

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

FORM 8-K

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

Date of report (Date of earliest event reported): December 30, 2015

STRATA  
SKIN SCIENCES

STRATA SKIN SCIENCES, INC.  
(Exact Name of Registrant Specified in Charter)

Delaware  
(State or Other  
Jurisdiction of  
Incorporation)

000-51481  
(Commission File  
Number)

13-3986004  
(I.R.S. Employer  
Identification No.)

100 Lakeside Drive, Suite 100, Horsham,  
Pennsylvania  
(Address of Principal Executive Offices)

19044  
(Zip Code)

Registrant's telephone number, including area code: 215-619-3200

MELA Sciences, Inc.  
(Former Name or Former Address, if Changed Since Last Report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

- Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)
- Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)
- Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))
- Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

**Item 1.01. Entry into a Material Definitive Agreement.**

On December 30, 2015, the Company entered into a \$12.0 million credit facility pursuant to a Credit and Security Agreement (the "Agreement") and related financing documents with MidCap Financial Trust ("MidCap") and the lenders listed therein. Under the Agreement, the credit facility may be drawn down in two tranches, the first of which was drawn for \$10.5 million on December 30, 2015. The proceeds of this first tranche were used to repay \$10 million principal amount of short-term senior secured promissory notes, plus associated interest, loan fees and expenses. The second tranche may be drawn after January 1, 2016. In connection with the repayment of the short-term notes, the Company also repurchased a debenture from an unrelated party outstanding from its 2014 financing for approximately \$118,000. The Company's obligations under the credit facility are secured by a first priority lien on all of the Company's assets. Other financing documents included subordination agreements and other amendments with the Company's existing debenture holders from its 2014 and 2015 financings.

The credit facility bears an interest rate of LIBOR plus 8.25%, which was 8.75% as of December 30, 2015. The loan period is 60 months and is payable as interest only for the first 18 months. Thereafter the loans are amortized on a straight-line basis and due in full on the maturity date, which is 60 months from the draw of the initial tranche, i.e., December 30, 2020.

In connection with entering into the credit facility, the Company issued to the lenders warrants to purchase an aggregate of 650,442 shares of the Company's common stock at an exercise price of \$1.13 per share, which equals the VWAP for the ten-day period prior to the closing date. The warrants are exercisable for five years from the date of issuance. Upon draw down of the second tranche for \$1.5 million, another warrant or warrants will be issued for the aggregate number of shares equal to 7.0% of 1,500,000 divided by the exercise price, which will equal the VWAP for the ten-day period prior to the closing date of the second tranche. The Warrants have not been registered under the Securities Act of 1933, as amended (the "Securities Act").

The foregoing descriptions of the Agreement, the related financing documents and the warrants are subject to, and qualified in their entirety by such documents attached hereto as Exhibits 10.1, 10.2, 10.3, 10.4 and 10.5, respectively, which are incorporated herein by reference.

**Item 2.03. Creation of a Direct Financial Obligation or an Obligation Under an Off-Balance Sheet Arrangement of the Registrant.**

On December 30, 2015, the Company entered into a \$12.0 million credit facility. The information contained above in Item 1.01 is hereby incorporated by reference into this Item 2.03.

**Item 3.02. Unregistered Sales of Equity Securities.**

On December 30, 2015, the Company issued the warrants under the Agreement in a transaction exempt from the registration requirements under Section 4(a)(2) of the Securities Act. The information regarding the warrants is incorporated by reference to the summary description of the warrants contained in Item 1.01.

**Item 8.01. Other Events.**

On January 5, 2016, the Company issued a press release announcing that it had refinanced certain short term debt. The Company announced that on December 30, 2015 it refinanced \$10.0 million of short-term debt by entering into a \$12.0 million credit facility under the Agreement, as well as other related and ancillary agreements. A copy of the press release is furnished herewith as Exhibit 99.1.

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**Item 9.01.**

**Financial Statements and Exhibits.**

**Exhibit No.**

**Exhibit Description**

10.1	Credit and Security Agreement dated as of December 30, 2015 among MidCap, as administrative agent, the Lenders listed on the Credit Facility Schedule attached thereto and the Company.
10.2	Warrant to purchase shares of the Company's common stock issued December 30, 2015 issued to MidCap.
10.3	Warrant to purchase shares of the Company's common stock issued December 30, 2015 to Lender under the Credit Agreement.
10.4	Subordination Agreements dated as of December 30, 2015 among subordinated lenders, the Company and Midcap.
10.5	Omnibus Amendment to 2014 Transaction Documents and 2015 Transaction Documents dated as of December 30, 2015 among the Company and the holders of outstanding debentures under the 2014 and 2015 security purchase agreements.
99.1	Press Release by the Company dated January 5, 2016.

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SIGNATURE

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

By:

MELA SCIENCES, INC.  
/s/ Michael R. Stewart  
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Michael R. Stewart  
President and Chief Executive Officer

Date: January 5, 2016

## CREDIT AND SECURITY AGREEMENT

THIS CREDIT AND SECURITY AGREEMENT (this "Agreement"), dated as of December 30, 2015 (the "Closing Date") by and among MIDCAP FINANCIAL TRUST, a Delaware statutory trust ("MidCap"), as administrative agent ("Agent"), the Lenders listed on the Credit Facility Schedule attached hereto and otherwise party hereto from time to time (each a "Lender", and collectively the "Lenders"), and MELA SCIENCES, INC., a Delaware corporation (as such name may be changed after the date hereof to Strata Skin Sciences, Inc.) (together with each of its subsidiaries that hereafter becomes a party to this Agreement, the "Borrower"), provides the terms on which Lenders agree to lend to Borrower and Borrower shall repay Lenders. The parties agree as follows:

1 **ACCOUNTING AND OTHER TERMS**

Accounting terms not defined in this Agreement shall be construed in accordance with GAAP. Calculations and determinations must be made in accordance with GAAP. Capitalized terms not otherwise defined in this Agreement shall have the meanings set forth in Section 15. All other terms contained in this Agreement, unless otherwise indicated, shall have the meaning provided by the Code to the extent such terms are defined therein. All headings numbered without a decimal point are herein referred to as "Articles," and all paragraphs numbered with a decimal point (and all subparagraphs or subsections thereof) are herein referred to as "Sections."

2 **CREDIT FACILITIES AND TERMS**

2.1 **Promise to Pay.** Borrower hereby unconditionally promises to pay to each Lender in accordance with each Lender's respective Pro Rata Share of each Credit Facility, the outstanding principal amount of all Credit Extensions made by the Lenders under such Credit Facility and accrued and unpaid interest thereon and any other amounts due hereunder as and when due in accordance with this Agreement.

2.2 **Credit Facilities.** Subject to the terms and conditions hereof, each Lender, severally, but not jointly, agrees to make available to Borrower Credit Extensions in respect of each Credit Facility set forth opposite such Lender's name on the Credit Facility Schedule, in each case not to exceed such Lender's commitment as identified on the Credit Facility Schedule (such commitment of each Lender, as it may be amended to reflect assignments made in accordance with this Agreement or terminated or reduced in accordance with this Agreement, its "Applicable Commitment", and the aggregate of all such commitments of all Lenders, the "Applicable Commitments").

2.3 **Term Credit Facilities.**

(a) **Nature of Credit Facility; Credit Extension Requests.** For any Credit Facility identified on the Credit Facility Schedule as a term facility (a "Term Credit Facility"), Credit Extensions in respect of a Term Credit Facility may be requested by Borrower during the Draw Period for such Term Credit Facility. For any Credit Extension requested under a Term Credit Facility (other than a Credit Extension on the Closing Date), Agent must receive the completed Credit Extension Form by 12:00 noon (New York time) five (5) Business Days prior to the date the Credit Extension is to be funded. To the extent any Term Credit Facility proceeds are repaid for any reason, whether voluntarily or involuntarily (including repayments from insurance or condemnation proceeds), Agent and Lenders shall have no obligation to re-advance such sums to Borrower.

(b) **Principal Payments.** Principal payable on account of a Term Credit Facility shall be payable by Borrower to Lenders immediately upon the earliest of (i) the date(s) set forth in the Amortization Schedule for such Term Credit Facility (or if no such Amortization Schedule is attached, then upon Agent's demand for payment), or (ii) the Maturity Date. Except as this Agreement may specifically provide otherwise, all prepayments of Credit Extensions under Term Credit Facilities shall be applied by Lenders to the applicable Term Credit Facility in inverse order of maturity. The monthly payments required under the Amortization Schedule shall continue in the same amount (for so long as the applicable Term Credit Facility shall remain outstanding) notwithstanding any partial prepayment, whether mandatory or optional, of the applicable Term Credit Facility.

(c) **Mandatory Prepayment.** If a Term Credit Facility is accelerated following the occurrence of an Event of Default, Borrower shall immediately pay to Agent, for payment to each Lender in accordance with its respective Pro Rata Share, an amount equal to the sum of: (i) all outstanding principal of the Term Credit Facility

and all other Obligations, plus accrued and unpaid interest thereon, (ii) any fees payable under the Fee Letters by reason of such prepayment, (iii) the Applicable Prepayment Fee as specified in the Credit Facility Schedule for the Credit Facility being prepaid, and (iv) all other sums that shall have become due and payable, including Protective Advances. Additionally, at the election of Agent, Borrower shall prepay the Term Credit Facilities (to be allocated pro rata among the outstanding Credit Extensions under all Term Credit Facilities) in the following amounts: (A) on the date on which any Credit Party (or Agent as loss payee or assignee) receives any casualty proceeds in excess of One Hundred Thousand Dollars (\$100,000) for personal property, or in excess of Two Hundred Fifty Thousand Dollars (\$250,000) for real property, in respect of assets upon which Agent maintained a Lien, an amount equal to one hundred percent (100%) of such proceeds (net of out-of-pocket expenses and, in the case of personal property, repayment of any permitted purchase money debt encumbering the personal property that suffered such casualty), or such lesser portion of such proceeds as Agent shall elect to apply to the Obligations; and (B) upon receipt by any Credit Party of the proceeds of any asset disposition of personal property not made in the Ordinary Course of Business (other than transfers permitted by Section 7.1) an amount equal to one hundred percent (100%) of the net cash proceeds of such asset disposition (net of out-of-pocket expenses and repayment of any permitted purchase money debt encumbering such asset), or such lesser portion as Agent shall elect to apply to the Obligations. Notwithstanding the foregoing, (a) so long as no Default or Event of Default has occurred and is continuing, Borrower shall have the option of applying the proceeds of any casualty policy up to (\$250,000) in the aggregate with respect to any property loss in any one year, toward the replacement or repair of destroyed or damaged property; provided that any such replaced or repaired property (x) shall be of greater, equal, or like value as the replaced or repaired Collateral and (y) shall be deemed Collateral in which Agent and Lenders have been granted a first priority security interest, and (b) after the occurrence and during the continuance of a Default or Event of Default, all proceeds payable under such casualty policy shall, at the option of Agent, be payable to Agent, for the ratable benefit of the Lenders, on account of the Obligations.

(d) Permitted Prepayment. Except as provided below, Borrower shall have no right to prepay the Credit Extensions made in respect of a Term Credit Facility. After the Closed Period, if any, for the applicable Term Credit Facility as specified in the Credit Facility Schedule, Borrower shall have the option to prepay the Prepayable Amount (as defined below) of a Term Credit Facility advanced by the Lenders under this Agreement, provided Borrower (i) provides written notice to Agent and each Lender of its election to prepay the Prepayable Amount at least thirty (30) days prior to such prepayment, and (ii) pays to each Lender in accordance with its respective Pro Rata Share, on the date of such prepayment, an amount equal to the sum of (A) the Prepayable Amount, plus accrued interest thereon, (B) any fees payable under the Fee Letters by reason of such prepayment, (C) the Applicable Prepayment Fee as specified in the Credit Facility Schedule for the Credit Facility being prepaid, and (D) all Protective Advances. The term "Prepayable Amount" means (x) \$5,000,000 or more so long as no more than two prepayments under this Section 2.3(d) have been made and (y) otherwise all, but not less than all, of the Credit Extensions and all other Obligations under all Term Credit Facilities.

2.4 Reserved

2.5 Reserved

2.6 Interest and Payments: Administration

(a) Interest; Computation of Interest. Each Credit Extension shall bear interest on the outstanding principal amount thereof from the date when made until paid in full at a rate per annum equal to the Applicable Interest Rate. Each Lender may, upon the failure of Borrower to pay any fees or interest as required herein, capitalize such interest and fees and begin to accrue interest thereon until paid in full, which such interest shall be at a rate per annum equal to the Applicable Interest Rate unless and until the Default Rate shall otherwise apply. All other Obligations shall bear interest on the outstanding amount thereof from the date they first become payable by Borrower under the Financing Documents until paid in full at a rate per annum equal to the Applicable Interest Rate unless and until the Default Rate shall otherwise apply. Interest on the Credit Extensions and all fees payable under the Financing Documents shall be computed on the basis of a 360-day year and the actual number of days elapsed in the period during which such interest accrues. In computing interest on any Credit Extension or other advance, the date of the making of such Credit Extension or advance shall be included and the date of payment shall be excluded; provided, however, that if any Credit Extension or advance is repaid on the same day on which it is made, such day shall be included in computing interest on such Credit Extension or advance. As of each Applicable Interest Rate Determination Date, Agent shall determine (which determination shall, absent manifest error in calculation, be final, conclusive and binding upon all parties) the interest rate that shall apply to the Credit Extensions.

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(b) **Default Rate.** Upon the election of Agent following the occurrence and during the continuance of an Event of Default, Obligations shall bear interest at a rate per annum which is three hundred basis points (3.00%) above the rate that is otherwise applicable thereto (the "**Default Rate**"). Payment or acceptance of the increased interest rate provided in this subsection is not a permitted alternative to timely payment and shall not constitute a waiver of any Event of Default or otherwise prejudice or limit any rights or remedies of Agent or Lenders.

(c) **Payments Generally.** Except as otherwise provided in this Section 2.6(c) or otherwise in this Agreement or as otherwise directed by Agent, all payments in respect of the Obligations shall be made to Agent for the account of the applicable Lenders in accordance with their Pro Rata Share. Payments of principal and interest in respect of any Credit Facility identified on the Credit Facility Schedule as "Term" shall be made to Agent for the account of each applicable Lender. All Obligations are payable upon demand of Agent in the absence of any other due date specified herein. All fees payable under the Financing Documents shall be deemed non-refundable as of the date paid. Any payment required to be made to Agent or a Lender under this Agreement may be made by debit or automated clearing house payment initiated by Agent or such Lender from any of Borrower's deposit accounts, including the Designated Funding Account, and Borrower hereby authorizes Agent and each Lender to debit any such accounts for any amounts Borrower owes hereunder when due. Without limiting the foregoing, Borrower shall tender to Agent and Lenders any authorization forms as Agent or any Lender may require to implement such debit or automated clearing house payment. These debits or automated clearing house payments shall not constitute a set-off. Payments of principal and/or interest received after 4:00 p.m. New York time are considered received at the opening of business on the next Business Day. When a payment is due on a day that is not a Business Day, the payment is due the next Business Day and additional fees or interest, as applicable, shall continue to accrue until paid. All payments to be made by Borrower under any Financing Document shall be made without set-off, recoupment or counterclaim, in lawful money of the United States and in immediately available funds. The balance of the Obligations, as recorded in Agent's books and records at any time, shall be conclusive and binding evidence of the amounts due and owing to Agent and Lenders by each Borrower absent manifest error; provided, however, that any failure to so record or any error in so recording shall not limit or otherwise affect any Borrower's duty to pay all amounts owing hereunder or under any Financing Document. Agent shall provide Borrower with a monthly statement regarding the Credit Extensions (but neither Agent nor any Lender shall have any liability if Agent shall fail to provide any such statement). Unless Borrower notifies Agent of any objection to any such statement (specifically describing the basis for such objection) within ninety (90) days after the date of receipt thereof, it shall be deemed final, binding and conclusive upon Borrower in all respects as to all matters reflected therein.

(d) **Interest Payments; Maturity Date.** Commencing on the first (1<sup>st</sup>) Payment Date following the funding of a Credit Extension, and continuing on the Payment Date of each successive month thereafter through and including the Maturity Date, Borrower shall make monthly payments of interest, in arrears, calculated as set forth in this Section 2.6. All unpaid principal and accrued interest is due and payable in full on the Maturity Date or any earlier date specified herein. If the Obligations are not paid in full on or before the Maturity Date, all interest thereafter accruing shall be payable immediately upon accrual.

(e) **Fees.** Borrower shall pay, as and when due and payable under the terms of the Fee Letters, to Agent and each Lender, as applicable, for their own accounts and not for the benefit of any other Lenders, the fees set forth in the Fee Letters.

(f) **Protective Advances.** Borrower shall pay to Agent for the account of Lenders all Protective Advances (including reasonable attorneys' fees and expenses for documentation and negotiation of this Agreement, the Warrants and the other Financing Documents) when due under any Financing Document (and in the absence of any other due date specified herein, such Protective Advances shall be due upon demand).

(g) **Maximum Lawful Rate.** In no event shall the interest charged hereunder with respect to the Obligations exceed the maximum amount permitted under the Laws of the State of Maryland. Notwithstanding anything to the contrary in any Financing Document, if at any time the rate of interest payable hereunder (the "**Stated Rate**") would exceed the highest rate of interest permitted under any applicable Law to be charged (the "**Maximum Lawful Rate**"), then for so long as the Maximum Lawful Rate would be so exceeded, the rate of interest payable shall be equal to the Maximum Lawful Rate; *provided, however*, that if at any time thereafter the Stated Rate is less than the Maximum Lawful Rate, Borrower shall, to the extent permitted by Law, continue to pay interest at the Maximum Lawful Rate until such time as the total interest received is equal to the total interest which would have been received had the Stated Rate been (but for the operation of this provision) the interest rate payable. Thereafter, the interest rate payable shall be the Stated Rate unless and until the Stated Rate again would exceed the Maximum Lawful Rate, in which event this provision shall again apply. In no event shall the total interest

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received by any Lender exceed the amount which it could lawfully have received, had the interest been calculated for the full term hereof at the Maximum Lawful Rate. If, notwithstanding the prior sentence, any Lender has received interest hereunder in excess of the Maximum Lawful Rate, such excess amount shall be applied to the reduction of the principal balance of such Lender's Credit Extensions or to other amounts (other than interest) payable hereunder, and if no such Credit Extensions or other amounts are then outstanding, such excess or part thereof remaining shall be paid to Borrower. In computing interest payable with reference to the Maximum Lawful Rate applicable to any Lender, such interest shall be calculated at a daily rate equal to the Maximum Lawful Rate *divided* by the number of days in the year in which such calculation is made.

(h) Taxes; Additional Costs.

(i) Any and all payments by or on account of any obligation of Borrower hereunder shall be made without deduction or withholding for any Taxes, except as required by applicable law. For purposes of this Section 2.6(h), the term "applicable law" shall include FATCA. If any applicable law (as determined in the good faith discretion of an applicable Withholding Agent) requires the deduction or withholding of any Tax from any such payment by a Withholding Agent, then Borrower shall make such deduction or withholding and shall timely pay the full amount deducted or withheld to the relevant Governmental Authority in accordance with applicable law and, if such Tax is an Indemnified Tax, then the sum payable by Borrower shall be increased as necessary so that after such deduction or withholding has been made (including such deductions and withholdings applicable to additional sums payable under this Section 2.6(h)) the applicable Recipient receives an amount equal to the sum it would have received had no such deduction or withholding been made. If Borrower fails to make any such required deduction or withholding, then Agent may make any such deduction or withholding and payment to the relevant Governmental Authority.

(ii) Borrower shall timely pay to the relevant Governmental Authority in accordance with applicable law, or at the option of the Agent timely reimburse it for the payment of, any Other Taxes.

(iii) Borrower shall indemnify each Recipient, within 10 days after demand therefor, for the full amount of any Indemnified Taxes (including Indemnified Taxes imposed or asserted on or attributable to amounts payable under this Section 2.6(h)) payable or paid by such Recipient or required to be withheld or deducted from a payment to such Recipient and any expenses arising therefrom or with respect thereto, whether or not such Indemnified Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to Borrower by a Lender (with a copy to the Agent), or by the Agent on its own behalf or on behalf of a Lender, shall be conclusive absent manifest error.

(iv) Each Lender shall severally indemnify the Agent, within 10 days after demand therefor, for (i) any Indemnified Taxes attributable to such Lender (but only to the extent that Borrower has not already indemnified the Agent for such Indemnified Taxes and without limiting the obligation of Borrower to do so), (ii) any Taxes attributable to such Lender's failure to comply with the provisions of Section 13.1(c) relating to the maintenance of a Participant Register and (iii) any Excluded Taxes attributable to such Lender, in each case, that are payable or paid by the Agent in connection with this Agreement or any Obligation, and any reasonable expenses arising therefrom or with respect thereto, whether or not such Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to any Lender by the Agent shall be conclusive absent manifest error. Each Lender hereby authorizes the Agent to set off and apply any and all amounts at any time owing to such Lender pursuant to this Agreement or otherwise payable by the Agent to the Lender from any other source against any amount due to the Agent under this paragraph (iv).

(v) As soon as practicable after any payment of Taxes by Borrower to a Governmental Authority pursuant to this Section 2.6(h), Borrower shall deliver to the Agent the original or a certified copy of a receipt issued by such Governmental Authority evidencing such payment, a copy of the return reporting such payment or other evidence of such payment reasonably satisfactory to the Agent.

(vi) Any Lender that is entitled to an exemption from or reduction of withholding Tax with respect to payments made in connection with this Agreement or any Obligation shall deliver to Borrower and the Agent, at

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the time or times reasonably requested by Borrower or the Agent, such properly completed and executed documentation reasonably requested by Borrower or the Agent as will permit such payments to be made without withholding or at a reduced rate of withholding. In addition, any Lender, if reasonably requested by Borrower or the Agent, shall deliver such other documentation prescribed by applicable law or reasonably requested by Borrower or the Agent as will enable Borrower or the Agent to determine whether or not such Lender is subject to backup withholding or information reporting requirements. Notwithstanding anything to the contrary in the preceding two sentences, the completion, execution and submission of such documentation (other than such documentation set forth in Section 2.6(h)(vii)(A), (vii)(B) and (vii)(D) below) shall not be required if in the Lender's reasonable judgment such completion, execution or submission would subject such Lender to any material unreimbursed cost or expense or would materially prejudice the legal or commercial position of such Lender.

(vii) Without limiting the generality of the foregoing,

(A) any Lender that is a U.S. Person shall deliver the Agent on or prior to the date on which such Lender becomes a Lender under this Agreement (and from time to time thereafter upon the reasonable request of Borrower or the Agent), executed copies of IRS Form W-9 certifying that such Lender is exempt from U.S. federal backup withholding tax;

(B) any Foreign Lender shall, to the extent it is legally entitled to do so, deliver to the Agent (in such number of copies as shall be requested by the recipient) on or prior to the date on which such Foreign Lender becomes a Lender under this Agreement (and from time to time thereafter upon the reasonable request of Borrower or the Agent), whichever of the following is applicable:

(1) in the case of a Foreign Lender claiming the benefits of an income tax treaty to which the United States is a party (x) with respect to payments of interest under this Agreement or any Financing Document, executed copies of IRS Form W-8BEN-E or W-8BEN, as applicable, establishing an exemption from, or reduction of, U.S. federal withholding Tax pursuant to the "interest" article of such tax treaty and (y) with respect to any other applicable payments under this Agreement or any other Financing Document, IRS Form W-8BEN-E or W-8BEN, as applicable, establishing an exemption from, or reduction of, U.S. federal withholding Tax pursuant to the "business profits" or "other income" article of such tax treaty;

(2) executed copies of IRS Form W-8ECI;

(3) in the case of a Foreign Lender claiming the benefits of the exemption for portfolio interest under Section 881(c) of the IRC, (x) executed copies of IRS Form W-8BEN-E or W-8BEN, and (y) a certification to the effect that such Foreign Lender is not a "bank" within the meaning of Section 881(c)(3)(A) of the IRC, a "10 percent shareholder" of Borrower within the meaning of Section 881(c)(3)(B) of the IRC, or a "controlled foreign corporation" described in Section 881(c)(3)(C) of the IRC, together with such Other Tax Certification as Agent may reasonably request from time to time; or

(4) to the extent a Foreign Lender is not the beneficial owner, executed copies of IRS Form W-8IMY, accompanied by IRS Form W-8ECI, IRS Form W-8BEN-E or W-8BEN, as applicable, IRS Form W-9, and/or such Other Tax Certification from each beneficial owner as Agent may reasonably request, as applicable; provided that if the Foreign Lender is a partnership and one or more direct or indirect partners of such Foreign Lender are claiming the portfolio interest exemption, such Foreign Lender may provide such Other Tax Certification as may be reasonably required by Agent on behalf of each such direct and indirect partner;

(C) any Foreign Lender shall, to the extent it is legally entitled to do so, deliver to Agent (in such number of copies as shall be requested by the recipient) on or prior to the date on which such Foreign Lender becomes a Lender under this Agreement (and from time to time thereafter upon the reasonable request of Borrower or the Agent), executed copies of any other form prescribed by applicable law as a basis for claiming exemption from or a reduction in U.S. federal withholding Tax, duly completed, together with such Other Tax Certification as may be prescribed by applicable law to permit Borrower or the Agent to determine the withholding or deduction required to be made; and

(D) if a payment made to a Lender under any this Agreement would be subject to U.S. federal withholding Tax imposed by FATCA if such Lender were to fail to comply with the applicable reporting requirements of FATCA (including those contained in Section 1471(b) or 1472(b) of the IRC, as applicable), such Lender shall deliver to Borrower and the Agent at the time or times prescribed by law and at such time or times reasonably requested

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by Borrower or the Agent such documentation prescribed by applicable law (including as prescribed by Section 1471(b)(3)(C)(i) of the IRC) and such Other Tax Certification reasonably requested by Borrower or the Agent as may be necessary for Borrower and the Agent to comply with their obligations under FATCA and to determine that such Lender has complied with such Lender's obligations under FATCA or to determine the amount to deduct and withhold from such payment. Solely for purposes of this clause (D), "FATCA" shall include any amendments made to FATCA after the date of this Agreement.

Each Lender agrees that if any form or certification it previously delivered pursuant to this Section 2.6(h)(vi) or (vii) expires or becomes obsolete or inaccurate in any respect, it shall update such form or certification or promptly notify Borrower and the Agent in writing of its legal inability to do so.

(viii) If any party determines, in its sole discretion exercised in good faith, that it has received a refund of any Taxes as to which it has been indemnified pursuant to this Section 2.6(h) (including by the payment of additional amounts pursuant to this Section 2.6(h)), it shall pay to the indemnifying party an amount equal to such refund (but only to the extent of indemnity payments made under this Section with respect to the Taxes giving rise to such refund), net of all out-of-pocket expenses (including Taxes) of such indemnified party and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund). Such indemnifying party, upon the request of such indemnified party, shall repay to such indemnified party the amount paid over pursuant to this paragraph (h) (plus any penalties, interest or other charges imposed by the relevant Governmental Authority) in the event that such indemnified party is required to repay such refund to such Governmental Authority. Notwithstanding anything to the contrary in this paragraph (h), in no event will the indemnified party be required to pay any amount to an indemnifying party pursuant to this paragraph (h) the payment of which would place the indemnified party in a less favorable net after-Tax position than the indemnified party would have been in if the Tax subject to indemnification and giving rise to such refund had not been deducted, withheld or otherwise imposed and the indemnification payments or additional amounts with respect to such Tax had never been paid. This paragraph shall not be construed to require any indemnified party to make available its Tax returns (or any other information relating to its Taxes that it deems confidential) to the indemnifying party or any other Person.

(ix) If any Lender shall determine in its commercially reasonable judgment that the adoption or taking effect of, or any change in, any applicable Law regarding capital adequacy, in each instance, after the Closing Date, or any change after the Closing Date in the interpretation, administration or application thereof by any Governmental Authority, central bank or comparable agency charged with the interpretation, administration or application thereof, or the compliance by any Lender or any Person controlling such Lender with any request, guideline or directive regarding capital adequacy (whether or not having the force of law) of any such Governmental Authority, central bank or comparable agency adopted or otherwise taking effect after the Closing Date, has or would have the effect of reducing the rate of return on such Lender's or such controlling Person's capital as a consequence of such Lender's obligations hereunder to a level below that which such Lender or such controlling Person could have achieved but for such adoption, taking effect, change, interpretation, administration, application or compliance (taking into consideration such Lender's or such controlling Person's policies with respect to capital adequacy) then from time to time, upon written demand by such Lender (which demand shall be accompanied by a statement setting forth the basis for such demand and a calculation of the amount thereof in reasonable detail, a copy of which shall be furnished to Agent), Borrower shall promptly pay to such Lender such additional amount as will compensate such Lender or such controlling Person for such reduction; provided, however, that notwithstanding anything in this Agreement to the contrary, (A) the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines or directives thereunder or issued in connection therewith and (B) all requests, rules, guidelines or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority) or the United States or foreign regulatory authorities, in each case pursuant to Basel III, shall in each case be deemed to be a "change in applicable Law", regardless of the date enacted, adopted or issued.

(x) If any Lender requires compensation under this subsection (h), or requires any Borrower to pay any additional amount to any Lender or any Governmental Authority for the account of any Lender pursuant to this subsection (h), then, upon the written request of Borrower, such Lender shall use reasonable efforts to designate a different lending office for funding or booking its Credit Extensions hereunder or to assign its rights and obligations hereunder (subject to the terms of this Agreement) to another of its offices, branches or affiliates, if, in the judgment of such Lender, such designation or assignment (A) would eliminate or materially reduce amounts payable pursuant to any such subsection, as the case may be, in the future, and (B) would not subject such Lender to any unreimbursed cost or expense and would not otherwise be disadvantageous to such Lender (as determined in its sole discretion). Borrower hereby agrees to pay all reasonable costs and expenses incurred by any Lender in connection with any such designation or assignment.

(xi) Each party's obligations under this Section 2.6(h) shall survive the resignation or replacement of the Agent or any assignment of rights by, or the replacement of, a Lender, and the repayment, satisfaction or discharge of all Obligations hereunder.

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(i) Administrative Fees and Charges

(i) Borrower shall pay to Agent, for its own account and not for the benefit of any other Lenders, all reasonable fees and expenses in connection with audits and inspections of the books and records of the Credit Parties, audits, valuations or appraisals of the Collateral, audits of Borrower's compliance with applicable Laws and such other matters as Agent shall deem appropriate, which shall be due and payable on the first Business Day of the month following the date of issuance by Agent of a written request for payment thereof to any Borrower; provided, that, as long as no Default has occurred within the preceding twelve (12) months, Agent shall be entitled to such reimbursement for no more than one audit and inspection per calendar quarter.

(ii) If payments of principal or interest due on the Obligations, or any other amounts due hereunder or under the other Financing Documents, are not timely made and remain overdue for a period of five (5) days, Borrower, without notice or demand by Agent, promptly shall pay to Agent, for its own account and not for the benefit of any other Lenders, as additional compensation to Agent in administering the Obligations, an amount equal to five percent (5.0%) of each delinquent payment.

2.7 Secured Promissory Notes. At the election of any Lender made as to each Credit Facility for which it has made Credit Extensions, each Credit Facility shall be evidenced by one or more secured promissory notes in form and substance satisfactory to Agent and Lenders (each a "**Secured Promissory Note**"). Upon receipt of an affidavit of an officer of a Lender as to the loss, theft, destruction, or mutilation of its Secured Promissory Note, Borrower shall issue, in lieu thereof, a replacement Secured Promissory Note in the same amount thereof and of like tenor.

3 CONDITIONS OF CREDIT EXTENSIONS

3.1 Conditions Precedent to Initial Credit Extension. Each Lender's obligation to make an advance in respect of a Credit Facility is subject to the condition precedent that Agent shall consent to or shall have received, in form and substance satisfactory to Agent, such documents, and completion of such other matters, as Agent may reasonably deem necessary or appropriate, including, without limitation, all items listed on the Closing Deliveries Schedule attached hereto.

3.2 Conditions Precedent to all Credit Extensions. The obligation of each Lender to make each Credit Extension, including the initial Credit Extension, is subject to the following conditions precedent:

(a) satisfaction of all Applicable Funding Conditions for the applicable Credit Extension as set forth in the Credit Facility Schedule, if any, in each case each in form and substance satisfactory to Agent and each Lender;

(b) timely receipt by the Agent and each Lender of an executed Credit Extension Form in the form attached hereto;

(c) (i) for Credit Extensions made on the Closing Date, the representations and warranties in Article 5 and elsewhere in the Financing Documents shall be true, correct and complete in all respects on the Closing Date; provided, however, that those representations and warranties expressly referring to a specific date shall be true, correct and complete in all respects as of such date; and

(ii) for Credit Extensions made after the Closing Date, if any, the representations and warranties in Article 5 and elsewhere in the Financing Documents shall be true, correct and complete in all material respects on the date of the Credit Extension Form and on the Funding Date of each Credit Extension; provided, however, that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof; and provided, further that those representations and warranties expressly referring to a specific date shall be true, accurate and complete in all material respects as of such date. Each Credit Extension is Borrower's representation and warranty on that date that the representations and warranties in Article 5 and elsewhere in the Financing Documents remain true, accurate and complete in all material respects; provided, however, that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof; and provided, further that those representations and warranties expressly referring to a specific date shall be true,

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accurate and complete in all material respects as of such date;

(d) no Default or Event of Default shall have occurred and be continuing or result from the Credit Extension;

(e) Agent shall be satisfied with the results of any searches conducted under Section 3.5;

(f) receipt by Agent of such evidence as Agent shall request to confirm that the deliveries made in Section 3.1 remain current, accurate and in full force and effect, or if not, updates thereto, each in form and substance satisfactory to Agent;

(g) as determined in such Lender's sole discretion, there has not been any Material Adverse Change or any material adverse deviation by Borrower from the most recent business plan of Borrower presented to and accepted by Agent; and

(h) with respect to each Credit Extension, the Lenders shall have received the Warrants (or additional Warrants, as the case may be) in an aggregate amount equal to seven percent (7.00%) of the total principal amount of the Credit Extensions.

3.3 **Method of Borrowing.** Each Credit Extension in respect of each Credit Facility shall be in an amount at least equal to the applicable Minimum Credit Extension Amount for such Credit Facility as set forth in the Credit Facility Schedule or such lesser amount as shall remain undisbursed under the Applicable Commitments for such Credit Facility. The date of funding for any requested Credit Extension shall be a Business Day. To obtain a Credit Extension, Borrower shall deliver to Agent a completed Credit Extension Form executed by a Responsible Officer. Agent may rely on any notice given by a person whom Agent reasonably believes is a Responsible Officer or designee thereof. Agent and Lenders shall have no duty to verify the authenticity of any such notice.

3.4 **Funding of Credit Facilities.** In Agent's discretion, Credit Extensions may be funded by Agent on behalf of the Lenders or by the Lenders directly. If Agent elects to fund any Credit Extension on behalf of the Lenders, upon the terms and subject to the conditions set forth in this Agreement, each Lender, severally and not jointly, shall make available to Agent its Pro Rata Share of the requested Credit Extension, in lawful money of the United States of America in immediately available funds, prior to 11:00 a.m. (New York time) on the specified date for the Credit Extension. Agent (or if Agent elects to have each Lender fund its Credit Extensions to Borrower directly, each Lender) shall, unless it shall have determined that one of the conditions set forth in Section 3.1 or 3.2, as applicable, has not been satisfied, by 2:00 p.m. (New York time) on the specified date for the Credit Extension, credit the amounts received by it in like funds to Borrower by wire transfer to the Designated Funding Account (or to the account of Borrower in respect of the Obligations, if the Credit Extension is being made to pay an Obligation of Borrower). A Credit Extension made prior to the satisfaction of any conditions set forth in Section 3.1 or 3.2 shall not constitute a waiver by Agent or Lenders of Borrower's obligation to satisfy such conditions, and any such Credit Extension made in the absence of such satisfaction shall be made in each Lender's discretion.

3.5 **Searches.** Before the Closing Date, and thereafter (as and when determined by Agent in its discretion), Agent shall have the right to perform, all at Borrower's expense, the searches described in clauses (a), (b), and (c) below against Borrower and any other Credit Party, the results of which are to be consistent with Borrower's representations and warranties under this Agreement and the reasonably satisfactory results of which shall be a condition precedent to all Credit Extensions requested by Borrower: (a) title investigations, UCC searches and fixture filings searches; (b) judgment, pending litigation, federal tax lien, personal property tax lien, and corporate and partnership tax lien searches, in each jurisdiction searched under clause (a) above; and (c) searches of applicable corporate, limited liability company, partnership and related records to confirm the continued existence, organization and good standing of the applicable Person and the exact legal name under which such Person is organized.

#### 4 **CREATION OF SECURITY INTEREST**

4.1 **Grant of Security Interest.** Borrower hereby grants Agent, for the ratable benefit of the Lenders, to secure the payment and performance in full of all of the Obligations, a continuing security interest in, and pledges to Agent, for the ratable benefit of the Lenders, the Collateral, wherever located, whether now owned or hereafter acquired or arising, and all proceeds and products thereof. Borrower represents, warrants, and covenants that the security interest granted herein is and shall at all times continue to be a first priority perfected security interest in the Collateral, subject only to Permitted Liens that may have priority by operation of applicable Law or by the terms of a written intercreditor or subordination agreement

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entered into by Agent.

4.2 Representations and Covenants.

(a) As of the Closing Date, Borrower has no ownership interest in any Chattel Paper, letter of credit rights, commercial tort claims, Instruments, documents or investment property (other than as disclosed on the **Disclosure Schedule** attached hereto).

