a Seller Material Adverse Effect;

(ii) make any material modifications to any Assigned Contract;

(iii) sell, lease (as lessor), transfer, license, or otherwise dispose of any Acquired Assets, other than inventory sold in the ordinary course of business;

(iv) mortgage or pledge any Acquired Assets or allow any Lien to be placed on any Acquired Assets, except for Liens for Taxes not yet due and payable and Liens arising solely by actions of the Buyer;

(v) to the extent it relates to the Product Line Operations, materially adversely alter its customary practices with respect to collection of accounts receivable of the Product Line Operations, billing practices or the provision of discounts, rebates or allowances;

(vi) enter into any advertising contracts; or

(vii) enter into any agreement or commitment to take any action prohibited by this Section 5.2.

### 5.3 ACCESS.

(a) The Seller shall permit representatives of the Buyer (which, for purposes of this Section 5.3 shall include representatives of any lender to the Buyer) to have access (at reasonable times, on reasonable prior written notice and in a manner so as not to interfere with the normal business operations of the Product Line Operations) to the premises, properties, financial and accounting records, contracts, personnel (including senior management of the Seller and persons who provided diligence information to the Buyer) and other records and documents of the Seller pertaining to the Product Line Operations. Notwithstanding the foregoing, the Seller shall not be obligated (i) to provide any information, documents or access to any representative of the Buyer unless the Buyer is responsible, pursuant to the terms of the confidentiality letter agreement dated as of November 6, 2002 between the Buyer and the Seller (the "Confidentiality Agreement"), for the use and disclosure of any information obtained by such Person from the Seller, or such Person enters into a confidentiality agreement with the Seller on terms that are substantially the same as those set forth in the Confidentiality Agreement or (ii) to provide any information, documents or access that would (A) violate the provisions of any applicable laws or regulations or any confidentiality agreement to which it is a Party or (B) cause the loss of the attorney-client privilege with respect thereto. Prior to the Closing, the Buyer and its representatives shall not contact or communicate with the employees, customers and suppliers of the Seller, except with the prior written consent of the Seller, which consent shall not be unreasonably withheld; PROVIDED, HOWEVER, in the event the circumstances set forth in clauses (A) or (B) above are implicated, to the extent reasonably practicable, the Seller and the Buyer shall use commercially reasonable efforts to accommodate the Buyer's access and respect all such laws, regulations, confidentiality agreements and privileges through other means (e.g., joint defense agreements, additional confidentiality agreements, etc.).

(b) The Buyer and the Seller acknowledge and agree that the Confidentiality Agreement remains in full force and effect and that information provided by the Seller to the Buyer pursuant to this Agreement prior to the Closing shall be treated in accordance with the Confidentiality Agreement. If this Agreement is terminated prior to the Closing, the Confidentiality Agreement shall remain in full force and effect in accordance with its terms. If the

Closing occurs, the Confidentiality Agreement, insofar as it covers information relating to the Acquired Assets, shall terminate effective as of the Closing, but shall remain in effect insofar as it covers other information disclosed thereunder.

5.4 EXCLUSIVITY. The Seller shall neither authorize nor permit its officers, directors, employees, representatives and agents to (i) initiate, solicit or encourage any proposal, offer or discussion with any party (other than the Buyer) concerning any acquisition of the Product Line Operations or the assets thereof; (ii) engage in discussions or negotiations with any party (other than the Buyer) concerning any such transaction; (iii) enter into any agreement relating to or approve any such transaction; or (iv) take any other action to cooperate in any way with, or facilitate any inquiries or the making of any proposal that constitutes, or may reasonably be expected to lead to, any Acquisition Proposal. Without limiting the preceding sentence, the Parties agree that any violation of the restrictions described in the preceding sentence by the Seller and any officer, employee, financial advisor, attorney, or other advisor or representative of the Seller, whether or not such Person is purporting to act on behalf of the Seller, will be deemed to be a breach of this Section 5.4 by the Seller. For purposes of this Agreement, "ACQUISITION PROPOSAL" means (i) any proposal for a merger or other business combination involving the Seller which includes the Product Line Operations or the Acquired Assets, or (ii) an offer to acquire the Acquired Assets in any manner, directly or indirectly.

5.5 NOTICE OF SUITS. Each Party shall promptly notify the other of any action, suit or proceeding that is instituted or, to its knowledge, threatened against such Party to restrain, prohibit or otherwise challenge the legality of any transaction contemplated by this Agreement. The Seller will promptly notify the Buyer of any lawsuit, claim, proceeding or investigation that is, to the Seller's knowledge, threatened, brought or asserted against the Seller that would have been listed in Article III if the lawsuit, claim, proceeding or investigation had arisen prior to the date of this Agreement.

5.6 [\*\*\*] NON-COMPETE. The Seller shall use commercially reasonable efforts to obtain from [\*\*\*] a covenant not to compete on comparable terms to those set forth in Section 9.2 or on such other terms as are reasonably acceptable to the Buyer as evidenced by its written approval; PROVIDED, HOWEVER, that the failure to obtain such covenant from [\*\*\*] shall not be a breach of this covenant; and, PROVIDED, FURTHER, that the Seller shall not be required to make any payments or agree to any material undertakings in connection with obtaining this covenant.

ARTICLE VI-  
CONDITIONS PRECEDENT TO CLOSING

6.1 CONDITIONS TO OBLIGATIONS OF THE BUYER. The obligation of the Buyer to consummate the transactions to be consummated at the Closing is subject to the satisfaction (or waiver by the Buyer) of the following conditions:

(a) the representations and warranties of the Seller set forth in Article III that are qualified as to materiality shall be true and correct and all other representations and warranties of the Seller set forth in Article III shall be true and correct in all material respects, in each case as of the Closing Date as if made as of the Closing Date, except (i) for changes contemplated or permitted by this Agreement and (ii) for those representations

and warranties that address matters only as of a particular date which representations and warranties shall be true and correct in all material respects as of such date (other than those that are qualified as to materiality, which shall be true and correct as of such date);

(b) the Seller shall have performed or complied in all material respects with the agreements and covenants required to be performed or complied with by it under this Agreement as of or prior to the Closing;

(c) (i) no action, suit or proceeding brought by a Governmental Authority seeking to prevent consummation of the transactions contemplated by this Agreement shall be pending;

(ii) no action, suit or proceeding brought by a third party that is not a Governmental Authority seeking to prevent consummation of the transactions contemplated by this Agreement that would reasonably be expected to have a Seller Material Adverse Effect shall be pending; and

(iii) no judgment, order, decree, stipulation or injunction enjoining or preventing the consummation of the transactions contemplated by this Agreement shall be in effect;

(d) the Seller shall have delivered to the Buyer a certificate (the "Seller Certificate") signed by a duly authorized officer of the Seller on behalf of the Seller to the effect that each of the conditions specified in clauses (a) through (c) (insofar as clause (c) relates to an action, suit or proceeding involving, or a judgment, order, decree, stipulation or injunction against the Seller) of this Section 6.1 have been satisfied;

(e) the applicable waiting period (and any extensions thereof) under the Hart-Scott-Rodino Act and any comparable applicable Canadian law shall have expired or otherwise been terminated;

(f) the Seller shall have obtained (or caused to be obtained) all of the Third Party Consents set forth in Section 6.1(f) of the Seller's Disclosure Schedule and effected all of the Governmental Filings which are required on the part of the Seller to consummate the transactions contemplated by this Agreement, except for those Third Party Consents and Governmental Filings, which, if not obtained or effected would not in the aggregate reasonably be expected to result in a Seller Material Adverse Effect;

(g) The Seller shall have given appropriate notices in accordance with the provisions of the Excluded Contracts, notifying the contract parties that the assets related to the Product Line Operations will be sold to the Buyer and that such contracts will be terminated with respect to Phos-Lo Products, to the extent allowable in accordance with the provisions of such contracts.

(h) the Buyer shall have received such other customary certificates (such as a certificate of corporate good standing of the Seller in



Massachusetts and certificates as to the incumbency of officers and the adoption of authorizing resolutions) as the Buyer shall reasonably request in connection with the Closing;

(i) the Seller shall have delivered all certificates, instruments, contracts and other documents to be delivered by it pursuant to Section 2.3(b) (including all applicable Ancillary Agreements); and

(j) no Seller Material Adverse Effect, other than as shall be described on Section 6.1 of the Seller's Disclosure Schedule shall have occurred since the date of execution of this Agreement.