(b) Borrower shall promptly (and in any event within 10 days of acquiring any of the following) deliver to Agent all tangible Chattel Paper and all Instruments and documents owned at any time by any Borrower and constituting part of the Collateral duly endorsed and accompanied by duly executed instruments of transfer or assignment, all in form and substance satisfactory to Agent. Borrower shall provide Agent with "control" (as defined in the Code) of all electronic Chattel Paper owned by any Borrower and constituting part of the Collateral by having Agent identified as the assignee on the records pertaining to the single authoritative copy thereof and otherwise complying with the applicable elements of control set forth in the Code. Borrower also shall deliver to Agent all security agreements securing any such Chattel Paper and securing any such Instruments. Borrower will mark conspicuously all such Chattel Paper and all such Instruments and Documents with a legend, in form and substance satisfactory to Agent, indicating that such Chattel Paper and such Instruments and Documents are subject to the security interests and Liens in favor of Agent created pursuant to this Agreement and the Financing Documents.

(c) Borrower shall promptly (and in any event within 10 days of acquiring any of the following) deliver to Agent all letters of credit on which any Borrower is the beneficiary and which give rise to letter of credit rights owned by such Borrower which constitute part of the Collateral in each case duly endorsed and accompanied by duly executed instruments of transfer or assignment, all in form and substance satisfactory to Agent. Borrower shall take any and all actions as may be necessary or desirable, or that Agent may request, from time to time, to cause Agent to obtain exclusive "control" (as defined in the Code) of any such letter of credit rights in a manner acceptable to Agent.

(d) Borrower shall promptly (and in any event within 10 days) advise Agent upon any Borrower becoming aware that it has any interests in any commercial tort claim that constitutes part of the Collateral, which such notice shall include descriptions of the events and circumstances giving rise to such commercial tort claim and the dates such events and circumstances occurred, the potential defendants with respect such commercial tort claim and any court proceedings that have been instituted with respect to such commercial tort claims, and Borrower shall, with respect to any such commercial tort claim, execute and deliver to Agent such documents as Agent shall request to perfect, preserve or protect the Liens, rights and remedies of Agent with respect to any such commercial tort claim.

(e) Except for Inventory in an aggregate amount of One Hundred Thousand Dollars (\$100,000), no Inventory or other Collateral shall at any time be in the possession or control of any warehouse, consignee, bailee or any of Borrower's agents or processors without prior written notice to Agent and the receipt by Agent, if Agent has so requested, of warehouse receipts, consignment agreements or bailee lien waivers (as applicable) satisfactory to Agent prior to the commencement of such possession or control. Borrower shall, upon the request of Agent, notify any such warehouse, consignee, bailee, agent or processor of the security interests and Liens in favor of Agent created pursuant to this Agreement and the Financing Documents, instruct such Person to hold all such Collateral for Agent's account subject to Agent's instructions and shall, in Agent's discretion, obtain an Access Agreement or other acknowledgement from such Person that such Person holds the Collateral for Agent's benefit.

(f) Upon request of Agent, Borrower shall promptly deliver to Agent any and all certificates of title, applications for title or similar evidence of ownership of all such tangible personal property and shall cause Agent to be named as lienholder on any such certificate of title or other evidence of ownership. Borrower shall not permit any such tangible personal property to become fixtures to real estate unless such real estate is subject to a Lien in favor of Agent.

(g) As of the Closing Date and each subsequent date that the representations and warranties under this Agreement are remade, all Deposit Accounts, Securities Accounts, Commodity Accounts or other bank accounts or investment accounts owned by Borrower, together with the purpose of such accounts and the financial

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institutions at which such accounts reside, are listed on the **Disclosure Schedule**.

(h) Each Borrower hereby authorizes Agent to file without the signature of such Borrower one or more UCC financing statements relating to its Liens on all or any part of the Collateral, which financing statements may list Agent as the "secured party" and such Borrower as the "debtor" and which describe and indicate the collateral covered thereby as all or any part of the Collateral under the Financing Documents (including an indication of the collateral covered by any such financing statement as "all assets" of such Borrower now owned or hereafter acquired), in such jurisdictions as Agent from time to time determines are appropriate, and to file without the signature of such Borrower any continuations of or corrective amendments to any such financing statements, in any such case in order for Agent to perfect, preserve or protect the Liens, rights and remedies of Agent with respect to the Collateral. Each Borrower also ratifies its authorization for Agent to have filed in any jurisdiction any initial financing statements or amendments thereto if filed prior to the date hereof. Any financing statement may include a notice that any disposition of the Collateral in contravention of this Agreement, by either Borrower or any other Person, shall be deemed to violate the rights of Agent and the Lenders under the Code.

(i) As of the Closing Date, no Borrower holds, and after the Closing Date Borrower shall promptly notify Agent in writing upon creation or acquisition by any Borrower of, any Collateral which constitutes a claim against any Governmental Authority, including, without limitation, the federal government of the United States or any instrumentality or agency thereof, the assignment of which claim is restricted by any applicable Law, including, without limitation, the federal Assignment of Claims Act and any other comparable Law. Upon the request of Agent, Borrower shall take such steps as may be necessary or desirable, or that Agent may request, to comply with any such applicable Law.

(j) Borrower shall furnish to Agent from time to time any statements and schedules further identifying or describing the Collateral and any other information, reports or evidence concerning the Collateral as Agent may reasonably request from time to time.

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#### **REPRESENTATIONS AND WARRANTIES**

Borrower represents and warrants as follows on the Closing Date, on the date of each Credit Extension, and on such other dates when such representations and warranties under this Agreement are remade:

##### **5.1 Due Organization, Authorization, Power and Authority.**

(a) Each Credit Party is duly existing and in good standing, as a Registered Organization in its respective jurisdiction of formation. Each Credit Party is qualified and licensed to do business and is in good standing in any jurisdiction in which the conduct of its business or its ownership of property requires that it be qualified except where the failure to do so could not reasonably be expected to have a Material Adverse Change. The Financing Documents have been duly authorized, executed and delivered by each Credit Party and constitute legal, valid and binding agreements enforceable in accordance with their terms. The execution, delivery and performance by each Credit Party of each Financing Document executed or to be executed by it is in each case within such Credit Party's powers.

(b) The execution, delivery and performance by each Credit Party of the Financing Documents to which it is a party do not (i) conflict with any of such Credit Party's organizational documents; (ii) contravene, conflict with, constitute a default under or violate any Law; (iii) contravene, conflict or violate any applicable order, writ, judgment, injunction, decree, determination or award of any Governmental Authority by which such Credit Party or any of its property or assets may be bound or affected; (iv) require any action by, filing, registration, or qualification with, or Required Permit from, any Governmental Authority (except such Required Permits which have already been obtained and are in full force and effect); or (v) constitute a default under or conflict with any Material Agreement. No Credit Party is in default under any agreement to which it is a party or by which it is bound in which the default could reasonably be expected to have a Material Adverse Change.

5.2 **Litigation.** Except as disclosed on the **Disclosure Schedule** or, after the Closing Date, pursuant to Section 6.7, there are no actions, suits, proceedings or investigations pending or, to the knowledge of the Responsible Officers, threatened in writing by or against any Credit Party which involves the possibility of any judgment or liability of more than Two Hundred Fifty Thousand Dollars (\$250,000.00) or that could result in a Material Adverse Change, or which questions the validity of the Financing Documents, or the other documents required thereby or any action to be taken

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pursuant to any of the foregoing, nor does any Credit Party have reason to believe that any such actions, suits, proceedings or investigations are threatened.

5.3 No Material Deterioration in Financial Condition; Financial Statements. All financial statements for the Credit Parties delivered to Agent or any Lender fairly present, in conformity with GAAP, in all material respects the consolidated financial condition and consolidated results of operations of such Credit Party. There has been no material deterioration in the consolidated financial condition of any Credit Party from the most recent financial statements and projections submitted to Agent or any Lender. There has been no material adverse deviation from the most recent annual operating plan of Borrower delivered to Agent and Lenders

5.4 Solvency. The fair salable value of each Credit Party's assets (including goodwill *minus* disposition costs) exceeds the fair value of its liabilities, excluding the aggregate amount of the Convertible Debt Liabilities. After giving effect to the transactions described in this Agreement, (a) no Credit Party is left with unreasonably small capital in relation to its business as presently conducted, and (b) each Credit Party is able to pay its debts (including trade debts) as they mature.

5.5 Subsidiaries; Investments; Margin Stock. Borrower and its Subsidiaries do not own any stock, partnership interest or other equity securities, except for Permitted Investments. Without limiting the foregoing, Borrower and its Subsidiaries do not own or hold any Margin Stock.

5.6 Tax Returns and Payments; Pension Contributions. Each Credit Party has timely filed all required tax returns and reports, and, except for those Taxes that are subject to a Permitted Contest, each Credit Party has timely paid all foreign, federal, state and material local Taxes, assessments, deposits and contributions owed by such Credit Party. Other than as disclosed to Agent in accordance with Section 6.2, Borrower is unaware of any claims or adjustments proposed for any prior tax years of any Credit Party which could result in additional Taxes becoming due and payable by such Credit Party. No Credit Party nor any trade or business (whether or not incorporated) that is under common control with any Credit Party within the meaning of Section 414(b) or (c) of the IRC (and Sections 414(m) and (o) of the IRC for purposes of the provisions relating to Section 412 of the IRC) or Section 4001 of ERISA (an "ERISA Affiliate") (i) has failed to satisfy the "minimum funding standards" (as defined in Section 412 of or Section 302 of ERISA), whether or not waived, with respect to any Pension Plan, (ii) has incurred liability with respect to the withdrawal or partial withdrawal of any Credit Party or ERISA Affiliate from any Pension Plan or incurred a cessation of operations that is treated as a withdrawal, (iii) has incurred any liability under Title IV of ERISA (other than for PBGC premiums due but not delinquent under Section 4007 of ERISA), (iv) has had any "reportable event" as defined in Section 4043(c) of ERISA (or the regulations issued thereunder) (other than an event for which the 30-day notice requirement is waived) occur with respect to any Pension Plan or (v) failed to maintain (1) each "plan" (as defined by Section 3(3) of ERISA) in all material respects with the applicable provisions of ERISA, the IRC and other federal or state laws, and (2) the tax qualified status of each plan (as defined above) intended to be so qualified.

5.7 Intellectual Property and License Agreements. A list of all Registered Intellectual Property of each Credit Party and all in-bound license or sublicense agreements, exclusive out-bound license or sublicense agreements, or other rights of any Credit Party to use Intellectual Property (but excluding in-bound licenses of over-the-counter software that is commercially available to the public), as of the Closing Date and, as updated pursuant to Section 6.14, is set forth on the **Intangible Assets Schedule**. Such **Intangible Assets Schedule** shall be prepared by Borrower in the form provided by Agent and contain all information required in such form. Except for Permitted Licenses, each Credit Party is the sole owner of its Intellectual Property free and clear of any Liens. Each Patent is valid and enforceable and no part of the Material Intangible Assets has been judged invalid or unenforceable, in whole or in part, and to the best of Borrower's knowledge, no claim has been made that any part of the Intellectual Property violates the rights of any third party.

5.8 Regulatory Status. All of Borrower's Products and Regulatory Required Permits are listed on the **Products Schedule** and **Regulatory Required Permits Schedule**, respectively (as updated from time to time pursuant to Section 6.14), and Borrower has delivered to Agent a copy of all Regulatory Required Permits requested by Agent as of the date hereof or to the extent requested by Agent pursuant to Section 6.16. With respect to any Product, (i) Borrower and its Subsidiaries have received, and such Product is the subject of, all Regulatory Required Permits needed in connection with the testing, manufacture, marketing or sale of such Product as currently being conducted by or on behalf of Borrower, and have provided Agent and each Lender with all notices and other information required by Section 6.16, (ii) such Product is being tested, manufactured, marketed or sold, as the case may be, in material compliance with all applicable Laws and Regulatory Required Permits. As of the Closing Date, there have been no Regulatory Reporting Events.

5.9 Accuracy of Schedules and Perfection Certificate. All information set forth in the **Disclosure Schedule**, **Intangible Assets Schedule**, the **Regulatory Required Permits Schedule** and the **Products Schedule** is true, accurate and complete as of the Closing Date, the date of delivery of the last Compliance Certificate and any other subsequent date on which Borrower is requested to update such certificate. All information set forth in the Perfection Certificate is true, accurate and complete as of the Closing Date and any other subsequent date on which Borrower is requested to update such certificate.

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Borrower covenants and agrees as follows:

6.1 Organization and Existence; Government Compliance.

(a) Each Credit Party shall maintain its legal existence and good standing in its respective jurisdiction of formation and maintain qualification in each jurisdiction in which the failure to so qualify could reasonably be expected to have a Material Adverse Change. If a Credit Party is not now a Registered Organization but later becomes one, Borrower shall promptly notify Agent of such occurrence and provide Agent with such Credit Party's organizational identification number.

(b) Each Credit Party shall comply with all Laws, ordinances and regulations to which it or its business locations is subject, the noncompliance with which could reasonably be expected to result in a Material Adverse Change. Each Credit Party shall obtain and keep in full force and effect and comply with all of the Required Permits, except where failure to have or maintain compliance with or effectiveness of such Required Permit could not reasonably be expected to result in a Material Adverse Change. Upon request of Agent or any Lender, each Credit Party shall promptly (and in any event within three (3) Business Days) provide copies of any such obtained Required Permits to Agent. Borrower shall notify Agent within three (3) Business Days (but in any event prior to Borrower submitting any requests for Credit Extensions or release of any reserves) of the occurrence of any facts, events or circumstances known to a Borrower, whether threatened, existing or pending, that could cause any Required Permit to become limited, suspended or revoked. Notwithstanding the foregoing, each Credit Party shall comply with Section 6.16 as it relates to Regulatory Required Permits and to the extent that there is a conflict between this Section and Section 6.16 as it relates to Regulatory Required Permits, Section 6.16 shall govern.

6.2 Financial Statements, Reports, Certificates.

(a) Each Credit Party shall deliver to Agent and each Lender: (i) as soon as available, but no later than thirty (30) days after the last day of each month, a company prepared consolidated and consolidating balance sheet, income statement and cash flow statement covering such Credit Party's consolidated operations for such month certified by a Responsible Officer and in a form acceptable to Agent and each Lender; (ii) as soon as available, but no later than one hundred twenty (120) days after the last day of a Credit Party's fiscal year, audited consolidated and consolidating financial statements prepared under GAAP, consistently applied, together with an unqualified opinion on the financial statements from an independent certified public accounting firm acceptable to Agent and each Lender in its reasonable discretion; (iii) as soon as available after approval thereof by such Credit Party's governing board, but no later than forty-five (45) days after the last day of such Credit Party's fiscal year, and as amended and/or updated, such Credit Party's financial projections for current fiscal year; (iv) within five (5) days of delivery, copies of all statements, reports and notices made available to all of such Credit Party's security holders or to any holders of Subordinated Debt; (v) in the event that such Credit Party is or becomes subject to the reporting requirements under the Securities Exchange Act of 1934, as amended, within five (5) days of filing, all reports on Form 10-K, 10-Q and 8-K filed with the Securities and Exchange Commission ("SEC") or a link thereto on such Credit Party's or another website on the Internet; (vi) as soon as available, but no later than thirty (30) days after the last day of each month, copies of the month-end account statements for each Collateral Account maintained by a Credit Party, which statements may be provided to Agent and each Lender by Borrower or directly from the applicable institution(s); (vii) promptly (and in any event within ten (10) days of any request therefor) such readily available budgets, sales projections, operating plans, financial information and other information, reports or statements regarding the Credit Parties or their respective businesses, contractors and subcontractors reasonably requested by Agent or any Lender; and (viii) within ten (10) days after any Credit Party becomes aware of any material claim or adjustment proposed for any prior tax years of any Credit Party or any of their Subsidiaries which could result in additional Taxes becoming due and payable by such Credit Party or Subsidiary, notice of such material claim or adjustment.

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(b) Within thirty (30) days after the last day of each month, Borrower shall deliver to Agent and each Lender with the monthly financial statements described above, a duly completed Compliance Certificate signed by a Responsible Officer.

(c) Borrower shall cause each Credit Party to keep proper books of record and account in accordance with GAAP in which full, true and correct entries shall be made of all dealings and transactions in relation to its business and activities. Upon at least two Business Days' prior written notice and during business hours (which such limitations shall not apply if a Default or Event of Default has occurred), Borrower shall allow, and cause each Credit Party to allow, Agent and Lenders to visit and inspect any properties of a Credit Party, to examine and make abstracts or copies from any Credit Party's books, to conduct a collateral audit and analysis of its operations and the Collateral to verify the amount and age of the accounts, the identity and credit of the respective account debtors, to review the billing practices of the Credit Party and to discuss its respective affairs, finances and accounts with their respective officers, employees and independent public accountants as often as may reasonably be desired; provided, however, that Agent shall conduct no more than two (2) such visits and inspections per twelve (12) month period unless a Default or Event of Default has occurred during such period. Borrower shall reimburse Agent and each Lender for all reasonable costs and expenses associated with such visits and inspections.

(d) Borrower shall, and shall cause each Credit Party to, deliver to Agent and each Lender, within five (5) days after the same are sent or received, copies of all material correspondence, reports, documents and other filings with any Governmental Authority that could reasonably be expected to have a material effect on any of the Required Permits material to Borrower's business or otherwise on the operations of Borrower or any of its Subsidiaries (except that reporting related to Regulatory Required Permits and/or Regulatory Reporting Events shall be governed by Section 6.16).

6.3 **Maintenance of Property.** Borrower shall cause all equipment and other tangible personal property used in the Ordinary Course of Business other than Inventory to be maintained and preserved in the same condition, repair and in working order as of the date hereof, ordinary wear and tear excepted, and shall promptly make or cause to be made all repairs, replacements and other improvements in connection therewith that are necessary or desirable to such end. Borrower shall cause each Credit Party to keep all Inventory in good and marketable condition, free from material defects. Returns and allowances between a Credit Party and its Account Debtors shall follow the Credit Party's customary practices as they exist at the Closing Date. Borrower shall promptly notify Agent of all returns, recoveries, disputes and claims that involve more than One Hundred Thousand Dollars (\$100,000) of Inventory collectively among all Credit Parties.

6.4 **Taxes; Pensions.** Borrower shall timely file and cause each Credit Party to timely file, all required tax returns and reports and timely pay, and cause each Credit Party to timely pay, all foreign, federal, state, and local Taxes, assessments, deposits and contributions owed, and shall deliver to Agent, on demand, appropriate certificates attesting to such payments; provided, however, that a Credit Party may defer payment of any contested Taxes, so long as such Credit Party (a) in good faith contests its obligation to pay the Taxes by appropriate proceedings promptly and diligently instituted and conducted, (b) notifies Agent in writing of the commencement of, and any material development in, the proceedings, and (c) posts bonds or takes any other steps required to prevent the Governmental Authority levying such contested Taxes from obtaining a Lien upon any of the Collateral (such contest, a "**Permitted Contest**"). Borrower shall pay, and cause each Credit Party to pay, all amounts necessary to fund all present pension, profit sharing and deferred compensation plans in accordance with their terms. Each Credit Party and their ERISA Affiliates shall timely make all required contributions to each Pension Plan and shall maintain each "plan" (as defined by Section 3(3) of ERISA) in material compliance with the applicable provisions of ERISA, the Internal Revenue Code and other federal and state laws. Borrower shall give written notice to Agent and each Lender promptly (and in any event within three (3) Business Days) upon Borrower becoming aware of any (i) Credit Party's or any ERISA Affiliate's failure to make any contribution required to be made with respect to any Pension Plan not having been timely made, (ii) notice of the PBGC's, any Credit Party's or any ERISA Affiliate's intention to terminate or to have a trustee appointed to administer any such Pension Plan, or (iii) complete or partial withdrawal by any Credit Party or any ERISA Affiliate from any Pension Plan.

6.5 **Insurance.** Borrower shall, and shall cause each Credit Party to, keep its business and the Collateral insured for risks and in amounts standard for companies in Borrower's industry and location and as Agent may reasonably request. Insurance policies shall be in a form, with companies, and in amounts that are satisfactory to Agent. All property policies shall have a lender's loss payable endorsement showing Agent as sole lender's loss payee and waive subrogation against Agent, and all liability policies shall show, or have endorsements showing, Agent as an additional insured. No other loss payees may be shown on the policies unless Agent shall otherwise consent in writing.

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If required by Agent and to the extent possible within the policies of each insurer, all policies (or the lesser payable and additional insured endorsements) shall provide that the insurer shall endeavor to give Agent at least thirty (30) days' (ten (10) days' for non-payment of premium) notice before canceling, amending, or declining to renew its policy. At Agent's request, Borrower shall deliver certified copies of all such Credit Party insurance policies and evidence of all premium payments. If any Credit Party fails to obtain insurance as required under this Section 6.5 or to pay any amount or furnish any required proof of payment to third persons and Agent, Agent may make all or part of such payment or obtain such insurance policies required in this Section 6.5, and take any action under the policies Agent deems prudent.

6.6 Collateral Accounts. Borrower shall, and shall cause each Credit Party to, provide Agent five (5) days prior written notice before establishing any Collateral Account at or with any bank or financial institution. In addition, for each Collateral Account that any Credit Party at any time maintains (and in connection with any such Collateral Account established after the Closing Date, prior to opening such Collateral Account), Borrower shall, and shall cause each Credit Party to, cause the applicable bank or financial institution at or with which any Collateral Account is maintained to execute and deliver a Control Agreement or other appropriate instrument with respect to such Collateral Account to perfect Agent's Lien in such Collateral Account in accordance with the terms hereunder, which Control Agreement may not be terminated without prior written consent of Agent. The provisions of the previous sentence shall not apply to (a) the JPMorgan Account provided that (i) the JPMorgan Account is closed in accordance with Section 6.17 and (ii) the aggregate value of the cash and other assets on deposit in the JPMorgan Account shall not exceed €20,000 at any time, (b) the HSBC India Account provided that the aggregate value of the cash and other assets on deposit in the HSBC India Account shall not exceed the US dollar equivalent of \$50,000 at any time, or (c) any deposit accounts exclusively used for payroll, payroll taxes and, in Agent's discretion, other employee wage and benefit payments to or for the benefit of a Credit Party's employees and identified to Agent by Borrower as such; provided, however, that at all times Borrower may maintain one or more separate Deposit Accounts to hold any and all amounts to be used for payroll, payroll taxes and other employee wage and benefit payments, and shall not commingle any monies allocated for such purposes with funds in any other Deposit Account.

6.7 Notices of Material Agreements, Litigation and Defaults; Cooperation in Litigation

(a) Borrower shall promptly (and in any event within the time periods specified below) provide written notice to Agent and each Lender of the following:

(i) Within three (3) Business Days of Borrower becoming aware of the existence of any Event of Default or event which, with the giving of notice or passage of time, or both, would constitute an Event of Default;

(ii) Within three (3) Business Days of Borrower becoming aware of (or having reason to believe any of the following are pending or threatened in writing) any action, suit, proceeding or investigation by or against Borrower or any Credit Party which involves the possibility of any judgement or liability of more than Two Hundred Fifty Thousand Dollars (\$250,000) or that could result in a Material Adverse Change, or which questions the validity of any of the Financing Documents, or the other documents required thereby or any action to be taken pursuant to any of the foregoing;

(iii) (A) Within three (3) Business Days of Borrower (1) executing and delivering any amendment, consent, waiver or other modification to any Material Agreement which is material and adverse to such Material Agreement or which could reasonably be expected to have a Material Adverse Effect or (2) receiving or delivering any notice of termination or default or similar notice in connection with any Material Agreement and (B) together with delivery of the next Compliance Certificate (included as an update to the Disclosure Schedule delivered therewith), the execution of any new Material Agreement and/or any new material amendment, consent, waiver or other modification to any Material Agreement not previously disclosed.

(b) Borrower shall, and shall cause each Credit Party, to provide such further information (including copies of such documentation) as Agent or any Lender shall reasonably request with respect to any of the events or notices described in clause (a). From the date hereof and continuing through the termination of this Agreement, Borrower shall, and shall cause each Credit Party to, make available to Agent and each Lender, without expense to Agent or any Lender, each Credit Party's officers, employees and agents and books, to the extent that Agent or any Lender may deem them reasonably necessary to prosecute or defend any third-party suit or proceeding instituted by or against Agent or any Lender with respect to any Collateral or relating to a Credit Party.(b)

6.8 Creation/Acquisition of Subsidiaries. Borrower shall provide Agent with at least thirty (30) days (or such shorter period as Agent may accept in its sole discretion) prior written notice of its intention to create or, to the extent permitted pursuant to this Agreement, acquire a new Subsidiary. Upon such creation or, to the extent permitted hereunder, acquisition of any Subsidiary, Borrower and such Subsidiary shall promptly (and in any event within five (5) Business Days of such creation or acquisition) take all such action as may be reasonably required by Agent or the Required Lenders to cause each such Subsidiary to either, in the discretion of Agent, become a co-Borrower hereunder or to guarantee the Obligations of Borrower under the Financing Documents and, in each case, grant a continuing pledge and security interest in and to the assets of such Subsidiary (substantially as described on Exhibit A hereto); and Borrower shall grant and pledge to Agent, for the ratable benefit of the Lenders, a perfected security interest in the stock, units or other evidence of ownership of each Subsidiary (the foregoing collectively, the "**Joinder Requirements**"); provided, that Borrower shall not be permitted to make any Investment in such Subsidiary until such time as Borrower has satisfied the Joinder Requirements.

6.9 Use of Proceeds. Borrower shall use the proceeds of the Credit Extensions solely for (a) transaction fees incurred in connection with the Financing Documents, (b) for working capital needs of Borrower and its Subsidiaries, and (c) any other Permitted Purpose specified in the Credit Facility Schedule for such Credit Facility. No portion of the proceeds of the Credit Extensions will be used for family, personal, agricultural or household use or to purchase Margin Stock.

6.10 Hazardous Materials; Remediation.

(a) If any release or disposal of Hazardous Materials shall occur or shall have occurred on any real property or any other assets of any Borrower or any other Credit Party, such Borrower will cause, or direct the applicable Credit Party to cause, the prompt containment and removal of such Hazardous Materials and the remediation of such real property or other assets as is necessary to comply with all Laws and to preserve the value of such real property or other assets. Without limiting the generality of the foregoing, each Borrower shall, and shall cause each other Credit Party to, comply with each Law requiring the performance at any real property by any Borrower or any other Credit Party of activities in response to the release or threatened release of a Hazardous Material.

(b) Borrower will provide Agent within thirty (30) days after written demand therefor with a bond, letter of credit or similar financial assurance evidencing to the reasonable satisfaction of Agent that sufficient funds are available to pay the cost of removing, treating and disposing of any Hazardous Materials or Hazardous Materials Contamination and discharging any assessment which may be established on any property as a result thereof, such demand to be made, if at all, upon Agent's determination that the failure to remove, treat or dispose of any Hazardous Materials or Hazardous Materials Contamination, or the failure to discharge any such assessment could reasonably be expected to have a Material Adverse Change.

(c) If there is any conflict between this Section 6.10 and any environmental indemnity agreement which is a Financing Document, the environmental indemnity agreement shall govern and control.

6.11 Power of Attorney. Each of the officers of Agent is hereby irrevocably made, constituted and appointed the true and lawful attorney for each Borrower (without requiring any of them to act as such) with full power of substitution to do the following: (a) pay, contest or settle any Lien, charge, encumbrance, security interest, and adverse claim in or to the Collateral (in each case, so long as no Default or Event of Default has occurred, other than Permitted Liens), or any judgment based thereon, or otherwise take any action to terminate or discharge the same; (b) so long as Agent has provided not less than three (3) Business Days' prior written notice to Borrower to perform the same and Borrower has failed to take such action, (i) execute in the name of any Person comprising Borrower any schedules, assignments, instruments, documents, and statements that Borrower is obligated to give Agent under this Agreement or that Agent or any Lender deems necessary to perfect or better perfect Agent's security interest or Lien in any Collateral, (ii) do such other and further acts and deeds in the name of Borrower that Agent may deem necessary or desirable to enforce, protect or preserve any Collateral or its rights therein, including, but not limited to, to sign Borrower's name on any invoice or bill of lading for any Account or drafts against Account Debtors; and (iii) after the occurrence and during the continuance of an Event of Default, (A) endorse the name of any Borrower upon any and all checks, drafts, money orders, and other instruments for the payment of money that are payable to Borrower; (B) make, settle, and adjust all claims under Borrower's insurance policies; (C) take any action any Credit Party is required to take under this Agreement or any other Financing Document; (D) transfer the Collateral into the name of Agent or a third party as the Code permits; (E) exercise any rights and remedies described in this Agreement or the other Financing Documents; and (F) do such other and further acts and deeds in the name of Borrower that Agent may deem necessary or desirable to enforce its rights with regard to any Collateral.

6.12 Further Assurances. Borrower shall, and shall cause each Credit Party to, promptly execute any further instruments and take further action as Agent reasonably requests to perfect or better perfect or continue Agent's Lien in the Collateral or to effect the purposes of this Agreement or any other Financing Document.

6.13 Post-Closing Obligations. Borrower shall, and shall cause each Credit Party to, complete each of the post-closing obligations and/or deliver to Agent each of the documents, instruments, agreements and information listed on the **Post-Closing Obligations Schedule** attached hereto, on or before the date set forth for each such item thereon (as the same may be extended by Agent in writing in its sole discretion), each of which shall be completed or provided in form and substance satisfactory to Agent and Lenders.

6.14 Disclosure Schedule Updates. Borrower shall, in the event of any information in the **Disclosure Schedule** becoming outdated, inaccurate, incomplete or misleading, deliver to Agent, together with the next Compliance Certificate required to be delivered under this Agreement after such event, a proposed update to the **Disclosure Schedule** correcting all outdated, inaccurate, incomplete or misleading information; provided, however, (i) with respect to any proposed updates to the **Disclosure Schedule** involving Permitted Liens, Permitted Indebtedness or Permitted Investments, Agent will replace the **Disclosure Schedule** attached hereto with such proposed update only if such updated information is consistent with the definitions of and limitations herein pertaining to Permitted Liens, Permitted Indebtedness or Permitted Investments and (ii) with respect to any proposed updates to the **Disclosure Schedule** involving other matters, Agent will replace the applicable portion of the **Disclosure Schedule** attached hereto with such proposed update upon Agent's approval thereof.

6.15 Intellectual Property and Licensing.

(a) Together with each Compliance Certificate required to be delivered pursuant to Section 6.2(b) to the extent (A) Borrower acquires and/or develops any new Registered Intellectual Property, or (B) Borrower enters into or becomes bound by any additional in-bound license or sublicense agreement, any additional exclusive out-bound license or sublicense agreement or other agreement with respect to rights in Intellectual Property (other than over-the-counter software that is commercially available to the public), or (C) there occurs any other material change in Borrower's Registered Intellectual Property, in-bound licenses or sublicenses or exclusive out-bound licenses or sublicenses from that listed on the **Intangible Assets Schedule**, together with such Compliance Certificate, deliver to Agent an updated **Intangible Assets Schedule** reflecting such updated information.

(b) If Borrower obtains any Registered Intellectual Property (other than copyrights, mask works and related applications, which are addressed below), Borrower shall promptly execute such intellectual property security agreements (which shall be filed in the United States Patent and Trademark Office) and other documents and provide such other information (including, without limitation, copies of applications) and take such other actions as Agent shall request in its good faith business judgment to perfect and maintain a first priority perfected security interest in favor of Agent, for the ratable benefit of Lenders, in such property. If Borrower decides to register any copyrights or mask works in the United States Copyright Office, Borrower shall: (x) provide Agent with at least fifteen (15) days prior written notice of Borrower's intent to register such copyrights or mask works together with a copy of the application it intends to file with the United States Copyright Office (excluding Exhibits thereto); (y) execute an intellectual property security agreement and such other documents and provide such other information and take such other actions as Agent may request in its good faith business judgment to perfect and maintain a first priority perfected security interest in favor of Agent, for the ratable benefit of the Lenders, in the copyrights or mask works intended to be registered with the United States Copyright Office; and (z) record such intellectual property security agreement with the United States Copyright Office contemporaneously with filing the copyright or mask work application(s) with the United States Copyright Office.

(c) Borrower shall take such steps as Agent requests to obtain the consent of, or waiver by, any person whose consent or waiver is necessary for (x) all licenses or agreements to be deemed "Collateral" and for Agent to have a security interest in it that might otherwise be restricted or prohibited by Law or by the terms of any such license or agreement, whether now existing or entered into in the future, and (y) Agent to have the ability in the event of a liquidation of any Collateral to dispose of such Collateral in accordance with Agent's rights and remedies under this Agreement and the other Financing Documents.

(d) Borrower shall own, or be licensed to use or otherwise have the right to use, all Material Intangible Assets. Borrower shall cause all Registered Intellectual Property to be duly and properly registered, filed or issued in the appropriate office and jurisdictions for such registrations, filings or issuances, except where the failure to do so would not reasonably be expected to result in a Material Adverse Change. Borrower shall at all times conduct its business without infringement or claim of infringement of any Intellectual Property rights of others. Borrower shall (i) protect, defend and maintain the validity and enforceability of its Material Intangible Assets (ii) promptly advise Agent in writing of material infringements of its Material Intangible Assets, or of a material claim of infringement by Borrower on the Intellectual Property rights of others; and (iii) not allow any of Borrower's Material Intangible Assets to be abandoned, invalidated, forfeited or dedicated to the public or to become unenforceable. Borrower shall not become a party to, nor become bound by, any material license or other agreement with respect to which Borrower is the licensee that prohibits or otherwise restricts Borrower from granting a security interest in Borrower's interest in such license or agreement or other property.

#### 6.16 Regulatory Reporting and Covenants.

(a) Borrower shall notify Agent and each Lender promptly (and in any event within 3 Business Days of receiving, becoming aware of or determining that (each, a "Regulatory Reporting Event" and collectively, the "Regulatory Reporting Events")): (i) any Governmental Authority, specifically including the FDA is conducting or has conducted (A) if applicable, any investigation of Borrower's or its Subsidiaries' manufacturing facilities and processes for any Product which has disclosed any material deficiencies or violations of Laws and/or the Regulatory Required Permits related thereto or (B) an investigation or review of any Regulatory Required Permit (other than routine reviews in the Ordinary Course of Business associated with the renewal of a Regulatory Required Permit and which could not reasonably be expected to result in a Material Adverse Change), (ii) development, testing, and/or manufacturing of any Product should cease, (iii) if a Product has been approved for marketing and sale, any marketing or sales of such Product should cease or such Product should be withdrawn from the marketplace, (iv) any Regulatory Required Permit has been revoked or withdrawn, (v) adverse clinical test results with respect to any Product which have or could reasonably be expected to result in a Material Adverse Change, (vi) any Product recalls or voluntary Product withdrawals from any market (other than discrete batches or lots that are not material in quantity or amount and are not made in conjunction with a larger recall) or (vii) any significant failures in the manufacturing of any Product such that the amount of such Product successfully manufactured in accordance with all specifications thereof and the required payments to be made to Borrower therefor in any month shall decrease significantly with respect to the quantities of such Product and payments produced in the prior month. Borrower shall provide to Agent or any Lender such further information (including copies of such documentation) as Agent or any Lender shall reasonably request with respect to any such Regulatory Reporting Event.

(b) Borrower shall, and shall cause each Credit Party to, obtain all Regulatory Required Permits necessary for compliance in all material respects with Laws with respect to testing, manufacturing, developing, selling or marketing of Products and shall, and shall cause each Credit Party to, maintain and comply fully and completely in all respects with all such Regulatory Required Permits, the noncompliance with which could have a Material Adverse Change. In the event Borrower or any Credit Party obtains any new Regulatory Required Permit or any information on the **Regulatory Required Permits Schedule** becomes outdated, inaccurate, incomplete or misleading, Borrower shall, together with the next Compliance Certificate required to be delivered under this Agreement after such event provide Agent with an updated **Regulatory Required Permits Schedule** including such updated information.

(c) If, after the Closing Date, (i) Borrower determines to manufacture, sell, develop, test or market any new Product, Borrower shall deliver prior written notice to Agent of such determination (which shall include a brief description of such Product) and, together with delivery of the next Compliance Certificate shall provide an updated **Intangible Assets Schedule**, **Products Schedule** and **Regulatory Required Permits Schedule** (and copies of such Required Permits as Agent may request) reflecting updates related to such determination.

6.17 JPMorgan Account. Borrower shall close the JPMorgan Account on or before March 31, 2016.

#### 7 NEGATIVE COVENANTS

Borrower shall not do, nor shall it permit any Credit Party to do, any of the following without the prior written consent of Agent:

7.1 Dispositions. Convey, sell, abandon, lease, license, transfer, assign or otherwise dispose of (collectively, "**Transfer**") all or any part of its business or property, except for (a) sales, transfers or dispositions of Inventory in the Ordinary Course of Business; or (b) sales or abandonment of (i) worn-out or obsolete Equipment or (ii) other Equipment that is no longer used or useful in the business of Borrower with a fair salable value not to exceed Two Hundred Fifty Thousand Dollars (\$250,000) in the aggregate in each fiscal year of Borrower for all such Equipment; (c) to the extent they may constitute a Transfer, Permitted Liens; (d) to the extent they may constitute a Transfer, Permitted Investments; or (e) Permitted Licenses.

7.2 Changes in Business, Management, Ownership or Business Locations. (a) Engage in any business other than the businesses currently engaged in by Borrower or such Subsidiary, as applicable, or reasonably related thereto; (b) liquidate or dissolve; (c) (i) have a change in Responsible Officer where a suitable permanent replacement, as approved by Borrower's board of directors, has not been named and hired by not later than ninety (90) days after such change, or (ii) enter into any transaction or series of related transactions which would result in a Change in Control unless the agreements with respect to such transactions provide for, as a condition precedent to the consummation thereof, either (x) the indefeasible payment in full of the Obligations or (y) the consent of the Agent and Lenders; (d) add any new offices or business locations, or enter into any new leases with respect to existing offices or business locations without first delivering a fully-executed Access Agreement to Agent (except as otherwise provided below); (e) change its jurisdiction of organization; (f) change its organizational structure or type; (g) change its legal name unless Borrower has given at least thirty (30) days prior written notice to Agent of Borrower's intention to take any such action (which such written notice shall include an updated version of any Disclosure Schedule impacted by such change) and have executed any and all documents, instruments and agreements and taken any other actions which Agent may request after receiving such written notice in order to protect and preserve the Liens, rights and remedies of Agent with respect to the Collateral; provided, however, that Agent acknowledges that Borrower intends to change its name to "Strata Skin Sciences, Inc." effective as of January 5, 2016, and that no additional notice shall be required under this clause (g) regarding such name change; or (h) change any organizational number (if any) assigned by its jurisdiction of organization. Notwithstanding the foregoing, in the case of subpart (d) preceding, provided that the applicable lease or license agreement, or applicable law, do not grant to the landlord or licensor any Lien upon intangible assets of the tenant or licensee, subpart (d) shall not restrict leases or licenses for (i) such new or existing offices or business locations containing less than Fifty Thousand Dollars (\$50,000) in Borrower's assets or property and not containing Borrower's Books and (ii) any new or existing business location constituting a warehouse, consignee or bailee location that does not contain any of Borrower's Books and would not otherwise require an Access Agreement pursuant to the criteria set forth in Section 4.2(e).