6.2 CONDITIONS TO OBLIGATIONS OF THE SELLER. The obligation of the Seller to consummate the transactions to be consummated at the Closing is subject to the satisfaction (or waiver by the Seller) of the following conditions:

(a) the representations and warranties of the Buyer set forth in Article IV that are qualified as to materiality shall be true and correct and all other representations and warranties of the Buyer set forth in Article IV shall be true and correct in all material respects, in each case as of the Closing Date as if made as of the Closing Date, except (i) for changes contemplated or permitted by this Agreement and (ii) for those representations and warranties that address matters only as of a particular date, which representations and warranties shall be true and correct in all material respects as of such date (other than those that are qualified as to materiality, which shall be true and correct as of such date);

(b) the Buyer shall have performed or complied in all material respects with its agreements and covenants required to be performed or complied with by it under this Agreement as of or prior to the Closing;

(c) (i) no action, suit or proceeding brought by a Governmental Authority seeking to prevent consummation of the transactions contemplated by this Agreement shall be pending;

(ii) no action, suit or proceeding brought by a third party that is not a Governmental Authority seeking to prevent consummation of the transactions contemplated by this Agreement that would reasonably be expected to have a Buyer Material Adverse Effect shall be pending; and

(iii) no judgment, order, decree, stipulation or injunction enjoining or preventing the consummation of the transactions contemplated by this Agreement shall be in effect;

(d) the Buyer shall have delivered to the Seller a certificate (the "Buyer Certificate") signed by a duly authorized officer of the Buyer on behalf of the Buyer to the effect that each of the conditions specified in clauses (a) through (c) (insofar as clause (c) relates to an action, suit or proceeding involving, or a judgment, order, decree, stipulation or injunction against the Buyer) of this Section 6.2 have been satisfied;

(e) the applicable waiting period (and any extensions thereof) under the Hart-Scott-Rodino Act and any comparable applicable Canadian law shall have expired or otherwise been terminated;

(f) the Buyer shall have obtained (or caused to be obtained) all of the Third Party Consents set forth in Section 6.2(f) of the Buyer's Disclosure Schedule and effected all of the Governmental Filings which are required on the part of the Buyer to consummate the transactions contemplated by this Agreement, except for those Third Party Consents and Governmental Filings, which, if not obtained or effected, would not reasonably be expected to result in a Buyer Material Adverse Effect;

(g) the Seller shall have received such other customary certificates (such as a certificate of corporate good standing of the Buyer in its jurisdiction of incorporation and certificates as to the incumbency of officers and the adoption of authorizing resolutions) as it shall reasonably request in connection with the Closing;

(h) the Buyer shall have delivered all certificates, instruments, contracts and other documents to be delivered by it pursuant to Section 2.3(b) (including all applicable Ancillary Agreements);

(i) the Buyer shall have listed the Shares on the Nasdaq National Market; and

(j) no Buyer Material Adverse Effect, other than as shall be described on Section 6.1 of the Buyer's Disclosure Schedule, shall have occurred since the date of execution of this Agreement.

#### ARTICLE VII- INDEMNIFICATION

7.1 INDEMNIFICATION BY THE SELLER. Subject to the terms and conditions of this Article VII, the Seller shall indemnify the Buyer and its officers, directors, employees, agents, representatives and its Affiliates (the "Buyer Indemnitees") in respect of, and hold the Buyer Indemnitees harmless against, any and all liabilities, obligations, judgments, interest, losses, assessments, damages, fines, fees, penalties, costs and expenses (including without limitation reasonable attorneys' fees and expenses of investigating and defending claims, lawsuits, complaints, actions or other pending or threatened litigation) (collectively, "Damages") incurred or suffered by any of the Buyer Indemnitees resulting from or attributable to:

(a) any breach of any representation or warranty of the Seller contained in this Agreement, any Ancillary Agreement (except the Manufacturing Agreement) or the Seller's Certificate;

(b) any failure by the Seller to perform or observe any covenant or agreement required to be performed or observed by the Seller contained in this Agreement or any Ancillary Agreement (except the Manufacturing Agreement);

(c) any failure by the Seller to pay, perform or discharge any Excluded Liabilities;

(d) any liabilities arising out of the Seller's conduct of the Product Line Operations on or prior to the Closing Date whether asserted prior to or after the Closing Date (except to the extent the same constitutes an Assumed Liability); or

(e) the material breach by the Seller of its obligations under the Transition Services Agreement.

7.2 INDEMNIFICATION BY THE BUYER. Subject to the terms and conditions of this Article VII, the Buyer shall indemnify the Seller and its officers, directors, employees, agents, representatives and its Affiliates (the "Seller Indemnitees") in respect of, and hold the Seller Indemnitees harmless against, any and all Damages incurred or suffered by any of the Seller Indemnitees thereof resulting from or constituting:

(a) any breach of any representation or warranty of the Buyer contained in this Agreement, any Ancillary Agreement (except the Manufacturing Agreement) or the Buyer's Certificate;

(b) any failure by the Buyer to perform or observe any covenant or agreement contained in this Agreement or any Ancillary Agreement (except the Manufacturing Agreement);

(c) any failure by the Buyer to pay, perform or discharge any Assumed Liabilities; or

(d) the provision of Services (as defined in the Transition Services Agreement) by or on behalf of the Seller under the Transition Services Agreement, except to the extent that such Damages result from a material breach by the Seller of its obligations under the Transition Services Agreement.

### 7.3 CLAIMS FOR INDEMNIFICATION.

(a) THIRD PARTY CLAIMS. All claims for indemnification made under this Agreement resulting from, related to or arising out of a third-party claim against an Indemnified Party shall be made in accordance with the following procedures.

(i) A Person entitled to indemnification under this Article VII (an "Indemnified Party") shall give prompt written notification to the Person from whom indemnification is sought (the "Indemnifying Party") of the commencement of any action, suit or proceeding relating to a third-party claim (a "Third Party Claim") for which indemnification may be sought or, if earlier, upon the assertion of any such claim by a third party; PROVIDED, HOWEVER, that the failure so to notify the Indemnifying Party promptly or at all shall not relieve the Indemnifying Party of any liability or obligation it may have to the Indemnified Party hereunder except to the extent of actual prejudice caused by such failure. Such notification shall include a description in reasonable detail (to the extent known by the Indemnified Party) of the facts constituting the basis for such Third Party Claim and the amount of the Damages claimed. Within

twenty-five (25) days after delivery of such notification, the Indemnifying Party may, upon written notice thereof to the Indemnified Party, assume control of the defense of such action, suit, proceeding or claim with counsel reasonably satisfactory to the Indemnified Party. Notwithstanding the foregoing, the Indemnifying Party may not assume the defense of any Third Party claim for equitable or other non-monetary relief that would materially affect the ongoing operations of the Product Line Operations.

(ii) The Party not controlling such defense may participate therein at its own expense; PROVIDED that if the Indemnifying Party assumes control of such defense and the Indemnified Party reasonably concludes, based on advice from counsel, that the Indemnifying Party and the Indemnified Party have conflicting interests with respect to such action, suit, proceeding or claim, the reasonable fees and expenses of counsel to the Indemnified Party solely in connection therewith shall be considered "Damages" for the purposes of this Agreement; PROVIDED, HOWEVER, that in no event shall the Indemnifying Party be responsible for the fees and expenses of more than one counsel for all Indemnified Parties, The Party controlling such defense shall keep the other Party advised of the status of such action, suit, proceeding or claim and the defense thereof and shall consider recommendations made by the other Party with respect thereto.

(iii) The Indemnified Party shall not agree to any settlement of any Third Party Claim without the prior written consent of the Indemnifying Party, which consent shall not be unreasonably withheld or delayed. The Indemnifying Party shall not agree to any settlement of any Third Party Claim that does not include a complete release of the Indemnified Party from all liability with respect thereto or that imposes any liability or obligation on the Indemnified Party without the prior written consent of the Indemnified Party, which consent shall not be unreasonably withheld or delayed.

(b) PROCEDURE FOR OTHER CLAIMS. An Indemnified Party wishing to assert a claim for indemnification under this Article VII which is not subject to Section 7.3(a) shall deliver to the Indemnifying Party a written notice (a "Claim Notice") which contains (i) a description and the amount (the "Claimed Amount") of any Damages incurred by the Indemnified Party, (ii) a statement that the Indemnified Party is entitled to indemnification under this Article VII and a reasonable explanation of the basis therefor, and (iii) a demand for payment in the amount of such Damages. Within twenty-five (25) days after delivery of a Claim Notice, the Indemnifying Party shall deliver to the Indemnified Party a written response in which the Indemnifying Party shall: (I) agree that the Indemnified Party is entitled to receive all of the Claimed Amount (in which case such response shall be accompanied by a payment by the Indemnifying Party to the Indemnified Party of the Claimed Amount, by check or by wire transfer), (II) agree that the Indemnified Party is entitled to receive part, but not all, of the Claimed Amount (the "Agreed Amount") (in which case such response shall be accompanied by a payment by the Indemnifying Party to the Indemnified Party of the Agreed Amount, by check or by wire transfer ), or (III) contest that the Indemnified Party is entitled to receive any of the Claimed

Amount. If the Indemnifying Party in such response contests the payment of all or part of the Claimed Amount, the Indemnifying Party and the Indemnified Party shall use good faith efforts to resolve such dispute. If such dispute is not resolved within sixty (60) days following the delivery by the Indemnifying Party of such response, the Indemnifying Party and the Indemnified Party shall each have the right to submit such dispute to arbitration in accordance with the provisions of Section 10.18.

#### 7.4 SURVIVAL.

(a) The representations and warranties of the Seller and the Buyer set forth in this Agreement, the Seller Certificate and the Buyer Certificate shall survive the Closing and the consummation of the transactions contemplated hereby and continue until the date 18 months after the Closing Date, at which time they shall expire PROVIDED, HOWEVER, (i) the representations and warranties contained in Sections 3.11 and 3.17 shall survive for sixty (60) days beyond the applicable statute of limitations, (ii) the representations and warranties contained in Section 3.5 shall survive the Closing and continue until the third anniversary of the Closing Date, (iii) the representations and warranties contained in Section 3.8 shall survive the Closing and continue until the fifth anniversary of the Closing Date and (iv) the representations and warranties of the Seller contained in Sections 3.1, 3.2, 3.3, 3.4 and 3.14 and of the Buyer contained in Sections 4.1, 4.2, 4.3, 4.4, 4.8 and 4.9 shall survive the Closing and the consummation of the transactions contemplated hereby without limitation.

(b) If an indemnification claim under Section 7.1(a) or Section 7.2(a) is properly asserted in writing pursuant to Section 7.3 prior to the expiration as provided in Section 7.4(a) of the representation or warranty that is the basis for such claim, then such representation or warranty shall survive until, but only for the purpose of, the resolution of such claim.

#### 7.5 LIMITATIONS.

(a) Notwithstanding anything to the contrary contained in this Agreement, the following limitations shall apply to indemnification claims under this Agreement:

(i) no individual claim (or series of related claims) for indemnification under Section 7.1(a) or Section 7.2(a) shall be valid and assertable unless it is (or they are) for an amount in excess of [\*\*\*];

(ii) the Seller shall be liable with respect to claims under Section 7.1(a) only if the aggregate Damages related to such claims (excluding any claims disallowed under Section 7.5(a)(i)), when considered together, exceeds [\*\*\*] and only for that portion of the aggregate Damages related to such claims (excluding any claims disallowed under Section 7.5(a)(i)), which, when considered together, exceeds [\*\*\*];

(iii) the aggregate liability of the Seller for all Damages under Section 7.1(a) (other than Damages in respect of a breach of Section 3.8) shall not exceed [\*\*\*]; PROVIDED, HOWEVER, that such Damages, when considered together with all Damages in respect of a breach of Section 3.8, shall not exceed [\*\*\*];

(iv) the aggregate liability of the Seller for all Damages in respect of a breach of Section 3.8, when considered together with all of the Damages under Section 7.1(a), shall not exceed [\*\*\*];

(v) the Buyer shall be liable with respect to claims under Section 7.2(a) only if the aggregate Damages related to such claims (excluding any claims disallowed under Section 7.5(a)(i)), when considered together, exceeds [\*\*\*] and only for that portion of the aggregate Damages related to such claims (excluding any claims disallowed under Section 7.5(a)(i)), which, when considered together, exceeds [\*\*\*]; and

(vi) the aggregate liability of the Buyer for all Damages under Section 7.2(a) shall not exceed [\*\*\*].

(b)

(i) Notwithstanding anything to the contrary contained in this Article VII, the Buyer Indemnitees shall be entitled to indemnification for Damages in respect of a breach of Sections 3.1, 3.2, 3.3, 3.4, 3.14 and 3.17 hereof and under Sections 7.1(b), 7.1(c), 7.1(d) and 7.1(e) hereof irrespective of the limitations set forth above in Sections 7.5(a)(i), 7.5(a)(ii), 7.5(a)(iii) and 7.5(a)(iv)

(ii) Notwithstanding anything to the contrary contained in this Article VII, the Seller Indemnitees shall be entitled to indemnification for Damages in respect of a breach of Sections 4.1, 4.2, 4.3, 4.4, 4.8 and 4.9 hereof and under Sections 7.2(b), 7.2(c) and 7.2(d) hereof irrespective of the limitations set forth above in Sections 7.5(a)(i), 7.5(a)(v) and 7.5(a)(vi).

(c) No right to indemnification under this Article VII shall be limited by reason of any investigation or audit conducted before or after the Closing of any Party hereto or the knowledge of such Party of any breach of any representation, warranty, agreement or covenant by the other Party at any time, or the decision by such Party to complete the Closing.

(d) Except with respect to Third Party Claims, for which this Section 7.5(d) shall not apply, in no event shall any Indemnifying Party be responsible or liable for any Damages or other amounts under this Article VII that exceed in the aggregate [\*\*\*] and that are consequential, in the nature of lost profits, diminution in the value of property, special or punitive or otherwise not actual damages. Each Party shall (and shall cause its Affiliates to) use reasonable commercial efforts to pursue all legal rights and remedies available in order to minimize the Damages for which indemnification is provided to it under this Article VII.

(e) The amount of Damages recoverable by an Indemnified Party under this Article VI with respect to an indemnity claim shall be reduced by (i) the amount of any payment received by such Indemnified Party (or an Affiliate thereof), with respect to the Damages to which such indemnity claim relates, from an insurance carrier, and (ii) the amount of any Tax benefit realized or realizable by such Indemnified Party (or an Affiliate thereof) which is attributable to the Damages to which such indemnity claim relates. For purposes of this Section 7.5(e), the Tax benefit realized or realizable by any Indemnified Party (or an Affiliate thereof) shall be determined as of the date of the receipt of payment from the Indemnifying Party by calculating the present value of all expected reductions in Tax payments attributable to any expected deductions or decreases in income associated with the Damages to which such indemnity claim relates (net of any increase in Tax payments that may result from the receipt of the indemnification payment), assuming that the Indemnified Party is always subject to a total combined Tax rate of 40% and using a discount rate equal to the prime rate of interest reported in THE WALL STREET JOURNAL at the time such indemnification payment is made. An Indemnified Party shall use

reasonable commercial efforts to pursue, and to cause its Affiliates to pursue, all Tax benefits to which it may be entitled in connection with any Damages it incurs, and the Parties shall cooperate with each other in pursuing insurance claims with respect to any Damages or any indemnification obligations with respect to Damages. If an Indemnified Party (or an Affiliate) receives any insurance payment in connection with any claim for Damages for which it has already received an indemnification payment from the Indemnifying Party, it shall pay to the Indemnifying Party, within 30 days of receiving such insurance payment, an amount equal to the excess of (A) the amount previously received by the Indemnified Party under this Article VII with respect to such claim plus the amount of the insurance payments received, over (B) the amount of Damages with respect to such claim which the Indemnified Party has become entitled to receive under this Article VII.

(f) Except with respect to claims for fraud or for equitable relief, including specific performance, made with respect to breaches of any covenant or agreement contained in this Agreement or the Ancillary Agreements, the rights of the Indemnified Parties under this Article VII shall be the sole and exclusive remedies of the Indemnified Parties and their respective Affiliates with respect to claims covered by Section 7.1 or Section 7.2 or otherwise relating to the transactions that are the subject of this Agreement. Without limiting the generality of the foregoing, in no event shall any Party, its successors or permitted assigns be entitled to claim or seek rescission of the transactions consummated by this Agreement.

7.6 TREATMENT OF INDEMNIFICATION PAYMENTS. All indemnification payments made under this Agreement shall be treated by the Parties as an adjustment to the purchase price to the maximum extent allowable under applicable law.

7.7 CONSTRUCTION. The parties intend that each representation, warranty and covenant herein shall have independent significance. If any party has breached any representation, warranty or covenant contained herein in any respect, the fact that there exists another representation, warranty or covenant relating to the same subject matter (regardless of the relative levels of specificity) which the party has not breached shall not detract from or mitigate the fact that the party is in breach of the first representation, warranty or covenant, as the case may be.

7.8 INTEREST. Any amounts not paid when due under Sections 7.1 or 7.2 shall bear interest at the lesser of (i) the rate equal to the prime lending rate as published in THE WALL STREET JOURNAL on the date such amount was due, plus 3% per annum and (ii) the highest rate permitted by law.