7.3 Mergers or Acquisitions. Merge or consolidate with any other Person, or acquire all or substantially all of the capital stock or property of another Person; provided, however, that a Subsidiary of Borrower may merge or consolidate into another Subsidiary that is a Borrower, so long as (a) Borrower has provided Agent with prior written notice of such transaction, (b) a Person already comprising Borrower shall be the surviving legal entity, (c) Borrower's tangible net worth is not thereby reduced, (d) no Event of Default has occurred and is continuing prior thereto or arises as a result therefrom, and (e) Borrower shall be in compliance with the covenants set forth in this Agreement both before and after giving effect to such transaction.

7.4 Indebtedness. Create, incur, assume, or be liable for any Indebtedness other than Permitted Indebtedness.

7.5 Encumbrance. (a) Create, incur, allow, or suffer any Lien on any of its property, except for Permitted Liens, (b) permit any Collateral to fail to be subject to the first priority security interest granted herein except for Permitted Liens that may have priority by operation of applicable Law or by the terms of a written intercreditor or subordination agreement entered into by Agent, or (c) enter into any agreement, document, instrument or other arrangement (except with or in favor of Agent) with any Person which directly or indirectly prohibits or has the effect of prohibiting Borrower or any Subsidiary from assigning, mortgaging, pledging, granting a security interest in or upon, or encumbering any of Borrower's or any Subsidiary's Collateral or Intellectual Property, except as is otherwise permitted in the definition of "Permitted Liens" herein.

7.6 Maintenance of Collateral Accounts. Maintain any Collateral Account, except pursuant to the terms of Section 6.6 hereof.

7.7 Distributions; Investments; Margin Stock. (a) Pay any dividends (other than dividends payable solely in common stock) or make any distribution or payment with respect to or redeem, retire or purchase or repurchase any of its equity interests (other than repurchases pursuant to the terms of employee stock purchase plans, employee restricted stock agreements or similar plans) or (b) directly or indirectly make any Investment (including, without limitation, any additional Investment in any Subsidiary) other than Permitted Investments. Without limiting the foregoing, Borrower shall not, and shall not permit any of its Subsidiaries to, purchase or carry Margin Stock.

7.8 Transactions with Affiliates. Directly or indirectly enter into or permit to exist any material transaction with any Affiliate of any Credit Party, except for (a) transactions that are in the Ordinary Course of Business, upon fair and reasonable terms that are no less favorable to Borrower than would be obtained in an arm's length transaction with a non-affiliated Person, (b) transactions with Subsidiaries that are designated as a Borrower hereunder and that are not otherwise prohibited by Article 7 of this Agreement, and (c) transactions permitted by Section 7.7 of this Agreement.

7.9 Subordinated Debt. (a) Make or permit any payment on any Subordinated Debt, except to the extent expressly permitted to be made pursuant to the terms of the Subordination Agreement to which such Subordinated Debt is subject, or (b) amend any provision in any document relating to the Subordinated Debt other than as may be expressly permitted pursuant to the terms of any applicable Subordination Agreement to which such Subordinated Debt is subject.

7.10 Compliance. Become an "investment company" or a company controlled by an "investment company", under the Investment Company Act of 1940, as amended or undertake as one of its important activities extending credit to purchase or carry Margin Stock, or use the proceeds of any Credit Extension for that purpose; (i) fail, or permit any ERISA Affiliate to fail, to meet "minimum funding standards" (as defined in Section 412 of the Internal Revenue Code or Section 302 of ERISA), whether or not waived, (ii) permit (with respect to any Credit Party, any Subsidiary of any Credit Party or any ERISA Affiliate thereof) a "reportable event" as defined in Section 4043(c) of ERISA (or the regulations issued thereunder) (other than an event for which the 30-day notice requirement is waived) to occur, (iii) engage in any "prohibited transaction" within the meaning of Section 406 of ERISA or Section 4975 of the Internal Revenue Code that could result in liability in excess of \$150,000 in the aggregate or that could reasonably be expected to result in a Material Adverse Change; (iv) fail to comply with the Federal Fair Labor Standards Act that could result in liability in excess of \$150,000 in the aggregate or that could reasonably be expected to result in a Material Adverse Change; (v) permit (with respect to any Credit Party, any Subsidiary of any Credit Party or any ERISA Affiliate thereof) the withdrawal from participation in any Pension Plan, or (vi) incur, or permit any Credit Party, any Subsidiary of any Credit Party or any ERISA Affiliate thereof to incur, any liability under Title IV of ERISA (other than for PBGC premiums due but not delinquent under Section 4007 of ERISA).

7.11 Amendments to Organization Documents and Material Agreements. Amend, modify or waive any provision of (a) any Material Agreement in a manner that is materially adverse to Borrower, that is adverse to Agent or any Lender, that pertains to rights to assign or grant a security interest in such Material Agreement or that could or could reasonably be expected to result in a Material Adverse Change, or (b) any of its organizational documents (other than a change in registered agents, or a change that could not adversely affect the rights of Agent or Lenders hereunder, but, for the avoidance of doubt, under no circumstances a change of its name, type of organization or jurisdiction of organization), in each case, without the prior written consent of Agent. Borrower shall provide to Agent copies of all amendments, waivers and modifications of any Material Agreement or organizational documents.

7.12 Compliance with Anti-Terrorism Laws. Directly or indirectly, knowingly enter into any documents, instruments, agreements or contracts with any Person listed on the OFAC Lists. Borrower shall immediately notify Agent if Borrower has knowledge that Borrower or any Subsidiary or Affiliate is listed on the OFAC Lists or (a) is convicted on, (b) pleads *nolo contendere* to, (c) is indicted on, or (d) is arraigned and held over on charges involving money laundering or predicate crimes to money laundering. Borrower will not, nor will Borrower permit any Subsidiary or Affiliate to, directly or indirectly, (i) conduct any business or engage in any transaction or dealing with any Blocked Person, including, without limitation, the making or receiving of any contribution of funds, goods or services to or for the benefit of any Blocked Person, (ii) deal in, or otherwise engage in any transaction relating to, any property or interests in property blocked pursuant to Executive Order No. 13224, any similar executive order or other Anti-Terrorism Law, or (iii) engage in or conspire to engage in any transaction that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in Executive Order No. 13224 or other Anti-Terrorism Law. Agent hereby notifies Borrower

that pursuant to the requirements of Anti-Terrorism Laws, and Agent's policies and practices, Agent is required to obtain, verify and record certain information and documentation that identifies Borrower and its principals, which information includes the name and address of Borrower and its principals and such other information that will allow Agent to identify such party in accordance with Anti-Terrorism Laws.

7.13 Financial Covenant. Permit consolidated net revenue of Borrower and its Subsidiaries determined on a consolidated basis in accordance with GAAP for the twelve month period ending on the last day of the most recently completed calendar month to be less than the minimum amount set forth on the Financial Covenant Schedule for such period.

8 RESERVED

9 RESERVED

10 EVENTS OF DEFAULT

10.1 Events of Default. The occurrence of any of the following conditions and/or events, whether voluntary or involuntary, by operation of law or otherwise, shall constitute an "Event of Default" and Credit Parties shall thereupon be in default under this Agreement and each of the other Financing Documents:

(a) Borrower fails to (i) make any payment of principal or interest on any Credit Extension on its due date, or (ii) pay any other Obligations within three (3) Business Days after such Obligations are due and payable (which three (3) Business Day grace period shall not apply to payments due on the Maturity Date or the date of acceleration pursuant to Section 10.2 hereof).

(b) Any Credit Party defaults in the performance of or compliance with any term contained in this Agreement or in any other Financing Document (other than occurrences described in other provisions of this Section 10.1 for which a different grace or cure period is specified or for which no grace or cure period is specified and thereby constitute immediate Events of Default) and such default is not remedied by the Credit Party or waived by Agent within ten (10) days after the earlier of (i) the date of receipt by any Borrower of notice from Agent or Required Lenders of such default, or (ii) the date an officer of such Credit Party becomes aware, or through the exercise of reasonable diligence should have become aware, of such default;

(c) Any Credit Party defaults in the performance of or compliance with any term contained in Section 6.2, 6.4, 6.5, 6.6, 6.7(a), 6.8, 6.9, 6.10, 6.13, 6.15 or 6.16 or Article 7.

(d) Any representation, warranty, certification or statement made by any Credit Party, and holder of Subordinated Debt or any other Person acting for or on behalf of a Credit Party or a holder of Subordinated Debt (i) in any Financing Document or in any certificate, financial statement or other document delivered pursuant to any Financing Document, or (ii) to induce Agent and/or Lenders to enter into this Agreement or any Financing Document is incorrect in any respect (or in any material respect if such representation, warranty, certification or statement is not by its terms already qualified as to materiality) when made (or deemed made);

(e) (i) any Credit Party defaults under or breaches any Material Agreement (after any applicable grace period contained therein), or a Material Agreement shall be terminated by a third party or parties party thereto prior to the expiration thereof, or there is a loss of a material right of a Credit Party under any Material Agreement to which it is a party, in each case which could reasonably be expected to result in a Material Adverse Change, (ii) (A) any Credit Party fails to make (after any applicable grace period) any payment when due (whether due because of scheduled maturity, required prepayment provisions, acceleration, demand or otherwise) on any Indebtedness (other than the Obligations) of such Credit Party or such Subsidiary having an aggregate principal amount (including undrawn committed or available amounts and including amounts owing to all creditors under any combined or syndicated credit arrangement) of more than One Hundred Thousand Dollars (\$100,000) ("**Material Indebtedness**"), (B) any other event shall occur or condition shall exist under any contractual obligation relating to any such Material Indebtedness, if the effect of such event or condition is to accelerate, or to permit the acceleration of (without regard to any subordination terms with respect thereto), the maturity of such Material Indebtedness or (C) any such Material Indebtedness shall become or be declared to be due and payable, or be required to be prepaid, redeemed, defeased or repurchased (other than by a regularly scheduled required prepayment), prior to the stated maturity thereof, (iii) any Credit Party defaults (beyond any applicable grace period) under any obligation for payments due or otherwise under any lease agreement for such Credit Party's principal place of business or any place of business that meets the criteria for the requirement of an Access Agreement under Section 7.2 or for which an Access Agreement exists or was required to be delivered, (iv) the occurrence of any breach or default under any terms or provisions of any Subordinated Debt Document or under any agreement subordinating the Subordinated Debt to all or any portion of the Obligations, or the occurrence of any event requiring the prepayment of any Subordinated Debt, or the delivery of any notice with respect to any Subordinated Debt or pursuant to any Subordination Agreement that triggers the start of any standstill or similar period under any Subordination Agreement, or (v) any Borrower makes any payment on account of any Indebtedness that has been subordinated to any of the Obligations, other than payments specifically permitted by the terms of such subordination;

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(f) (i) any Credit Party shall generally not pay its debts as such debts become due, shall admit in writing its inability to pay its debts generally, shall make a general assignment for the benefit of creditors, or shall cease doing business as a going concern, (ii) any proceeding shall be instituted by or against any Credit Party seeking to adjudicate it a bankrupt or insolvent or seeking liquidation, winding up, reorganization, arrangement, adjustment, protection, relief, composition of it or its debts or any similar order, in each case under any law relating to bankruptcy, insolvency or reorganization or relief of debtors or seeking the entry of an order for relief or the appointment of a custodian, receiver, trustee, conservator, liquidating agent, liquidator, other similar official or other official with similar powers, in each case for it or for any substantial part of its property and, in the case of any such proceedings instituted against (but not by or with the consent of) such Credit Party, either such proceedings shall remain undismissed or unstayed for a period of sixty (60) days or more or any action sought in such proceedings shall occur or (iii) any Credit Party shall take any corporate or similar action or any other action to authorize any action described in clause (i) or (ii) above;

(g) (i) The service of process seeking to attach, execute or levy upon, seize or confiscate any Collateral Account, any Intellectual Property, or any funds of any Credit Party on deposit with Agent, any Lender or any Affiliate of Agent or any Lender, or (ii) a notice of lien, levy, or assessment is filed against any assets of a Credit Party by any government agency, and the same under subclauses (i) and (ii) hereof are not discharged or stayed (whether through the posting of a bond or otherwise) prior to the earlier to occur of ten (10) days after the occurrence thereof or such action becoming effective;

(h) (i) any court order enjoins, restrains, or prevents Borrower from conducting any material part of its business, (ii) the institution by any Governmental Authority of criminal proceedings against any Credit Party, or (iii) one or more judgments or orders for the payment of money (not paid or fully covered by insurance and as to which the relevant insurance company has acknowledged coverage in writing) aggregating in excess of \$100,000 shall be rendered against any or all Credit Parties and either (A) enforcement proceedings shall have been commenced by any creditor upon any such judgments or orders, or (B) there shall be any period of ten (10) consecutive days during which a stay of enforcement of any such judgments or orders, by reason of a pending appeal, bond or otherwise, shall not be in effect,

(i) any Lien created by any of the Financing Documents shall at any time fail to constitute a valid and perfected Lien on all of the Collateral purported to be encumbered thereby, subject to no prior or equal Lien except Permitted Liens, or any Credit Party shall so assert; any provision of any Financing Document shall fail to be valid and binding on, or enforceable against, a Credit Party, or any Credit Party shall so assert;

(j) (i) A Change in Control occurs or (ii) any Credit Party or direct or indirect equity owner in a Credit Party shall enter into an agreement which contemplates a Change in Control (unless such agreement is either (A) non-binding on such Credit Party or (B) provides for, as a condition precedent to the consummation of such agreement, either (x) the indefeasible payment in full in cash of all Obligations or (y) the consent of Agent and Lenders);

(k) Any Required Permit shall have been (i) revoked, rescinded, suspended, modified in a materially adverse manner or not renewed in the Ordinary Course of Business for a full term, or (ii) subject to any decision by a Governmental Authority that designates a hearing with respect to any applications for renewal of any of such Required Permit or that could result in the Governmental Authority taking any of the actions described in clause (i) above, and such decision or such revocation, rescission, suspension, modification or non-renewal has, or could reasonably be expected to have, a Material Adverse Change;

(l) (i) the voluntary withdrawal or institution of any action or proceeding by the FDA or similar Governmental Authority to order the withdrawal of any Product or Product category from the market or to enjoin Borrower, its Subsidiaries or any representative of Borrower or its Subsidiaries from manufacturing, marketing, selling or distributing any Product or Product category, (ii) the institution of any action or proceeding by any DEA, FDA, or any other Governmental Authority to revoke, suspend, reject, withdraw, limit, or restrict any Regulatory Required Permit held by Borrower, its Subsidiaries or any representative of Borrower or its Subsidiaries, which, in each case, has or could reasonably be expected to result in Material Adverse Change, (iii) the commencement of any enforcement action against Borrower, its Subsidiaries or any representative of Borrower or its Subsidiaries (with respect to the business of Borrower or its Subsidiaries) by DEA, FDA, or any other Governmental Authority which has or could reasonably be expected to result in a Material Adverse Change, or (iv) the occurrence of adverse test results in connection with a Product which could result in Material Adverse Change.

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(m) If any Borrower is or becomes an entity whose equity is registered with the SEC, and/or is publicly traded on and/or registered with a public securities exchange, such Borrower's equity fails to remain registered with the SEC in good standing, and/or such equity fails to remain publicly traded on and registered with a public securities exchange, including, for the avoidance of doubt, the over-the-counter bulletin board or the over-the-counter markets group exchanges managed by the Financial Industry Regulatory Authority, Inc.;

(n) The occurrence of any fact, event or circumstance that could reasonably be expected to result in a Material Adverse Change; or

(o) Agent determines, based on information available to it and in its reasonable judgment, that there is a reasonable likelihood that Borrower shall fail to comply with one or more financial covenants in this Agreement during the next succeeding financial reporting period.

All cure periods provided for in this Section 10.1 shall run concurrently with any cure period provided for in any applicable Financing Documents under which the default occurred.

#### 10.2 Rights and Remedies.

(a) Upon the occurrence and during the continuance of an Event of Default, Agent may, and at the written direction of any Lender shall, without notice or demand, do any or all of the following: (i) deliver notice of the Event of Default to Borrower, (ii) by notice to any Borrower declare all Obligations immediately due and payable (but if an Event of Default described in Section 10.1(f) occurs all Obligations shall be immediately due and payable without any action by Agent or the Lenders), or (iii) by notice to any Borrower suspend or terminate the obligations, if any, of the Lenders to advance money or extend credit for Borrower's benefit under this Agreement or under any other agreement between any Credit Party and Agent and/or the Lenders (but if an Event of Default described in Section 10.1(f) occurs all obligations, if any, of the Lenders to advance money or extend credit for Borrower's benefit under this Agreement or under any other agreement between Borrower and Agent and/or the Lenders shall be immediately terminated without any action by Agent or the Lenders).

(b) Without limiting the rights of Agent and Lenders set forth in Section 10.2(a) above, upon the occurrence and during the continuance of an Event of Default, Agent shall have the right, without notice or demand, to do any or all of the following:

(i) with or without legal process, enter any premises where the Collateral may be and take possession of and remove the Collateral from the premises or store it on the premises, and foreclose upon and/or sell, lease or liquidate, the Collateral, in whole or in part;

(ii) apply to the Obligations (A) any balances and deposits of any Credit Party that Agent or any Lender or any Affiliate of Agent or a Lender holds or controls, or (B) any amount held or controlled by Agent or any Lender or any Affiliate of Agent or a Lender owing to or for the credit or the account of any Credit Party;

(iii) settle, compromise or adjust and grant releases with respect to disputes and claims directly with Account Debtors for amounts on terms and in any order that Agent considers advisable, notify any Person owing any Credit Party money of Agent's security interest in such funds, and verify the amount of such Account;

(iv) make any payments and do any acts it considers necessary or reasonable to protect the Collateral and/or its security interest in the Collateral. Borrower shall assemble the Collateral if Agent requests and make it available as Agent designates. Agent may also render any or all of the Collateral unusable at a Credit Party's premises and may dispose of such Collateral on such premises without liability for rent or costs. Borrower grants Agent a license to enter and occupy any of its premises, without charge, to exercise any of Agent's rights or remedies;

(v) pay, purchase, contest, or compromise any Lien which appears to be prior or superior to its security interest and pay all expenses incurred;

(vi) ship, reclaim, recover, store, finish, maintain, repair, prepare for sale, and/or advertise for sale, the Collateral. Agent is hereby granted a non-exclusive, royalty-free license or other right to use, without charge, Borrower's labels, patents, copyrights, mask works, rights of use of any name, trade secrets, trade names, trademarks, service

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marks, and advertising matter, or any similar property as it pertains to the Collateral, in completing production of, advertising for sale, and selling any Collateral (and including in such license access to all media in which any of the licensed items may be recorded or stored and to all computer software and programs used for the compilation or printout thereof) and, in connection with Agent's exercise of its rights under this Article 10, Borrower's rights under all licenses and all franchise agreements shall be deemed to inure to Agent for the benefit of the Lenders;

(vii) place a "hold" on any account maintained with Agent or the Lenders or any Affiliate of Agent or a Lender and/or deliver a notice of exclusive control, any entitlement order, or other directions or instructions pursuant to any Control Agreement or similar agreements providing control of any Collateral;

(viii) demand and receive possession of the Books of Borrower and the other Credit Parties; and

(ix) exercise all other rights and remedies available to Agent under the Financing Documents or at law or equity, including all remedies provided under the Code (including disposal of the Collateral pursuant to the terms thereof).

10.3 **Notices.** Any notice that Agent is required to give to a Credit Party under the UCC of the time and place of any public sale or the time after which any private sale or other intended disposition of the Collateral is to be made shall be deemed to constitute reasonable notice if such notice is given in accordance with this Agreement at least five (5) days prior to such action.

10.4 **Protective Payments.** If any Credit Party fails to pay or perform any covenant or obligation under this Agreement or any other Financing Document, Agent may pay or perform such covenant or obligation, and all amounts so paid by Agent are Protective Advances and immediately due and payable, bearing interest at the then highest applicable rate for the Credit Facilities hereunder, and secured by the Collateral. No such payments or performance by Agent shall be construed as an agreement to make similar payments or performance in the future or constitute Agent's waiver of any Event of Default.

10.5 **Liability for Collateral No Waiver; Remedies Cumulative.** So long as Agent and the Lenders comply with reasonable banking practices regarding the safekeeping of the Collateral in the possession or under the control of Agent and the Lenders, Agent and the Lenders shall not be liable or responsible for: (a) the safekeeping of the Collateral; (b) any loss or damage to the Collateral; (c) any diminution in the value of the Collateral; or (d) any act or default of any carrier, warehouseman, bailee, or other Person. Borrower bears all risk of loss, damage or destruction of the Collateral. Agent's failure, at any time or times, to require strict performance by Borrower of any provision of this Agreement or any other Financing Document shall not waive, affect, or diminish any right of Agent thereafter to demand strict performance and compliance herewith or therewith. No waiver hereunder shall be effective unless signed by Agent and then is only effective for the specific instance and purpose for which it is given. Agent's rights and remedies under this Agreement and the other Financing Documents are cumulative. Agent has all rights and remedies provided under the Code, by Law, or in equity. Agent's exercise of one right or remedy is not an election, and Agent's waiver of any Event of Default is not a continuing waiver. Agent's delay in exercising any remedy is not a waiver, election, or acquiescence.

10.6 **Application of Payments and Proceeds.** Notwithstanding anything to the contrary contained in this Agreement, upon the occurrence and during the continuance of an Event of Default, (i) Borrower, for itself and the other Credit Parties, irrevocably waives the right to direct the application of any and all payments at any time or times thereafter received by Agent from or on behalf of Borrower of all or any part of the Obligations, and, as between Borrower and the Credit Parties on the one hand and Agent and Lenders on the other, Agent shall have the continuing and exclusive right to apply and to reapply any and all payments received against the Obligations in such manner as Agent may deem advisable notwithstanding any previous application by Agent, and (ii) unless the Agent and the Lenders shall agree otherwise, the proceeds of any sale of, or other realization upon all or any part of the Collateral shall be applied: *first*, to the Protective Advances; *second*, to accrued and unpaid interest on the Obligations (including any interest which, but for the provisions of the United States Bankruptcy Code, would have accrued on such amounts); *third*, to the principal amount of the Obligations outstanding; and *fourth*, to any other indebtedness or obligations of the Credit Parties owing to Agent or any Lender under the Financing Documents. Borrower shall remain fully liable for any deficiency. Any balance remaining shall be delivered to Borrower or to whoever may be lawfully entitled to receive such balance or as a court of competent jurisdiction may direct. Unless the Agent and the Lenders shall agree otherwise, in carrying out the foregoing, (x) amounts received shall be applied in the numerical order provided until exhausted prior to the application to the next succeeding category, and (y) each of the Persons entitled to receive a payment in any particular category shall receive an amount equal to its pro rata share of amounts available to be applied pursuant thereto for such category.

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## 10.7 Waivers.

(a) Except as otherwise provided for in this Agreement and to the fullest extent permitted by applicable law, each Borrower waives: (i) presentment, demand and protest, and notice of presentment, dishonor, intent to accelerate, acceleration, protest, default, nonpayment, maturity, release, compromise, settlement, extension or renewal of any or all Financing Documents and hereby ratifies and confirms whatever Agent or Lenders may do in this regard; (ii) all rights to notice and a hearing prior to Agent's or any Lender's entry upon the premises of a Borrower, the taking possession or control of, or to Agent's or any Lender's replevy, attachment or levy upon, any Collateral or any bond or security which might be required by any court prior to allowing Agent or any Lender to exercise any of its remedies; and (iii) the benefit of all valuation, appraisal and exemption Laws. Each Borrower acknowledges that it has been advised by counsel of its choices and decisions with respect to this Agreement, the other Financing Documents and the transactions evidenced hereby and thereby.

(b) Each Borrower for itself and all its successors and assigns, (i) agrees that its liability shall not be in any manner affected by any indulgence, extension of time, renewal, waiver, or modification granted or consented to by Lender; (ii) consents to any indulgences and all extensions of time, renewals, waivers, or modifications that may be granted by Agent or any Lender with respect to the payment or other provisions of the Financing Documents, and to any substitution, exchange or release of the Collateral, or any part thereof, with or without substitution, and agrees to the addition or release of any Borrower, endorsers, guarantors, or sureties, or whether primarily or secondarily liable, without notice to any other Borrower and without affecting its liability hereunder; (iii) agrees that its liability shall be unconditional and without regard to the liability of any other Borrower, Agent or any Lender for any tax on the indebtedness; and (iv) to the fullest extent permitted by law, expressly waives the benefit of any statute or rule of law or equity now provided, or which may hereafter be provided, which would produce a result contrary to or in conflict with the foregoing.

(c) To the extent that Agent or any Lender may have acquiesced in any noncompliance with any requirements or conditions precedent to the closing of the Credit Facilities or to any subsequent disbursement of Credit Extensions, such acquiescence shall not be deemed to constitute a waiver by Agent or any Lender of such requirements with respect to any future Credit Extensions and Agent may at any time after such acquiescence require Borrower to comply with all such requirements. Any forbearance by Agent or a Lender in exercising any right or remedy under any of the Financing Documents, or otherwise afforded by applicable law, including any failure to accelerate the maturity date of the Credit Facilities, shall not be a waiver of or preclude the exercise of any right or remedy nor shall it serve as a novation of the Financing Documents or as a reinstatement of the Obligations or a waiver of such right of acceleration or the right to insist upon strict compliance of the terms of the Financing Documents. Agent's or any Lender's acceptance of payment of any sum secured by any of the Financing Documents after the due date of such payment shall not be a waiver of Agent's and such Lender's right to either require prompt payment when due of all other sums so secured or to declare a default for failure to make prompt payment. The procurement of insurance or the payment of taxes or other Liens or charges by Agent as the result of an Event of Default shall not be a waiver of Agent's right to accelerate the maturity of the Obligations, nor shall Agent's receipt of any condemnation awards, insurance proceeds, or damages under this Agreement operate to cure or waive any Credit Party's default in payment of sums secured by any of the Financing Documents.

(d) Without limiting the generality of anything contained in this Agreement or the other Financing Documents, each Borrower agrees that if an Event of Default is continuing (i) Agent and Lenders shall not be subject to any "one action" or "election of remedies" law or rule, and (ii) all Liens and other rights, remedies or privileges provided to Agent or Lenders shall remain in full force and effect until Agent or Lenders have exhausted all remedies against the Collateral and any other properties owned by Borrower and the Financing Documents and other security instruments or agreements securing the Obligations have been foreclosed, sold and/or otherwise realized upon in satisfaction of Borrower's obligations under the Financing Documents.

(e) Neither Agent nor any Lender shall be under any obligation to marshal any assets in payment of any or all of the Obligations. Nothing contained herein or in any other Financing Document shall be construed as requiring Agent or any Lender to resort to any part of the Collateral for the satisfaction of any of Borrower's obligations under the Financing Documents in preference or priority to any other Collateral, and Agent may seek satisfaction out of all of the Collateral or any part thereof, in its absolute discretion in respect of Borrower's obligations under the Financing Documents. To the fullest extent permitted by law, each Borrower, for itself and its successors and assigns, waives in the event of foreclosure of any or all of the Collateral any equitable right otherwise available to any Credit Party which would require the separate sale of any of the Collateral or require Agent or Lenders to exhaust their remedies against any part of the Collateral before proceeding against any other part of the Collateral; and further in the event of such foreclosure each Borrower does hereby expressly consent to and authorize, at the option of Agent, the foreclosure and sale either separately or together of each part of the Collateral.

10.8 Injunctive Relief. The parties acknowledge and agree that, in the event of a breach or threatened breach of any Credit Party's obligations under any Financing Documents, Agent and Lenders may have no adequate remedy in money damages and, accordingly, shall be entitled to an injunction (including, without limitation, a temporary restraining order, preliminary injunction, writ of attachment, or order compelling an audit) against such breach or threatened breach, including, without limitation, maintaining any cash management and collection procedure described herein. However, no specification in this Agreement of a specific legal or equitable remedy shall be construed as a waiver or prohibition against any other legal or equitable remedies in the event of a breach or threatened breach of any provision of this Agreement. Each Credit Party waives, to the fullest extent permitted by law, the requirement of the posting of any bond in connection with such injunctive relief. By joining in the Financing Documents as a Credit Party, each Credit Party specifically joins in this Section 10.8 as if this Section 10.8 were a part of each Financing Document executed by such Credit Party.

## 11 NOTICES

All notices, consents, requests, approvals, demands, or other communication (collectively, "**Communication**") by any party to this Agreement or any other Financing Document must be in writing and shall be deemed to have been validly served, given, or delivered: (a) upon the earlier of actual receipt and three (3) Business Days after deposit in the U.S. mail, first class, registered or certified mail return receipt requested, with proper postage prepaid; (b) upon transmission, when sent by electronic mail (if an email address is specified herein) or facsimile transmission; (c) one (1) Business Day after deposit with a reputable overnight courier with all charges prepaid; or (d) when delivered, if hand-delivered by messenger, all of which shall be addressed to the party to be notified and sent to the address, facsimile number, or email address indicated below. Any of Agent, Lender or Borrower may change its mailing or electronic mail address or facsimile number by giving the other party written notice thereof in accordance with the terms of this Article 11.

### If to Borrower:

Mela Sciences, Inc.  
100 Lakeside Drive, Suite 100  
Horsham, Pennsylvania 19044  
Attention: Christina Allgeier, Chief Financial Officer  
Fax: (215) 619-3209  
E-Mail: callgeier@melasciences.com

### If to Agent or to MidCap (or any of its Affiliates or Approved Funds) as a Lender:

MidCap Financial Trust  
c/o MidCap Financial Services, LLC, as servicer  
7255 Woodmont Ave, Suite 200  
Bethesda, MD 20814  
Attn: Account Manager for Mela Sciences transaction  
Facsimile: 301-941-1450  
Email: notices@midcapfinancial.com

With a copy to:

MidCap Financial Trust  
c/o MidCap Financial Services, LLC, as servicer  
7255 Woodmont Ave, Suite 200  
Bethesda, MD 20814  
Attn: Legal  
Facsimile: 301-941-1450  
Email: legalnotices@midcapfinancial.com

If to any Lender other than MidCap: at the address set forth in the signature pages to this Agreement or provided as a notice address for such in connection with any assignment hereunder.

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## 12 CHOICE OF LAW, VENUE AND JURY TRIAL WAIVER

12.1 THIS AGREEMENT, EACH SECURED PROMISSORY NOTE AND EACH OTHER FINANCING DOCUMENT, AND THE RIGHTS, REMEDIES AND OBLIGATIONS OF THE PARTIES HERETO AND THERETO, AND ANY CLAIM, CONTROVERSY OR DISPUTE ARISING UNDER OR RELATED TO THIS AGREEMENT OR SUCH FINANCING DOCUMENT, THE RELATIONSHIP OF THE PARTIES, AND/OR THE INTERPRETATION AND ENFORCEMENT OF THE RIGHTS AND DUTIES OF THE PARTIES AND ALL OTHER MATTERS RELATING HERETO, THERETO OR ARISING THEREFROM (WHETHER SOUNDING IN CONTRACT LAW, TORT LAW OR OTHERWISE), SHALL BE GOVERNED BY, AND CONSTRUED AND INTERPRETED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF MARYLAND, WITHOUT REFERENCE TO ITS CONFLICT OF LAW PROVISIONS. NOTWITHSTANDING THE FOREGOING, AGENT AND LENDERS SHALL HAVE THE RIGHT TO BRING ANY ACTION OR PROCEEDING AGAINST BORROWER OR ITS PROPERTY IN THE COURTS OF ANY OTHER JURISDICTION WHICH AGENT AND LENDERS (IN ACCORDANCE WITH THE PROVISIONS OF SECTION 12.1) DEEM NECESSARY OR APPROPRIATE TO REALIZE ON THE COLLATERAL OR TO OTHERWISE ENFORCE AGENT'S AND LENDERS' RIGHTS AGAINST BORROWER OR ITS PROPERTY. BORROWER EXPRESSLY SUBMITS AND CONSENTS IN ADVANCE TO THE JURISDICTION OF THE FEDERAL AND STATE COURTS LOCATED IN THE STATE OF MARYLAND AND ANY SUCH OTHER JURISDICTION IN ANY ACTION OR SUIT COMMENCED IN ANY SUCH COURT, AND BORROWER HEREBY WAIVES ANY OBJECTION THAT IT MAY HAVE BASED UPON LACK OF PERSONAL JURISDICTION, IMPROPER VENUE, OR FORUM NON CONVENIENS AND HEREBY CONSENTS TO THE GRANTING OF SUCH LEGAL OR EQUITABLE RELIEF AS IS DEEMED APPROPRIATE BY SUCH COURT. BORROWER HEREBY WAIVES PERSONAL SERVICE OF THE SUMMONS, COMPLAINTS, AND OTHER PROCESS ISSUED IN SUCH ACTION OR SUIT AND AGREES THAT SERVICE OF SUCH SUMMONS, COMPLAINTS, AND OTHER PROCESS MAY BE MADE BY REGISTERED OR CERTIFIED MAIL ADDRESSED TO BORROWER AT THE ADDRESS SET FORTH IN ARTICLE 11 OF THIS AGREEMENT AND THAT SERVICE SO MADE SHALL BE DEEMED COMPLETED UPON THE EARLIER TO OCCUR OF BORROWER'S ACTUAL RECEIPT THEREOF OR THREE (3) DAYS AFTER DEPOSIT IN THE U.S. MAIL, PROPER POSTAGE PREPAID.

12.2 **TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, BORROWER, AGENT AND LENDERS EACH WAIVE THEIR RIGHT TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION ARISING OUT OF OR BASED UPON THIS AGREEMENT, THE FINANCING DOCUMENTS OR ANY CONTEMPLATED TRANSACTION, INCLUDING CONTRACT, TORT, BREACH OF DUTY AND ALL OTHER CLAIMS. THIS WAIVER IS A MATERIAL INDUCEMENT FOR BOTH PARTIES TO ENTER INTO THIS AGREEMENT. EACH PARTY HAS REVIEWED THIS WAIVER WITH ITS COUNSEL.**

12.3 Borrower, Agent and each Lender agree that each Credit Extension (including those made on the Closing Date) shall be deemed to be made in, and the transactions contemplated hereunder and in any other Financing Document shall be deemed to have been performed in, the State of Maryland.

## 13 GENERAL PROVISIONS

### 13.1 Successors and Assigns.

(a) This Agreement binds and is for the benefit of the successors and permitted assigns of each party. Borrower may not assign this Agreement or any rights or obligations under it without Agent's prior written consent (which may be granted or withheld in Agent's discretion). Any Lender may at any time assign to one or more Eligible Assignees all or any portion of such Lender's Applicable Commitment and/or Credit Extensions, together with all related obligations of such Lender hereunder; provided that, unless an Event of Default has occurred and is continuing, no Lender shall assign any of such Lender's rights or obligations hereunder to a direct competitor of any Credit Party. Borrower and Agent shall be entitled to continue to deal solely and directly with such Lender in connection with the interests so assigned until Agent shall have received and accepted an effective assignment agreement in form and substance acceptable to Agent, executed, delivered and fully completed by the applicable parties thereto, and shall have received such other information regarding such Eligible Assignee as Agent reasonably shall require. Notwithstanding anything set forth in this Agreement to the contrary, any Lender may at any time pledge or assign a security interest in all or any portion of its rights under this Agreement to secure obligations of such Lender, including any pledge or assignment to secure obligations to a Federal Reserve Bank;

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provided, however, that no such pledge or assignment shall release such Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto. If requested by Agent, Borrower agrees to (i) execute any documents reasonably required to effectuate and acknowledge each assignment of an Applicable Commitment or Credit Extension to an assignee hereunder, (ii) make Borrower's management available to meet with Agent and prospective participants and assignees of Applicable Commitments or Credit Extensions and (iii) assist Agent or the Lenders in the preparation of information relating to the financial affairs of Borrower as any prospective participant or assignee of an Applicable Commitment or Credit Extension reasonably may request.

(b) From and after the date on which the conditions described above have been met, (i) such Eligible Assignee shall be deemed automatically to have become a party hereto and, to the extent of the interests assigned to such Eligible Assignee pursuant to such assignment agreement, shall have the rights and obligations of a Lender hereunder, and (ii) the assigning Lender, to the extent that rights and obligations hereunder have been assigned by it pursuant to such assignment agreement, shall be released from its rights and obligations hereunder (other than those that survive termination). Upon the request of the Eligible Assignee (and, as applicable, the assigning Lender) pursuant to an effective assignment agreement, each Borrower shall execute and deliver to Agent for delivery to the Eligible Assignee (and, as applicable, the assigning Lender) secured notes in the aggregate principal amount of the Eligible Assignee's Credit Extensions or Applicable Commitments (and, as applicable, secured promissory notes in the principal amount of that portion of the principal amount of the Credit Extensions or Applicable Commitments retained by the assigning Lender).

(c) Agent, acting solely for this purpose as an agent of Borrower, shall maintain at its offices located in Bethesda, Maryland a copy of each assignment agreement delivered to it and a Register for the recordation of the names and addresses of each Lender, and the commitments of, and principal amount (and stated interest) of the Credit Extensions owing to, such Lender pursuant to the terms hereof (the "**Register**"). The entries in such Register shall be conclusive, absent manifest error, and Borrower, Agent and Lenders may treat each Person whose name is recorded therein pursuant to the terms hereof as a Lender hereunder for all purposes of this Agreement, notwithstanding notice to the contrary. Such Register shall be available for inspection by Borrower and any Lender, at any reasonable time upon reasonable prior notice to Agent. Each Lender that sells a participation shall, acting solely for this purpose as an agent of Borrower maintain a register on which it enters the name and address of each participant and the principal amounts (and stated interest) of each participant's interest in the Obligations (each, a "**Participant Register**"). The entries in the Participant Registers shall be conclusive, absent manifest error. Each Participant Register shall be available for inspection by Borrower and the Agent at any reasonable time upon reasonable prior notice to the applicable Lender; provided, that no Lender shall have any obligation to disclose all or any portion of the Participant Register (including the identity of any Participant or any information relating to a Participant's interest in any commitments, loans, letters of credit or its other obligations under any Financing Document) to any Person (including Borrower) except to the extent that such disclosure is necessary to establish that such commitment, loan, letter of credit or other obligation is in registered form under Section 5f.103-1(c) of the United States Treasury Regulations. For the avoidance of doubt, the Agent (in its capacity as Agent) shall have no responsibility for maintaining a participant register.

(d) Notwithstanding anything to the contrary contained in this Agreement, the Credit Extensions (including any Secured Promissory Notes evidencing such Credit Extensions) are registered obligations, the right, title and interest of the Lenders and their assignees in and to such Credit Extensions shall be transferable only upon notation of such transfer in the Register and no assignment thereof shall be effective until recorded therein. This Agreement shall be construed so that the Credit Extensions are at all times maintained in "registered form" within the meaning of Sections 163(f), 871(h)(2) and 881(c)(2) of the IRC and Section 5f.103-1(c) of the United States Treasury Regulations.

### 13.2 Indemnification

(a) Borrower hereby agrees to promptly pay (i) (A) all costs and expenses of Agent (including, without limitation, the costs, expenses and reasonable fees of counsel to, and independent appraisers and consultants retained by, Agent) in connection with the examination, review, due diligence investigation, documentation, negotiation, closing and syndication of the transactions contemplated by the Financing Documents, and in connection with the continued administration of the Financing Documents including (1) any amendments, modifications, consents and waivers to and/or under any and all Financing Documents, and (2) any periodic public record searches conducted by or at the request of Agent (including, without limitation, title investigations, UCC

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searches, fixture filing searches, judgment, pending litigation and tax lien searches and searches of applicable corporate, limited liability, partnership and related records concerning the continued existence, organization and good standing of certain Persons), and (B) costs and expenses of Agent in connection with the performance by Agent of its rights and remedies under the Financing Documents; (ii) without limitation of the preceding clause (i), all costs and expenses of Agent in connection with the creation, perfection and maintenance of Liens pursuant to the Financing Documents; (iii) without limitation of the preceding clause (i), all costs and expenses of Agent in connection with (A) protecting, storing, insuring, handling, maintaining or selling any Collateral, (B) any litigation, dispute, suit or proceeding relating to any Financing Document, and (C) any workout, collection, bankruptcy, insolvency and other enforcement proceedings under any and all of the Financing Documents; (iv) without limitation of the preceding clause (i), all costs and expenses of Agent in connection with Agent's reservation of funds in anticipation of the funding of the Credit Extensions to be made hereunder; and (v) all costs and expenses incurred by Agent or Lenders in connection with any litigation, dispute, suit or proceeding relating to any Financing Document and in connection with any workout, collection, bankruptcy, insolvency and other enforcement proceedings under any and all Financing Documents, whether or not Agent or Lenders are a party thereto. If Agent or any Lender uses in-house counsel for any of these purposes, Borrower further agrees that the Obligations include reasonable charges for such work commensurate with the fees that would otherwise be charged by outside legal counsel selected by Agent or such Lender for the work performed.

(b) Borrower hereby agrees to indemnify, pay and hold harmless Agent and Lenders and the officers, directors, employees, trustees, agents, investment advisors, collateral managers, servicers, and counsel of Agent and Lenders (collectively called the "**Indemnitees**") from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, claims, costs, expenses and disbursements of any kind or nature whatsoever (including the disbursements and reasonable fees of counsel for such Indemnitee) in connection with any investigative, response, remedial, administrative or judicial matter or proceeding, whether or not such Indemnitee shall be designated a party thereto and including any such proceeding initiated by or on behalf of a Credit Party, and the reasonable expenses of investigation by engineers, environmental consultants and similar technical personnel and any commission, fee or compensation claimed by any broker (other than any broker retained by Agent or Lenders) asserting any right to payment for the transactions contemplated hereby, which may be imposed on, incurred by or asserted against such Indemnitee as a result of or in connection with the transactions contemplated hereby and the use or intended use of the proceeds of the Credit Facilities, except that Borrower shall have no obligation hereunder to an Indemnitee with respect to any liability resulting from the gross negligence or willful misconduct of such Indemnitee, as determined by a final non-appealable judgment of a court of competent jurisdiction. To the extent that the undertaking set forth in the immediately preceding sentence may be unenforceable, Borrower shall contribute the maximum portion which it is permitted to pay and satisfy under applicable Law to the payment and satisfaction of all such Indemnified Liabilities incurred by the Indemnitees or any of them. No Indemnitee shall be liable for any damages arising from the use by unintended recipients of any information or other materials distributed by it through telecommunications, electronic or other information transmission systems in connection with this Agreement or the other Financing Documents or the transactions contemplated hereby or thereby.

(c) Notwithstanding any contrary provision in this Agreement, the obligations of Borrower under this Section 13.2 shall survive the payment in full of the Obligations and the termination of this Agreement. NO INDEMNITEE SHALL BE RESPONSIBLE OR LIABLE TO ANY CREDIT PARTY OR TO ANY OTHER PARTY TO ANY FINANCING DOCUMENT, ANY SUCCESSOR, ASSIGNEE OR THIRD PARTY BENEFICIARY OR ANY OTHER PERSON ASSERTING CLAIMS DERIVATIVELY THROUGH SUCH PARTY, FOR INDIRECT, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES WHICH MAY BE ALLEGED AS A RESULT OF CREDIT HAVING BEEN EXTENDED, SUSPENDED OR TERMINATED UNDER THIS AGREEMENT OR ANY OTHER FINANCING DOCUMENT OR AS A RESULT OF ANY OTHER TRANSACTION CONTEMPLATED HEREUNDER OR THEREUNDER.

13.3 Time of Essence. Time is of the essence for the payment and performance of the Obligations in this Agreement.

13.4 Severability of Provisions. Each provision of this Agreement is severable from every other provision in determining the enforceability of any provision.

13.5 Correction of Financing Documents. Agent and the Lenders may correct patent errors and fill in any blanks in this Agreement and the other Financing Documents consistent with the agreement of the parties.

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13.6 **Integration.** This Agreement and the Financing Documents represent the entire agreement about this subject matter and supersede prior negotiations or agreements. All prior agreements, understandings, representations, warranties, and negotiations between the parties about the subject matter of this Agreement and the Financing Documents merge into this Agreement and the Financing Documents.

13.7 **Counterparts.** This Agreement may be executed in any number of counterparts and by different parties on separate counterparts, each of which, when executed and delivered, is an original, and all taken together, constitute one Agreement. Delivery of an executed signature page of this Agreement by facsimile transmission or electronic transmission shall be as effective as delivery of a manually executed counterpart hereof.

13.8 **Survival.** All covenants, representations and warranties made in this Agreement continue in full force until this Agreement has terminated pursuant to its terms and all Obligations (other than inchoate indemnity obligations and any other obligations which, by their terms, are to survive the termination of this Agreement) have been satisfied. The obligation of Borrower in Section 13.2 to indemnify each Lender and Agent shall survive until the statute of limitations with respect to such claim or cause of action shall have run. All powers of attorney and appointments of Agent or any Lender as Borrower's attorney in fact hereunder, and all of Agent's and Lenders' rights and powers in respect thereof, are coupled with an interest, are irrevocable until all Obligations (other than inchoate indemnity obligations and any other obligations which, by their terms, are to survive the termination of this Agreement) have been fully repaid and performed and Agent's and the Lenders' obligation to provide Credit Extensions terminates.

13.9 **Confidentiality.** In handling any confidential information of Borrower, each of the Lenders and Agent shall use all reasonable efforts to maintain, in accordance with its customary practices, the confidentiality of information obtained by it pursuant to any Financing Document and designated in writing by any Credit Party as confidential, but disclosure of information may be made: (a) to the Lenders' and Agent's Subsidiaries or Affiliates; (b) to prospective transferees or purchasers of any interest in the Credit Extensions; (c) as required by Law, regulation, subpoena, order or other legal, administrative, governmental or regulatory request; (d) to regulators or as otherwise required in connection with an examination or audit, or to any nationally recognized rating agency; (e) as Agent or any Lender considers appropriate in exercising remedies under the Financing Documents; (f) to financing sources that are advised of the confidential nature of such information and are instructed to keep such information confidential; (g) to third party service providers of the Lenders and/or Agent so long as such service providers are bound to such Lender or Agent by obligations of confidentiality; and (h) in connection with any litigation or other proceeding to which such Lender or Agent or any of their Affiliates is a party or bound, or to the extent necessary to respond to public statements or disclosures by Credit Parties or their Affiliates referring to a Lender or Agent or any of their Affiliates. Confidential information does not include information that either: (i) is in the public domain or in the Lenders' and/or Agent's possession when disclosed to the Lenders and/or Agent, or becomes part of the public domain after disclosure to the Lenders and/or Agent; or (ii) is disclosed to the Lenders and/or Agent by a third party, if the Lenders and/or Agent does not know that the third party is prohibited from disclosing the information. Agent and/or Lenders may use confidential information for the development of client databases, reporting purposes, and market analysis, so long as Agent and/or Lenders, as applicable, do not disclose Borrower's identity or the identity of any Person associated with Borrower unless otherwise permitted by this Agreement. The provisions of the immediately preceding sentence shall survive the termination of this Agreement. The agreements provided under this Section 13.9 supersede all prior agreements, understanding, representations, warranties, and negotiations between the parties about the subject matter of this Section 13.9.

13.10 **Right of Set-off.** Borrower hereby grants to Agent and to each Lender, a lien, security interest and right of set-off as security for all Obligations to Agent and each Lender hereunder, whether now existing or hereafter arising upon and against all deposits, credits, collateral and property, now or hereafter in the possession, custody, safekeeping or control of Agent or the Lenders or any entity under the control of Agent or the Lenders (including an Agent or Lender Affiliate) or in transit to any of them. At any time after the occurrence and during the continuance of an Event of Default, without demand or notice, Agent or the Lenders may set-off the same or any part thereof and apply the same to any liability or obligation of Borrower even though unmatured and regardless of the adequacy of any other collateral securing the Obligations. ANY AND ALL RIGHTS TO REQUIRE AGENT TO EXERCISE ITS RIGHTS OR REMEDIES WITH RESPECT TO ANY OTHER COLLATERAL WHICH SECURES THE OBLIGATIONS, PRIOR TO EXERCISING ITS RIGHT OF SET-OFF WITH RESPECT TO SUCH DEPOSITS, CREDITS OR OTHER PROPERTY OF BORROWER, ARE HEREBY KNOWINGLY, VOLUNTARILY AND IRREVOCABLY WAIVED.

13.11 **Publicity.** Borrower will not directly or indirectly publish, disclose or otherwise use in any public disclosure, advertising material, promotional material, press release or interview, any reference to the name, logo or any trademark of Agent or any Lender or any of their Affiliates or any reference to this Agreement or the financing evidenced

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hereby, in any case except as required by applicable Law, subpoena or judicial or similar order, in which case Borrower shall endeavor to give Agent prior written notice of such publication or other disclosure. Each Lender and Borrower hereby authorizes each Lender to publish the name of such Lender and Borrower, the existence of the financing arrangements referenced under this Agreement, the primary purpose and/or structure of those arrangements, the amount of credit extended under each facility, the title and role of each party to this Agreement, and the total amount of the financing evidenced hereby in any "tombstone", comparable advertisement or press release which such Lender elects to submit for publication. In addition, each Lender and Borrower agrees that each Lender may provide lending industry trade organizations with information necessary and customary for inclusion in league table measurements after the Closing Date. With respect to any of the foregoing, such authorization shall be subject to such Lender providing Borrower and the other Lenders with an opportunity to review and confer with such Lender regarding, and approve, the contents of any such tombstone, advertisement or information, as applicable, prior to its initial submission for publication, but subsequent publications of the same tombstone, advertisement or information shall not require Borrower's approval.

13.12 No Strict Construction. The parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties hereto and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of this Agreement.

13.13 Approvals. Unless expressly provided herein to the contrary, any approval, consent, waiver or satisfaction of Agent or Lenders with respect to any matter that is the subject of this Agreement or the other Financing Documents may be granted or withheld by Agent and Lenders in their sole and absolute discretion and credit judgment.

13.14 Amendments; Required Lenders; Inter-Lender Matters.

(a) No amendment, modification, termination or waiver of any provision of this Agreement or any other Financing Document, no approval or consent thereunder, or any consent to any departure by Borrower therefrom (in each case, other than amendments, waivers, approvals or consents deemed ministerial by Agent), shall in any event be effective unless the same shall be in writing and signed by Borrower, Agent and Required Lenders. Except as set forth in clause (b) below, all such amendments, modifications, terminations or waivers requiring the consent of the "Lenders" shall require the written consent of Required Lenders.

(b) No amendment, modification, termination or waiver of any provision of this Agreement or any other Financing Document shall, unless in writing and signed by Agent and by each Lender directly affected thereby: (i) increase or decrease the Applicable Commitment of any Lender (which shall be deemed to affect all Lenders), (ii) reduce the principal of or rate of interest on any Obligation or the amount of any fees payable hereunder, (iii) postpone the date fixed for or waive any payment of principal of or interest on any Credit Extension, or any fees or reimbursement obligation hereunder, (iv) release all or substantially all of the Collateral, or consent to a transfer of any of the Intellectual Property, in each case, except as otherwise expressly permitted in the Financing Documents (which shall be deemed to affect all Lenders), (v) subordinate the lien granted in favor of Agent securing the Obligations (which shall be deemed to affect all Lenders, except as otherwise provided below), (vi) release a Credit Party from, or consent to a Credit Party's assignment or delegation of, such Credit Party's obligations hereunder and under the other Financing Documents or any Guarantor from its guaranty of the Obligations (which shall be deemed to affect all Lenders) or (vii) amend, modify, terminate or waive this Section 13.14(b) or the definition of "Required Lenders" or "Pro Rata Share" or any other provision hereof specifying the number or percentage of Lenders required to amend, waive or otherwise modify any rights hereunder or make any determination or grant any consent hereunder, without the consent of each Lender. For purposes of the foregoing, no Lender shall be deemed affected by (i) waiver of the imposition of the Default Rate or imposition of the Default Rate to only a portion of the Obligations, (ii) waiver of the accrual of late charges, (iii) waiver of any fee solely payable to Agent under the Financing Documents, (iv) subordination of a lien granted in favor of Agent provided such subordination is limited to equipment being financed by a third party providing Permitted Indebtedness. Notwithstanding any provision in this Section 13.14 to the contrary, no amendment, modification, termination or waiver affecting or modifying the rights or obligations of Agent hereunder shall be effective unless signed by Agent and Required Lenders

(c) Agent shall not grant its written consent to any deviation or departure by Borrower or any Credit Party from the provisions of Article 7 without the prior written consent of the Required Lenders. Required Lenders shall have the right to direct Agent to take any action described in Section 10.2(b). Upon the occurrence of any Event of Default, Agent shall have the right to exercise any and all remedies referenced in Section 10.2 without the written consent of Required Lenders following the occurrence of an "Exigent Circumstance" (as defined below). All matters requiring the satisfaction or acceptance of Agent in the definition of Subordinated Debt shall further require the satisfaction and acceptance of each

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Required Lender. Any reference in this Agreement to an allocation between or sharing by the Lenders of any right, interest or obligation "ratably," "proportionally" or in similar terms shall refer to Pro Rata Share unless expressly provided otherwise. As used in this Section, "**Exigent Circumstance**" means any event or circumstance that, in the reasonable judgment of Agent, imminently threatens the ability of Agent to realize upon all or any material portion of the Collateral, such as, without limitation, fraudulent removal, concealment, or abscondment thereof, destruction or material waste thereof, or failure of Borrower after reasonable demand to maintain or reinstate adequate casualty insurance coverage, or which, in the judgment of Agent, could result in a material diminution in value of the Collateral.

13.15 **Borrower Liability.** If there is more than one entity comprising Borrower, then (a) any Borrower may, acting singly, request Credit Extensions hereunder, (b) each Borrower hereby appoints the other as agent for the other for all purposes hereunder, including with respect to requesting Credit Extensions hereunder, (c) each Borrower shall be jointly and severally obligated to pay and perform all obligations under the Financing Documents, including, but not limited to, the obligation to repay all Credit Extensions made hereunder and all other Obligations, regardless of which Borrower actually receives said Credit Extensions, as if each Borrower directly received all Credit Extensions, and (d) each Borrower waives (1) any suretyship defenses available to it under the Code or any other applicable law, and (2) any right to require the Lenders or Agent to: (A) proceed against any Borrower or any other person; (B) proceed against or exhaust any security; or (C) pursue any other remedy. The Lenders or Agent may exercise or not exercise any right or remedy they have against any Credit Party or any security (including the right to foreclose by judicial or non-judicial sale) without affecting any other Credit Party's liability or any Lien against any other Credit Party's assets. Notwithstanding any other provision of this Agreement or other related document, until the indefeasible payment in cash in full of the Obligations (other than inchoate indemnity obligations) and termination of the Applicable Commitments, each Borrower irrevocably waives all rights that it may have at law or in equity (including, without limitation, any law subrogating Borrower to the rights of the Lenders and Agent under this Agreement) to seek contribution, indemnification or any other form of reimbursement from any other Credit Party, or any other Person now or hereafter primarily or secondarily liable for any of the Obligations, for any payment made by any Credit Party with respect to the Obligations in connection with this Agreement or otherwise and all rights that it might have to benefit from, or to participate in, any security for the Obligations as a result of any payment made by a Credit Party with respect to the Obligations in connection with this Agreement or otherwise. Any agreement providing for indemnification, reimbursement or any other arrangement prohibited under this Section shall be null and void. If any payment is made to a Credit Party in contravention of this Section, such Credit Party shall hold such payment in trust for the Lenders and Agent and such payment shall be promptly delivered to Agent for application to the Obligations, whether matured or unmatured.

13.16 **Reinstatement.** This Agreement shall remain in full force and effect and continue to be effective should any petition or other proceeding be filed by or against any Credit Party for liquidation or reorganization, should any Credit Party become insolvent or make an assignment for the benefit of any creditor or creditors or should an interim receiver, receiver, receiver and manager or trustee be appointed for all or any significant part of any Credit Party's assets, and shall continue to be effective or to be reinstated, as the case may be, if at any time payment and performance of the Obligations, or any part thereof, is, pursuant to applicable law, rescinded or reduced in amount, or must otherwise be restored or returned by any obligee of the Obligations, whether as a fraudulent preference reviewable transaction or otherwise, all as though such payment or performance had not been made. In the event that any payment, or any part thereof, is rescinded, reduced, restored or returned, the Obligations shall be reinstated and deemed reduced only by such amount paid and not so rescinded, reduced, restored or returned.

13.17. **USA PATRIOT Act Notification.** Agent (for itself and not on behalf of any Lender) and each Lender hereby notifies each Borrower that pursuant to the requirements of the USA PATRIOT Act, it is required to obtain, verify and record certain information and documentation that identifies Borrower, which information includes the name and address of Borrower and such other information that will allow Agent or such Lender, as applicable, to identify Borrower in accordance with the USA PATRIOT Act.

13.18 **Warrants.** Notwithstanding anything to the contrary herein, any warrants issued to the Lenders by any Credit Party, the stock issuable thereunder, any equity securities purchased by Lenders, any amounts paid thereunder, any dividends, and any other rights in connection therewith shall not be subject to the terms and conditions of this Agreement. Nothing herein shall affect any Lender's rights under any such warrants, stock, or other equity securities to administer, manage, transfer, assign, or exercise such warrants, stock, or other equity securities for its own account.

## 14 **AGENT**

14.1 **Appointment and Authorization of Agent.** Each Lender hereby irrevocably appoints, designates and authorizes Agent to take such action on its behalf under the provisions of this Agreement and each other Financing Document and to exercise such powers and perform such duties as are expressly delegated to it by the terms of this Agreement or any other Financing Document, together with such powers as are reasonably incidental thereto. The provisions of this Article are solely for the benefit of Agent and Lenders and none of Credit Parties nor any other Person shall have any rights as a third party beneficiary of any of the provisions hereof. The duties of Agent shall be mechanical and administrative in nature. Notwithstanding any provision to the contrary contained elsewhere herein or in any other Financing Document, 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 or participant, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement or any other Financing Document or otherwise exist against Agent. Without limiting the generality of the foregoing sentence, the use of the term "agent" herein and in the other Financing Documents with reference to Agent is not intended to connote any fiduciary or other implied (or express) obligations arising under agency doctrine of any applicable Law. Instead, such term is used merely as a matter of market custom, and is intended to create or reflect only an administrative relationship between independent contracting parties. Without limiting the generality of the foregoing, Agent shall have the sole and exclusive right and authority (to the exclusion of the Lenders), and is hereby authorized, to (a) act as collateral agent for Agent and each Lender for purposes of the perfection of all liens created by the Financing Documents and all other purposes stated therein, (b) manage, supervise and otherwise deal with the Collateral, (c) take such other action as is necessary or desirable to maintain the perfection and priority of the liens created or purported to be created by the Financing Documents, (d) except as may be otherwise specified in any Financing Document, exercise all remedies given to Agent and the other Lenders with respect to the Collateral, whether under the Financing Documents, applicable law or otherwise and (e) execute any amendment, consent or waiver under the Financing Documents on behalf of any Lender that has consented in writing to such amendment, consent or waiver; **provided, however,** that Agent hereby appoints, authorizes and directs each Lender to act as collateral sub-agent for Agent and the Lenders for purposes of the perfection of all liens with respect to the Collateral, including any deposit account maintained by a Credit Party with, and cash and cash equivalents held by, such Lender, and may further authorize and direct the Lenders to take further actions as collateral sub-agents for purposes of enforcing such liens or otherwise to transfer the Collateral subject thereto to Agent, and each Lender hereby agrees to take such further actions to the extent, and only to the extent, so authorized and directed.

### 14.2 **Successor Agent.**

(a) Agent may at any time assign its rights, powers, privileges and duties hereunder to (i) another Lender or an Affiliate of Agent or any Lender or any Approved Fund, or (ii) any Person to whom Agent, in its capacity as a Lender, has assigned (or will assign, in conjunction with such assignment of agency rights hereunder) fifty percent (50%) or more of the Credit Extensions or Applicable Commitments then held by Agent (in its capacity as a Lender), in each case without the consent of the Lenders or Borrower. Following any such assignment, Agent shall give notice to the Lenders and Borrower. An assignment by Agent pursuant to this subsection (a) shall not be deemed a resignation by Agent for purposes of subsection (b) below.

(b) Without limiting the rights of Agent to designate an assignee pursuant to subsection (a) above, Agent may at any time give notice of its resignation to the Lenders and Borrower. Upon receipt of any such notice of resignation, Required Lenders shall have the right to appoint a successor Agent. If no such successor shall have been so appointed by Required Lenders and shall have accepted such appointment within ten (10) Business Days after the retiring Agent gives notice of its resignation, then the retiring Agent may, on behalf of the Lenders, appoint a successor Agent; *provided, however,* that if Agent shall notify Borrower and the Lenders that no Person has accepted such appointment, then such resignation shall nonetheless become effective in accordance with such notice from Agent that no Person has accepted such appointment and, from and following delivery of such notice, (i) the retiring Agent shall be discharged from its duties and obligations hereunder and under the other Financing Documents, and (ii) all payments, communications and determinations provided to be made by, to or through Agent shall instead be made by or to each Lender directly, until such time as Required Lenders appoint a successor Agent as provided for above in this subsection (b).

(c) Upon (i) an assignment permitted by subsection (a) above, or (ii) the acceptance of a successor's appointment as Agent pursuant to subsection (b) above, such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring (or retired) Agent, and the retiring Agent shall be discharged from all of its duties and obligations hereunder and under the other Financing Documents (if not already discharged therefrom as provided above in this subsection (c)). The fees payable by Borrower to a successor Agent shall be the same as those payable to its predecessor unless otherwise agreed between Borrower and such successor. After the retiring Agent's resignation hereunder and under the other Financing Documents, the provisions of this Article shall continue in effect for the benefit of such retiring Agent and its sub-agents in respect

of any actions taken or omitted to be taken by any of them while the retiring Agent was acting or was continuing to act as Agent.

14.3 Delegation of Duties. Agent may execute any of its duties under this Agreement or any other Financing Document by or through its, or its Affiliates', agents, employees or attorneys-in-fact and shall be entitled to obtain and rely upon the advice of counsel and other consultants or experts 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 in the absence of gross negligence or willful misconduct. Any such Person to whom Agent delegates a duty shall benefit from this Article 14 to the extent provided by Agent.

14.4 Liability of Agent. Except as otherwise provided herein, no "Agent-Related Person" (as defined below) shall (a) 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 Financing Document or the transactions contemplated hereby (except for its own gross negligence or willful misconduct in connection with its duties expressly set forth herein), or (b) be responsible in any manner to any Lender or participant for any recital, statement, representation or warranty made by any Credit Party or any officer thereof, contained herein or in any other Financing 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 Financing Document, or the validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement or any other Financing Document, or for any failure of any Credit Party or any other party to any Financing Document to perform its obligations hereunder or thereunder. No Agent-Related Person shall be under any obligation to any Lender or participant 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 Financing Document, or to inspect the Collateral, other properties or books or records of any Credit Party or any Affiliate thereof. The term "**Agent-Related Person**" means the Agent, together with its Affiliates, and the officers, directors, employees, agents, advisors, auditors and attorneys-in-fact of such Persons; provided, however, that no Agent-Related Person shall be an Affiliate of Borrower.

14.5 Reliance by Agent. Agent shall be entitled to rely, and shall be fully protected in relying, upon any writing, communication, signature, resolution, representation, notice, consent, certificate, affidavit, letter, telegram, facsimile, telex or telephone message, electronic mail 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), independent accountants and other experts selected by Agent. Agent shall be fully justified in failing or refusing to take any action under any Financing Document (a) if such action would, in the opinion of Agent, be contrary to law or any Financing Document, (b) if such action would, in the opinion of Agent, expose Agent to any potential liability under any law, statute or regulation or (c) if Agent shall not first have received such advice or concurrence of all Lenders as it deems appropriate and, if it so requests, it shall first be indemnified to its satisfaction by the Lenders against any and all liability and expense which 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 Financing Document in accordance with a request or consent of all Lenders (or Required Lenders where authorized herein) and such request and any action taken or failure to act pursuant thereto shall be binding upon all the Lenders.

14.6 Notice of Default. Agent shall not be deemed to have knowledge or notice of the occurrence of any Default and/or Event of Default, unless Agent shall have received written notice from a Lender or Borrower, describing such default or Event of Default. Agent will notify the Lenders of its receipt of any such notice. While an Event of Default has occurred and is continuing, Agent may (but shall not be obligated to) take such action, or refrain from taking such action, with respect to such Event of Default as Agent shall deem advisable or in the best interest of the Lenders, including without limitation, satisfaction of other security interests, liens or encumbrances on the Collateral not permitted under the Financing Documents, payment of taxes on behalf of Borrower or any other Credit Party, payments to landlords, warehouseman, bailees and other Persons in possession of the Collateral and other actions to protect and safeguard the Collateral, and actions with respect to insurance claims for casualty events affecting a Credit Party and/or the Collateral.

14.7 Credit Decision; Disclosure of Information by Agent. Each Lender acknowledges that no Agent-Related Person has made any representation or warranty to it, and that no act by Agent hereafter taken, including any consent to and acceptance of any assignment or review of the affairs of Borrower or any Affiliate thereof, shall be deemed to constitute any representation or warranty by any Agent-Related Person to any Lender as to any matter, including whether Agent-Related Persons have disclosed material information in their possession. 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 the Credit Parties, and all applicable bank or other regulatory Laws relating to the transactions contemplated hereby, and made its own decision to enter into this Agreement and to extend credit to Borrower hereunder. 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 Financing 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. Except for notices, reports and other documents expressly required to be furnished to the Lenders by Agent herein, 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 any Credit Party which may come into the possession of any Agent-Related Person.

14.8 Indemnification of Agent. Whether or not the transactions contemplated hereby are consummated, each Lender shall, severally and pro rata based on its respective Pro Rata Share, indemnify upon demand each Agent-Related Person (to the extent not reimbursed by or on behalf of Borrower and without limiting the obligation of Borrower to do so), and hold harmless each Agent-Related Person from and against any and all Indemnified Liabilities (which shall not include legal expenses of Agent incurred in connection with the closing of the transactions contemplated by this Agreement) incurred by it; *provided, however*, that no Lender shall be liable for the payment to any Agent-Related Person of any portion of such Indemnified Liabilities to the extent determined in a judgment by a court of competent jurisdiction to have resulted from such Agent-Related Person's own gross negligence or willful misconduct; *provided, however*, that no action taken in accordance with the directions of the Required Lenders shall be deemed to constitute gross negligence or willful misconduct for purposes of this Section. Without limitation of the foregoing, each Lender shall, severally and pro rata based on its respective Pro Rata Share, reimburse Agent upon demand for its ratable share of any costs or out-of-pocket expenses (including Protective Advances incurred after the closing of the transactions contemplated by this Agreement) incurred by Agent (in its capacity as Agent, and not as a Lender) 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 Financing 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 in full of the Obligations, the termination of this Agreement and the resignation of Agent. The term "Indemnified Liabilities" means those liabilities described in Section 13.2(a) and Section 13.2(b).

14.9 Agent in its Individual Capacity. With respect to its Credit Extensions, MidCap shall have the same rights and powers under this Agreement as any other Lender and may exercise such rights and powers as though it were not Agent, and the terms "Lender" and "Lenders" include MidCap in its individual capacity. MidCap and its Affiliates may lend money to, invest in, and generally engage in any kind of business with, any Credit Party and any of their Affiliates and any person who may do business with or own securities of any Credit Party or any of their Affiliates, all as if MidCap were not Agent and without any duty to account therefor to Lenders. MidCap and its Affiliates may accept fees and other consideration from a Credit Party for services in connection with this Agreement or otherwise without having to account for the same to Lenders. Each Lender acknowledges the potential conflict of interest between MidCap as a Lender holding disproportionate interests in the Credit Extensions and MidCap as Agent, and expressly consents to, and waives, any claim based upon, such conflict of interest.

14.10 Agent May File Proofs of Claim. In case of the pendency of any receivership, insolvency, liquidation, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceeding relative to any Credit Party, Agent (irrespective of whether the principal of any Credit Extension, shall then be due and payable as herein expressed or by declaration or otherwise and irrespective of whether Agent shall have made any demand on such Credit Party) shall be entitled and empowered, by intervention in such proceeding or otherwise:

(a) to file and prove a claim for the whole amount of the principal and interest owing and unpaid in respect of the Credit Extensions and all other Obligations that are owing and unpaid and to file such other documents as may be necessary or advisable in order to have the claims of the Lenders and Agent (including any claim for the reasonable compensation, expenses, disbursements and advances of the Lenders and Agent and their respective agents and counsel and all other amounts due the Lenders and Agent allowed in such judicial proceeding); and

(b) to collect and receive any monies or other property payable or deliverable on any such claims and to distribute the same;

and any custodian, receiver, assignee, trustee, liquidator, sequestrator or other similar official in any such judicial proceeding is hereby authorized by each Lender to make such payments to Agent and, in the event that Agent shall consent to the making of such payments directly to the Lenders, to pay to Agent any amount due for the reasonable compensation, expenses, disbursements and advances of Agent and its agents and counsel, including Protective Advances. To the extent that Agent fails timely to do so, each Lender may file a claim relating to such Lender's claim.

14.11 Collateral and Guaranty Matters. The Lenders irrevocably authorize Agent, at its option and in its discretion, to release (a) any Credit Party and any Lien on any Collateral granted to or held by Agent under any Financing Document upon the date that all Obligations (other than inchoate indemnity obligations for which no claim has yet been made and any other obligations which, by their terms, are to survive the termination of this Agreement) due hereunder have been fully and indefeasibly paid in full and no Applicable Commitments or other obligations of any Lender to provide funds to Borrower under this Agreement remain outstanding, and (b) any Lien on any Collateral that is transferred or to be transferred as part of or in connection with any transfer permitted hereunder or under any other Financing Document. Upon request by Agent at any time, all Lenders will confirm in writing Agent's authority to release its interest in particular types or items of Collateral pursuant to this Section 14.11.

#### 14.12 Advances; Payments; Non-Funding Lenders.

(a) Advances; Payments. If Agent receives any payment for the account of Lenders on or prior to 11:00 a.m. (New York time) on any Business Day, Agent shall pay to each applicable Lender such Lender's Pro Rata Share of such payment on such Business Day. If Agent receives any payment for the account of Lenders after 11:00 a.m. (New York time) on any Business Day, Agent shall pay to each applicable Lender such Lender's Pro Rata Share of such payment on the next Business Day. To the extent that any Lender has failed to fund any Credit Extension (a "**Non-Funding Lender**"), Agent shall be entitled to set-off the funding short-fall against that Non-Funding Lender's Pro Rata Share of all payments received from Borrower.

(b) Return of Payments.

(i) If Agent pays an amount to a Lender under this Agreement in the belief or expectation that a related payment has been or will be received by Agent from a Credit Party and such related payment is not applicable to Agent, then Agent will be entitled to recover such amount (including interest accruing on such amount at the Federal Funds Rate for the first Business Day and thereafter, at the rate otherwise applicable to such Obligation) from such Lender on demand without set-off, counterclaim or deduction of any kind.

(ii) If Agent determines at any time that any amount received by Agent under this Agreement must be returned to a Credit Party or paid to any other person pursuant to any insolvency law or otherwise, then, notwithstanding any other term or condition of this Agreement or any other Financing Document, Agent will not be required to distribute any portion thereof to any Lender. In addition, each Lender will repay to Agent on demand any portion of such amount that Agent has distributed to such Lender, together with interest at such rate, if any, as Agent is required to pay to a Credit Party or such other person, without set-off, counterclaim or deduction of any kind.

#### 14.13 Miscellaneous.

(a) Neither Agent nor any Lender shall be responsible for the failure of any Non-Funding Lender to make a Credit Extension or make any other advance required hereunder. The failure of any Non-Funding Lender to make any Credit Extension or any payment required by it hereunder shall not relieve any other Lender (each such other Lender, an "**Other Lender**") of its obligations to make the Credit Extension or payment required by it, but neither any Other Lender nor Agent shall be responsible for the failure of any Non-Funding Lender to make a Credit Extension or make any other payment required hereunder. Notwithstanding anything set forth herein to the contrary, a Non-Funding Lender shall not have any voting or consent rights under or with respect to any Financing Document or constitute a "Lender" (or be included in the calculation of "Required Lender" hereunder) for any voting or consent rights under or with respect to any Financing Document. At Borrower's request, Agent or a person reasonably acceptable to Agent shall have the right with Agent's consent and in Agent's

sole discretion (but shall have no obligation) to purchase from any Non-Funding Lender, and each Non-Funding Lender agrees that it shall, at Agent's request, sell and assign to Agent or such person, all of the Applicable Commitments and all of the outstanding Credit Extensions of that Non-Funding Lender for an amount equal to the principal balance of the Credit Extensions held by such Non-Funding Lender and all accrued interest and fees with respect thereto through the date of sale, such purchase and sale to be consummated pursuant to an executed assignment agreement reasonably acceptable to Agent.

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(b) Each Lender shall promptly remit to the other Lenders such sums as may be necessary to ensure the ratable repayment of each Lender's portion of any Credit Extension and the ratable distribution of interest, fees and reimbursements paid or made by any Credit Party. Notwithstanding the foregoing, if this Agreement requires payments of principal and interest to be made directly to the Lenders, a Lender receiving a scheduled payment shall not be responsible for determining whether the other Lenders also received their scheduled payment on such date; *provided, however*, if it is determined that a Lender received more than its ratable share of scheduled payments made on any date or dates, then such Lender shall remit to the Agent (for Agent to redistribute to itself and the Lenders in a manner to ensure the payment to Agent of any sums due Agent hereunder and the ratable repayment of each Lender's portion of any Credit Extension and the ratable distribution of interest, fees and reimbursements) such sums as may be necessary to ensure the ratable payment of such scheduled payments, as instructed by Agent. If any payment or distribution of any kind or character, whether in cash, properties or securities and whether voluntary, involuntary, through the exercise of any right of set-off, or otherwise, shall be received by a Lender in excess of its ratable share, then (i) the portion of such payment or distribution in excess of such Lender's ratable share shall be received by such Lender in trust for application to the payments of amounts due on the other Lender's claims, or, in the case of Collateral, shall hold such Collateral for itself and as agent and bailee for the Agent and other Lenders and (ii) such Lender shall promptly advise the Agent of the receipt of such payment, and, within five (5) Business Days of such receipt and, in the case of payments and distributions, such Lender shall purchase (for cash at face value) from the other Lenders (through the Agent), without recourse, such participations in the Credit Extension made by the other Lenders as shall be necessary to cause such purchasing Lender to share the excess payment ratably with each of them in accordance with the respective Pro Rata Shares of the Lenders; *provided, however*, that if all or any portion of such excess payment is thereafter recovered by or on behalf of a Credit Party from such purchasing Lender, the purchase shall be rescinded and the purchase price restored to the extent of such recovery, but without interest; *provided, further*, that the provisions of this Section shall not be construed to apply to (x) any payment made by a Credit Party pursuant to and in accordance with the express terms of this Agreement or the other Financing Documents, or (y) any payment obtained by a Lender as consideration for the assignment of or sale of a participation in any of its Applicable Commitment pursuant to Section 13.1. Borrower agrees that any Lender so purchasing a participation from another Lender pursuant to this Section may exercise all its rights of payment (including the right of set-off) with respect to such participation as fully as if such Lender were the direct creditor of Borrower in the amount of such participation. No documentation other than notices and the like shall be required to implement the terms of this Section. The Agent shall keep records (which shall be conclusive and binding in the absence of manifest error) of participations purchased pursuant to this Section and shall in each case notify the Lenders following any such purchases.