ARTICLE VIII-  
TERMINATION

8.1 TERMINATION OF AGREEMENT. The Parties may terminate this Agreement prior to the Closing as provided below:

(a) the Parties may terminate this Agreement by mutual written consent;

(b) the Buyer may terminate this Agreement by giving written notice to the Seller in the event the Seller is in breach of any representation, warranty, covenant or agreement contained in this Agreement and such breach (i) would cause the conditions set forth in Section 6.1(a) or Section 6.1(b) not to be satisfied and (ii) is not cured within twenty (20) days following delivery by the Buyer to the Seller of written notice of such breach;

(c) the Seller may terminate this Agreement by giving written notice to the Buyer in the event the Buyer is in breach of any representation, warranty, covenant or agreement contained in this Agreement and such breach (i) would cause the conditions set forth in Section 6.2(a) or Section 6.2(b) not to be satisfied and (ii) is not cured within twenty (20) days following delivery by the Seller to the Buyer of written notice of such breach;

(d) the Buyer may terminate this Agreement by giving written notice to the Seller if the Closing shall not have occurred on or before November 1, 2003 by reason of the failure of any condition precedent under Section 6.1 (unless the failure results exclusively from a breach by the Buyer of any representation, warranty, covenant or agreement contained in this Agreement); and

(e) the Seller may terminate this Agreement by giving written notice to the Buyer if the Closing shall not have occurred on or before November 1, 2003 by reason of the failure of any condition precedent under Section 6.2 (unless the failure results exclusively from a breach by the Seller of any representation, warranty, covenant or agreement contained in this Agreement).

(f) the Seller may terminate this Agreement by giving written notice to the Buyer in accordance with Section 5.1(c)(i).

8.2 EFFECT OF TERMINATION. If any Party terminates this Agreement pursuant to Section 8.1, all obligations of the Parties hereunder shall terminate without any liability of any Party to the other Party except for the provisions of Section 9.1(d) relating to confidentiality, Section 10.1 relating to press releases and announcements, Section 3.14 relating to brokerage, and Section 10.9 relating to expenses shall survive such termination. Notwithstanding the foregoing, termination of this Agreement shall not relieve any Party for any breach by such Party, prior to the termination of this Agreement, of any covenant, agreement, representation or warranty contained in this Agreement or impair the right of any Party to obtain such remedies as may be available to it in law or equity with respect to such a breach of any covenant, agreement, representation or warranty contained in this Agreement by the other Party.



ARTICLE IX-  
ADDITIONAL COVENANTS

9.1 ACCESS TO INFORMATION; RECORD RETENTION; COOPERATION.

(a) ACCESS TO INFORMATION. Subject to compliance with contractual obligations and applicable laws, during the ten (10)-year period following the Closing, after not less than five (5) days prior written notice, each Party shall afford to the other Party and to such Party's authorized accountants, counsel, bank auditors and other designated representatives during normal business hours in a manner so as to not unreasonably interfere with the conduct of business (i) reasonable access and duplicating rights to all non-privileged records, books, contracts, instruments, documents, correspondence, computer data and other data and information (collectively, "Information") within the possession or control of such Party to the extent such access may reasonably be required by the Party seeking access solely in connection with matters relating to or affected by the operations of the Product Line Operations, as to the Seller, for periods prior to the Closing Date, and as to the Buyer, for periods on and after the Closing Date and (ii) reasonable access to the personnel of such Party; PROVIDED, HOWEVER, notwithstanding anything to the contrary contained in this Section 9.1(a), this Section 9.1(a) shall not give the Seller the right to have access to the Buyer's Information and personnel for the purpose of reviewing the accuracy of any payments made pursuant to Section 2.4 beyond what is provided for in Section 2.4 of this Agreement. Requests may be made under this Section 9.1(a) for financial reporting and accounting matters, preparing financial statements, preparing and filing of any Tax Returns, prosecuting any claims for refund, defending any Tax claims or assessment, preparing securities law or securities exchange filings, prosecuting, defending or settling any litigation or insurance claim, performing obligations under this Agreement and the Ancillary Agreements, and all other proper business purposes, but may not be made, and access and duplicating rights need not be afforded, in connection with disputes between the Parties, including without limitation disputes as to indemnification hereunder.

(b) REIMBURSEMENT. A Party making Information or personnel available to the other Party under Section 9.1(a) shall be entitled to receive from the other Party, upon the presentation of invoices therefor, payments for such amounts relating to supplies, disbursements and other out-of-pocket expenses, as may reasonably be incurred in making such Information or personnel available; PROVIDED, HOWEVER, that no such reimbursements shall be required for the salary or cost of fringe benefits or similar expenses pertaining to employees of the providing Party.

(c) RETENTION OF RECORDS. Except as may otherwise be required by law or agreed to in writing by the Parties, each Party shall use reasonable commercial efforts to preserve, until five (5) years after the Closing Date, all Information in its possession or control pertaining to the Product Line Operations after December 31, 1998. Notwithstanding the foregoing, in lieu of retaining any specific Information, any Party may offer in writing to the other Party to deliver such Information to the other Party, and if such offer is not accepted within sixty (60) days, the offered Information may be disposed of at any time.

(d) CONFIDENTIALITY.

(i) From and after the Closing, each Party shall hold, and shall cause its respective Affiliates, auditors, attorneys, financial advisors, bankers and other consultants and advisors, to hold, in strict confidence all Information concerning the other Party furnished to it by the other Party or such other Party's representatives pursuant to this Agreement or the Confidentiality Agreement except to the extent that such Information:

- (A) is or becomes generally available to the public other than as a result of any breach of the obligations provided for by this Section 9.1(d);
- (B) was within the possession of the receiving Party prior to it initially being furnished to the receiving Party by or on behalf of the disclosing Party; or
- (C) is or becomes available on a non-confidential basis to the receiving Party from a source other than the disclosing Party, provided that the source of such Information did not breach any obligation of confidentiality to the disclosing Party.

(ii) Each Party shall not release or disclose such Information to any other Person, except its auditors, attorneys, financial advisors, bankers and other consultants and advisors, unless compelled to disclose such Information by judicial or administrative process or by other requirements of law or so as not to violate the rules of any stock exchange, law, order, or regulation of a Governmental Authority; PROVIDED, HOWEVER, that in the case of disclosure compelled by judicial or administrative process, the receiving Party shall (to the extent permitted by applicable law) notify the disclosing Party promptly of the request and the documents requested thereby so that the disclosing Party may seek an appropriate protective order or other appropriate remedy; and PROVIDED FURTHER that the receiving party shall use reasonable efforts to avoid and/or minimize such disclosure.

9.2 COVENANT NOT TO COMPETE. For a period of [\*\*\*] after the Closing Date (the "Closing Restricted Period"), the Seller and its controlled Affiliates shall not, directly or indirectly, engage in the business of, or own any equity or any debt convertible into equity of, or counsel, operate, or assist, any entity that is in the business of, [\*\*\*] (the "Restricted Business").

(a) The Closing Restricted Period shall be tolled with respect to the Seller and its respective Affiliates during any period of violation of this covenant not to compete by any of them.

(b) In the event that any of the covenants contained in this Section 9.2 shall be determined by any court of competent jurisdiction to be unenforceable by reason of its extending for too long a period of time or over too large a geographical area or by reason of its being too extensive in any other respect, it shall be interpreted to extend only over the longest period of time for which it may be enforceable, and/or over the largest geographical area as to which it may be enforceable and/or to the maximum extent in all other

aspects as to which it may be enforceable, all as determined by such court in such action. The Seller acknowledges that both the length of time and the geographic scope are considered by it to be reasonable given the nature of the Product Line Operations and are necessary to the protection of the Product Line Operations.

(c) The restrictive covenants contained in this Section 9.2 are each covenants independent of any other provision of this Agreement, and the existence of any claim which the Seller may allege against any other party to this Agreement, whether based on this Agreement or otherwise, shall not prevent the enforcement of these covenants. The Seller acknowledges that the Buyer is purchasing the goodwill of the Product Line Operations and the covenants contained in this Section 9.2 are essential to the protection of the Buyer's investment in the Product Line Operations and that the Buyer would not purchase the Product Line Operations but for these covenants. The Seller agrees that a breach by the Seller of this Section 9.2 shall cause irreparable harm to the Buyer and the Product Line Operations and that the Buyer's remedies at law for any breach or threat of breach of the provisions of this Section 9.2 shall be inadequate, and that the Buyer shall be entitled to an injunction or injunctions to prevent breaches of this Section 9.2 and to enforce specifically the terms and provisions hereof, in addition to any other remedy to which the Buyer may be entitled at law.

(d) Notwithstanding the foregoing, neither the Seller nor its Affiliates shall be prohibited from:

(i) continuing to engage in any type of business conducted by the Seller as of the date of this Agreement which is not part of the Product Line Operations or selling products or services which are not part of the Product Line Operations;

(ii) acquiring or owning less than [\*\*\*] (by voting power) of the outstanding capital stock of any publicly-traded company which is engaged in the Restricted Business; or

(iii) performing the Seller's obligations under this Agreement and the Ancillary Agreements, including without limitation manufacturing the Phos-Lo product line for the Buyer pursuant to the Manufacturing Agreement, or otherwise taking actions in connection with the winding up of the Product Line Operations.