## 15 **DEFINITIONS**

In addition to any terms defined elsewhere in this Agreement, or in any schedule or exhibit attached hereto, as used in this Agreement, the following terms have the following meanings:

"**Access Agreement**" means a landlord consent, bailee letter or warehouseman's letter, in form and substance reasonably satisfactory to Agent, in favor of Agent executed by such landlord, bailee or warehouseman, as applicable, for any third party location.

"**Account**" means any "account", as defined in the Code, with such additions to such term as may hereafter be made, and includes, without limitation, all accounts receivable and other sums owing to Borrower.

"**Account Debtor**" means any "account debtor", as defined in the Code, with such additions to such term as may hereafter be made.

"**Affiliate**" means, with respect to any Person, a Person that owns or controls directly or indirectly the Person, any Person that controls or is controlled by or is under common control with the Person, and each of that Person's senior executive officers, directors, partners and, for any Person that is a limited liability company, that Person's managers and members.

"**Agent**" means, MidCap, not in its individual capacity, but solely in its capacity as agent on behalf of and for the benefit of the Lenders, together with its successors and assigns.

"**Agreement**" has the meaning given it in the preamble of this Agreement.

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"**Anti-Terrorism Laws**" means any Laws relating to terrorism or money laundering, including Executive Order No. 13224 (effective September 24, 2001), the USA PATRIOT Act, the Laws comprising or implementing the Bank Secrecy Act, and the Laws administered by OFAC.

"**Applicable Commitment**" has the meaning given it in Section 2.2

"**Applicable Floor**" means for each Credit Facility the per annum rate of interest specified on the Credit Facility Schedule; provided, however, that for the Applicable Prime Rate, the Applicable Floor is a per annum rate that is three hundred basis points above the Applicable Floor for the Applicable Libor Rate.

"**Applicable Index Rate**" means, for any Applicable Interest Period, the rate per annum determined by Agent equal to the Applicable Libor Rate; provided, however, that 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 Agent or any Lender, make it unlawful or impractical for Agent or such Lender to fund or maintain Obligations bearing interest based upon the Applicable Libor Rate, Agent or such Lender shall give notice of such changed circumstances to Agent and Borrower and the Applicable Index Rate for Obligations outstanding or thereafter extended or made by Agent or such Lender shall thereafter be the Applicable Prime Rate until Agent or such Lender determines (as to the portion of the Credit Extensions or Obligations owed to it) that it would no longer be unlawful or impractical to fund or maintain such Obligations or Credit Extensions at the Applicable Libor Rate. In the event that Agent shall have determined (which determination shall be final and conclusive and binding upon all parties hereto), as of any Applicable Interest Rate Determination Date, that adequate and fair means do not exist for ascertaining the interest rate applicable to any Credit Facility on the basis provided for herein, then Agent may select a comparable replacement index and corresponding margin.

"**Applicable Interest Period**" for each Credit Facility has the meaning specified for that Credit Facility in the Credit Facility Schedule; provided, however, that at any time that the Applicable Prime Rate is the Applicable Index Rate, Applicable Interest Period shall mean the period commencing as of the most recent Applicable Interest Rate Determination Date and continuing until the next Applicable Interest Rate Determination Date or such earlier date as the Applicable Prime Rate shall no longer be the Applicable Index Rate; and provided, further, that at any time the Libor Rate Index is adjusted as set forth in the definition thereof, or re-implemented following invocation of the Applicable Prime Rate as permitted herein, the Applicable Interest Period shall mean the period commencing as of such adjustment or re-implementation and continuing until the next Applicable Interest Rate Determination Date, if any.

"**Applicable Interest Rate**" means a per annum rate of interest equal to the Applicable Index Rate plus the Applicable Margin.

"**Applicable Interest Rate Determination Date**" means the second (2nd) Business Day prior to the first (1st) day of the related Applicable Interest Period; provided, however, that at any time that the Applicable Prime Rate is the Applicable Index Rate, Applicable Interest Rate Determination Date means the date of any change in the Base Rate Index; and provided, further, that at any time the Libor Rate Index is adjusted as set forth in the definition thereof, the Applicable Interest Rate Determination Date shall mean the date of such adjustment or the second (2nd) Business Day prior to the first (1st) day of the related Applicable Interest Period, as elected by Agent.

"**Applicable Libor Rate**" means, for any Applicable Interest Period, the rate per annum, determined by Agent (rounded upwards, if necessary, to the next 1/100th%), equal to the greater of (a) the Applicable Floor and (b) the Libor Rate Index.

"**Applicable Margin**" for each Credit Facility has the meaning specified for that Credit Facility in the Credit Facility Schedule.

"**Applicable Prepayment Fee**", for each Credit Facility, has the meaning given it in the Credit Facility Schedule for such Credit Facility.

"**Applicable Prime Rate**" means, for any Applicable Interest Period, the rate per annum, determined by Agent (rounded upwards, if necessary, to the next 1/100th%), equal to the greater of (a) the Applicable Floor and (b) the Base Rate Index.

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"**Approved Fund**" means any (a) investment company, fund, trust, securitization vehicle or conduit that is (or will be) engaged in making, purchasing, holding or otherwise investing in commercial loans and similar extensions of credit in the Ordinary Course of Business, or (b) any Person (other than a natural person) which temporarily warehouses loans for any Lender or any entity described in the preceding clause (a) and that, with respect to each of the preceding clauses (a) and (b), is administered or managed by (i) a Lender, (ii) an Affiliate of a Lender or (iii) a Person (other than a natural person) or an Affiliate of a Person (other than a natural person) that administers or manages a Lender.

"**Base Rate Index**" means, for any Applicable Interest Period, the rate per annum, determined by Agent (rounded upwards, if necessary, to the next 1/100th%) as being the rate of interest announced, from time to time, within Wells Fargo Bank, N.A. ("**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 publications as Wells Fargo may designate; provided, however, that Agent may, upon prior written notice to any Borrower, choose a reasonably comparable index or source to use as the basis for the Base Rate Index.

"**Blocked Person**" means: (a) any Person listed in the annex to, or is otherwise subject to the provisions of, Executive Order No. 13224, (b) a Person owned or controlled by, or acting for or on behalf of, any Person that is listed in the annex to, or is otherwise subject to the provisions of, Executive Order No. 13224, (c) a Person with which any Lender is prohibited from dealing or otherwise engaging in any transaction by any Anti-Terrorism Law, (d) a Person that commits, threatens or conspires to commit or supports "terrorism" as defined in Executive Order No. 13224, or (e) a Person that is named a "specially designated national" or "blocked person" on the most current list published by OFAC or other similar list.

"**Books**" means all of books and records of a Person, including ledgers, federal and state tax returns, records regarding the Person's assets or liabilities, the Collateral, business operations or financial condition, and all computer programs or storage or any equipment containing such information.

"**Borrower**" mean the entity(ies) described in the first paragraph of this Agreement and each of their successors and permitted assigns. The term "each Borrower" shall refer to each Person comprising Borrower if there is more than one such Person, or the sole Borrower if there is only one such Person. The term "any Borrower" shall refer to any Person comprising Borrower if there is more than one such Person, or the sole Borrower if there is only one such Person.

"**Borrowing Resolutions**" means, with respect to any Person, those resolutions, in form and substance satisfactory to Agent, adopted by such Person's Board of Directors or other appropriate governing body and delivered by such Person to Agent approving the Financing Documents to which such Person is a party and the transactions contemplated thereby, as well as any other approvals as may be necessary or desired to approve the entering into the Financing Documents or the consummation of the transactions contemplated thereby or in connection therewith.

"**Business Day**" means any day that is not (a) a Saturday or Sunday or (b) a day on which Agent is closed.

"**Change in Control**" means any event, transaction, or occurrence as a result of which (a) any "person" (as such term is defined in Sections 3(a)(9) and 13(d)(3) of the Exchange Act), other than an Existing Investor or a trustee or other fiduciary holding securities under an employee benefit plan of Borrower, is or becomes a beneficial owner (within the meaning Rule 13d-3 promulgated under the Exchange Act), directly or indirectly, of securities of Borrower, representing thirty-five percent (35%) or more of the combined voting power of Borrower's then outstanding securities; (b) during any period of twelve consecutive calendar months, individuals who at the beginning of such period constituted the board of directors or board of managers or similar governing Person(s) of Borrower (together with any new directors or managers whose election by the board of directors or board of managers or similar governing Person(s) of Borrower was approved by a vote of not less than a majority of the directors or managers then still in office who either were directors or managers at the beginning of such period or whose election or nomination for election was previously so approved) cease for any reason other than death or disability to constitute a majority of the directors or managers then in office; (c) the occurrence of any "change in control" or any term or provision of similar effect under any Subordinated Debt Document or Borrower's Operating Documents; or (d) Borrower ceases to own and control, directly or indirectly, all of the economic and voting rights

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associated with the outstanding securities of each of its Subsidiaries.

"**Closing Date**" has the meaning given it in the preamble of this Agreement.

"**Code**" means the Uniform Commercial Code in effect on the date hereof, as the same may, from time to time, be enacted and in effect in the State of Maryland; *provided, however*, that to the extent that the Code is used to define any term herein or in any Financing Document and such term is defined differently in different Articles or Divisions of the Code, the definition of such term contained in Article or Division 9 shall govern; and *provided, further*, that in the event that, by reason of mandatory provisions of Law, any or all of the attachment, perfection, or priority of, or remedies with respect to, Agent's Lien on any Collateral is governed by the Uniform Commercial Code in effect in a jurisdiction other than the State of Maryland, the term "**Code**" shall mean the Uniform Commercial Code as enacted and in effect in such other jurisdiction solely for purposes of the provisions thereof relating to such attachment, perfection, priority, or remedies and for purposes of definitions relating to such provisions.

"**Collateral**" means all property, now existing or hereafter acquired, mortgaged or pledged to, or purported to be subjected to a Lien in favor of, Agent, for the benefit of Agent and Lenders, pursuant to this Agreement and the other Financing Documents, including, without limitation, all of the property described in **Exhibit A** hereto.

"**Collateral Account**" means any Deposit Account, Securities Account or Commodity Account.

"**Commitment Commencement Date**" has the meaning given it in the Credit Facility Schedule.

"**Commitment Termination Date**" has the meaning given it in the Credit Facility Schedule.

"**Commodity Account**" means any "commodity account", as defined in the Code, with such additions to such term as may hereafter be made.

"**Communication**" has the meaning given it in Article 11.

"**Compliance Certificate**" means a certificate, duly executed by an authorized officer of Borrower, appropriately completed and substantially in the form of **Exhibit B**.

"**Contingent Obligation**" means, for any Person, any direct or indirect liability, contingent or not, of that Person for (a) any indebtedness, lease, dividend, letter of credit or other obligation of another such as an obligation directly or indirectly guaranteed, endorsed, co-made, discounted or sold with recourse by that Person, or for which that Person is directly or indirectly liable; (b) any obligations for undrawn letters of credit for the account of that Person; and (c) all obligations from any interest rate, currency or commodity swap agreement, interest rate cap or collar agreement, or other agreement or arrangement designated to protect a Person against fluctuation in interest rates, currency exchange rates or commodity prices; but "Contingent Obligation" does not include endorsements in the Ordinary Course of Business. The amount of a Contingent Obligation is the stated or determined amount of the primary obligation for which the Contingent Obligation is made or, if not determinable, the maximum reasonably anticipated liability for it determined by the Person in good faith; but the amount may not exceed the maximum of the obligations under any guarantee or other support arrangement.

"**Control Agreement**" means any control agreement, each of which shall be in form and substance satisfactory to Agent, entered into among the depository institution at which Borrower maintains a Deposit Account or the securities intermediary or commodity intermediary at which Borrower maintains a Securities Account or a Commodity Account, Borrower, and Agent pursuant to which Agent obtains control (within the meaning of the Code) for the benefit of the Lenders over such Deposit Account, Securities Account or Commodity Account.

"**Convertible Debt Liabilities**" means the obligations and liabilities of the Credit Parties under (a) the 4% Senior Secured Convertible Debentures of the Borrower due June 30, 2021, (b) the 2.25% Series A Senior Secured Convertible Debentures of the Borrower due June 30, 2021 and (c) the 2.25% Series B Senior Unsecured Convertible Debentures of the Borrower due June 30, 2021.

"**Credit Extension**" means an advance or disbursement of proceeds to or for the account of Borrower in

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respect of a Credit Facility.

"**Credit Extension Form**" means that certain form attached hereto as **Exhibit C**, as the same may be from time to time revised by Agent.

"**Credit Facility**" means a credit facility specified on the Credit Facility Schedule.

"**Credit Party**" means any Borrower, any Guarantor under a guarantee of the Obligations or any part thereof, and any other Person (other than Agent, a Lender or a participant of a Lender), whether now existing or hereafter acquired or formed, that becomes obligated as a borrower, guarantor, surety, indemnitor, pledgor, assignor or other obligor under any Financing Document, and any Person whose equity interests or portion thereof have been pledged or hypothecated to Agent under any Financing Document; and "**Credit Parties**" means all such Persons, collectively.

"**DEA**" means the Drug Enforcement Administration of the United States of America, any comparable state or local Government Authority, any comparable Government Authority in any non-United States jurisdiction, and any successor agency of any of the foregoing.

"**Default**" means any fact, event or circumstance which with notice or passage of time or both, could constitute an Event of Default.

"**Default Rate**" has the meaning given it in Section 2.6(b).

"**Deposit Account**" means any "deposit account" as defined in the Code with such additions to such term as may hereafter be made.

"**Designated Funding Account**" is Borrower's Deposit Account, account number 4375499944, maintained with Wells Fargo Bank, N.A. and over which Agent has been granted control for the ratable benefit of all Lenders.

"**Dollars**," "**dollars**" and "**\$**" each means lawful money of the United States.

"**Draw Period**" means, for each Credit Facility, the period commencing on the Commitment Commencement Date and ending on the Commitment Termination Date.

"**Drug Application**" means a new drug application, an abbreviated drug application, or a product license application for any Product, as appropriate, as those terms are defined in the FDCA.

"**Eligible Assignee**" means (a) a Lender, (b) an Affiliate of a Lender, (c) an Approved Fund, and (d) any other Person (other than a natural person) approved by Agent; *provided, however*, that notwithstanding the foregoing, "Eligible Assignee" shall not include (x) any Person to which assignment by Agent or a Lender of its rights, powers, privileges and duties under this Agreement would trigger any additional liabilities or withholding obligations for the Credit Parties under Section 2.6(h) of this Agreement unless Agent or the assigning Lender has provided prior written notice of such proposed assignment to Borrower or (y) any Credit Party or any Subsidiary of a Credit Party. Notwithstanding the foregoing, in connection with assignments by a Lender due to a forced divestiture at the request of any regulatory agency, the restrictions set forth herein shall not apply and Eligible Assignee shall mean any Person or party becoming an assignee incident to such forced divestiture.

"**Environmental Law**" means any present and future law (statutory or common), ordinance, treaty, rule, regulation, order, policy, other legal requirement or determination of an arbitrator or of a Governmental Authority and/or Required Permits imposing liability or standards of conduct for or relating to the regulation and protection of human health, safety, the workplace, the environment and natural resources, and including public notification requirements and environmental transfer of ownership, notification or approval statutes.

"**Equipment**" means all "equipment", as defined in the Code, with such additions to such term as may hereafter be made, and includes without limitation all machinery, fixtures, goods, vehicles (including motor vehicles and trailers), and any interest in any of the foregoing.

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"ERISA" means the Employee Retirement Income Security Act of 1974, and all regulations promulgated thereunder.

"Event of Default" has the meaning given it in Section 10.1.

"Excluded Taxes" means any of the following Taxes imposed on or with respect to a Recipient or required to be withheld or deducted from a payment to a Recipient, (a) Taxes imposed on or measured by net income (however denominated), franchise Taxes, and branch profits Taxes, in each case, (i) imposed as a result of such Recipient being organized under the laws of, or having its principal office or, in the case of any Lender, its applicable lending office located in, the jurisdiction imposing such Tax (or any political subdivision thereof) or (ii) that are Other Connection Taxes, (b) in the case of a Lender, U.S. federal withholding Taxes imposed on amounts payable to or for the account of such Lender with respect to an applicable interest in a Loan or Commitment pursuant to a law in effect on the date on which (i) such Lender acquires such interest in the Loan or Commitment or (ii) such Lender changes its lending office, except in each case to the extent that, pursuant to Section 2.6(h)(i) or 2.6(h)(iii), amounts with respect to such Taxes were payable either to such Lender's assignor immediately before such Lender became a party hereto or to such Lender immediately before it changed its lending office, (c) Taxes attributable to such Recipient's failure to comply with Section 2.6(h)(vi) and (vii) and (d) any U.S. federal withholding Taxes imposed under FATCA.

"Exigent Circumstance" has the meaning given it in Section 13.14.

"Existing Investors" means Sabby Healthcare Master Fund Ltd., Sabby Volatility Warrant Master Fund Ltd., Broadfin Healthcare Master Fund, LTD, Intracoastal Capital, LLC and any Affiliate of the foregoing.

"FATCA" means Sections 1471 through 1474 of the IRC, as of the date of this Agreement (or any amended or successor version that is substantively comparable and not materially more onerous to comply with), any current or future regulations or official interpretations thereof and any agreements entered into pursuant to Section 1471(b)(1) of the IRC.

"FDA" means the Food and Drug Administration of the United States of America, any comparable state or local Government Authority, any comparable Government Authority in any non-United States jurisdiction, and any successor agency of any of the foregoing.

"FDCA" means the Federal Food, Drug and Cosmetic Act, as amended, 21 U.S.C. Section 301 et seq., and all regulations promulgated thereunder.

"Federal Funds Rate" means, for any day, the rate per annum equal to the weighted average of the rates on overnight Federal funds transactions with members of the Federal Reserve System arranged by Federal funds brokers on such day, as published by the Federal Reserve Bank of New York on the Business Day next succeeding such day, provided that if no such rate is so published on such next succeeding Business Day, the Federal Funds Rate for such day shall be the average rate quoted to Agent on such day on such transactions as determined by Agent in a commercially reasonable manner.

"Federal Reserve Board" means the Board of Governors of the Federal Reserve System, or any entity succeeding to any of its principal functions.

"Fee Letters" means, collectively, the fee letter agreements among Borrower and Agent and Borrower and each Lender.

"Financing Documents" means, collectively, this Agreement, the Perfection Certificate, the Fee Letter(s), each Subordination Agreement, each note and guarantee executed by one or more Credit Parties in connection with the indebtedness governed by this Agreement, and each other present or future agreement executed by one or more Credit Parties and, or for the benefit of, the Lenders and/or Agent in connection with this Agreement, all as amended, restated, or otherwise modified from time to time.

"Foreign Lender" means a Lender that is not a U.S. Person.

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"**Funding Date**" means any date on which a Credit Extension is made to or on account of Borrower which shall be a Business Day.

"**GAAP**" means generally accepted accounting principles set forth in the opinions and pronouncements of the Accounting Principles Board of the American Institute of Certified Public Accountants and statements and pronouncements of the Financial Accounting Standards Board or in such other statements by such other Person as may be approved by a significant segment of the accounting profession in the United States, which are applicable to the circumstances as of the date of determination.

"**General Intangibles**" means all "general intangibles", as defined in the Code, with such additions to such term as may hereafter be made, and includes without limitation, all copyright rights, copyright applications, copyright registrations and like protections in each work of authorship and derivative work, whether published or unpublished, any patents, trademarks, service marks and, to the extent permitted under applicable Law, any applications therefor, whether registered or not, any trade secret rights, including any rights to unpatented inventions, payment intangibles, royalties, contract rights, goodwill, franchise agreements, purchase orders, customer lists, route lists, telephone numbers, domain names, claims, income and other tax refunds, security and other deposits, options to purchase or sell real or personal property, rights in all litigation presently or hereafter pending (whether in contract, tort or otherwise), insurance policies (including, without limitation, key man, property damage, and business interruption insurance), payments of insurance and rights to payment of any kind.

"**Governmental Authority**" means any nation or government, any state or other political subdivision thereof, any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative functions of or pertaining to government, any securities exchange and any self-regulatory organization.

"**Guarantor**" means any present or future guarantor of the Obligations.

"**Hazardous Materials**" means petroleum and petroleum products and compounds containing them, including gasoline, diesel fuel and oil; explosives, flammable materials; radioactive materials; polychlorinated biphenyls and compounds containing them; lead and lead-based paint; asbestos or asbestos-containing materials; underground or above-ground storage tanks, whether empty or containing any substance; any substance the presence of which is prohibited by any Laws; toxic mold, any substance that requires special handling; and any other material or substance now or in the future defined as a "hazardous substance," "hazardous material," "hazardous waste," "toxic substance," "toxic pollutant," "contaminant," "pollutant" or other words of similar import within the meaning of any Environmental Law, including: (a) any "hazardous substance" defined as such in (or for purposes of) CERCLA, or any so-called "superfund" or "superlien" Law, including the judicial interpretation thereof; (b) any "pollutant or contaminant" as defined in 42 U.S.C.A. § 9601(33); (c) any material now defined as "hazardous waste" pursuant to 40 C.F.R. Part 260; (d) any petroleum or petroleum by-products, including crude oil or any fraction thereof; (e) natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel; (f) any "hazardous chemical" as defined pursuant to 29 C.F.R. Part 1910; (g) any toxic or harmful substances, wastes, materials, pollutants or contaminants (including, without limitation, asbestos, polychlorinated biphenyls ("PCB's"), flammable explosives, radioactive materials, infectious substances, materials containing lead-based paint or raw materials which include hazardous constituents); and (h) any other toxic substance or contaminant that is subject to any Environmental Laws or other past or present requirement of any Governmental Authority.

"**Hazardous Materials Contamination**" means contamination (whether now existing or hereafter occurring) of the improvements, buildings, facilities, personalty, soil, groundwater, air or other elements on or of the relevant property by Hazardous Materials, or any derivatives thereof, or on or of any other property as a result of Hazardous Materials, or any derivatives thereof, generated on, emanating from or disposed of in connection with the relevant property.

"**HSBC India Account**" means that certain Deposit Account numbered 166-300970-001 maintained at HSBC Bank located in India.

"**Indebtedness**" means (a) indebtedness for borrowed money (including the Obligations) or the deferred price of property or services, such as reimbursement and other obligations for surety bonds and letters of credit, (b) obligations evidenced by notes, bonds, debentures or similar instruments, (c) capital lease obligations, (d) non-contingent obligations of such Person to reimburse any bank or other Person in respect of amounts paid under a

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letter of credit, banker's acceptance or similar instrument, (e) equity securities of such Person subject to repurchase or redemption other than at the sole option of such Person, (f) obligations secured by a Lien on any asset of such Person, whether or not such obligation is otherwise an obligation of such Person, (g) "earnouts", purchase price adjustments, profit sharing arrangements, deferred purchase money amounts and similar payment obligations or continuing obligations of any nature of such Person arising out of purchase and sale contracts, (h) all Indebtedness of others guaranteed by such Person, (i) off-balance sheet liabilities and/or pension plan or multiemployer plan liabilities of such Person, (j) obligations arising under non-compete agreements, (k) obligations arising under bonus, deferred compensation, incentive compensation or similar arrangements, other than those arising in the Ordinary Course of Business, and (l) Contingent Obligations.

"**Indemnified Liabilities**" has the meaning given it in Section 14.8.

"**Indemnified Taxes**" means (a) Taxes, other than Excluded Taxes, imposed on or with respect to any payment made by or on account of any obligation of Borrower under this Agreement and (b) to the extent not otherwise described in (a), Other Taxes.

"**Indemnitee**" has the meaning given it in Section 13.2.

"**Insolvency Proceeding**" means any proceeding by or against any Person under the United States Bankruptcy Code, or any other bankruptcy or insolvency Law, including assignments for the benefit of creditors, compositions, extensions generally with its creditors, or proceedings seeking reorganization, arrangement, or other relief.

"**Intellectual Property**" means all copyright rights, copyright applications, copyright registrations and like protections in each work of authorship and derivative work, whether published or unpublished, any patents, patent applications and like protections, including improvements, divisions, continuations, renewals, reissues, extensions, and continuations-in-part of the same, trademarks, trade names, service marks, mask works, rights of use of any name, domain names, or any other similar rights, any applications therefor, whether registered or not, know-how, operating manuals, trade secret rights, clinical and non-clinical data, rights to unpatented inventions, and any claims for damage by way of any past, present, or future infringement of any of the foregoing.

"**Inventory**" means all "inventory", as defined in the Code, with such additions to such term as may hereafter be made, and includes without limitation all merchandise, raw materials, parts, supplies, packing and shipping materials, work in process and finished products, including without limitation such inventory as is temporarily out of Borrower's custody or possession or in transit and including any returned goods and any documents of title representing any of the above.

"**Investment**" means, with respect to any Person, directly or indirectly, (a) to purchase or acquire any stock or stock equivalents, or any obligations or other securities of, or any interest in, any Person, including the establishment or creation of a Subsidiary, (b) to make or commit to make any acquisition (including through licensing) of (i) of all or substantially all of the assets of another Person, or (ii) any business, Product, business line or product line, division or other unit operation of any Person or (c) make or purchase any advance, loan, extension of credit or capital contribution to, or any other investment in, any Person.

"**IRC**" means the Internal Revenue Code of 1986, as amended, and any successor provisions.

"**IRS**" means the United States Internal Revenue Service.

"**Joinder Requirements**" has the meaning set forth in Section 6.8.

"**JPMorgan Account**" means that certain Deposit Account numbered 6161610792 maintained at the JPMorgan Chase Bank, N.A. branch located at 106 Corporate Park Drive, White Plains, NY 10604.

"**Laws**" means any and all federal, state, provincial, territorial, local and foreign statutes, laws, judicial decisions, regulations, guidance, guidelines, ordinances, rules, judgments, orders, decrees, codes, plans, injunctions, permits, concessions, grants, franchises, governmental agreements and governmental restrictions, whether now or hereafter in effect, which are applicable to any Credit Party in any particular circumstance.

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"**Lender**" means any one of the Lenders.

"**Lenders**" means the Persons identified on the Credit Facility Schedule as amended from time to time to reflect assignments made in accordance with this Agreement.

"**Libor Rate Index**" means, for any Applicable Interest Period, the rate per annum, determined by Agent (rounded upwards, if necessary, to the next 1/100th%) by dividing (a) the rate per annum, determined by Agent in accordance with its customary procedures, and utilizing such electronic or other quotation sources as it considers appropriate (rounded upwards, if necessary, to the next 1/100%), to be the rate at which Dollar deposits (for delivery on the first day of such Applicable Interest Period or, if such day is not a Business Day, on the preceding Business Day) in the amount of One Million Dollars (\$1,000,000) are offered to major banks in the London interbank market on or about 11:00 a.m. (New York time) on the Applicable Interest Rate Determination Date, for a period of thirty (30) days, which determination shall be conclusive in the absence of manifest error, by (b) 100% minus the Reserve Percentage; provided, however, that Agent may, upon prior written notice to any Borrower, choose a reasonably comparable index or source to use as the basis for the Libor Rate Index. The Libor Rate Index 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, in each case, 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), which additional or increased costs would increase the cost of funding loans bearing interest based upon the Libor Rate Index; provided, however, that notwithstanding anything in this Agreement to the contrary, (i) the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines or directives thereunder or issued in connection therewith and (ii) all requests, rules, guidelines or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority) or the United States or foreign regulatory authorities, in each case pursuant to Basel III, shall in each case be deemed to be a "change in applicable Law", regardless of the date enacted, adopted or issued. 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 require such Lender to furnish to Borrower a statement setting forth the basis for adjusting such Libor Rate Index and the method for determining the amount of such adjustment.

"**Lien**" means a claim, mortgage, deed of trust, lien, levy, charge, pledge, security interest or other encumbrance of any kind, whether voluntarily incurred or arising by operation of Law or otherwise against any property.

"**Margin Stock**" means "margin stock" as such term is defined in Regulation T, U, or X of the Board of Governors of the Federal Reserve System.

"**Material Adverse Change**" means (a) a material impairment in the perfection or priority of the Agent's Lien (or any Lender's Lien therein to the extent provided for in the Financing Documents) in the Collateral; (b) a material impairment in the value of the Collateral; (c) a material adverse change in the business, operations, or condition (financial or otherwise) or prospects of any Credit Party; or (d) a material impairment of the prospect of repayment of any portion of the Obligations.

"**Material Agreement**" means (a) the agreements listed in the **Disclosure Schedule**, (b) each agreement or contract to which a Credit Party is a party relating to Material Intangible Assets or development of Products or Intellectual Property, (c) any agreement with respect to any Product, the loss of which would materially impair Borrower's ability to sell or market such Product, and (d) any agreement or contract to which such Credit Party or its Subsidiaries is a party the termination of which could reasonably be expected to result in a Material Adverse Change.

"**Material Indebtedness**" has the meaning given it in Section 10.1.

"**Material Intangible Assets**" means all of (i) Borrower's Intellectual Property and (ii) license or sublicense agreements or other agreements with respect to rights in Intellectual Property, in each case that are material to the condition (financial or other), business or operations of Borrower, as determined by Agent.

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"**Maturity Date**" means December 1, 2020.

"**Maximum Lawful Rate**" has the meaning given it in Section 2.6(g).

"**MidCap**" has the meaning given it in the preamble of this Agreement.

"**Multiemployer Plan**" means any employee benefit plan of the type described in Section 4001(a)(3) or ERISA, to which any Credit Party or any ERISA Affiliate has at any time (whether presently or in the past) sponsored, maintained, contributed to, or had an obligation to make contributions to or to which any Credit Party or any ERISA Affiliate has any liability, contingent or otherwise.

"**Obligations**" means all of Borrower's obligations to pay when due any debts, principal, interest, Protective Advances, fees, indemnities and other amounts Borrower owes the Agent or Lenders now or later, under this Agreement or the other Financing Documents, including, without limitation, interest accruing after Insolvency Proceedings begin (whether or not allowed) and debts, liabilities, or obligations of Borrower assigned to the Lenders and/or Agent, and the payment and performance of each other Credit Party's covenants and obligations under the Financing Documents. "Obligations" does not include obligations under any Warrants or any other warrants issued to Agent or a Lender.

"**OFAC**" means the U.S. Department of Treasury Office of Foreign Assets Control.

"**OFAC Lists**" means, collectively, the Specially Designated Nationals and Blocked Persons List maintained by OFAC pursuant to Executive Order No. 13224, 66 Fed. Reg. 49079 (Sept. 25, 2001) and/or any other list of terrorists or other restricted Persons maintained pursuant to any of the rules and regulations of OFAC or pursuant to any other applicable Executive Orders.

"**Operating Documents**" means, for any Person, such Person's formation documents, as certified with the Secretary of State of such Person's state of formation on a date that is no earlier than thirty (30) days prior to the Closing Date, and (a) if such Person is a corporation, its bylaws in current form, (b) if such Person is a limited liability company, its limited liability company agreement (or similar agreement), and (c) if such Person is a partnership, its partnership agreement (or similar agreement), each of the foregoing with all current amendments or modifications thereto.

"**Ordinary Course of Business**" means, in respect of any transaction involving any Credit Party, the ordinary course of business of such Credit Party, as conducted by such Credit Party in accordance with past practices or then current business practices set forth in the most recent operating plan of Borrower to the extent approved by Agent, which shall in any event be at arms-length.

"**Other Connection Taxes**" means, with respect to any Recipient, Taxes imposed as a result of a present or former connection between such Recipient and the jurisdiction imposing such Tax (other than connections arising from such Recipient having executed, delivered, become a party to, performed its obligations under, received payments under, received or perfected a security interest under, engaged in any other transaction pursuant to or enforced this Agreement, or sold or assigned an interest in any Obligation hereunder).

"**Other Tax Certification**" means such certification or evidence, in each case in form and substance satisfactory to Agent, that any Lender or prospective Lender is exempt from U.S. federal withholding tax or backup withholding tax, including evidence supporting the basis for such exemption.

"**Other Taxes**" means all present or future stamp, court or documentary, intangible, recording, filing or similar Taxes that arise from any payment made under, from the execution, delivery, performance, enforcement or registration of, from the receipt or perfection of a security interest under, or otherwise with respect to, this Agreement, except any such Taxes that are Other Connection Taxes imposed with respect to an assignment.

"**Participant Register**" has the meaning given it in Section 13.1(c).

"**Payment Date**" means the first calendar day of each calendar month.

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"**PBGC**" means the Pension Benefit Guaranty Corporation, or any successor entity thereto.

"**Pension Plan**" means any employee benefit pension plan that is subject to the minimum funding standards under Section 412 of the Code or is covered by Title IV of ERISA (including a Multiemployer Plan) that any Credit Party or any ERISA Affiliate has, at any time (whether presently or in the past) sponsored, maintained, contributed to, or had an obligation to make contributions to or to which any Credit Party or any ERISA Affiliate has any liability (contingent or otherwise).

"**Perfection Certificate**" means the Perfection Certificate delivered to Agent as of the Closing Date, together with any amendments thereto required under this Agreement.

"**Permitted Contest**" has the meaning given it in Section 6.4.

"**Permitted Contingent Obligations**" means (a) Contingent Obligations resulting from endorsements for collection or deposit in the Ordinary Course of Business; (b) Contingent Obligations incurred in the Ordinary Course of Business with respect to surety and appeal bonds, performance bonds and other similar obligations not to exceed One Hundred Thousand Dollars (\$100,000) in the aggregate at any time outstanding; (c) Contingent Obligations arising under indemnity agreements with title insurers; (d) Contingent Obligations arising with respect to customary indemnification obligations in favor of purchasers in connection with dispositions of personal property assets permitted under Article 7; (e) Contingent Obligations arising under the Financing Documents; (f) so long as there exists no Event of Default both immediately before and immediately after giving effect to any such transaction, Contingent Obligations existing or arising under any swap contract, provided, however, that such obligations are (or were) entered into by Borrower or an Affiliate in the Ordinary Course of Business for the purpose of directly mitigating risks associated with liabilities, commitments, investments, assets, or property held or reasonably anticipated by such Person and not for purposes of speculation; (g) Contingent Obligations existing or arising in connection with any security deposit or letter of credit obtained for the sole purpose of securing a lease of real property, or in connection with ancillary bank services such as a corporate credit card facility, provided that the aggregate face amount of all such security deposits, letters of credit and ancillary bank services does not at any time exceed \$175,000; and (h) other Contingent Obligations not permitted by clauses (a) through (g) above, not to exceed \$50,000 in the aggregate at any time outstanding.

"**Permitted Indebtedness**" means: (a) Borrower's Indebtedness to the Lenders and Agent under this Agreement and the other Financing Documents; (b) Indebtedness existing on the Closing Date and described on the **Disclosure Schedule**; (c) Indebtedness secured by Permitted Liens; (d) Subordinated Debt; (e) unsecured Indebtedness to trade creditors incurred in the Ordinary Course of Business; (f) Permitted Contingent Obligations; (g) extensions, refinancings, modifications, amendments and restatements of any items of Permitted Indebtedness set forth in (b) and (c) above, *provided, however*, that the principal amount thereof is not increased or the terms thereof are not modified to impose more burdensome terms upon the obligors thereunder; and (h) Indebtedness consisting of intercompany loans and advances made by any Credit Party to any other Credit Party, provided that (1) the obligations of the Credit Parties under such intercompany loan shall be subordinated at all times to the Obligations of the Credit Parties hereunder or under the other Financing Documents in a manner satisfactory to Agent and (2) to the extent that such Indebtedness is evidenced by a promissory note or other written instrument, Borrower shall pledge and deliver to Agent, for the benefit of itself and the Lenders, the original promissory note or instrument, as applicable, along with an endorsement in blank in form and substance satisfactory to Agent.

"**Permitted Investments**" means: (a) Investments existing on the Closing Date and described on the **Disclosure Schedule**; (b) Investments consisting of cash equivalents; (c) any Investments in liquid assets permitted by Borrower's investment policy, as amended from time to time, provided that such investment policy (and any such amendment thereto) has been approved in writing by Agent (provided, that, under no circumstances shall Borrower be permitted to invest in or hold Margin Stock); (d) Investments consisting of the endorsement of negotiable instruments for deposit or collection or similar transactions in the ordinary course of any Credit Party; (e) Investments consisting of deposit accounts or securities accounts in which the Agent has a first priority perfected security interest except as otherwise provided by Section 6.6; (f) Investments in Subsidiaries solely to the extent permitted pursuant to Section 6.8; (g) Investments consisting of (i) travel advances and employee relocation loans and other employee loans and advances in the Ordinary Course of Business, and (ii) loans to employees, officers or directors relating to the purchase of equity securities of Borrower or its Subsidiaries pursuant to employee stock purchase plans or agreements approved by Borrower's board of directors; (h) Investments (including debt obligations) received in connection with the bankruptcy or reorganization of customers or suppliers and in

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settlement of delinquent obligations of, and other disputes with, customers or suppliers arising in the Ordinary Course of Business; and (i) Investments consisting of intercompany Indebtedness in accordance with and to the extent permitted by clause (h) of the definition of "Permitted Indebtedness".

"**Permitted License**" means any non-exclusive license of patent rights of Borrower or its Subsidiaries so long as all such Permitted Licenses are granted to third parties in the Ordinary Course of Business, do not result in a legal transfer of title to the licensed property, and have been granted in exchange for fair consideration.

"**Permitted Liens**" means: (a) Liens existing on the Closing Date and shown on the **Disclosure Schedule** or arising under this Agreement and the other Financing Documents; (b) purchase money Liens or capital leases securing no more than One Hundred Thousand Dollars (\$100,000.00) in the aggregate amount outstanding (i) on Equipment acquired or held by a Credit Party incurred for financing the acquisition of the Equipment, or (ii) existing on Equipment when acquired, if the Lien is confined to the property and improvements and the proceeds of the Equipment; (c) Liens for taxes, fees, assessments or other government charges or levies, either not delinquent or being contested in good faith and for which adequate reserves are maintained on the Books of the Credit Party against whose asset such Lien exists, *provided* that no notice of any such Lien has been filed or recorded under any applicable law, including, without limitation, the IRC and the treasury regulations adopted thereunder; (d) statutory Liens securing claims or demands of materialmen, mechanics, carriers, warehousemen, landlords and other Persons imposed without action of such parties, *provided* that they have no priority over any of Agent's Lien and the aggregate amount of such Liens for all Credit Parties does not any time exceed Twenty-Five Thousand Dollars (\$25,000); (e) leases or subleases of real property granted in the Ordinary Course of Business, and leases, subleases, non-exclusive licenses or sublicenses of property (other than real property or Intellectual Property) granted in the Ordinary Course of Business, if the leases, subleases, licenses and sublicenses do not prohibit granting Agent a security interest in such underlying property; (f) banker's liens, rights of set-off and Liens in favor of financial institutions incurred made in the Ordinary Course of Business arising in connection with a Credit Party's Collateral Accounts provided that such Collateral Accounts are subject to a Control Agreement to the extent required hereunder; (g) Liens to secure payment of workers' compensation, employment insurance, old-age pensions, social security and other like obligations incurred in the Ordinary Course of Business (other than Liens imposed by ERISA); (h) Liens arising from judgments, decrees or attachments in circumstances not constituting an Event of Default; (i) easements, reservations, rights-of-way, restrictions, minor defects or irregularities in title and similar charges or encumbrances affecting real property not constituting a Material Adverse Change; and (j) Liens incurred in the extension, renewal or refinancing of the indebtedness secured by Liens described in (a) and (b) above, but any extension, renewal or replacement Lien must be limited to the property encumbered by the existing Lien and the principal amount of the Indebtedness may not increase.

"**Person**" means any individual, sole proprietorship, partnership, limited liability company, joint venture, company, trust, unincorporated organization, association, corporation, institution, public benefit corporation, firm, joint stock company, estate, entity or government agency.

"**Pro Rata Share**" means, as determined by Agent, with respect to each Credit Facility and Lender holding an Applicable Commitment or Credit Extensions in respect of such Credit Facility, a percentage (expressed as a decimal, rounded to the ninth decimal place) determined by *dividing* (a) in the case of fully-funded Credit Facilities, the amount of Credit Extensions held by such Lender in such Credit Facility by the aggregate amount of all outstanding Credit Extensions for such Credit Facility, and (b) in the case of Credit Facilities that are not fully-funded, the amount of Credit Extensions and unfunded Applicable Commitments held by such Lender in such Credit Facility by the aggregate amount of all outstanding Credit Extensions and unfunded Applicable Commitments for such Credit Facility.

"**Protective Advances**" means all audit fees and expenses, costs, and expenses (including reasonable attorneys' fees and expenses) of Agent and Lenders for preparing, amending, negotiating, administering, defending and enforcing the Financing Documents and the Warrants (including, without limitation, those incurred in connection with appeals or Insolvency Proceedings) or otherwise incurred by Agent or the Lenders in connection with the Financing Documents and the Warrants.

"**Products**" means any products manufactured, sold, developed, tested or marketed by any Borrower or any of its Subsidiaries, including without limitation, those products set forth on the **Products Schedule** (as updated from time to time in accordance with Section 6.16); *provided*, that, for the avoidance of doubt, any new Product not disclosed on the **Products Schedule** shall still constitute a "Product" as herein defined.

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"**Recipient**" means the Agent and any Lender, as applicable.

"**Register**" has the meaning given it in Section 13.1(d).

"**Registered Intellectual Property**" means any patent, registered trademark or servicemark, registered copyright, registered mask work, or any pending application for any of the foregoing.

"**Registered Organization**" means any "registered organization" as defined in the Code, with such additions to such term as may hereafter be made.

"**Required Lenders**" means, unless all of the Lenders and Agent agree otherwise in writing, Lenders having (a) more than sixty percent (60%) of the Applicable Commitments of all Lenders, or (b) if such Applicable Commitments have expired or been terminated, more than sixty percent (60%) of the aggregate outstanding principal amount of the Credit Extensions.

"**Regulatory Required Permit**" means any and all licenses, approvals and permits issued by the FDA, DEA or any other applicable Governmental Authority, including without limitation Drug Applications, necessary for the testing, manufacture, marketing or sale of any Product by any applicable Borrower(s) and its Subsidiaries as such activities are being conducted by such Borrower and its Subsidiaries with respect to such Product at such time and any drug listings and drug establishment registrations under 21 U.S.C. Section 510, registrations issued by DEA under 21 U.S.C. Section 823 (if applicable to any Product), and those issued by State governments for the conduct of Borrower's or any Subsidiary's business.

"**Required Permit**" means all material licenses, certificates, accreditations, product clearances or approvals, provider numbers or provider authorizations, supplier numbers, provider numbers, marketing authorizations, other authorizations, registrations, permits, consents and approvals of a Credit Party issued or required under Laws applicable to the business of Borrower or any of its Subsidiaries or necessary in the manufacturing, importing, exporting, possession, ownership, warehousing, marketing, promoting, sale, labeling, furnishing, distribution or delivery of goods or services under Laws applicable to the business of Borrower or any of its Subsidiaries. Without limiting the generality of the foregoing, "**Required Permits**" includes any Regulatory Required Permit.

"**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.

"**Responsible Officer**" means any of the President and Chief Executive Officer or Chief Financial Officer of Borrower.

"**Secretary's Certificate**" means, with respect to any Person, a certificate, in form and substance satisfactory to Agent, executed by such Person's secretary (or other appropriate officer acceptable to Agent in its sole but reasonable discretion) on behalf of such Person certifying (a) that attached to such certificate is a true, correct, and complete copy of Borrower Resolutions then in full force and effect authorizing and ratifying the execution, delivery, and performance by such Person of the Financing Documents to which it is a party; (b) the name(s) of the Person(s) authorized to execute the Financing Documents on behalf of such Person, together with a sample of the true signature(s) of such Person(s); (c) that attached to such certificate are true, correct, and complete copies of the Operating Documents of Borrower and good standing certificates of Borrower certified by the Secretary of State of the state(s) of organization of Borrower as of a date no earlier than thirty (30) days prior to the Closing Date; (d) that attached to such certificate is true, correct, and complete copy of Borrower's Registration Rights Agreement/Investors' Rights Agreement, voting agreements or other agreements among shareholders and any amendments to the foregoing; and (e) that Agent and the Lenders may conclusively rely on such certificate unless and until such Person shall have delivered to Agent a further certificate canceling or amending such prior certificate.

"**Secured Promissory Note**" has the meaning given it in Section 2.7.

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"**Securities Account**" means any "securities account", as defined in the Code, with such additions to such term as may hereafter be made.

"**Stated Rate**" has the meaning given it in Section 2.6(g).

"**Subordinated Debt**" means indebtedness incurred by Borrower which shall be (a) in an amount satisfactory to Agent, (b) made pursuant to documents in form and substance satisfactory to Agent (the "**Subordinated Debt Documents**"), and (c) subordinated to all of Borrower's now or hereafter indebtedness to the Agent and Lenders pursuant to a Subordination Agreement.

"**Subordination Agreement**" means a subordination, intercreditor, or other similar agreement in form and substance, and on terms, approved by Agent in writing.

"**Subsidiary**" means, with respect to any Person, any Person of which more than fifty percent (50.0%) of the voting stock or other equity interests (in the case of Persons other than corporations) is owned or controlled, directly or indirectly, by such Person.

"**Taxes**" means all present or future taxes, levies, imposts, duties, deductions, withholdings (including backup withholding), assessments, fees or other charges imposed by any Governmental Authority, including any interest, additions to tax or penalties applicable thereto.

"**Transfer**" has the meaning given it in Section 7.1.

"**Warrants**" means warrants to purchase shares of Borrower's Common Stock, in the form of Exhibit D, including the Initial Warrants (as defined on the Closing Deliverables Schedule) and any warrants issued pursuant to Section 3.2(h).

"**U.S. Person**" means any Person that is a "United States Person" as defined in Section 7701(a)(30) of the Code.

"**Withholding Agent**" means Borrower and Agent.

[SIGNATURES APPEAR ON FOLLOWING PAGE(S)]

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IN WITNESS WHEREOF, intending that this instrument constitute an instrument executed and delivered under seal, the parties hereto have caused this Agreement to be executed as of the Closing Date.

**BORROWER:**

MELA SCIENCES, INC.

By: /s/ Michael R. Stewart (SEAL)

Name: Michael R. Stewart

Title: President & CEO

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**AGENT:**

**MIDCAP FINANCIAL TRUST**

By: Apollo Capital Management, L.P.,  
its investment manager

By: Apollo Capital Management GP, LLC,  
its general partner

By: /s/ Maurice Amsellem (SEAL)

Name: Maurice Amsellem

Title: Authorized Signatory

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**LENDERS:**

**MIDCAP FUNDING XIII TRUST**

By: Apollo Capital Management, L.P.,  
its investment manager

By: Apollo Capital Management GP, LLC,  
its general partner

By: /s/ Maurice Amsellem (SEAL)

Name: Maurice Amsellem

Title: Authorized Signatory

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By: /s/ Daniel Edelman  
Name: Daniel Edelman  
Title: Vice President

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**EXHIBITS**

Exhibit A	Collateral
Exhibit B	Form of Compliance Certificate
Exhibit C	Credit Extension Form
Exhibit D	Form of Warrants

**SCHEDULES**

Credit Facility Schedule
Amortization Schedule (for each Credit Facility)
Post-Closing Obligations Schedule
Closing Deliveries Schedule
Disclosure Schedule
Intangible Assets Schedule
Products Schedule
Regulatory Required Permits Schedule

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**EXHIBIT A**

**COLLATERAL**

The Collateral consists of all assets of Borrower, including all of Borrower's right, title and interest in and to the following personal property:

(a) all goods, Accounts (including health-care insurance receivables), Equipment, Inventory, contract rights or rights to payment of money, leases, license agreements, franchise agreements, General Intangibles, commercial tort claims, documents, instruments (including any promissory notes), chattel paper (whether tangible or electronic), cash, deposit accounts, investment accounts, commodity accounts and other Collateral Accounts, all certificates of deposit, fixtures, letters of credit rights (whether or not the letter of credit is evidenced by a writing), securities, and all other investment property, supporting obligations, and financial assets, whether now owned or hereafter acquired, wherever located; and

(b) all Borrower's Books relating to the foregoing, and any and all claims, rights and interests in any of the above and all substitutions for, additions, attachments, accessories, accessions and improvements to and replacements, products, proceeds and insurance proceeds of any or all of the foregoing.

Pursuant to the terms of a certain negative pledge arrangement with Agent and Lenders, Borrower has agreed not to encumber any of its Intellectual Property without Agent's and Lenders' prior written consent.

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**COMPLIANCE CERTIFICATE**

TO: MidCap Financial Trust , as Agent  
 FROM: \_\_\_\_\_  
 DATE: \_\_\_\_\_, 201\_\_

The undersigned authorized officer of \_\_\_\_\_ ("**Borrower**") certifies that under the terms and conditions of the Credit and Security Agreement between Borrower, Agent and the Lenders (as amended, restated, supplemented, replaced or otherwise modified from time to time, the "**Agreement**"):

- (1) Borrower is in complete compliance with all required covenants for the month ending \_\_\_\_\_, 201\_\_, except as noted below;
- (2) there are no Events of Default;
- (3) all representations and warranties in the Agreement are true and correct in all material respects on this date except as noted below; *provided, however*, that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof; and *provided, further*, that those representations and warranties expressly referring to a specific date shall be true, accurate and complete in all material respects as of such date;
- (4) each of Borrower and the other Credit Parties has timely filed all required tax returns and reports, and has timely paid all foreign, federal, state and local taxes, assessments, deposits and contributions owed except as otherwise permitted pursuant to the terms of the Agreement;
- (5) no Liens have been levied or claims made against Borrower or any of its Subsidiaries relating to unpaid employee payroll or benefits of which Borrower has not previously provided written notification to Agent; and
- (6) attached hereto is an updated [Disclosure Schedule][Regulatory Required Permits Schedule][Products Schedule][Intangible Assets Schedule][INSERT AS APPROPRIATE] as required to be updated pursuant to the terms of the Credit and Security Agreement.
- (7) consolidated net revenue of Borrower and its Subsidiaries determined on a consolidated basis in accordance with GAAP for the twelve month period ended [ ] is \$[ ].

Attached are the required documents supporting the certifications set forth in this Compliance Certificate. The undersigned certifies, in his/her capacity as an officer of Borrower, that these are prepared in accordance with GAAP consistently applied from one period to the next except as explained in an accompanying letter or footnotes. The undersigned acknowledges, in his/her capacity as an officer of Borrower, that no borrowings may be requested at any time or date of determination that Borrower is not in compliance with any of the terms of the Agreement, and that compliance is determined not just at the date this certificate is delivered. Capitalized terms used but not otherwise defined herein shall have the meanings given them in the Agreement.

**Please indicate compliance status by circling Yes/No under "Complies" column.**

<u>Reporting Covenant</u>	<u>Required</u>	<u>Complies</u>	
Monthly Financial Statements	Monthly within 30 days	Yes	No
Audited Financial Statements	Annually within 120 days after FYE	Yes	No
Board Approved Projections	Annually within 30 days after FYE	Yes	No
Compliance Certificate	Monthly within 30 days	Yes	No

The following are the exceptions with respect to the certification above: (If no exceptions exist, state "No exceptions to note.")

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**MELA SCIENCES, INC.**

By:  
Name:  
Title:

**AGENT USE ONLY**

Received by: \_\_\_\_\_  
AUTHORIZED SIGNER  
Date: \_\_\_\_\_

Verified: \_\_\_\_\_  
AUTHORIZED SIGNER  
Date: \_\_\_\_\_

Compliance Status:            Yes    No

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**EXHIBIT C**

**CREDIT EXTENSION FORM**

**DEADLINE IS NOON NEW YORK TIME**

Date: \_\_\_\_\_, 201\_\_

**LOAN ADVANCE:**

**Complete Outgoing Wire Request section below if all or a portion of the funds from this loan advance are for an outgoing wire**

From Account # \_\_\_\_\_ (Loan Account #) To Account # \_\_\_\_\_ (Deposit Account #)

Amount of Advance \$ \_\_\_\_\_

Requested Date of Advance (subject to requirements of Credit Agreement): \_\_\_\_\_

All Borrower's representations and warranties in the Credit and Security Agreement are true, correct and complete in all material respects on the date of the request for an advance; *provided, however*, that such materiality qualifier shall not be applicable to any representations and warranties that already are qualified or modified by materiality in the text thereof; and *provided, further*, that those representations and warranties expressly referring to a specific date shall be true, accurate and complete in all material respects as of such date:

**Authorized Signature:** \_\_\_\_\_ Phone Number: \_\_\_\_\_  
Print Name/Title: \_\_\_\_\_

**OUTGOING WIRE REQUEST:**

**Complete only if all or a portion of funds from the loan advance above is to be wired.**

Beneficiary Name: \_\_\_\_\_ Amount of Wire: \$ \_\_\_\_\_  
Beneficiary Lender: \_\_\_\_\_ Account Number: \_\_\_\_\_  
City and State: \_\_\_\_\_

Beneficiary Lender Transit (ABA) #: \_\_\_\_\_ Beneficiary Lender Code (Swift, Sort, Chip, etc.): \_\_\_\_\_  
**(For International Wire Only)**  
Intermediary Lender: \_\_\_\_\_ Transit (ABA) #: \_\_\_\_\_

For Further Credit to:  
Special Instruction:

*By signing below, I (we) acknowledge and agree that my (our) funds transfer request shall be processed in accordance with and subject to the terms and conditions set forth in the agreements(s) covering funds transfer service(s), which agreements(s) were previously received and executed by me.*

Authorized Signature: \_\_\_\_\_ 2<sup>nd</sup> Signature (if required): \_\_\_\_\_  
Print Name/Title: \_\_\_\_\_ Print Name/Title: \_\_\_\_\_  
Telephone #: \_\_\_\_\_ Telephone #: \_\_\_\_\_

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THIS WARRANT AND THE SHARES ISSUABLE UPON EXERCISE HEREOF HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "ACT"), OR ANY STATE SECURITIES LAWS, AND MAY NOT BE SOLD, OFFERED FOR SALE, PLEDGED, OR HYPOTHECATED IN THE ABSENCE OF AN EFFECTIVE REGISTRATION STATEMENT RELATED THERETO OR, SUBJECT TO SECTION 11 HEREOF, AN OPINION OF CONSEL (WHICH MAY BE COMPANY COUNSEL) REASONABLY SATISFACTORY TO THE COMPANY THAT SUCH REGISTRATION IS NOT REQUIRED UNDER THE ACT, OR ANY APPLICABLE STATE SECURITIES LAWS.

## WARRANT AGREEMENT

To Purchase Shares of the Common Stock of

MELA Sciences, Inc.

Dated as of December 30, 2015 (the "Effective Date")

WHEREAS, MELA Sciences, Inc., a Delaware corporation (the "Company"), has entered into the Credit and Security Agreement (as defined below) with MidCap Financial Trust, a Delaware statutory trust, in its capacity as administrative agent for itself and the Lenders (as defined in the Credit and Security Agreement) (the "Warrantholder");

WHEREAS, pursuant to the Credit and Security Agreement and as additional consideration to the Warrantholder for, among other things, its agreements in the Credit and Security Agreement, the Company has agreed to issue to the Warrantholder this Warrant Agreement (this "Agreement"), evidencing the right to purchase shares of the Company's Common Stock (the "Warrant");

NOW, THEREFORE, in consideration of the Warrantholder having executed and delivered the Credit and Security Agreement and provided the financial accommodations contemplated therein, and in consideration of the mutual covenants and agreements contained herein, the Company and Warrantholder agree as follows:

### SECTION 1. GRANT OF THE RIGHT TO PURCHASE COMMON STOCK.

(a) Grant of Purchase Right. For value received, the Company hereby grants to the Warrantholder, and the Warrantholder is entitled, upon the terms and subject to the conditions hereinafter set forth, to subscribe for and purchase, from the Company, up to the number of fully paid and non-assessable shares of Common Stock (as defined below) as determined pursuant to Section 1(b) below, at a purchase price per share equal to the Exercise Price (as defined below). The number and Exercise Price of such shares are subject to adjustment as provided in Section 8. As used herein, the following terms shall have the following meanings:

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

"Affiliate" means a business entity that directly or indirectly Controls, is Controlled by, or is under the common Control of a party hereto, and "Control" of an organization or entity shall mean: (i) ownership or direct or indirect control of 50% or more of the outstanding voting shares or other ownership interests of such organization or entity; or (ii) direct or indirect possession of the power to elect or appoint 50% or more of the members of the board of director or other governing body of such organization or other entity.



"Charter" means the Company's Fifth Amended and Restated Certificate of Incorporation, as amended, or other constitutional document, as it may be amended and in effect from time to time.

"Common Stock" means the Company's common stock, \$0.001 par value per share, as presently constituted under the Charter, and any class and/or series of Company capital stock for or into which such common stock may be converted or exchanged in a reorganization, recapitalization or similar transaction.

"Credit and Security Agreement" means that certain Credit and Security Agreement of even date herewith among the Company, the several Lenders or entities from time to time Lender parties thereto (including, without limitation, the Warrantholder), and MidCap Financial Trust in its capacity as administrative agent for itself and the Lenders, as amended and/or restated and in effect from time to time.

"Exercise Price" means \$1.13, subject to adjustment from time to time in accordance with the provisions of the Warrant.

"June 2015 Registration Rights Agreement" means that certain Registration Rights Agreement, dated as of June 22, 2015, by and among the Company and each purchaser set forth therein.

"Liquid Sale" means the closing of a Merger Event in which the consideration received by the Company and/or its stockholders, as applicable, consists solely of cash and/or Marketable Securities.

"Marketable Securities" in connection with a Merger Event means securities meeting all of the following requirements: (i) the issuer thereof is then subject to the reporting requirements of Section 13 or Section 15(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and is then current in its filing of all required reports and other information under the Act and the Exchange Act; (ii) the class and series of shares or other security of the issuer that would be received by the Warrantholder in connection with the Merger Event were the Warrantholder to exercise the Warrant on or prior to the closing thereof is then traded on a national securities exchange or over-the-counter market, and (iii) following the closing of such Merger Event, the Warrantholder would not be restricted from publicly re-selling all of the issuer's shares and/or other securities that would be received by the Warrantholder in such Merger Event were the Warrantholder to exercise the Warrant in full on or prior to the closing of such Merger Event, except to the extent that any such restriction (x) arises solely under federal or state securities laws, rules or regulations, and (y) does not extend beyond six (6) months from the closing of such Merger Event.

"Merger Event" means any of the following: (i) a sale, lease or other transfer of all or substantially all assets of the Company, (ii) any merger or consolidation involving the Company in which the Company is not the surviving entity or in which the outstanding shares of the Company's capital stock are otherwise converted into or exchanged for shares of capital stock or other securities or property of another entity or converted into the right to receive cash, or (iii) any sale by holders of the outstanding voting equity securities of the Company in a single transaction or series of related transactions of shares constituting a majority of the outstanding combined voting power of the Company.

"Purchase Price" means, with respect to any exercise of the Warrant, an amount equal to the then-effective Exercise Price multiplied by the number of shares of Common Stock as to which the Warrant is then exercised.

(b) Number of Shares. The Warrant shall be exercisable for the purchase of 487,832 shares of Common Stock, subject to adjustment from time to time in accordance with the provisions of this Agreement.

**SECTION 2. TERM OF THE AGREEMENT.**

The term of this Agreement and the right to purchase Common Stock as granted herein shall commence on the Effective Date and, subject to Section 8(a) below, shall be exercisable for a period ending upon the fifth anniversary of the Effective Date.

**SECTION 3. EXERCISE OF THE PURCHASE RIGHTS.**

(a) Exercise. The purchase rights set forth in this Agreement are exercisable by the Warranholder, in whole or in part, at any time, or from time to time, prior to the expiration of the term set forth in Section 2, by tendering to the Company at its principal office a notice of exercise in the form attached hereto as Exhibit I (the "Notice of Exercise"), duly completed and executed. Promptly upon receipt of the Notice of Exercise and the payment of the Purchase Price in accordance with the terms set forth below, and in no event later than three (3) business days thereafter, the Company shall issue, at the Company's expense, to the Warranholder a certificate for the number of shares of Common Stock purchased and shall execute the acknowledgment of exercise in the form attached hereto as Exhibit II (the "Acknowledgment of Exercise") indicating the number of shares which remain subject to future purchases under the Warrant, if any. The delivery by the Warranholder of the Notice of Exercise and the payment of the Purchase Price as provided above shall constitute the Warranholder's certification to the Company that the Warranholder's representations contained in Section 10 of this Agreement are true and correct as of the exercise date as if remade in their entirety (or, in the case of any transferee Warranholder, such transferee Warranholder's certification to the Company that such representations are true and correct as to such transferee Warranholder as of the exercise date). The delivery by the Company of the Acknowledgement of Exercise as provided above shall constitute the Company's certification to the Warranholder that the Company's representations contained in Section 9 of this Agreement are true and correct as of the exercise date as if remade in their entirety. Except as expressly set forth in this Agreement, the Warranholder shall not be required to deliver this Agreement in order to effect an exercise of the Warrant hereunder.

The Purchase Price may be paid at the Warranholder's election either (i) by cash or check, or (ii) by surrender of all or a portion of the Warrant for shares of Common Stock to be exercised under this Agreement and, if applicable, an amended Agreement setting forth the remaining number of shares purchasable hereunder, as determined below ("Net Issuance"). If the Warranholder elects the Net Issuance method, the Company will issue shares of Common Stock in accordance with the following formula:

$$X = \frac{Y(A-B)}{A}$$

Where: X = the number of shares of Common Stock to be issued to the Warranholder.

Y = the number of shares of Common Stock requested to be exercised under this Agreement.

A = the then-current fair market value of one (1) share of Common Stock at the time of exercise

B = the then effective Exercise Price

For purposes of the above calculation, the current fair market value of shares of Common Stock shall mean with respect to each share of Common Stock:

(i) (a) at all times when the Common Stock shall be traded on a national securities exchange, the last reported sale price reported on such national securities exchange before the day the current fair market value of the securities is being determined, or (b) at all times when the Common Stock shall not be traded on a national securities exchange, the average of the closing bid and asked prices over the three (3) trading day period ending before the day the current fair market value of the securities is being determined;

(ii) if the exercise is in connection with a Merger Event, the fair market value of a share of Common Stock shall be deemed to be the per share value received by the holders of the outstanding shares of Common Stock upon the closing of such Merger Event as determined in reasonable good faith by the Company's Board of Directors; or

(iii) in cases other than as described in the foregoing clauses (i) and (ii), the current fair market value of a share of Common Stock shall be determined in reasonable good faith by the Company's Board of Directors.

In the event of Section 3(a)(ii) or 3(a)(iii) above, the Company's Board of Directors shall prepare a certificate, to be signed by an authorized officer of the Company, setting forth in reasonable detail the basis for and method of determination of the fair market value of a share of Common Stock. The Company's Board of Directors will also certify to the Warrantholder that this per share fair market value will be applicable to all holders of the Company's Common Stock. Such certifications must be made to the Warrantholder, in the event of Section 3(a)(ii) above, at least ten (10) business days prior to the proposed effective date of Merger Event, and in the event of Section 3(a)(iii), promptly after exercise of this Warrant.

Upon partial exercise by either cash or Net Issuance, upon request by the Warrantholder and surrender of all or a portion of the Warrant prior to the expiration or earlier termination hereof, the Company shall promptly issue an amended Agreement representing the remaining number of shares purchasable hereunder. All other terms and conditions of such amended Agreement shall be identical to those contained herein, including, but not limited to the Effective Date hereof.

(b) Exercise Prior to Expiration. To the extent the Warrant is not previously exercised as to all shares subject hereto, and if the then-current fair market value of one share of Common Stock is greater than the Exercise Price then in effect, or, in the case of a Liquid Sale, where the value per share of Common Stock (as determined as of the closing of such Liquid Sale in accordance with the definitive agreements executed by the parties in connection with such Merger Event) to be paid to the holders thereof is greater than the Exercise Price then in effect, this Agreement, unless the Warrantholder notifies the Company in writing otherwise, shall be deemed automatically exercised on a Net Issuance basis pursuant to Section 3(a) (even if not surrendered) as of immediately before its expiration determined in accordance with Section 2; provided, however, that the more specific provisions of Section 8(a) shall govern in the case of an automatic exercise upon a Merger Event that is a Liquid Sale. For purposes of such automatic exercise, the fair market value of one share of Common Stock upon such expiration shall be determined pursuant to Section 3(a). To the extent the Warrant or any portion hereof is deemed automatically exercised pursuant to this Section 3(b), the Company agrees to promptly notify the Warrantholder of the number of shares of Common Stock if any, the Warrantholder is to receive by reason of such automatic exercise.

**SECTION 4. RESERVATION OF SHARES.**

During the term of this Agreement, the Company will at all times have authorized and reserved a sufficient number of shares of its Common Stock to provide for the full exercise of the rights to purchase Common Stock as provided for herein.

**SECTION 5. NO FRACTIONAL SHARES OR SCRIP.**

No fractional shares or scrip representing fractional shares shall be issued upon the exercise of this Agreement, but in lieu of such fractional shares the Company shall make a cash payment therefor upon the basis of the Exercise Price then in effect.

**SECTION 6. NO RIGHTS AS STOCKHOLDER.**

Without limitation of any provision hereof, the Warrantholder agrees that this Agreement does not entitle the Warrantholder to any voting rights or other rights as a stockholder of the Company prior to the exercise of any of the purchase rights set forth in this Agreement.

**SECTION 7. WARRANTHOLDER REGISTRY.**

The Company shall maintain a registry showing the name and address of the registered holder of this Agreement. The Warrantholder's initial address, for purposes of such registry, is set forth in Section 12(g) below. The Warrantholder may change such address by giving written notice of such changed address to the Company.

**SECTION 8. ADJUSTMENT RIGHTS.**

The Exercise Price and the number of shares of Common Stock purchasable hereunder are subject to adjustment from time to time, as follows:

(a) **Merger Event.** In connection with a Merger Event that is a Liquid Sale where the value per share of Common Stock is greater than the exercise price then in effect, the Warrant shall, on and after the closing thereof, automatically and without further action on the part of any party or other person, represent the right to receive, in lieu of the shares of Common Stock that are issuable hereunder as of immediately prior to the closing of such Merger Event, the consideration payable on or in respect of such shares of Common Stock less the Purchase Price for all such shares of Common Stock (such consideration to include both the consideration payable at the closing of such Merger Event and all deferred consideration payable thereafter, if any, including, but not limited to, payments of amounts deposited at such closing into escrow and payments in the nature of earn-outs, milestone payments or other performance-based payments), and such Merger Event consideration shall be paid to the Warrantholder as and when it is paid to the holders of the outstanding shares of Common Stock; provided, however, in the event of a Merger Event that is an arms length sale of all or substantially all of the Company's assets (and only its assets) to a third party that is not an Affiliate of the Company (a "True Asset Sale"), the Warrantholder may either (a) exercise its conversion or purchase right under this Warrant and such exercise will be deemed effective immediately prior to the consummation of such Merger Event, or (b) permit the Warrant to continue for the term of this Agreement if the Company continues as a going concern following the closing of any such True Asset Sale. In connection with a Merger Event that is not a Liquid Sale, the Company shall cause the successor or surviving entity to assume this Agreement and the obligations of the Company hereunder on the closing thereof, and thereafter the Warrant shall be exercisable for the same number, class, and type of securities or other property as the Warrantholder would have received in consideration for the shares of Common Stock issuable hereunder had it exercised the Warrant in full as of immediately prior to such closing, at an aggregate Exercise Price no greater than the aggregate Exercise Price in effect as of immediately prior to such closing, and subject to further adjustment from time to time in accordance with the provisions of this Agreement. The provisions of this Section 8(a) shall similarly apply to successive Merger Events.

(b) Reclassification of Shares. Except for Merger Events subject to Section 8(a), if the Company at any time shall, by combination, reclassification, exchange or subdivision of securities or otherwise, change any of the securities as to which purchase rights under this Agreement exist into the same or a different number of securities of any other class or classes of securities, this Agreement shall thereafter represent the right to acquire such number and kind of securities as would have been issuable as the result of such change with respect to the securities which were subject to the purchase rights under this Agreement immediately prior to such combination, reclassification, exchange, subdivision or other change. The provisions of this Section 8(b) shall similarly apply to successive combination, reclassification, exchange, subdivision or other change.

(c) Subdivision or Combination of Shares. If the Company at any time shall combine or subdivide its Common Stock, (i) in the case of a subdivision, the Exercise Price shall be proportionately decreased and the number of shares for which the Warrant is exercisable shall be proportionately increased, or (ii) in the case of a combination, the Exercise Price shall be proportionately increased and the number of shares for which the Warrant is exercisable shall be proportionately decreased.

(d) Stock Dividends. If the Company at any time while this Agreement is outstanding and unexpired shall:

(i) pay a dividend with respect to the outstanding shares of Common Stock payable in additional shares of Common Stock, then the Exercise Price shall be adjusted to that price determined by multiplying the Exercise Price in effect immediately prior to such date of determination by a fraction (A) the numerator of which shall be the total number of shares of Common Stock outstanding immediately prior to such dividend or distribution, and (B) the denominator of which shall be the total number of shares of Common Stock outstanding immediately after such dividend or distribution, and the number of shares of Common Stock for which the Warrant is exercisable shall be proportionately increased; or

(ii) make any other dividend or distribution on or with respect to Common Stock, except any dividend or distribution (A) in cash, or (B) specifically provided for in any other clause of this Section 8, then, in each such case, provision shall be made by the Company such that the Warrantholder shall receive upon exercise or conversion of the Warrant a proportionate share of any such distribution as though it were the holder of the Common Stock (or other stock for which the Common Stock is convertible) as of the record date fixed for the determination of the stockholders of the Company entitled to receive such distribution.

(e) Notice of Certain Events. If: (i) the Company shall declare any dividend or distribution upon its outstanding Common Stock, payable in stock, cash, property or other securities (provided that the Warrantholder in its capacity as lender under the Credit and Security Agreement consents to such dividend); (ii) the Company shall offer for subscription pro rata to the holders of its Common Stock any additional shares of stock of any class or other rights; (iii) the Company shall effect a closing of any Merger Event; or (iv) there shall be any voluntary dissolution, liquidation or winding up of the Company; then, in connection with each such event, the Company shall give the Warrantholder notice thereof at the same time and in the same manner as it gives notice thereof to the holders of outstanding Common Stock; provided, however, in the case of subclause (iii), the Company shall give the Warrantholder notice thereof not later than ten (10) business days prior to the closing thereof setting forth the material terms and conditions thereof, and shall provide the Warrantholder with copies of the draft transaction agreements and other documents in connection therewith and with such other information respecting such proposed Merger Event as may reasonably be requested by the Warrantholder.

(f) Notice of Adjustments. Whenever any Exercise Price or the kind or number of securities issuable under this Warrant shall be adjusted pursuant to the terms hereof, the Company shall prepare a certificate signed by an officer of the Company setting forth, in reasonable detail, the event requiring the adjustment, the amount of the adjustment, the method by which such adjustment was calculated, and the Exercise Price and number or kind of shares issuable upon exercise of this Warrant after giving effect to such adjustment, and within thirty (30) days of such adjustment shall cause copies of such certificate to be delivered to the Warrantholder.

**SECTION 9. REPRESENTATIONS, WARRANTIES AND COVENANTS OF THE COMPANY.**

(a) Reservation of Common Stock. The Company covenants and agrees that all shares of Common Stock, if any, that may be issued upon the exercise of the rights represented by the Warrant will, upon issuance, be validly issued and outstanding, fully paid and non-assessable. The Company further covenants and agrees that the Company will, at all times during the term hereof, have authorized and reserved, free from preemptive rights, a sufficient number of shares of Common Stock to provide for the full exercise of the rights represented by the Warrant. If at any time during the term hereof the number of authorized but unissued shares of Common Stock shall not be sufficient to permit exercise of the Warrant in full, the Company will take such corporate action as may, in the reasonable opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purposes. This Warrant has been validly issued and is free of restrictions on transfer other than restrictions on transfer set forth herein and under applicable state and federal securities laws. Subject to applicable restrictions on transfer, the issuance and delivery of this Warrant and the shares of Common Stock issuable upon exercise of this Warrant are not subject to any preemptive or other similar rights or any liens or encumbrances except as specifically set forth in the Company's Charter or this Warrant. The Company agrees that it will, and will cause its subsidiaries and representatives to, use their commercially reasonable efforts to list and qualify the shares of Common Stock that are issued to the Warrantholder upon the exercise of this Warrant for trading on NASDAQ or any other securities exchange then applicable as soon as reasonably practicable following the satisfaction of the Company's obligations under the June 2015 Registration Rights Agreement. Except and to the extent as waived or consented to by the Warrantholder, the Company shall not by any action, including, without limitation, amending its certificate of incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms of this Warrant or the June 2015 Registration Rights Agreement, but will at all times in good faith assist in the carrying out of all such terms and in the taking of all such actions as may be necessary or appropriate to protect the rights of the Warrantholder as set forth in this Warrant against impairment. Without limiting the generality of the foregoing, the Company will (i) not increase the par value of any shares of Common Stock issuable upon exercise of this Warrant above the amount payable therefor upon such exercise immediately prior to such increase in par value, (ii) take all such action as may be necessary or appropriate in order that the Company may validly and legally issue fully paid and nonassessable shares of Common Stock upon the exercise of this Warrant and (iii) use commercially reasonable efforts to obtain all such authorizations, exemptions or consents from any public regulatory body having jurisdiction thereof, as may be, necessary to enable the Company to perform its obligations under this Warrant.

(b) Due Authority; No Conflict; Corporate Organization. The execution and delivery by the Company of this Agreement and the performance of all obligations of the Company hereunder, including the issuance to the Warrantholder of the right to acquire the shares of Common Stock, have been duly authorized by all necessary corporate action on the part of the Company. The execution, delivery, and performance of this Agreement will not result in (a) any violation of, be in conflict with, or constitute a default under, with or without the passage of time or the giving of notice (i) the Company's Charter or current bylaws; (ii) any law or governmental rule, regulation or order applicable to it; (iii) any provision

(c) of any judgment, decree, or order to which Company is a party, by which it is bound, or to which any of its material assets are subject, or (iv) any contract, obligation, or commitment to which the Company is a party or by which it is bound, or (b) the creation of any lien, charge or encumbrance upon any assets of the Company. This Agreement constitutes a legal, valid and binding agreement of the Company, enforceable in accordance with its terms, except as may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws relating to or affecting creditors' rights generally (including, without limitation, fraudulent conveyance laws) and by general principles of equity, regardless of whether considered in a proceeding in equity or at law. The Company (a) is a corporation duly organized, validly existing, and in good standing under the laws of the jurisdiction of its organization, (b) has the corporate power and authority to own and operate its properties and to carry on its business as now conducted and as proposed to be conducted; and (c) is qualified as a foreign corporation in all jurisdictions where such qualification is required.

(d) Consents and Approvals. No consent or approval of, giving of notice to, registration with, or taking of any other action in respect of any state, federal or other governmental authority or agency is required with respect to the execution, delivery and performance by the Company of its obligations under this Agreement, except for the filing of notices pursuant to Regulation D under the Act and any filing required by applicable state securities law, which filings will be effective by the time required thereby.