### 9.3 USE OF NAME FOR TRANSITION PERIOD.

(a) Following the Closing, except as otherwise provided herein, the Buyer shall have no rights to use any trademarks, trade names, logos or any contraction, abbreviation or simulation of the Seller (the "Retained Marks") and will not hold itself out as having any affiliations with the Seller.

(b) Notwithstanding the provisions of Section 9.3(a),

(i) for a period of [\*\*\*] days after the Closing Date, the Buyer may utilize sales promotional aids, literature and other printed material of the Product Line Operations, provided such material clearly and prominently displays the following statement or a statement of similar

import, the form of which shall be approved by the Seller: "[the Buyer product name], formerly a product of Braintree Laboratories, Inc." Promptly following the Closing Date, the Buyer will implement a plan to eliminate the use of all such material within such [\*\*\*] period; and

(ii) the Buyer may disclose to its customers and potential customers that it is conducting the Product Line Operations as a successor to the Seller from and after the Closing Date.

Notwithstanding anything in this Agreement to the contrary, the Buyer may not use the Retained Marks or the Seller's packaging and labeling, and may not reference the Seller's NDC numbers, on the Finished Goods Inventory or on any Phos-Lo Products sold to the Buyer pursuant to the Manufacturing Agreement.

(c) The royalty-free licenses to use the Retained Marks set forth in this Section 9.3 shall not prohibit the Seller or any of its Affiliates from using the Retained Marks (or any similar name or logo) during the term of the respective license or thereafter in any manner. The Buyer agrees that its use of the Retained Marks shall be consistent with the past practices of the Seller in connection with the Seller's business and operations and, with respect to such use, the Buyer shall adhere to substantially similar quality standards to which the Seller adhered immediately prior to the Closing.

9.4 COLLECTION OF ACCOUNTS RECEIVABLE. The Buyer agrees that it shall forward promptly to the Seller any monies, checks or instruments received by the Buyer after the Closing with respect to any accounts receivable included as an Excluded Asset pursuant to this Agreement. The Seller agrees that it shall forward promptly to the Buyer any monies, checks or instruments received by the Seller after the Closing with respect to any accounts receivable included as an Assigned Asset pursuant to this Agreement.

9.5 RESALE OF PRODUCT LINE. If, at any time during the period commencing on the Closing Date and ending on the fifth anniversary of the Closing Date, the Buyer sells, licenses or otherwise disposes of the Phos-Lo product line, or a substantial portion thereof, [\*\*\*] in one transaction or a series of transactions, then (i) the Buyer shall promptly provide written notice of such sale, license or disposition to the Seller following the closing of such sale, license or disposition (such notice being accompanied by the sale, license or disposition agreement) and (ii) [\*\*\*].

9.6 COVENANT NOT TO HIRE. Until the second anniversary of the Closing Date, neither Party will solicit or hire employees of the other Party without the other Party's prior written consent. Notwithstanding the foregoing, neither party is prevented from employing, or attempting to employ any employee of the other party who approaches such party on an unsolicited basis concerning employment or who responds to a solicitation or advertisement for employment which is made to the general public.

9.7 REQUIREMENTS FOR TRANSFER OF THE SHARES; LEGEND.

(a) The Shares shall not be sold or transferred unless either (i) they first shall have been registered under the Securities Act, or (ii) the Buyer first shall have been furnished with an opinion of legal counsel, reasonably satisfactory to the Buyer, to the effect that such sale or transfer is exempt from the registration requirements of the Securities Act.

(b) Notwithstanding the foregoing, no registration or opinion of counsel shall be required for (i) a transfer by the Seller to a stockholder of the Seller, PROVIDED that the transferee agrees in writing to be subject to the terms of this Section 9.7 to the same extent as if it were the Seller hereunder, or (ii) a transfer made in accordance with Rule 144 under the Securities Act.

(c) LEGEND. Each certificate representing the Shares shall bear a legend substantially in the following form:

"The shares represented by this certificate have not been registered under the Securities Act of 1933, as amended, and may not be offered, sold or otherwise transferred, pledged or hypothecated unless and until such shares are registered under such Act or an opinion of counsel satisfactory to the issuer is obtained to the effect that such registration is not required."

The foregoing legend shall be removed from the certificates representing the Shares, at the request of the holder thereof, at such time as they become eligible for resale pursuant to Rule 144(k) under the Securities Act.

(d) The Seller shall provide to the Buyer promptly upon request by the Buyer such information regarding the Seller, the Shares and the intended method of disposition of such Shares as shall be required to effect the registration of the Shares or to comply with applicable state securities laws.

(e) (i) The aggregate amount of Shares sold for the account of the Seller in each of the [\*\*\*] periods following the Closing (each, a "Selling Period") shall not exceed the percentage listed below (the "Selling Percentage") of the aggregate volume of trading in the Buyer Common Stock reported through Nasdaq during the preceding [\*\*\*] period.

SELLING PERIODS	SELLING PERCENTAGE
1	[***]
2	[***]
3	[***]
4	[***]

Notwithstanding the foregoing, in the event that the Seller is unable to sell any Shares during a Selling Period because the Registration Statement has not been declared effective by the SEC or as a result of the operation of Section 9.8(b)(i), then [\*\*\*].

(ii) From time to time, during the [\*\*\*] period ending on [\*\*\*], the Seller shall be permitted hereunder to sell Shares; provided, however, that the Seller shall only be permitted to sell hereunder that number of Shares which, when added to the number of Shares sold by the Seller during the preceding [\*\*\*] (excluding, for this purpose, sales of Shares in the [\*\*\*] Selling Period referenced in clause (i) above), does not exceed the greatest of [\*\*\*].

(iii) This Section 9.7(e) shall terminate and be of no force or effect with respect to, and from and after, a Change in Control. For this purpose, "Change in Control" means (A) a merger or consolidation in which the Buyer or a subsidiary of the Buyer is a constituent party, except any such merger or consolidation involving the Buyer or a subsidiary of the Buyer in which (I) the holders of capital stock of the Buyer immediately before such merger or consolidation own immediately following such merger or consolidation more than 50% by voting power of the capital stock of or ownership interest in (1) the surviving or resulting entity or (2) if the surviving or resulting entity is a wholly owned subsidiary of another entity immediately following such merger or consolidation, the parent entity of such surviving or resulting entity, and (II) the ownership of such holders of capital stock immediately before such merger or consolidation is in substantially the same proportion as the ownership by such holders immediately following such merger or consolidation; or (B) the sale, in a single transaction or series of related transactions, (x) by the Buyer of all or substantially all the assets of the Buyer (except where such sale is to a wholly owned subsidiary) or (y) by the stockholders of the Buyer of more than 50% by voting power of the then-outstanding capital stock of the Buyer.

(iv) Each of the numbers and percentages set forth in this Section 9.7, as well as the total number of Shares to be issued to the Seller as the Closing Stock Payment, shall be subject to appropriate adjustment for stock splits, stock dividends, recapitalizations and similar events affecting the Buyer Common Stock).

#### 9.8 REGISTRATION RIGHTS.

(a) REGISTRATION OF SHARES. The Buyer shall file with the SEC, within fifteen (15) days following the Closing, a Registration Statement on Form S-3 covering the resale to the public by the Seller of the Shares (as the same may be amended, modified or supplemented, the "Registration Statement"). The Buyer shall use its best efforts to cause the Registration Statement to be declared effective by the SEC as soon as practicable. The Buyer shall, as expeditiously as possible, prepare and file with the SEC any amendments and supplements to the Registration Statement and the prospectus included in the Registration Statement as may be necessary to comply with the provisions of the Securities Act (including the anti-fraud provision thereof) and to cause the Registration Statement to become effective and to remain effective until the second anniversary of the Closing Date or such earlier time as all of the Shares covered by the Registration Statement have been sold.

#### (b) LIMITATIONS ON REGISTRATION RIGHTS.

(i) The Buyer may, by written notice to the Seller, (A) delay the filing or effectiveness of the Registration Statement or (B) suspend the Registration Statement after effectiveness and require that the Seller immediately cease sales of the Shares pursuant to the Registration Statement, in the event that the Buyer is engaged in any activity or transaction or preparations or negotiations for any activity or transaction that the Buyer desires to keep confidential for business reasons, if the Buyer determines in good faith that the public disclosure requirements imposed on the Buyer under

the Securities Act in connection with the Registration Statement would require disclosure of such activity, transaction, preparations or negotiations. Notwithstanding the foregoing, the Buyer may not delay the filing or effectiveness of the Registration Statement or suspend the effectiveness of the Registration Statement for more than 60 days in any 12-month period.

(ii) If the Buyer delays or suspends the Registration Statement or requires the Seller to cease sales of the Shares pursuant to clause (i) above, the Buyer shall, as promptly as practicable following the termination of the circumstance which entitled the Buyer to do so, take such actions as may be necessary to file the Registration Statement, have the Registration Statement declared effective, reinstate the effectiveness of the Registration Statement and/or give written notice to the Seller authorizing it to resume sales pursuant to the Registration Statement. If, as a result thereof, the prospectus included in the Registration Statement has been amended to comply with the requirements of the Securities Act, the Buyer shall enclose such revised prospectus with the notice to the Seller given pursuant to this clause (ii), and the Seller shall make no offers or sales of Shares pursuant to the Registration Statement other than by means of such revised prospectus.