(e) Exempt Transaction. Subject to the accuracy of the Warrantholder's representations in Section 10, the issuance of the Common Stock upon exercise of this Agreement will constitute a transaction exempt from (i) the registration requirements of Section 5 of the Act, in reliance upon Section 4(2) thereof, and (ii) the qualification requirements of the applicable state securities laws.

(f) Information Rights. At all times (if any) prior to the earlier to occur of (x) the date on which all shares of Common Stock issued on exercise of the Warrant have been sold, or (y) the expiration or earlier termination of the Warrant, when the Company shall not be required to file reports pursuant to Section 13 or 15(d) of the Exchange Act or shall not have timely filed all such required reports, the Warrantholder shall be entitled to the information rights contained in Section 6.2 of the Credit and Security Agreement, and in any such event Section 6.2 of the Credit and Security Agreement is hereby incorporated into this Agreement by this reference as though fully set forth herein; provided, however, that the Company shall not be required to deliver a Compliance Certificate once all Indebtedness (as defined in the Credit and Security Agreement) owed by the Company to the Warrantholder has been repaid. If at any time up to the earlier of the expiration or earlier termination of this Warrant and the complete exercise of this Warrant, the Company is no longer subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act, the Company shall also deliver to the Warrantholder, as soon as available and in any event within 30 days after the end of each fiscal quarter, an updated capitalization table of the Company in form and substance reasonably acceptable to the Warrantholder.

(g) Rule 144 Compliance. The Company shall, at all times prior to the earlier to occur of (x) the date of sale or other disposition by the Warrantholder of the Warrant or all shares of Common Stock issued on exercise of the Warrant, or (y) the expiration or earlier termination of the Warrant if its Warrant has not been exercised in full or in part on such date, timely file all reports required under the 1934 Act and otherwise timely take all actions necessary to permit the Warrantholder to sell or otherwise dispose of the Warrant and the shares of Common Stock issued on exercise hereof pursuant to Rule 144 promulgated under the Act as amended and in effect from time to time, provided that the foregoing shall not apply in the event of a Merger Event following which the successor or surviving entity is not subject to the reporting requirements of the 1934 Act. If the Warrantholder proposes to sell Common Stock issuable upon the exercise of this Agreement in compliance with Rule 144, then, upon the Warrantholder's written request to the Company, the Company shall as soon as a reason ably practicable furnish to the Warrantholder, and in any event within one (1) business day after receipt of such request, a written statement confirming the Company's compliance with the filing and other requirements of such Rule.

(h) Reports. The Company has previously furnished or made available to the Warrantholder complete and accurate copies, as amended or supplemented, of its (a) Annual Report on Form 10-K for the fiscal year ended December 31, 2014, as filed with the Securities and Exchange Commission (the "SEC"), and (b) all other reports filed by the Company under Section 13 or subsections (a) or (c) of Section 14 of the Exchange Act with the SEC since December 31, 2014 (such reports are collectively referred to herein as the "Company Reports"). The Company Reports constitute all of the documents required to be filed by the Company under Section 13 or subsections (a) or (c) of Section 14 of the Exchange Act with the SEC from December 31, 2014 through the date of this Warrant. The Company Reports complied in all material respects with the requirements of the Exchange Act and the rules and regulations thereunder when filed. As of their respective dates, the Company 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.

**SECTION 10. REPRESENTATIONS AND COVENANTS OF THE WARRANTHOLDER.**

This Agreement has been entered into by the Company in reliance upon the following representations and covenants of the Warrantholder:

- (a) Investment Purpose. The Warrant and the shares issued on exercise hereof will be acquired for investment and not with a view to the sale or distribution of any part thereof in violation of applicable federal and state securities laws, and the Warrantholder has no present intention of selling or engaging in any public distribution of the same except pursuant to a registration or exemption.
- (b) Private Issue. The Warrantholder understands (i) that the Common Stock issuable upon exercise of this Agreement is not, as of the Effective Date, registered under the Act or qualified under applicable state securities laws, and (ii) that the Company's reliance on exemption from such registration is predicated on the representations set forth in this Section 10.
- (c) Financial Risk. The Warrantholder has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of its investment, and has the ability to bear the economic risks of its investment.
- (d) Accredited Investor. The Warrantholder is an "accredited investor" within the meaning of Rule 501 of Regulation D promulgated under the Act, as presently in effect.
- (e) No Short Sales. The Warrantholder has not at any time on or prior to the Effective Date engaged in any short sales or equivalent transactions in the Common Stock. The Warrantholder agrees that at all times from and after the Effective Date and on or before the expiration or earlier termination of the Warrant, it shall not engage in any short sales or equivalent transactions in the Common Stock.

**SECTION 11. TRANSFERS.**

Subject to compliance with applicable federal and state securities laws, this Agreement and all rights hereunder are transferable, in whole or in part, without charge to the holder hereof (except for transfer taxes) upon surrender of this Agreement properly endorsed, together with, at the request of the Company, an opinion of counsel reasonably satisfactory to the Company to the effect that such transfer may be made pursuant to an available exemption from the registration requirements of the Act and all applicable state securities laws; provided, however, that without the prior written consent of the Company, not to be unreasonably withheld, this Warrant may be transferred only to an Affiliate (as defined below) of the Warrantholder. Subject to the foregoing, each taker and holder of this Agreement, by taking or holding the same, consents and agrees that this Agreement, when endorsed, shall be deemed negotiable, and that the holder hereof, when this Agreement shall have been so endorsed and its transfer recorded on the Company's books, shall be treated by the Company and all other persons dealing with this Agreement as the absolute owner hereof for any purpose and as the person entitled to exercise the



rights represented by this Agreement. The transfer of this Agreement shall be recorded on the books of the Company upon receipt by the Company of a notice of transfer in the form attached hereto as Exhibit III (the "Transfer Notice"), at its principal offices and the payment to the Company of all transfer taxes and other governmental charges imposed on such transfer. Until the Company receives such Transfer Notice, the Company may treat the registered owner hereof as the owner for all purposes. Notwithstanding anything herein or in any legend to the contrary, the Company shall not require an opinion of counsel in connection with any sale, assignment or other transfer by the Warrantholder of this Agreement, the Warrant (or any portion hereof or thereof or any interest herein or therein) or of any shares of Common Stock issued upon any exercise hereof to an Affiliate of the Warrantholder, provided that such Affiliate is an "accredited investor" as defined in Regulation D.

**SECTION 12. MISCELLANEOUS.**

(a) Effective Date. The provisions of this Agreement shall be construed and shall be given effect in all respects as if it had been executed and delivered by the Company on the date hereof. This Agreement shall be binding upon any successors or assigns of the Company.

(b) Remedies. In the event of any default hereunder, the non-defaulting party may proceed to protect and enforce its rights either by suit in equity and/or by action at law, including but not limited to an action for damages as a result of any such default, and/or an action for specific performance for any default where the Warrantholder will not have an adequate remedy at law and where damages will not be readily ascertainable.

(c) No Impairment of Rights. The Company will not, by amendment of its Charter or through any other means, avoid or seek to avoid the observance or performance of any of the terms of this Agreement, but will at all times in good faith assist in the carrying out of all such terms and in the taking of all such actions as may be necessary or appropriate in order to protect the rights of the Warrantholder against impairment.

(d) Additional Documents. The Company agrees to supply such other documents as the Warrantholder may from time to time reasonably request.

(e) Attorneys' Fees. In any litigation, arbitration or court proceeding between the Company and the Warrantholder relating hereto, the prevailing party shall be entitled to attorneys' fees and expenses and all costs of proceedings incurred in enforcing this Agreement. For the purposes of this Section 12(e), attorneys' fees shall include without limitation fees incurred in connection with the following: (i) contempt proceedings; (ii) discovery; (iii) any motion, proceeding or other activity of any kind in connection with an insolvency proceeding; (iv) garnishment, levy, and debtor and third party examinations; and (v) post-judgment motions and proceedings of any kind, including without limitation any activity taken to collect or enforce any judgment.

(f) Severability. In the event any one or more of the provisions of this Agreement shall for any reason be held invalid, illegal or unenforceable, the remaining provisions of this Agreement shall be unimpaired, and the invalid, illegal or unenforceable provision shall be replaced by a mutually acceptable valid, legal and enforceable provision, which comes closest to the intention of the parties underlying the invalid, illegal or unenforceable provision.

(g) Notices. Except as otherwise provided herein, any notice, demand, request, consent, approval, declaration, service of process or other communication that is required, contemplated, or permitted under this Agreement or with respect to the subject matter hereof shall be in writing, and shall be deemed to have been validly served, given, delivered, and received upon the earlier of: (a) personal delivery to the party to be notified, (b) when sent by confirmed electronic transmission or facsimile if sent during normal business hours of the recipient, if not, then on the next business day, (c) five days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one

business day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt, and shall be addressed to the party to be notified as follows:

If to the Warrantholder:

MidCap Financial Trust, as servicer  
7255 Woodmont Ave, Suite 200  
Bethesda, MD 20814  
Attn: Account Manager for Mela Sciences transaction  
Facsimile: 301-941-1450  
Email: notices@midcapfinancial.com

If to the Company:

Mela Sciences, Inc.  
100 Lakeside Drive, Suite 100  
Horsham, Pennsylvania 19044  
Attention: Christina Allgeier, Chief Financial Officer  
Fax: (215) 619-3209  
E-Mail: callgeier@melasciences.com

or to such other address as each party may designate for itself by like notice.

(h) Entire Agreement; Amendments. This Agreement constitutes the entire agreement and understanding of the parties hereto in respect of the subject matter hereof, and supersedes and replaces in their entirety any prior proposals, term sheets, letters, negotiations or other documents or agreements, whether written or oral, with respect to the subject matter hereof. None of the terms of this Agreement may be amended except by an instrument executed by each of the parties hereto. This Agreement does not supersede any confidentiality agreement between the Company and the Warrantholder.

(i) Headings. The various headings in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement or any provisions hereof.

(j) Advice of Counsel. Each of the parties represents to each other party hereto that it has discussed (or had an opportunity to discuss) with its counsel this Agreement and, specifically, the provisions of Sections 12(n), 12(o), 12(p) and 12(q).

(k) No Strict Construction. The parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties hereto and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of this Agreement.

(l) No Waiver. No omission or delay by the Warrantholder at any time to enforce any right or remedy reserved to it, or to require performance of any of the terms, covenants or provisions hereof by the Warrantholder at any time designated, shall be a waiver of any such right or remedy to which the Warrantholder is entitled, nor shall it in any way affect the right of the Warrantholder to enforce such provisions thereafter during the term of this Agreement.

(m) Survival. All agreements, representations and warranties contained in this Agreement or in any document delivered pursuant hereto shall be for the benefit of the respective parties hereto and shall survive the execution and delivery of this Agreement and the expiration or other termination of this Agreement.

(n) Governing Law. This Agreement has been negotiated and delivered to the Warrantholder in the State of Delaware, and shall be deemed to have been accepted by the Warrantholder in the State of Delaware. Delivery of Common Stock to the Warrantholder by the Company under this Agreement is due in the State of Delaware. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of Delaware, excluding conflict of laws principles that would cause the application of laws of any other jurisdiction.

(o) Mutual Waiver of Jury Trial. Because disputes arising in connection with complex financial transactions are most quickly and economically resolved by an experienced and expert person and the parties wish applicable state and federal laws to apply (rather than arbitration rules), the parties desire that their disputes arising under or in connection with this Agreement be resolved by a judge applying such applicable laws. EACH OF THE COMPANY AND THE WARRANTHOLDER SPECIFICALLY WAIVES ANY RIGHT IT MAY HAVE TO TRIAL BY JURY OF ANY CAUSE OF ACTION, CLAIM, CROSS-CLAIM, COUNTERCLAIM, THIRD PARTY CLAIM OR ANY OTHER CLAIM (COLLECTIVELY, "CLAIMS") ASSERTED BY THE COMPANY AGAINST THE WARRANTHOLDER OR ITS ASSIGNEE OR BY THE WARRANTHOLDER OR ITS ASSIGNEE AGAINST THE COMPANY RELATING TO THIS AGREEMENT. This waiver extends to all such Claims, including Claims that involve persons or entities other than the Company and the Warrantholder; Claims that arise out of or are in any way connected to the relationship between the Company and the Warrantholder; and any Claims for damages, breach of contract, specific performance, or any equitable or legal relief of any kind, arising out of this Agreement.

(p) Arbitration. If the Mutual Waiver of Jury Trial set forth in Section 12(o) is ineffective or unenforceable, the parties agree that all Claims shall be submitted to binding arbitration in accordance with the commercial arbitration rules of JAMS (the "Rules"), such arbitration to occur before one arbitrator, which arbitrator shall be a retired Federal court judge. The decision of the arbitrator shall be binding on the parties, and shall be final and nonappealable to the maximum extent permitted by law. Any judgment rendered by the arbitrator may be entered in a court of competent jurisdiction and enforced by the prevailing party as a final judgment of such court.

(q) Pre-arbitration Relief. In the event Claims are to be resolved by arbitration, either party may seek from a court of competent jurisdiction, any prejudgment order, writ or other relief and have such prejudgment order, writ or other relief enforced to the fullest extent permitted by law notwithstanding that all Claims are otherwise subject to resolution by binding arbitration.

(r) Counterparts. This Agreement and any amendments, waivers, consents or supplements hereto may be executed in any number of counterparts, and by different parties hereto in separate counterparts, each of which when so delivered shall be deemed an original, but all of which counterparts shall constitute but one and the same instrument.

(s) Specific Performance. The parties hereto hereby declare that it is impossible to measure in money the damages which will accrue to the Warrantholder by reason of the Company's failure to perform any of the obligations under this Agreement and agree that the terms of this Agreement shall be specifically enforceable by the Warrantholder. If the Warrantholder institutes any action or proceeding to specifically enforce the provisions hereof, any person against whom such action or proceeding is brought hereby waives the claim or defense therein that the Warrantholder has an adequate remedy at law, and such person shall not offer in any such action or proceeding the claim or defense that such remedy at law exists.

(t) Lost, Stolen, Mutilated or Destroyed Warrant. If the Warrant is lost, stolen, mutilated or destroyed, the Company may, on such terms as to indemnity or otherwise as it may reasonably impose (which shall, in the case of a mutilated Warrant, include the surrender thereof), issue a new Warrant of like denomination and tenor as the Warrant so lost, stolen, mutilated or destroyed. Any such new Warrant shall constitute an original contractual obligation of the Company, whether or not the allegedly lost, stolen, mutilated or destroyed Warrant shall be at any time enforceable by anyone.

(u) Charges, Taxes and Expenses. Issuance of certificates for shares of Common Stock upon the exercise or conversion of this Warrant shall be made without charge to the Warrantholder for any United States or state of the United States documentary stamp tax or other incidental expense with respect to the issuance of such certificate, all of which taxes and expenses shall be paid by the Company, and such certificates shall be issued in the name of the Warrantholder.

(v) Legends. To the extent required by applicable laws, the Warrant and the shares of Common Stock issuable hereunder (and the securities issuable, directly or indirectly, upon conversion of such shares of Common Stock, if any) may be imprinted with a restricted securities legend in substantially the following form:

THIS SECURITY HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "ACT"), OR ANY APPLICABLE STATE SECURITIES LAWS, AND MAY NOT BE SOLD, PLEDGED OR OTHERWISE TRANSFERRED WITHOUT AN EFFECTIVE REGISTRATION THEREOF UNDER THE ACT AND ANY APPLICABLE STATE SECURITIES LAWS, OR PURSUANT TO RULE 144 OR AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE ACT AND ANY APPLICABLE STATE SECURITIES LAWS.

[Remainder of Page Intentionally Left Blank]

COMPANY: MELA SCIENCES, INC.

By: /s/ Michael R. Stewart  
Name: Michael R. Stewart  
Title: President and Chief Executive Officer

WARRANTHOLDER: MIDCAP FINANCIAL TRUST

By: /s/ Maurice Amsellem  
Name: Maurice Amsellem  
Title: Authorized Signatory

EXHIBIT I  
NOTICE OF EXERCISE

To: \_\_\_\_\_]

- (1) The undersigned Warrantholder hereby elects to purchase [\_\_\_\_\_] shares of the Common Stock of MELA Sciences, Inc., pursuant to the terms of the Agreement dated the [\_\_] day of [\_\_\_\_\_, \_\_\_\_] (the "Agreement") between MELA Sciences, Inc. and the Warrantholder, and tenders herewith payment of the Purchase Price in full, together with all applicable transfer taxes, if any. [NET ISSUANCE: elects pursuant to Section 3(a) of the Agreement to effect a Net Issuance.]
- (2) Please issue a certificate or certificates representing said shares of Common Stock in the name of the undersigned or in such other name as is specified below.

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Address)

WARRANTHOLDER: MIDCAP FINANCIAL TRUST

By: \_\_\_\_\_  
Name:  
Title:

1. ACKNOWLEDGMENT OF EXERCISE

The undersigned [ \_\_\_\_\_ ], hereby acknowledge receipt of the "Notice of Exercise" from MIDCAP FINANCIAL TRUST to purchase [ \_\_\_\_ ] shares of the Common Stock of MELA Sciences, Inc., pursuant to the terms of the Agreement, and further acknowledges that [ \_\_\_\_ ] shares remain subject to purchase under the terms of the Agreement.

COMPANY: [ \_\_\_\_\_ ]

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

TRANSFER NOTICE

(To transfer or assign the foregoing Agreement execute this form and supply required information. Do not use this form to purchase shares.)

FOR VALUE RECEIVED, the foregoing Agreement and all rights evidenced thereby are hereby transferred and assigned to

\_\_\_\_\_

(Please Print)

whose address is \_\_\_\_\_

\_\_\_\_\_

Dated: \_\_\_\_\_

Holder's Signature: \_\_\_\_\_

Holder's Address: \_\_\_\_\_

\_\_\_\_\_

Signature Guaranteed: \_\_\_\_\_

NOTE: The signature to this Transfer Notice must correspond with the name as it appears on the face of the Agreement, without alteration or enlargement or any change whatever. Officers of corporations and those acting in a fiduciary or other representative capacity should file proper evidence of authority to assign the foregoing Agreement.



THIS WARRANT AND THE SHARES ISSUABLE UPON EXERCISE HEREOF HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "ACT"), OR ANY STATE SECURITIES LAWS, AND MAY NOT BE SOLD, OFFERED FOR SALE, PLEDGED, OR HYPOTHECATED IN THE ABSENCE OF AN EFFECTIVE REGISTRATION STATEMENT RELATED THERETO OR, SUBJECT TO SECTION 11 HEREOF, AN OPINION OF COUNSEL (WHICH MAY BE COMPANY COUNSEL) REASONABLY SATISFACTORY TO THE COMPANY THAT SUCH REGISTRATION IS NOT REQUIRED UNDER THE ACT, OR ANY APPLICABLE STATE SECURITIES LAWS.

## WARRANT AGREEMENT

To Purchase Shares of the Common Stock of

MELA Sciences, Inc.

Dated as of December 30, 2015 (the "Effective Date")

WHEREAS, MELA Sciences, Inc., a Delaware corporation (the "Company"), has entered into the Credit and Security Agreement (as defined below) with MidCap Financial Trust, a Delaware statutory trust, in its capacity as administrative agent for itself and the Lenders (as defined in the Credit and Security Agreement) (the "Warrantholder");

WHEREAS, pursuant to the Credit and Security Agreement and as additional consideration to the Warrantholder for, among other things, its agreements in the Credit and Security Agreement, the Company has agreed to issue to the Warrantholder this Warrant Agreement (this "Agreement"), evidencing the right to purchase shares of the Company's Common Stock (the "Warrant");

NOW, THEREFORE, in consideration of the Warrantholder having executed and delivered the Credit and Security Agreement and provided the financial accommodations contemplated therein, and in consideration of the mutual covenants and agreements contained herein, the Company and Warrantholder agree as follows:

### SECTION 1. GRANT OF THE RIGHT TO PURCHASE COMMON STOCK.

(a) Grant of Purchase Right. For value received, the Company hereby grants to the Warrantholder, and the Warrantholder is entitled, upon the terms and subject to the conditions hereinafter set forth, to subscribe for and purchase, from the Company, up to the number of fully paid and non-assessable shares of Common Stock (as defined below) as determined pursuant to Section 1(b) below, at a purchase price per share equal to the Exercise Price (as defined below). The number and Exercise Price of such shares are subject to adjustment as provided in Section 8. As used herein, the following terms shall have the following meanings:

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

"Affiliate" means a business entity that directly or indirectly Controls, is Controlled by, or is under the common Control of a party hereto, and "Control" of an organization or entity shall mean: (i) ownership or direct or indirect control of 50% or more of the outstanding voting shares or other ownership interests of such organization or entity; or (ii) direct or indirect possession of the power to elect or appoint 50% or more of the members of the board of director or other governing body of such organization or other entity.

"Charter" means the Company's Fifth Amended and Restated Certificate of Incorporation, as amended, or other constitutional document, as it may be amended and in effect from time to time.

"Common Stock" means the Company's common stock, \$0.001 par value per share, as presently constituted under the Charter, and any class and/or series of Company capital stock for or into which such common stock may be converted or exchanged in a reorganization, recapitalization or similar transaction.

"Credit and Security Agreement" means that certain Credit and Security Agreement of even date herewith among the Company, the several Lenders or entities from time to time Lender parties thereto (including, without limitation, the Warrantholder), and MidCap Financial Trust in its capacity as administrative agent for itself and the Lenders, as amended and/or restated and in effect from time to time.

"Exercise Price" means \$1.13, subject to adjustment from time to time in accordance with the provisions of the Warrant.

"June 2015 Registration Rights Agreement" means that certain Registration Rights Agreement, dated as of June 22, 2015, by and among the Company and each purchaser set forth therein.

"Liquid Sale" means the closing of a Merger Event in which the consideration received by the Company and/or its stockholders, as applicable, consists solely of cash and/or Marketable Securities.

"Marketable Securities" in connection with a Merger Event means securities meeting all of the following requirements: (i) the issuer thereof is then subject to the reporting requirements of Section 13 or Section 15(d) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and is then current in its filing of all required reports and other information under the Act and the Exchange Act; (ii) the class and series of shares or other security of the issuer that would be received by the Warrantholder in connection with the Merger Event were the Warrantholder to exercise the Warrant on or prior to the closing thereof is then traded on a national securities exchange or over-the-counter market, and (iii) following the closing of such Merger Event, the Warrantholder would not be restricted from publicly re-selling all of the issuer's shares and/or other securities that would be received by the Warrantholder in such Merger Event were the Warrantholder to exercise the Warrant in full on or prior to the closing of such Merger Event, except to the extent that any such restriction (x) arises solely under federal or state securities laws, rules or regulations, and (y) does not extend beyond six (6) months from the closing of such Merger Event.

"Merger Event" means any of the following: (i) a sale, lease or other transfer of all or substantially all assets of the Company, (ii) any merger or consolidation involving the Company in which the Company is not the surviving entity or in which the outstanding shares of the Company's capital stock are otherwise converted into or exchanged for shares of capital stock or other securities or property of another entity or converted into the right to receive cash, or (iii) any sale by holders of the outstanding voting equity securities of the Company in a single transaction or series of related transactions of shares constituting a majority of the outstanding combined voting power of the Company.

"Purchase Price" means, with respect to any exercise of the Warrant, an amount equal to the then-effective Exercise Price multiplied by the number of shares of Common Stock as to which the Warrant is then exercised.

(b) Number of Shares. The Warrant shall be exercisable for the purchase of 162,610 shares of Common Stock, subject to adjustment from time to time in accordance with the provisions of this Agreement.

**SECTION 2. TERM OF THE AGREEMENT.**

The term of this Agreement and the right to purchase Common Stock as granted herein shall commence on the Effective Date and, subject to Section 8(a) below, shall be exercisable for a period ending upon the fifth anniversary of the Effective Date.

**SECTION 3. EXERCISE OF THE PURCHASE RIGHTS.**

(a) Exercise. The purchase rights set forth in this Agreement are exercisable by the Warranholder, in whole or in part, at any time, or from time to time, prior to the expiration of the term set forth in Section 2, by tendering to the Company at its principal office a notice of exercise in the form attached hereto as Exhibit I (the "Notice of Exercise"), duly completed and executed. Promptly upon receipt of the Notice of Exercise and the payment of the Purchase Price in accordance with the terms set forth below, and in no event later than three (3) business days thereafter, the Company shall issue, at the Company's expense, to the Warranholder a certificate for the number of shares of Common Stock purchased and shall execute the acknowledgment of exercise in the form attached hereto as Exhibit II (the "Acknowledgment of Exercise") indicating the number of shares which remain subject to future purchases under the Warrant, if any. The delivery by the Warranholder of the Notice of Exercise and the payment of the Purchase Price as provided above shall constitute the Warranholder's certification to the Company that the Warranholder's representations contained in Section 10 of this Agreement are true and correct as of the exercise date as if remade in their entirety (or, in the case of any transferee Warranholder, such transferee Warranholder's certification to the Company that such representations are true and correct as to such transferee Warranholder as of the exercise date). The delivery by the Company of the Acknowledgement of Exercise as provided above shall constitute the Company's certification to the Warranholder that the Company's representations contained in Section 9 of this Agreement are true and correct as of the exercise date as if remade in their entirety. Except as expressly set forth in this Agreement, the Warranholder shall not be required to deliver this Agreement in order to effect an exercise of the Warrant hereunder.

The Purchase Price may be paid at the Warranholder's election either (i) by cash or check, or (ii) by surrender of all or a portion of the Warrant for shares of Common Stock to be exercised under this Agreement and, if applicable, an amended Agreement setting forth the remaining number of shares purchasable hereunder, as determined below ("Net Issuance"). If the Warranholder elects the Net Issuance method, the Company will issue shares of Common Stock in accordance with the following formula:

$$X = \frac{Y(A-B)}{A}$$

Where:

- X = the number of shares of Common Stock to be issued to the Warranholder.
- Y = the number of shares of Common Stock requested to be exercised under this Agreement.
- A = the then-current fair market value of one (1) share of Common Stock at the time of exercise.
- B = the then-effective Exercise Price.

For purposes of the above calculation, the current fair market value of shares of Common Stock shall mean with respect to each share of Common Stock:

(i) (a) at all times when the Common Stock shall be traded on a national securities exchange, the last reported sale price reported on such national securities exchange before the day the current fair market value of the securities is being determined, or (b) at all times when the Common Stock shall not be traded on a national securities exchange, the average of the closing bid and asked prices over the three (3) trading day period ending before the day the current fair market value of the securities is being determined;

(ii) if the exercise is in connection with a Merger Event, the fair market value of a share of Common Stock shall be deemed to be the per share value received by the holders of the outstanding shares of Common Stock upon the closing of such Merger Event as determined in reasonable good faith by the Company's Board of Directors; or

(iii) in cases other than as described in the foregoing clauses (i) and (ii), the current fair market value of a share of Common Stock shall be determined in reasonable good faith by the Company's Board of Directors.

In the event of Section 3(a)(ii) or 3(a)(iii) above, the Company's Board of Directors shall prepare a certificate, to be signed by an authorized officer of the Company, setting forth in reasonable detail the basis for and method of determination of the fair market value of a share of Common Stock. The Company's Board of Directors will also certify to the Warranholder that this per share fair market value will be applicable to all holders of the Company's Common Stock. Such certifications must be made to the Warranholder, in the event of Section 3(a)(ii) above, at least ten (10) business days prior to the proposed effective date of Merger Event, and in the event of Section 3(a)(iii), promptly after exercise of this Warrant.

Upon partial exercise by either cash or Net Issuance, upon request by the Warranholder and surrender of all or a portion of the Warrant prior to the expiration or earlier termination hereof, the Company shall promptly issue an amended Agreement representing the remaining number of shares purchasable hereunder. All other terms and conditions of such amended Agreement shall be identical to those contained herein, including, but not limited to the Effective Date hereof.

(b) Exercise Prior to Expiration. To the extent the Warrant is not previously exercised as to all shares subject hereto, and if the then-current fair market value of one share of Common Stock is greater than the Exercise Price then in effect, or, in the case of a Liquid Sale, where the value per share of Common Stock (as determined as of the closing of such Liquid Sale in accordance with the definitive agreements executed by the parties in connection with such Merger Event) to be paid to the holders thereof is greater than the Exercise Price then in effect, this Agreement, unless the Warranholder notifies the Company in writing otherwise, shall be deemed automatically exercised on a Net Issuance basis pursuant to Section 3(a) (even if not surrendered) as of immediately before its expiration determined in accordance with Section 2; provided, however, that the more specific provisions of Section 8(a) shall govern in the case of an automatic exercise upon a Merger Event that is a Liquid Sale. For purposes of such automatic exercise, the fair market value of one share of Common Stock upon such expiration shall be determined pursuant to Section 3(a). To the extent the Warrant or any portion hereof is deemed automatically exercised pursuant to this Section 3(b), the Company agrees to promptly notify the Warranholder of the number of shares of Common Stock if any, the Warranholder is to receive by reason of such automatic exercise.

**SECTION 4. RESERVATION OF SHARES.**

During the term of this Agreement, the Company will at all times have authorized and reserved a sufficient number of shares of its Common Stock to provide for the full exercise of the rights to purchase Common Stock as provided for herein.

**SECTION 5. NO FRACTIONAL SHARES OR SCRIP.**

No fractional shares or scrip representing fractional shares shall be issued upon the exercise of this Agreement, but in lieu of such fractional shares the Company shall make a cash payment therefor upon the basis of the Exercise Price then in effect.

**SECTION 6. NO RIGHTS AS STOCKHOLDER.**

Without limitation of any provision hereof, the Warrantholder agrees that this Agreement does not entitle the Warrantholder to any voting rights or other rights as a stockholder of the Company prior to the exercise of any of the purchase rights set forth in this Agreement.

**SECTION 7. WARRANTHOLDER REGISTRY.**

The Company shall maintain a registry showing the name and address of the registered holder of this Agreement. The Warrantholder's initial address, for purposes of such registry, is set forth in Section 12(g) below. The Warrantholder may change such address by giving written notice of such changed address to the Company.

**SECTION 8. ADJUSTMENT RIGHTS.**

The Exercise Price and the number of shares of Common Stock purchasable hereunder are subject to adjustment from time to time, as follows:

(a) **Merger Event.** In connection with a Merger Event that is a Liquid Sale where the value per share of Common Stock is greater than the exercise price then in effect, the Warrant shall, on and after the closing thereof, automatically and without further action on the part of any party or other person, represent the right to receive, in lieu of the shares of Common Stock that are issuable hereunder as of immediately prior to the closing of such Merger Event, the consideration payable on or in respect of such shares of Common Stock less the Purchase Price for all such shares of Common Stock (such consideration to include both the consideration payable at the closing of such Merger Event and all deferred consideration payable thereafter, if any, including, but not limited to, payments of amounts deposited at such closing into escrow and payments in the nature of earn-outs, milestone payments or other performance-based payments), and such Merger Event consideration shall be paid to the Warrantholder as and when it is paid to the holders of the outstanding shares of Common Stock; provided, however, in the event of a Merger Event that is an arms length sale of all or substantially all of the Company's assets (and only its assets) to a third party that is not an Affiliate of the Company (a "**True Asset Sale**"), the Warrantholder may either (a) exercise its conversion or purchase right under this Warrant and such exercise will be deemed effective immediately prior to the consummation of such Merger Event, or (b) permit the Warrant to continue for the term of this Agreement if the Company continues as a going concern following the closing of any such True Asset Sale. In connection with a Merger Event that is not a Liquid Sale, the Company shall cause the successor or surviving entity to assume this Agreement and the obligations of the Company hereunder on the closing thereof, and thereafter the Warrant shall be exercisable for the same number, class, and type of securities or other property as the Warrantholder would have received in consideration for the shares of Common Stock issuable hereunder had it exercised the Warrant in full as of immediately prior to such closing, at an aggregate Exercise Price no greater than the aggregate Exercise Price in effect as of immediately prior to such closing, and subject to further adjustment from time to time in accordance with the provisions of this Agreement. The provisions of this Section 8(a) shall similarly apply to successive Merger Events.

(b) Reclassification of Shares. Except for Merger Events subject to Section 8(a), if the Company at any time shall, by combination, reclassification, exchange or subdivision of securities or otherwise, change any of the securities as to which purchase rights under this Agreement exist into the same or a different number of securities of any other class or classes of securities, this Agreement shall thereafter represent the right to acquire such number and kind of securities as would have been issuable as the result of such change with respect to the securities which were subject to the purchase rights under this Agreement immediately prior to such combination, reclassification, exchange, subdivision or other change. The provisions of this Section 8(b) shall similarly apply to successive combination, reclassification, exchange, subdivision or other change.

(c) Subdivision or Combination of Shares. If the Company at any time shall combine or subdivide its Common Stock, (i) in the case of a subdivision, the Exercise Price shall be proportionately decreased and the number of shares for which the Warrant is exercisable shall be proportionately increased, or (ii) in the case of a combination, the Exercise Price shall be proportionately increased and the number of shares for which the Warrant is exercisable shall be proportionately decreased.

(d) Stock Dividends. If the Company at any time while this Agreement is outstanding and unexpired shall:

(i) pay a dividend with respect to the outstanding shares of Common Stock payable in additional shares of Common Stock, then the Exercise Price shall be adjusted to that price determined by multiplying the Exercise Price in effect immediately prior to such date of determination by a fraction (A) the numerator of which shall be the total number of shares of Common Stock outstanding immediately prior to such dividend or distribution, and (B) the denominator of which shall be the total number of shares of Common Stock outstanding immediately after such dividend or distribution, and the number of shares of Common Stock for which the Warrant is exercisable shall be proportionately increased; or

(ii) make any other dividend or distribution on or with respect to Common Stock, except any dividend or distribution (A) in cash, or (B) specifically provided for in any other clause of this Section 8, then, in each such case, provision shall be made by the Company such that the Warranholder shall receive upon exercise or conversion of the Warrant a proportionate share of any such distribution as though it were the holder of the Common Stock (or other stock for which the Common Stock is convertible) as of the record date fixed for the determination of the stockholders of the Company entitled to receive such distribution.

(e) Notice of Certain Events. If: (i) the Company shall declare any dividend or distribution upon its outstanding Common Stock, payable in stock, cash, property or other securities (provided that the Warranholder in its capacity as lender under the Credit and Security Agreement consents to such dividend); (ii) the Company shall offer for subscription pro rata to the holders of its Common Stock any additional shares of stock of any class or other rights; (iii) the Company shall effect a closing of any Merger Event; or (iv) there shall be any voluntary dissolution, liquidation or winding up of the Company; then, in connection with each such event, the Company shall give the Warranholder notice thereof at the same time and in the same manner as it gives notice thereof to the holders of outstanding Common Stock; provided, however, in the case of subclause (iii), the Company shall give the Warranholder notice thereof not later than ten (10) business days prior to the closing thereof setting forth the material terms and conditions thereof, and shall provide the Warranholder with copies of the draft transaction agreements and other documents in connection therewith and with such other information respecting such proposed Merger Event as may reasonably be requested by the Warranholder.

(f) Notice of Adjustments. Whenever any Exercise Price or the kind or number of securities issuable under this Warrant shall be adjusted pursuant to the terms hereof, the Company shall prepare a

certificate signed by an officer of the Company setting forth, in reasonable detail, the event requiring the adjustment, the amount of the adjustment, the method by which such adjustment was calculated, and the Exercise Price and number or kind of shares issuable upon exercise of this Warrant after giving effect to such adjustment, and within thirty (30) days of such adjustment shall cause copies of such certificate to be delivered to the Warranholder.

**SECTION 9. REPRESENTATIONS, WARRANTIES AND COVENANTS OF THE COMPANY.**

(a) Reservation of Common Stock. The Company covenants and agrees that all shares of Common Stock, if any, that may be issued upon the exercise of the rights represented by the Warrant will, upon issuance, be validly issued and outstanding, fully paid and non-assessable. The Company further covenants and agrees that the Company will, at all times during the term hereof, have authorized and reserved, free from preemptive rights, a sufficient number of shares of Common Stock to provide for the full exercise of the rights represented by the Warrant. If at any time during the term hereof the number of authorized but unissued shares of Common Stock shall not be sufficient to permit exercise of the Warrant in full, the Company will take such corporate action as may, in the reasonable opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purposes. This Warrant has been validly issued and is free of restrictions on transfer other than restrictions on transfer set forth herein and under applicable state and federal securities laws. Subject to applicable restrictions on transfer, the issuance and delivery of this Warrant and the shares of Common Stock issuable upon exercise of this Warrant are not subject to any preemptive or other similar rights or any liens or encumbrances except as specifically set forth in the Company's Charter or this Warrant. The Company agrees that it will, and will cause its subsidiaries and representatives to, use their commercially reasonable efforts to list and qualify the shares of Common Stock that are issued to the Warranholder upon the exercise of this Warrant for trading on NASDAQ or any other securities exchange then applicable as soon as reasonably practicable following the satisfaction of the Company's obligations under the June 2015 Registration Rights Agreement. Except and to the extent as waived or consented to by the Warranholder, the Company shall not by any action, including, without limitation, amending its certificate of incorporation or through any reorganization, transfer of assets, consolidation, merger, dissolution, issue or sale of securities or any other voluntary action, avoid or seek to avoid the observance or performance of any of the terms of this Warrant or the June 2015 Registration Rights Agreement, but will at all times in good faith assist in the carrying out of all such terms and in the taking of all such actions as may be necessary or appropriate to protect the rights of the Warranholder as set forth in this Warrant against impairment. Without limiting the generality of the foregoing, the Company will (i) not increase the par value of any shares of Common Stock issuable upon exercise of this Warrant above the amount payable therefor upon such exercise immediately prior to such increase in par value, (ii) take all such action as may be necessary or appropriate in order that the Company may validly and legally issue fully paid and nonassessable shares of Common Stock upon the exercise of this Warrant and (iii) use commercially reasonable efforts to obtain all such authorizations, exemptions or consents from any public regulatory body having jurisdiction thereof, as may be, necessary to enable the Company to perform its obligations under this Warrant.