(c) REGISTRATION PROCEDURES.

(i) In connection with the filing by the Buyer of the Registration Statement, the Buyer shall:

- (A) as expeditiously as possible, furnish to the Seller such reasonable number of copies of the prospectus, including any preliminary prospectus, in conformity with the requirements of the Securities Act, and such other documents as the Seller may reasonably request in order to facilitate the public sale or other disposition of the Shares;
- (B) as expeditiously as possible, use its best efforts to register or qualify the Shares covered by the Registration Statement under the securities or Blue Sky laws of such states as the Seller shall reasonably request, and do any and all other acts and things that may be necessary or desirable to enable the Seller to consummate the public sale or other disposition in such states of the Shares; PROVIDED, HOWEVER, that the Buyer shall not be required in connection with this clause (ii) to qualify as a foreign corporation or execute a general consent to service of process in any jurisdiction;
- (C) notify the Seller promptly after it shall receive notice thereof of the time when such Registration Statement has become effective or a supplement to any Prospectus forming a part of such Registration Statement has been filed; and

(D) as expeditiously as possible following the effectiveness of such Registration Statement, notify the Seller of any request by the SEC for the amending or supplementing of such Registration Statement or prospectus.

(ii) If the Buyer has delivered preliminary or final prospectuses to the Seller and, after having done so, the prospectus is amended or supplemented to comply with the requirements of the Securities Act, the Buyer shall promptly notify the Seller and, if requested by the Buyer, the Seller shall immediately cease making offers or sales of the Shares under the Registration Statement and return all prospectuses to the Buyer. The Buyer shall promptly provide the Seller with revised or supplemented prospectuses and, following receipt of the revised or supplemented prospectuses, the Seller shall be free to resume making offers and sales under the Registration Statement.

(iii) The Buyer shall pay the expenses incurred by it in complying with its obligations under this Section 9.8, including without limitation all registration and filing fees, exchange listing fees, printing expenses, fees and expenses of counsel for the Buyer, and fees and expenses of accountants for the Buyer, but excluding (A) any selling commission or underwriting discounts incurred by the Seller in connection with sales under the Registration Statement and (B) the fees and expenses of any counsel retained by the Seller.

(iv) The Seller shall promptly provide to the Buyer any information about the Seller that the Buyer reasonably requests in connection with the Registration Statement.

(d) INDEMNIFICATION AND CONTRIBUTION.

(i) In the event of any registration of any of the Shares under the Securities Act pursuant to this Agreement, the Buyer will indemnify and hold harmless the Seller, each underwriter of the Shares, and each other person, if any, who controls the Seller or underwriter within the meaning of the Securities Act or the Exchange Act against any losses, claims, damages or liabilities, joint or several, to which the Seller, underwriter or controlling person may become subject under the Securities Act, the Exchange Act, state securities or Blue Sky laws or otherwise, insofar as such losses, claims, damages or liabilities (or actions in respect thereof) arise out of or are based upon (A) any untrue statement or alleged untrue statement of any material fact contained in any Registration Statement under which the Shares were registered under the Securities Act, any preliminary prospectus or final prospectus contained in the Registration Statement, or any amendment or supplement to such Registration Statement, (B) the omission or alleged omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (C) any violation or alleged violation by the Buyer of the Securities Act, the Exchange Act, any state securities law or any rule or regulation promulgated under the Securities Act, the Exchange Act or any state securities law in connection with the Registration Statement or the offering contemplated thereby; and the Buyer will reimburse the Seller, underwriter and each such controlling person for any legal or any other expenses reasonably incurred by the Seller, underwriter or controlling person in connection with investigating or defending any such loss, claim, damage, liability or action; PROVIDED, HOWEVER, that the Buyer will not be liable in any such case to the



extent that any such loss, claim, damage or liability arises out of or is based upon any untrue statement or omission made in such Registration Statement, preliminary prospectus or prospectus, or any such amendment or supplement, in reliance upon and in conformity with information furnished to the Buyer, in writing, by or on behalf of the Seller, underwriter or controlling person specifically for use in the preparation thereof.

(ii) In the event of any registration of any of the Shares under the Securities Act pursuant to this Agreement, the Seller will indemnify and hold harmless the Buyer, each of its directors and officers and each underwriter (if any) and each person, if any, who controls the Buyer or any such underwriter within the meaning of the Securities Act or the Exchange Act, against any losses, claims, damages or liabilities, joint or several, to which the Buyer, such directors and officers, underwriter or controlling person may become subject under the Securities Act, Exchange Act, state securities or Blue Sky laws or otherwise, insofar as such losses, claims, damages or liabilities (or actions in respect thereof) arise out of or are based upon (A) any untrue statement or alleged untrue statement or a material fact contained in the Registration Statement, any preliminary prospectus or final prospectus contained in the Registration Statement, or any amendment or supplement to the Registration Statement, or (B) any omission or alleged omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, if and to the extent (and only to the extent) that the statement or omission was made in reliance upon and in conformity with information relating to the Seller furnished in writing to the Buyer by the Seller specifically for use in connection with the preparation of the Registration Statement, prospectus, amendment or supplement; PROVIDED, HOWEVER, that the obligations hereunder shall be limited to an amount equal to the net proceeds to the Seller of the Shares sold in connection with such registration.

(iii) A Person entitled to indemnification under this Section 9.8 (a "Registration Indemnified Party") shall give prompt written notification to the Person from whom indemnification is sought (the "Registration Indemnifying Party") after such Registration Indemnified Party has actual knowledge of any claims as to which indemnity may be sought, and shall permit the Registration Indemnifying Party to assume the defense of any such claim or any litigation resulting therefrom; PROVIDED, that counsel for the Registration Indemnifying Party, who shall conduct the defense of such claim or litigation, shall be approved by the Registration Indemnified Party (whose approval shall not be unreasonably withheld, conditioned or delayed); and, PROVIDED, FURTHER, that the failure of any Registration Indemnified Party to give notice as provided herein shall not relieve the Registration Indemnifying Party of its obligations under this Section 9.8(d) except to the extent that the Registration Indemnifying Party is adversely affected by such failure. The Registration Indemnified Party may participate in such defense at such party's expense; PROVIDED, HOWEVER, that the Registration Indemnifying Party shall pay such expense if the Registration Indemnified Party reasonably concludes that representation of such Registration Indemnified Party by the counsel retained by the Registration Indemnifying Party would be inappropriate due to actual or potential differing interests between the Registration Indemnified Party and any other party represented by such counsel in such proceeding; PROVIDED FURTHER that in no event shall the Registration Indemnifying Party be required to pay the expenses of more than one law firm per jurisdiction as counsel for the Registration Indemnified Party. The Registration Indemnifying Party also shall be responsible for the expenses of such defense if the Registration Indemnifying Party does not elect to assume such defense. No Registration Indemnifying Party, in the defense of any such claim or litigation shall, except with the consent of

each Registration Indemnified Party, consent to entry of any judgment or enter into any settlement which does not include as an unconditional term thereof the giving by the claimant or plaintiff to such Registration Indemnified Party of a release from all liability in respect of such claim or litigation, and no Registration Indemnified Party shall consent to entry of any judgment or settle such claim or litigation with the prior written consent of the Registration Indemnifying Party, which consent shall not be unreasonably withheld, conditioned or delayed.

(iv) In order to provide for just and equitable contribution in circumstances in which the indemnification provided for in this Section 9.8(d) is due in accordance with its terms but for any reason is held to be unavailable to a Registration Indemnified Party in respect to any losses, claims, damages and liabilities referred to herein, then the Registration Indemnifying Party shall in lieu of indemnifying such Registration Indemnified Party, contribute to the amount paid or payable by such Registration Indemnified Party as a result of such losses, claims, damages or liabilities to which such party may be subject in such proportion as is appropriate to reflect the relative fault of the Buyer on the one hand and the Seller on the other in connection with the statements or omissions which resulted in such losses, claims, damages or liabilities, as well as any other relevant equitable considerations. The relative fault of the Buyer and the Seller shall be determined by reference to, among other things, whether the untrue or alleged untrue statement of material fact related to information supplied by the Buyer or the Seller and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission. The Buyer and the Seller agree that it would not be just and equitable if contribution pursuant to this Section 9.8(d)(iv) were determined by pro rata allocation or by any other method of allocation which does not take into account of the equitable considerations referred to above. Notwithstanding the provisions of this Section 9.8(d)(iv), (A) in no case shall the Seller be liable or responsible for any amount in excess of the net proceeds received by the Seller from the offering of the Shares and (B) in such event the Buyer shall be liable and responsible for any amount in excess of such proceeds: PROVIDED, HOWEVER, that no Person guilty of fraudulent misrepresentations (within the meanings of Section 11(f) of the Securities Act) shall be entitled to contribution from any Person who was not guilty of such fraudulent misrepresentations. Any party entitled to contribution will, promptly after receipt of notice of commencement of any action, suit or proceeding against such party in respect of which a claim for contribution may be made against another party or parties under this Section 9.8(d)(iv), notify such party or parties from whom contribution may be sought, but the omission so to notify such party or parties from whom contribution may be sought shall not relieve such party from any other obligation it or they may have thereunder or otherwise under this Section 9.8(d)(iv). No party shall be liable for contribution with respect to any action, suit, proceeding or claim settled without its prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed.

(e) RULE 144. The Buyer agrees to:

(i) use its commercially reasonable best efforts to make and keep current public information about the Buyer available, as those terms are understood and defined in Rule 144;

(ii) use its commercially reasonable best efforts to file with the SEC in a timely manner all reports and other documents required of the Buyer under the Securities Act and the Exchange Act; and

(iii) furnish the Seller upon request (A) a written statement by the Buyer as to its compliance with the reporting requirements of Rule 144 and of the Securities Act and the Exchange Act, (B) a copy of the most recent annual or quarterly report of the Buyer, and (C) such other reports and documents of the Buyer as may reasonably request to avail itself of any similar rule or regulation of the SEC allowing it to sell any such securities without registration.

(f) ASSIGNMENT OF RIGHTS. The Seller may not assign any of its rights under this Section 9.8 except in connection with the transfer of some or all of the Shares to its stockholders, PROVIDED that each such transferee agrees in a written instrument delivered to the Buyer to be bound by the provisions of this Section 9.8.

(g) COOPERATION. It shall be a condition precedent to the obligations of the Buyer to take any action pursuant to this Section 9.8 that the Seller or any permitted assignee shall furnish to the Buyer all such information and materials and shall take all action as may be reasonably required in order to permit the Buyer to comply with the applicable requirements of the Securities Act and the SEC.

9.9 REBATE CHARGES; WHOLESALER CHARGES; DISCOUNTS. The Buyer shall promptly forward to the Seller any invoice or other communication that it receives that covers or relates to any Rebate Charges, Wholesaler Charges or Discounts. The Buyer shall cooperate with the Seller and provide to the Seller such information as may be reasonably requested by the Seller in order for the Seller to evaluate, calculate and determine claims made for Rebate Charges, Wholesaler Charges and Discounts.

9.10 [\*\*\*].

ARTICLE X-  
MISCELLANEOUS

10.1 PRESS RELEASES AND ANNOUNCEMENTS. Immediately after the execution and delivery of this Agreement, the Buyer will issue a press release announcing the execution and delivery of this Agreement, substantially in the form agreed by the Parties. No Party shall issue (and each Party shall cause its Affiliates not to issue) any other press release or public disclosure relating to the subject matter of this Agreement without the prior written approval of the other Party or Parties; PROVIDED, HOWEVER, that any Party may issue any press release or make any public disclosure it believes in good faith is required by law, regulation or stock exchange rule (in which case the disclosing Party shall promptly advise the other Party and the other Party shall, if practicable, have the right to review and comment on such press release or public disclosure prior to its issuance or publication).

10.2 NO THIRD PARTY BENEFICIARIES. This Agreement shall not confer any rights or remedies upon any Person other than the Parties and their respective successors and permitted assigns and, to the extent specified herein, their respective Affiliates.

10.3 ENTIRE AGREEMENT. This Agreement (including the documents referred to herein), the Ancillary Agreements and the Confidentiality Agreement constitute the entire agreement between the Buyer and the Seller with respect to the subject matter hereof. This Agreement and the Ancillary Agreements supersede any prior agreements or understandings between the Buyer and the Seller and any representations or statements made by or on behalf of the Seller or any of its respective Affiliates to the Buyer, whether written or oral, with respect to the subject matter hereof, other than the Confidentiality Agreement.

10.4 SUCCESSION AND ASSIGNMENT. No Party may assign either this Agreement or any of its rights, interests, or obligations hereunder without the prior written approval of the other Party, which written approval shall not be unreasonably withheld or delayed. Notwithstanding the foregoing, this Agreement, and all rights, interests and obligations hereunder, may be assigned, without such consent, to any entity that acquires all or substantially all of a Party's business or assets to which this Agreement relates and that agrees in a writing delivered to the non-assigning Party to be bound by the terms and conditions hereof as the assigning Party hereunder; PROVIDED, HOWEVER, that notwithstanding such assignment the Buyer shall remain primarily liable to the Seller for the Buyer's obligations hereunder. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns.

10.5 NOTICES. All notices, requests, demands, claims and other communications hereunder shall be in writing. Any notice, request, demand, claim or other communication hereunder shall be deemed duly delivered four (4) Business Days after it is sent by registered or certified mail, return receipt requested, postage prepaid, or one (1) Business Day after it is sent for next Business Day delivery via a reputable nationwide overnight courier service, in each case to the intended recipient as set forth below:

IF TO THE BUYER:  
-----

Nabi Biopharmaceuticals  
5800 Park of Commerce Boulevard, N.W.  
Boca Raton, FL 33487  
Telecopy: (561) 989-5801  
Attention: Anna E. Mack, Esq.

COPY TO:  
-----

Nutter McClennen & Fish LLP  
World Trade Center West  
155 Seaport Boulevard  
Boston, MA 02210-2604  
Telecopy: (617) 310-9597  
Attention: Constantine Alexander,  
Esq.

IF TO THE SELLER:

-----

Braintree Laboratories, Inc.  
60 Columbia Street West  
P.O. Box 850929  
Braintree, MA 02185-0929  
Telecopy: (781) 843-7932  
Attention: Robert M. Raleigh, Jr.

COPY TO:

-----

Hale and Dorr LLP  
60 State Street  
Boston, MA 02109  
Telecopy: (617) 526-5000  
Attention: David E. Redlick, Esq.

Any Party may give any notice, request, demand, claim, or other communication hereunder using any other means (including personal delivery, expedited courier, messenger service, telecopy, telex, ordinary mail, or electronic mail), but no such notice, request, demand, claim or other communication shall be deemed to have been duly given unless and until it actually is received by the Party for whom it is intended. Any Party may change the address to which notices, requests, demands, claims and other communications hereunder are to be delivered by giving the other Party notice in the manner herein set forth.

10.6 NO RIGHTS OR LICENSES BY IMPLICATION. No rights or licenses with respect to the Product Line Operations or Phos-Lo Products or any intellectual property rights or technology of either Party are granted or deemed granted hereunder or in connection herewith, other than those rights expressly granted in this Agreement or the Ancillary Agreements.

10.7 AMENDMENTS AND WAIVERS. The Parties may mutually amend or waive any provision of this Agreement at any time. No amendment or waiver of any provision of this Agreement shall be valid unless the same shall be in writing and signed by the Parties. No waiver by any Party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

10.8 SEVERABILITY. Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction. If the final judgment of a court of competent jurisdiction declares that any term or provision hereof is invalid or unenforceable, the Parties agree that the body making the determination of invalidity or unenforceability shall have the power to reduce the scope, duration or area of the term or provision, to delete specific words or phrases, or to replace any invalid or unenforceable term or provision with a term or provision that is valid and enforceable and that comes closest to expressing the intention of the invalid or unenforceable term or provision, and this Agreement shall be enforceable as so modified.

10.9 EXPENSES. Except as otherwise specifically provided to the contrary in this Agreement, each of the Parties shall bear its own costs and expenses (including legal fees and expenses) incurred in connection with this Agreement and the transactions contemplated hereby.

10.10 SPECIFIC PERFORMANCE. Each Party acknowledges and agrees that the other Party would be damaged irreparably in the event any of the provisions of this Agreement are not performed in accordance with their specific terms or otherwise are breached. Accordingly, each Party agrees that the other Party may be entitled to an injunction or injunctions to prevent breaches of the provisions of this Agreement and to enforce specifically this Agreement and the terms and provisions hereof in any action instituted in any state or federal court sitting in the Commonwealth of Massachusetts in accordance with Section 10.12.

10.11 GOVERNING LAW. This Agreement and any disputes hereunder shall be governed by and construed in accordance with the internal laws of the Commonwealth of Massachusetts without giving effect to any choice or conflict of law provision or rule (whether of the Commonwealth of Massachusetts or any other jurisdiction) that would cause the application of laws of any jurisdiction other than those of the Commonwealth of Massachusetts.

10.12 SUBMISSION TO JURISDICTION. Each Party (a) submits to the exclusive jurisdiction of any state or federal court sitting in the Commonwealth of Massachusetts, with respect to actions or proceedings arising out of or relating to this Agreement in which a Party seeks an injunction or any other equitable remedy and with respect to disputes specifically excluded from the provisions of Section 10.18, (b) submits to the exclusive jurisdiction of any state or federal court sitting in the Commonwealth of Massachusetts in any action or proceeding for the enforcement of any arbitration decision pursuant to Section 10.18, with respect to all actions and proceedings arising out of or relating to this Agreement other than those described by clause (a) above, (c) agrees that all claims in respect of such action or proceeding may be heard and determined only in any such court, (d) waives any claim of inconvenient forum or other challenge to venue in such court, and (e) agrees not to bring any action or proceeding arising out of or relating to this Agreement in any other court. Each Party may make service on the other Party, and each Party agrees to accept service, of any summons, complaint or other initial pleading made in the manner provided for the giving of notices in Section 10.5. Nothing in this Section 10.12, however, shall affect the right of any Party to serve such summons, complaint or initial pleading in any other manner permitted by law.

10.13 CONSTRUCTION.

(a) The language used in this Agreement shall be deemed to be the language chosen by the Parties to express their mutual intent, and no rule of strict construction shall be applied against any Party.

(b) Any reference to any federal, state, local, or foreign statute or law shall be deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise.

(c) The section headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

(d) Any reference herein to an Article, section or clause shall be deemed to refer to an Article, section or clause of this Agreement, unless the context clearly indicates otherwise.

(e) All references to "\$," "Dollars" or "US\$" refer to currency of the United States of America.

(f) Whenever the words "include", "includes" or "including" are used in this Agreement, they shall be deemed followed by the words "without limitation."

10.14 WAIVER OF JURY TRIAL. To the extent permitted by applicable law, each Party hereby irrevocably waives all rights to trial by jury in any action, proceeding or counterclaim (whether based on contract, tort or otherwise) arising out of or relating to this Agreement or the transactions contemplated hereby or the actions of any Party in the negotiation, administration, performance and enforcement of this Agreement.

10.15 INCORPORATION OF EXHIBITS AND SCHEDULES. The Exhibits and Schedules identified in this Agreement are incorporated herein by reference and made a part hereof.

10.16 COUNTERPARTS AND FACSIMILE SIGNATURE. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. This Agreement may be executed by facsimile signature.

10.17 TRANSFER AND SALES TAX. Notwithstanding any provisions of law imposing the burden of such Taxes on the Seller or the Buyer, as the case may be, each Party shall be responsible for and shall pay one-half of (a) all sales, use and transfer Taxes, and (b) all similar governmental charges, if any, upon the sale or transfer of any of the Acquired Assets hereunder. If either Party shall fail to pay such amounts on a timely basis, the other Party may pay such amounts to the appropriate Governmental Authority or Authorities, and the non-paying Party shall promptly reimburse the paying Party for any amounts so paid by paying Party. The Buyer agrees to timely sign and deliver to the Seller such certificates or forms as may be necessary or appropriate to establish an exemption from (or otherwise reduce), or file Tax Returns with respect to, such Taxes.

#### 10.18 ARBITRATION.

(a) In the event that any dispute, controversy or claim arises under this Agreement, including without limitation under Section 9.8 of this Agreement, that cannot be settled by the Buyer and the Seller, either Party may proceed to institute an arbitration proceeding and such dispute, controversy or claim shall be settled by arbitration in accordance with the following:

(i) APPLICABLE RULES. A single arbitrator shall conduct the arbitration proceedings in accordance with the provisions of the Federal Arbitration Act (99 U.S.C. Section 1 et seq.) (the "Federal Arbitration

Act") and the Commercial Arbitration Rules of the American Arbitration Association (the "Arbitration Rules"). The arbitration shall be held in Boston, Massachusetts.

(ii) INITIATION OF ARBITRATION. To submit a dispute, controversy or claim to arbitration, either the Buyer or the Seller shall furnish to the other and the American Arbitration Association a notice (the "Arbitration Notice") containing (A) the name and address of the complaining Party, (B) the nature of the dispute, controversy or claim in reasonable detail, (C) its intent to commence arbitration proceeding under this Agreement and (D) the other information required under the Federal Arbitration Act and the Arbitration Rules.

(iii) SELECTION OF ARBITRATOR. Within twenty (20) Business Days after delivery of the Arbitration Notice, the Buyer and the Seller shall seek to agree upon one arbitrator. If the Parties cannot mutually agree upon an arbitrator within the twenty (20) Business Day period after delivery of the Arbitration Notice, the American Arbitration Association shall select such arbitrator from the list of the American Arbitration Association's National Panel of Commercial Arbitrators. The arbitrator shall be an individual not subject to disqualification under Rule No. 19 (or any successor rule) of the Arbitration Rules (or any successor rule).

(iv) DISCOVERY. In addition, each party shall have the right to take discovery of the other party by any or all methods provided in the Federal Rules of Civil Procedure. The arbitrator may upon request exclude any evidence not made available to the other party pursuant to a proper discovery request from being used in the arbitration.

(v) JUDGMENT. The determination of the arbitrator as to the resolution of the dispute, controversy or claim shall be final and binding and conclusive to the maximum extent permitted by law. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. This agreement to arbitrate is irrevocable.

(b) FEES AND EXPENSES. Any reasonable fees and expenses incurred by any Party in connection with resolving any dispute, claim or controversy under this Section 10.18, including without limitation any legal fees or fees and expenses incurred in connection with any arbitration proceeding held pursuant to Section 10.18(a), shall be borne by such Party unless otherwise determined by the arbitrator.

(c) NO LIMITATION. Nothing in this Section 10.18 shall be construed as limiting in any way the right of a Party to seek a temporary restraining order or other injunctive relief with respect to any actual or threatened breach of this Agreement from a court in accordance with Section 10.12. Should any Party seek a temporary restraining order or other injunctive relief, then for purposes of determining whether to grant such temporary restraining order or other injunctive relief, the dispute underlying the request for such temporary restraining order or other injunctive relief may be heard by a court in accordance with Section 10.12.



10.19 TAX CONFIDENTIALITY PROVISION. Notwithstanding anything contained herein to the contrary, each Party to the transaction contemplated by this Agreement (the "Transaction") (and each of its employees, representatives and other agents) may disclose to any and all persons, without limitation of any kind, the tax treatment and tax structure of the Transaction and all materials of any kind (including opinions and other tax analyses) that are provided to such Party or Parties relating to the tax treatment or tax structure of the Transaction, except that such disclosure is not permitted to the extent necessary for each Party to comply with the federal or state securities laws. This authorization is not intended to permit disclosure of any other information and materials relating to the Transaction including, without limitation: (i) any portion of any materials to the extent not related to the tax treatment or tax structure of the Transaction, (ii) the identities of participants or potential participants in the Transaction, (iii) the existence or status of any negotiations, (iv) any pricing or financial information (except to the extent such pricing or financial information is related to the tax treatment or tax structure of the Transaction), and (v) any other term or detail not relevant to the tax treatment or the tax structure of the Transaction.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

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

BRAINTREE LABORATORIES, INC.

By: /s/ HARRY P. KEEGAN, III

-----  
Name: Harry P. Keegan, III  
Title: Chief Executive Officer

NABI BIOPHARMACEUTICALS

By: /s/ THOMAS H. McLAIN

-----  
Name: Thomas H. McLain  
Title: Chief Executive Officer

[SIGNATURE PAGE TO ASSET PURCHASE AGREEMENT]

## SECTION 1350 CERTIFICATION

The undersigned officers of Nabi Biopharmaceuticals (the "Company") hereby certify that, as of the date of this statement, the Company's quarterly report on Form 10-Q for the quarter ended June 28, 2003 (the "Report") fully complies with the requirements of section 13(a) of the Securities Exchange Act of 1934 and that, to the best of their knowledge, the information contained in the Report fairly presents, in all material respects, the financial condition as of June 28, 2003 and results of operations of the Company for the three and six months ended June 28, 2003.

The purpose of this certification is solely to comply with Title 18, Chapter 63, Section 1350 of the United States Code, as amended by Section 906 of the Sarbanes-Oxley Act of 2002. This statement is not "filed" for the purposes of Section 18 of the Securities Exchange Act of 1934 or otherwise subject to the liabilities of that Act or any other federal or state law or regulation.

Date: July 25, 2003

By: /s/ Thomas H. McLain

-----  
Name: Thomas H. McLain  
Title: Chief Executive Officer

Date: July 25, 2003

By: /s/ Mark Smith

-----  
Name: Mark L. Smith  
Title: Chief Financial Officer

A signed original of this written statement required by Section 1350, or other document authenticating, acknowledging, or otherwise adopting the signature that appears in typed form within the electronic version of this written statement required by Section 1350, has been provided to the Company and will be retained by the Company and furnished to the Securities and Exchange Commission or its staff upon request.