(b) Due Authority; No Conflict; Corporate Organization. The execution and delivery by the Company of this Agreement and the performance of all obligations of the Company hereunder, including the issuance to the Warranholder of the right to acquire the shares of Common Stock, have been duly authorized by all necessary corporate action on the part of the Company. The execution, delivery, and performance of this Agreement will not result in (a) any violation of, be in conflict with, or constitute a default under, with or without the passage of time or the giving of notice (i) the Company's Charter or current bylaws; (ii) any law or governmental rule, regulation or order applicable to it; (iii) any provision of any judgment, decree, or order to which Company is a party, by which it is bound, or to which any of its material assets are subject, or (iv) any contract, obligation, or commitment to which the Company is a

party or by which it is bound, or (b) the creation of any lien, charge or encumbrance upon any assets of the Company. This Agreement constitutes a legal, valid and binding agreement of the Company, enforceable in accordance with its terms, except as may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws relating to or affecting creditors' rights generally (including, without limitation, fraudulent conveyance laws) and by general principles of equity, regardless of whether considered in a proceeding in equity or at law. The Company (a) is a corporation duly organized, validly existing, and in good standing under the laws of the jurisdiction of its organization, (b) has the corporate power and authority to own and operate its properties and to carry on its business as now conducted and as proposed to be conducted; and (c) is qualified as a foreign corporation in all jurisdictions where such qualification is required.

(c) Consents and Approvals. No consent or approval of, giving of notice to, registration with, or taking of any other action in respect of any state, federal or other governmental authority or agency is required with respect to the execution, delivery and performance by the Company of its obligations under this Agreement, except for the filing of notices pursuant to Regulation D under the Act and any filing required by applicable state securities law, which filings will be effective by the time required thereby.

(d) Exempt Transaction. Subject to the accuracy of the Warrantholder's representations in Section 10, the issuance of the Common Stock upon exercise of this Agreement will constitute a transaction exempt from (i) the registration requirements of Section 5 of the Act, in reliance upon Section 4(2) thereof, and (ii) the qualification requirements of the applicable state securities laws.

(e) Information Rights. At all times (if any) prior to the earlier to occur of (x) the date on which all shares of Common Stock issued on exercise of the Warrant have been sold, or (y) the expiration or earlier termination of the Warrant, when the Company shall not be required to file reports pursuant to Section 13 or 15(d) of the Exchange Act or shall not have timely filed all such required reports, the Warrantholder shall be entitled to the information rights contained in Section 6.2 of the Credit and Security Agreement, and in any such event Section 6.2 of the Credit and Security Agreement is hereby incorporated into this Agreement by this reference as though fully set forth herein; provided, however, that the Company shall not be required to deliver a Compliance Certificate once all Indebtedness (as defined in the Credit and Security Agreement) owed by the Company to the Warrantholder has been repaid. If at any time up to the earlier of the expiration or earlier termination of this Warrant and the complete exercise of this Warrant, the Company is no longer subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act, the Company shall also deliver to the Warrantholder, as soon as available and in any event within 30 days after the end of each fiscal quarter, an updated capitalization table of the Company in form and substance reasonably acceptable to the Warrantholder.

(f) Rule 144 Compliance. The Company shall, at all times prior to the earlier to occur of (x) the date of sale or other disposition by the Warrantholder of the Warrant or all shares of Common Stock issued on exercise of the Warrant, or (y) the expiration or earlier termination of the Warrant if its Warrant has not been exercised in full or in part on such date, timely file all reports required under the 1934 Act and otherwise timely take all actions necessary to permit the Warrantholder to sell or otherwise dispose of the Warrant and the shares of Common Stock issued on exercise hereof pursuant to Rule 144 promulgated under the Act as amended and in effect from time to time, provided that the foregoing shall not apply in the event of a Merger Event following which the successor or surviving entity is not subject to the reporting requirements of the 1934 Act. If the Warrantholder proposes to sell Common Stock issuable upon the exercise of this Agreement in compliance with Rule 144, then, upon the Warrantholder's written request to the Company, the Company shall as soon as a reasonably practicable furnish to the Warrantholder, and in any event within one (1) business day after receipt of such request, a written statement confirming the Company's compliance with the filing and other requirements of such Rule.

(g) Reports. The Company has previously furnished or made available to the Warrantholder complete and accurate copies, as amended or supplemented, of its (a) Annual Report on Form 10-K for



the fiscal year ended December 31, 2014, as filed with the Securities and Exchange Commission (the "SEC"), and (b) all other reports filed by the Company under Section 13 or subsections (a) or (c) of Section 14 of the Exchange Act with the SEC since December 31, 2014 (such reports are collectively referred to herein as the "Company Reports"). The Company Reports constitute all of the documents required to be filed by the Company under Section 13 or subsections (a) or (c) of Section 14 of the Exchange Act with the SEC from December 31, 2014 through the date of this Warrant. The Company Reports complied in all material respects with the requirements of the Exchange Act and the rules and regulations thereunder when filed. As of their respective dates, the Company 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.

**SECTION 10. REPRESENTATIONS AND COVENANTS OF THE WARRANTHOLDER.**

This Agreement has been entered into by the Company in reliance upon the following representations and covenants of the Warrantholder:

- (a) Investment Purpose. The Warrant and the shares issued on exercise hereof will be acquired for investment and not with a view to the sale or distribution of any part thereof in violation of applicable federal and state securities laws, and the Warrantholder has no present intention of selling or engaging in any public distribution of the same except pursuant to a registration or exemption.
- (b) Private Issue. The Warrantholder understands (i) that the Common Stock issuable upon exercise of this Agreement is not, as of the Effective Date, registered under the Act or qualified under applicable state securities laws, and (ii) that the Company's reliance on exemption from such registration is predicated on the representations set forth in this Section 10.
- (c) Financial Risk. The Warrantholder has such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of its investment, and has the ability to bear the economic risks of its investment.
- (d) Accredited Investor. The Warrantholder is an "accredited investor" within the meaning of Rule 501 of Regulation D promulgated under the Act, as presently in effect.
- (e) No Short Sales. The Warrantholder has not at any time on or prior to the Effective Date engaged in any short sales or equivalent transactions in the Common Stock. The Warrantholder agrees that at all times from and after the Effective Date and on or before the expiration or earlier termination of the Warrant, it shall not engage in any short sales or equivalent transactions in the Common Stock.

**SECTION 11. TRANSFERS.**

Subject to compliance with applicable federal and state securities laws, this Agreement and all rights hereunder are transferable, in whole or in part, without charge to the holder hereof (except for transfer taxes) upon surrender of this Agreement properly endorsed, together with, at the request of the Company, an opinion of counsel reasonably satisfactory to the Company to the effect that such transfer may be made pursuant to an available exemption from the registration requirements of the Act and all applicable state securities laws; provided, however, that without the prior written consent of the Company, not to be unreasonably withheld, this Warrant may be transferred only to an Affiliate (as defined below) of the Warrantholder. Subject to the foregoing, each taker and holder of this Agreement, by taking or holding the same, consents and agrees that this Agreement, when endorsed, shall be deemed negotiable, and that the holder hereof, when this Agreement shall have been so endorsed and its transfer recorded on the Company's books, shall be treated by the Company and all other persons dealing with this Agreement as the absolute owner hereof for any purpose and as the person entitled to exercise the rights represented by this Agreement. The transfer of this Agreement shall be recorded on the books of the Company upon receipt by the Company of a notice of transfer in the form attached hereto as Exhibit

III (the "Transfer Notice"), at its principal offices and the payment to the Company of all transfer taxes and other governmental charges imposed on such transfer. Until the Company receives such Transfer Notice, the Company may treat the registered owner hereof as the owner for all purposes. Notwithstanding anything herein or in any legend to the contrary, the Company shall not require an opinion of counsel in connection with any sale, assignment or other transfer by the Warrantholder of this Agreement, the Warrant (or any portion hereof or thereof or any interest herein or therein) or of any shares of Common Stock issued upon any exercise hereof to an Affiliate of the Warrantholder, provided that such Affiliate is an "accredited investor" as defined in Regulation D.

**SECTION 12. MISCELLANEOUS.**

(a) Effective Date. The provisions of this Agreement shall be construed and shall be given effect in all respects as if it had been executed and delivered by the Company on the date hereof. This Agreement shall be binding upon any successors or assigns of the Company.

(b) Remedies. In the event of any default hereunder, the non-defaulting party may proceed to protect and enforce its rights either by suit in equity and/or by action at law, including but not limited to an action for damages as a result of any such default, and/or an action for specific performance for any default where the Warrantholder will not have an adequate remedy at law and where damages will not be readily ascertainable.

(c) No Impairment of Rights. The Company will not, by amendment of its Charter or through any other means, avoid or seek to avoid the observance or performance of any of the terms of this Agreement, but will at all times in good faith assist in the carrying out of all such terms and in the taking of all such actions as may be necessary or appropriate in order to protect the rights of the Warrantholder against impairment.

(d) Additional Documents. The Company agrees to supply such other documents as the Warrantholder may from time to time reasonably request.

(e) Attorneys' Fees. In any litigation, arbitration or court proceeding between the Company and the Warrantholder relating hereto, the prevailing party shall be entitled to attorneys' fees and expenses and all costs of proceedings incurred in enforcing this Agreement. For the purposes of this Section 12(e), attorneys' fees shall include without limitation fees incurred in connection with the following: (i) contempt proceedings; (ii) discovery; (iii) any motion, proceeding or other activity of any kind in connection with an insolvency proceeding; (iv) garnishment, levy, and debtor and third party examinations; and (v) post-judgment motions and proceedings of any kind, including without limitation any activity taken to collect or enforce any judgment.

(f) Severability. In the event any one or more of the provisions of this Agreement shall for any reason be held invalid, illegal or unenforceable, the remaining provisions of this Agreement shall be unimpaired, and the invalid, illegal or unenforceable provision shall be replaced by a mutually acceptable valid, legal and enforceable provision, which comes closest to the intention of the parties underlying the invalid, illegal or unenforceable provision.

(g) Notices. Except as otherwise provided herein, any notice, demand, request, consent, approval, declaration, service of process or other communication that is required, contemplated, or permitted under this Agreement or with respect to the subject matter hereof shall be in writing, and shall be deemed to have been validly served, given, delivered, and received upon the earlier of: (a) personal delivery to the party to be notified, (b) when sent by confirmed electronic transmission or facsimile if sent during normal business hours of the recipient, if not, then on the next business day, (c) five days after having been sent by registered or certified mail, return receipt requested, postage prepaid, or (d) one business day after deposit with a nationally recognized overnight courier, specifying next day delivery, with written verification of receipt, and shall be addressed to the party to be notified as follows:

If to the Warrantholder:

FlexpointMCLS Holdings LLC  
676 North Michigan Avenue, Suite 3300  
Chicago, IL 60611  
Re: Mela Sciences, Inc.  
Fax: (312) 327-4525  
E-Mail: [dedelman@flexpointford.com](mailto:dedelman@flexpointford.com)

If to the Company:

Mela Sciences, Inc.  
100 Lakeside Drive, Suite 100  
Horsham, Pennsylvania 19044  
Attention: Christina Allgeier, Chief Financial Officer  
Fax: (215) 619-3209  
E-Mail: [callgeier@melasciences.com](mailto:callgeier@melasciences.com)

or to such other address as each party may designate for itself by like notice.

(h) Entire Agreement; Amendments. This Agreement constitutes the entire agreement and understanding of the parties hereto in respect of the subject matter hereof, and supersedes and replaces in their entirety any prior proposals, term sheets, letters, negotiations or other documents or agreements, whether written or oral, with respect to the subject matter hereof. None of the terms of this Agreement may be amended except by an instrument executed by each of the parties hereto. This Agreement does not supersede any confidentiality agreement between the Company and the Warrantholder.

(i) Headings. The various headings in this Agreement are inserted for convenience only and shall not affect the meaning or interpretation of this Agreement or any provisions hereof.

(j) Advice of Counsel. Each of the parties represents to each other party hereto that it has discussed (or had an opportunity to discuss) with its counsel this Agreement and, specifically, the provisions of Sections 12(n), 12(o), 12(p) and 12(q).

(k) No Strict Construction. The parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties hereto and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any provisions of this Agreement.

(l) No Waiver. No omission or delay by the Warrantholder at any time to enforce any right or remedy reserved to it, or to require performance of any of the terms, covenants or provisions hereof by the Warrantholder at any time designated, shall be a waiver of any such right or remedy to which the Warrantholder is entitled, nor shall it in any way affect the right of the Warrantholder to enforce such provisions thereafter during the term of this Agreement.

(m) Survival. All agreements, representations and warranties contained in this Agreement or in any document delivered pursuant hereto shall be for the benefit of the respective parties hereto and shall survive the execution and delivery of this Agreement and the expiration or other termination of this Agreement.

(n) Governing Law. This Agreement has been negotiated and delivered to the Warrantholder in the State of Delaware, and shall be deemed to have been accepted by the Warrantholder in the State of Delaware. Delivery of Common Stock to the Warrantholder by the Company under this Agreement is due in the State of Delaware. This Agreement shall be governed by, and construed and enforced in

accordance with, the laws of the State of Delaware, excluding conflict of laws principles that would cause the application of laws of any other jurisdiction.

(o) Mutual Waiver of Jury Trial. Because disputes arising in connection with complex financial transactions are most quickly and economically resolved by an experienced and expert person and the parties wish applicable state and federal laws to apply (rather than arbitration rules), the parties desire that their disputes arising under or in connection with this Agreement be resolved by a judge applying such applicable laws. EACH OF THE COMPANY AND THE WARRANTHOLDER SPECIFICALLY WAIVES ANY RIGHT IT MAY HAVE TO TRIAL BY JURY OF ANY CAUSE OF ACTION, CLAIM, CROSS-CLAIM, COUNTERCLAIM, THIRD PARTY CLAIM OR ANY OTHER CLAIM (COLLECTIVELY, "CLAIMS") ASSERTED BY THE COMPANY AGAINST THE WARRANTHOLDER OR ITS ASSIGNEE OR BY THE WARRANTHOLDER OR ITS ASSIGNEE AGAINST THE COMPANY RELATING TO THIS AGREEMENT. This waiver extends to all such Claims, including Claims that involve persons or entities other than the Company and the Warrantholder; Claims that arise out of or are in any way connected to the relationship between the Company and the Warrantholder; and any Claims for damages, breach of contract, specific performance, or any equitable or legal relief of any kind, arising out of this Agreement.

(p) Arbitration. If the Mutual Waiver of Jury Trial set forth in Section 12(o) is ineffective or unenforceable, the parties agree that all Claims shall be submitted to binding arbitration in accordance with the commercial arbitration rules of JAMS (the "Rules"), such arbitration to occur before one arbitrator, which arbitrator shall be a retired Federal court judge. The decision of the arbitrator shall be binding on the parties, and shall be final and nonappealable to the maximum extent permitted by law. Any judgment rendered by the arbitrator may be entered in a court of competent jurisdiction and enforced by the prevailing party as a final judgment of such court.

(q) Pre-arbitration Relief. In the event Claims are to be resolved by arbitration, either party may seek from a court of competent jurisdiction, any prejudgment order, writ or other relief and have such prejudgment order, writ or other relief enforced to the fullest extent permitted by law notwithstanding that all Claims are otherwise subject to resolution by binding arbitration.

(r) Counterparts. This Agreement and any amendments, waivers, consents or supplements hereto may be executed in any number of counterparts, and by different parties hereto in separate counterparts, each of which when so delivered shall be deemed an original, but all of which counterparts shall constitute but one and the same instrument.

(s) Specific Performance. The parties hereto hereby declare that it is impossible to measure in money the damages which will accrue to the Warrantholder by reason of the Company's failure to perform any of the obligations under this Agreement and agree that the terms of this Agreement shall be specifically enforceable by the Warrantholder. If the Warrantholder institutes any action or proceeding to specifically enforce the provisions hereof, any person against whom such action or proceeding is brought hereby waives the claim or defense therein that the Warrantholder has an adequate remedy at law, and such person shall not offer in any such action or proceeding the claim or defense that such remedy at law exists.

(t) Lost, Stolen, Mutilated or Destroyed Warrant. If the Warrant is lost, stolen, mutilated or destroyed, the Company may, on such terms as to indemnity or otherwise as it may reasonably impose (which shall, in the case of a mutilated Warrant, include the surrender thereof), issue a new Warrant of like denomination and tenor as the Warrant so lost, stolen, mutilated or destroyed. Any such new Warrant shall constitute an original contractual obligation of the Company, whether or not the allegedly lost, stolen, mutilated or destroyed Warrant shall be at any time enforceable by anyone.

(u) Charges, Taxes and Expenses. Issuance of certificates for shares of Common Stock upon the exercise or conversion of this Warrant shall be made without charge to the Warrantholder for any United States or state of the United States documentary stamp tax or other incidental expense with respect

to the issuance of such certificate, all of which taxes and expenses shall be paid by the Company, and such certificates shall be issued in the name of the Warranholder.

(v) Legends. To the extent required by applicable laws, the Warrant and the shares of Common Stock issuable hereunder (and the securities issuable, directly or indirectly, upon conversion of such shares of Common Stock, if any) may be imprinted with a restricted securities legend in substantially the following form:

THIS SECURITY HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED (THE "ACT"), OR ANY APPLICABLE STATE SECURITIES LAWS, AND MAY NOT BE SOLD, PLEDGED OR OTHERWISE TRANSFERRED WITHOUT AN EFFECTIVE REGISTRATION THEREOF UNDER THE ACT AND ANY APPLICABLE STATE SECURITIES LAWS, OR PURSUANT TO RULE 144 OR AN EXEMPTION FROM THE REGISTRATION REQUIREMENTS OF THE ACT AND ANY APPLICABLE STATE SECURITIES LAWS.

[Remainder of Page Intentionally Left Blank]

COMPANY: MELA SCIENCES, INC.

By: /s/ Michael R. Stewart  
Name: Michael R. Stewart  
Title: President and Chief Executive Officer

WARRANTHOLDER: FLEXPOINT MCLS HOLDINGS LLC

By: /s/ Daniel Edelman  
Name: Daniel Edelman  
Title: Vice President

EXHIBIT I  
NOTICE OF EXERCISE

To: \_\_\_\_\_

- (1) The undersigned Warrantholder hereby elects to purchase \_\_\_\_\_ shares of the Common Stock of MELA Sciences, Inc., pursuant to the terms of the Agreement dated the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_ (the "Agreement") between MELA Sciences, Inc. and the Warrantholder, and tenders herewith payment of the Purchase Price in full, together with all applicable transfer taxes, if any. [NET ISSUANCE: elects pursuant to Section 3(a) of the Agreement to effect a Net Issuance.]
- (2) Please issue a certificate or certificates representing said shares of Common Stock in the name of the undersigned or in such other name as is specified below.

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Address)

WARRANTHOLDER: FLEXPOINT MCLS HOLDINGS LLC

By: \_\_\_\_\_  
Name:  
Title:

1. ACKNOWLEDGMENT OF EXERCISE

The undersigned [ \_\_\_\_\_ ], hereby acknowledge receipt of the "Notice of Exercise" from FLEXPOINT MCLS HOLDINGS LLC to purchase [ \_\_\_\_ ] shares of the Common Stock of MELA Sciences, Inc., pursuant to the terms of the Agreement, and further acknowledges that [ \_\_\_\_\_ ] shares remain subject to purchase under the terms of the Agreement.

COMPANY: [ \_\_\_\_\_ ]

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_



TRANSFER NOTICE

(To transfer or assign the foregoing Agreement execute this form and supply required information. Do not use this form to purchase shares.)

FOR VALUE RECEIVED, the foregoing Agreement and all rights evidenced thereby are hereby transferred and assigned to

\_\_\_\_\_

(Please Print)

whose address is \_\_\_\_\_

\_\_\_\_\_

Dated: \_\_\_\_\_

Holder's Signature: \_\_\_\_\_

Holder's Address: \_\_\_\_\_

\_\_\_\_\_

Signature Guaranteed: \_\_\_\_\_

NOTE: The signature to this Transfer Notice must correspond with the name as it appears on the face of the Agreement, without alteration or enlargement or any change whatever. Officers of corporations and those acting in a fiduciary or other representative capacity should file proper evidence of authority to assign the foregoing Agreement.

**SUBORDINATION AGREEMENT**

THIS SUBORDINATION AGREEMENT (this "Agreement") is entered into as of this 30<sup>th</sup> day of December, 2015, by and among **BROADFIN HEALTHCARE MASTER FUND, LTD.** ("**Broadfin**"), **SABBY HEALTHCARE MASTER FUND, LTD.** ("**Sabby**") and **SABBY VOLATILITY WARRANT MASTER FUND, LTD.** ("**Sabby Volatility**" and, together with Broadfin and Sabby, collectively, the "**Subordinated Lenders**"), **MELA SCIENCES, INC.**, a Delaware corporation ("**Borrower**"), and **MIDCAP FINANCIAL TRUST**, a Delaware statutory trust, as Agent for the financial institutions or other entities from time to time parties to the Senior Loan Agreement (as hereinafter defined) (acting in such capacity, "**Senior Agent**"), and as a Lender, or such then present holder or holders of the Senior Loan (as hereinafter defined) as may from time to time exist (the "**Lenders**," and collectively with the Senior Agent, the "**Senior Lenders**").

**RECITALS**

A. Borrower and Senior Lenders are entering into a Credit and Security Agreement of even date herewith (as the same may be amended, supplemented or otherwise modified from time to time, the "**Senior Loan Agreement**") pursuant to which, among other things, Senior Lenders have agreed, subject to the terms and conditions set forth in the Senior Loan Agreement, to make certain loans and financial accommodations to Borrower and the other Credit Parties. All of Borrower's obligations to Senior Lenders under the Senior Loan Agreement and the other Senior Loan Documents (as hereinafter defined) are secured by liens on and security interests in substantially all of the now existing and hereafter acquired personal property of Borrower (all collateral, real and personal, now or hereafter encumbered by the lien of any Senior Loan Document is herein referred to collectively as the "**Senior Loan Collateral**"). Borrower and any other Credit Party (as defined in the Senior Loan Agreement) may each be referred to herein as a "**Credit Party**" and collectively as "**Credit Parties**". All other capitalized terms used but not defined herein shall have the meanings set forth in the Senior Loan Agreement.

B. Pursuant to that certain Securities Purchase Agreement dated as of July 21, 2014 (as amended and as in effect on the date hereof or as may be amended, supplemented or otherwise modified from time to time in accordance with Section 3.2 hereof, the "**2014 Purchase Agreement**"), entered into by and among, *inter alios*, Borrower, Broadfin, Sabby, Sabby Volatility, Equitec Specialists, LLC, ("**Equitec**"), and Intracoastal Capital, LLC (as successor by assignment to Cranshire Capital Master Fund, Ltd.) ("**Intracoastal**" and, together with Broadfin, Sabby, Sabby Volatility and Equitec, the "**2014 Debenture Purchasers**"), Borrower issued and sold to the 2014 Debenture Purchasers the Borrower's 4% Senior Secured Convertible Debentures originally due July 24, 2019 (the "**2014 Debentures**"). All of Borrower's obligations with respect to the 2014 Debentures are secured by liens on and security interests in the "Collateral" as contemplated by, and defined in, that certain Amended and Restated Security Agreement, dated as of August 3, 2015 (as amended and as in effect on the date hereof or as may be amended, supplemented or otherwise modified from time to time in accordance with Section 3.2 hereof, the "**2014 Debentures Security Agreement**"), entered into by and among the Borrower, Sabby, Sabby Volatility, Broadfin, Equitec and Intracoastal.

C. Pursuant to that certain Securities Purchase Agreement dated as of June 22, 2015 (as amended and as in effect on the date hereof or as may be amended, supplemented or otherwise modified from time to time in accordance with Section 3.2 hereof, the "**2015 Purchase Agreement**" and, together with the 2014 Purchase Agreement, the "**Purchase Agreements**"), entered into by and among the Borrower and the Subordinated Lenders, Borrower issued and sold (i) to Sabby and Broadfin the Borrower's 2.25% Series A Senior Secured Convertible Debentures originally due June 22, 2020 (the "**2015 Series A Debentures**"), (ii) to Intracoastal the Borrower's 2.25% Senior Unsecured Convertible Debentures originally due June 22, 2020 (the "**2015 Series B Debentures**" and, together with the 2014

Debentures and the 2015 Series A Debentures, the "**Subordinated Debentures**"), and (i) to Sabby and Broadfin, the Borrower's 9% Senior Secured Notes (the "**2015 Notes**"). All of Borrower's obligations with respect to the 2015 Series A Debentures and the 2015 Notes are secured by liens on and security interests in the "Collateral" as contemplated by, and defined in, that certain Amended and Restated Security Agreement, dated as of August 3, 2015 (as amended and as in effect on the date hereof or as may be amended, supplemented or otherwise modified from time to time in accordance with Section 3.2 hereof, the "**2015 Debentures Security Agreement**" and, together with the 2014 Debentures Security Agreement, the "**Subordinated Security Agreements**"), entered into by and among the Borrower and the Subordinated Lenders.

D. Substantially concurrently with the execution of this Agreement, (i) Borrower is repaying in full with the proceeds of the Senior Loans (as defined below) (A) the 2015 Notes and (B) the 2014 Debentures held by Intracoastal and (ii) Intracoastal is executing and delivering to Senior Agent a subordination agreement with respect to the 2015 Series B Debentures on substantially similar terms to this Agreement, other than Section 5 of this Agreement.

E. As an inducement to and as one of the conditions precedent to the agreement of Senior Agent and Senior Lenders to consummate the transactions contemplated by the Senior Loan Agreement, Senior Agent and Senior Lenders have required the execution and delivery of this Agreement by Subordinated Lenders and Borrower in order to set forth the relative rights and priorities of Senior Lenders and Subordinated Lenders under the Senior Loan Documents and the Subordinated Loan Documents (as hereinafter defined).

#### AGREEMENT

**NOW, THEREFORE**, in order to induce Senior Lenders to consummate the transactions contemplated by the Senior Loan Agreement, and for other good and valuable consideration, the receipt and sufficiency of which hereby are acknowledged, the parties hereto hereby covenant and agree as follows:

1. **Definitions.** The following terms shall have the following meanings in this Agreement:

"**2014 Debentures Collateral**" means the "Collateral", as such term is defined in the 2014 Debentures Security Agreement as in effect on the date hereof.

"**2014 Registration Rights Agreement**" means the Registration Rights Agreement dated June 22, 2015 between Borrower and the Purchasers (as defined in the 2015 Purchase Agreement) entered into in connection with the 2015 Purchase Agreement as in effect on the date hereof or as may be amended, supplemented or otherwise modified from time to time in accordance with Section 3.2 hereof.

"**2014 Subordinated Lender Warrants**" means the Warrants, as such term is defined in the 2014 Purchase Agreement as in effect on the date hereof.

"**2015 Debentures Collateral**" means the "Collateral", as such term is defined in the 2015 Debentures Security Agreement as in effect on the date hereof.

"**2015 Registration Rights Agreement**" means the Registration Rights Agreement dated July 21, 2014 between Borrower and the Purchasers (as defined in the 2014 Purchase Agreement) entered into in connection with the 2014 Purchase Agreement as in effect on the date hereof or as may be amended, supplemented or otherwise modified from time to time in accordance with Section 3.2 hereof.

"**2015 Subordinated Lender Warrants**" means the Warrants, as such term is defined in the 2015 Purchase Agreement as in effect on the date hereof.

"**Bankruptcy Code**" means Chapter 11 of Title 11 of the United States Code, as amended from time to time, and any successor statute and all rules and regulations promulgated thereunder.

"**Bankruptcy Law**": the Bankruptcy Code and any other federal, state or foreign bankruptcy, insolvency, receivership or similar law affecting creditors' rights or any other or similar proceedings seeking any stay, reorganization, arrangement, composition or readjustment of obligations or indebtedness.

"**Blockage Notice**" means notice from the Senior Agent to the Subordinated Lender Representative that a Senior Loan Covenant Default has occurred and is continuing.

"**Blockage Period**" means a period of time beginning on the date a Blockage Notice is delivered to the Subordinated Lender Representative and terminating on the earliest to occur of:

- (a) 180 days following such date;
- (b) the written consent of Senior Agent to such termination;
- (c) the cure or waiver (as evidenced by a written waiver from Senior Agent to Borrower) of all Senior Loan Covenant Defaults; and
- (d) Payment in Full of the Senior Loans.

"**Collateral**" means the Senior Loan Collateral and Subordinated Loan Collateral.

"**Collateral Enforcement Action**" means: (a) to take any action to foreclose, execute, levy, or collect on, take possession or control (by set off or otherwise) of, sell or otherwise realize upon (judicially or non-judicially), or lease, license, or otherwise dispose of (whether publicly or privately), any Collateral, or otherwise exercise or enforce remedial rights with respect to any Collateral under the Senior Loan Documents or the Subordinated Loan Documents (including by way of set-off, recoupment, notification of a public or private sale or other disposition pursuant to the UCC or other applicable law, notification to account debtors, notification to depositary banks under deposit account control agreements, securities intermediaries under securities accounts or commodities intermediaries under commodities accounts, or exercise of rights under landlord consents, bailee waivers or similar agreements, if applicable, but excluding the execution and delivery of documentation solely to obtain control over deposit accounts or securities accounts in order to perfect a security interest therein), (b) to, or to enter into (or, if the Senior Agent consents thereto after the occurrence and during the continuation of a Senior Loan Covenant Default or Senior Loan Payment Default, any Credit Party enters into) any agreement in order to have a third party to, solicit bids to effect the liquidation or disposition of Collateral or to engage or retain sales brokers, marketing agents, investment bankers, accountants, appraisers, auctioneers, or other third Persons for the purposes of marketing, promoting, or selling any Collateral, (c) to receive a transfer of any Collateral in satisfaction of indebtedness or any other obligation secured thereby or make a credit bid for the purpose of doing so (whether or not in a Proceeding), (d) to notify account debtors to make payments to the Senior Lenders or Subordinated Lenders or their agents, as applicable, (e) to otherwise enforce a security interest or exercise another right or remedy, as a secured creditor or an unsecured creditor, pertaining to the Collateral at law, in equity, or pursuant to the Senior Loan Documents or Subordinated Loan Documents (including exercising voting rights in respect of equity or

debt interests comprising any of the Collateral), (f) to effect the disposition of any Collateral by any Credit Party after the occurrence and during the continuation of an "Event of Default" under the Senior Loan Documents or Subordinated Loan Documents, as applicable, (g) to take any other remedial actions as a secured creditor against any Collateral, (h) to commence any legal proceedings or actions against or with respect to any Credit Party or any of such Credit Party's assets for the purpose of effecting or facilitating any of the actions described in clauses (a) through (g) above, or (i) to commence any Proceeding against any Credit Party.

"**Conversion Shares**" means shares of the capital stock of Borrower issued to Subordinated Lenders pursuant to the terms of the Subordinated Loan Documents in full or partial satisfaction of the Subordinated Loans.

"**Distribution**" means, with respect to any indebtedness, (a) any payment or distribution by any Person of cash, securities or other property, by set-off or otherwise, on account of such indebtedness or obligation, (b) any redemption, purchase or other acquisition of such indebtedness or obligation by any Person, or (c) the granting of any lien or security interest to or for the benefit of the holders of such indebtedness or obligation in or upon any property of any Person.

"**Enforcement Action**" means (a) to take from or for the account of any Credit Party or any guarantor of the Subordinated Loans, by set-off or in any other manner, the whole or any part of any moneys which may now or hereafter be owing by any Credit Party or any such guarantor with respect to the Subordinated Loans; (b) to sue for payment of, or to initiate or participate with others in any suit, action or proceeding against any Credit Party or any such guarantor to (i) enforce payment of or to collect the whole or any part of the Subordinated Loans, or (ii) commence judicial enforcement of any of the rights and remedies under the Subordinated Loan Documents or applicable law with respect to the Subordinated Loan, including, without limitation, any judicial proceedings to obtain possession of any premises leased under the Subordinated Loan Documents; (c) to accelerate the Subordinated Loans; (d) to exercise any put option or to cause any Credit Party or any such guarantor to honor any redemption or mandatory prepayment obligation under any Subordinated Loan Document; (e) to notify account debtors or directly collect accounts receivable or other payment rights of any Credit Party or any such guarantor; (f) to exercise any self-help remedies available to each Subordinated Lender in its capacity as a landlord under a lease which constitutes a portion of the Subordinated Loan Documents; (g) to commence, or join with any creditors other than the Senior Agent in commencing any Proceeding, or (h) take any Collateral Enforcement Action.

"**Paid in Full**" or "**Payment in Full**" means, with respect to the Senior Loans, the full and indefeasible payment in cash and satisfaction in full of all of the obligations under the Senior Loan Documents (other than contingent indemnification obligations that survive repayment of the Senior Loans for which no claim has been made), and the termination of all obligations of Senior Agent and Senior Lenders under the Senior Loan Documents (including, without limitation, any commitment to lend), and the termination of the Senior Loan Documents.

"**Permitted Share Conversion Payments**" means amounts payable by Borrower pursuant to Section 4 of each of the 2014 Debentures and 2015 Series A Debentures with respect to liquidated damages, expense reimbursements, buy-in compensation or other similar payments relating to the Subordinated Lenders' respective rights to receive Conversion Shares; provided however, that the aggregate amount of such payments made by Borrower shall not exceed \$500,000 in any consecutive twelve month period.

**"Permitted Subordinated Interest Payments"** means regularly scheduled interest payments payable on a non-accelerated basis by Borrower to Subordinated Lenders pursuant to the terms of the Subordinated Debentures.

**"Permitted Subordinated Loan Enforcement Action"** means the seeking and obtaining, by any Subordinated Lender, of specific performance or injunctive relief to compel the Borrower to comply with (or not violate or breach) its obligations under the Subordinated Loan Documents to issue Conversion Shares, as long as such action (i) is not accompanied by any claim for monetary damages, collection action or other payment and (ii) does not result in the making or receipt of any Distribution with respect to the Subordinated Loans by the Subordinated Lenders other than the issuance of Conversion Shares by the Borrower.

**"Permitted Subordinated Loan Expenses"** means amounts payable by Borrower to reimburse Subordinated Lenders for their out-of-pocket legal expenses (i) in connection with the negotiation, execution and delivery of, and performance under, this Agreement in an aggregate amount not to exceed \$35,000 and (ii) pursuant to the terms of the Registration Rights Agreements, in connection with the registration of shares of the common stock of the Borrower as contemplated thereunder.

**"Permitted Subordinated Loan Payments"** means payment by Borrower to any Subordinated Lender of (i) Permitted Subordinated Interest Payments, (ii) Permitted Share Conversion Payments and (iii) Permitted Subordinated Loan Expenses.

**"Person"** means any natural person, corporation, general or limited partnership, limited liability company, firm, trust, association, government, governmental agency or other entity, whether acting in an individual, fiduciary or other capacity.

**"Proceeding"** means any voluntary or involuntary insolvency, bankruptcy, receivership, custodianship, liquidation, dissolution, reorganization, assignment for the benefit of creditors, appointment of a custodian, receiver, trustee or other officer with similar powers or any other proceeding for the liquidation, dissolution or other winding up of a Person.

**"Registration Rights Agreements"** means the 2014 Registration Rights Agreement and the 2015 Registration Rights Agreement.

**"Senior Loans"** means all obligations, liabilities and indebtedness of every nature of any Credit Party from time to time owed to Senior Lenders under the Senior Loan Documents or otherwise, whether now existing or hereafter created, including, without limitation, the principal amount of all debts, claims, reimbursement obligations, and indebtedness, accrued and unpaid interest and all fees, costs, indemnities and expenses, whether primary, secondary, direct, contingent, fixed or otherwise, heretofore, now and from time to time hereafter owing, due or payable, whether before or after the filing of a Proceeding under the Bankruptcy Code, together with (a) any amendments, modifications, renewals or extensions thereof, and (b) any interest accruing thereon after the commencement of a Proceeding, without regard to whether or not such interest is an allowed claim; provided, however, that in no event shall the principal amount of the Senior Loans, excluding for the avoidance of doubt the aggregate amount of all interest, fees, expenses, indemnities, reimbursement obligations, costs and premiums (if any), in each case accrued in respect of or attributable thereto, exceed \$15,000,000.

**"Senior Loan Covenant Default"** means any "Event of Default" under any Senior Loan Document, other than a Senior Loan Payment Default.

**"Senior Loan Payment Default"** means an "Event of Default" described in Section 10.1(a) of the Senior Loan Agreement or any other "Event of Default" under the Senior Loan Documents resulting from the failure of any Credit Party to pay, on a timely basis, any principal, interest, fee or other amount required to be paid pursuant to the terms of the Senior Loan Documents, including without limitation, any default in payment of Senior Loans after acceleration thereof.

**"Senior Loan Documents"** means the Senior Loan Agreement, any promissory note or other instruments evidencing the Senior Loan or the obligation to pay the Senior Loan, any guaranty with respect to the Senior Loan, any security agreement or other collateral document securing the Senior Loan and all other documents, agreements and instruments now existing or hereafter entered into evidencing or pertaining to all or any portion of the Senior Loan.

**"Standstill Period"** means the period commencing on the date of a Subordinated Loan Default and ending upon the date which is the earlier of (a) 180 days after the Senior Agent has received a Subordinated Loan Default Notice with respect to such Subordinated Loan Default and (b) the date on which the Payment in Full of the Senior Loans shall have occurred; provided that in the event that as of any day during such 180 days, no Subordinated Loan Default is continuing, then the Standstill Period shall be deemed not to have commenced.

**"Subordinated Lender Lien"** means all liens and security interests held by the Subordinated Lenders, their representatives and agents in and to all or a portion of the Subordinated Loan Collateral.

**"Subordinated Lender Representative"** means Broadfin Capital, LLC.

**"Subordinated Lender Warrants"** means the 2014 Subordinated Lender Warrants and the 2015 Subordinated Lender Warrants.

**"Subordinated Loans"** means all obligations, liabilities and indebtedness of every nature of any Credit Party from time to time owed to the Subordinated Lenders, their agents and representatives under the Subordinated Loan Documents, whether now existing or hereafter created, including, without limitation, the principal amount of all debts, claims, reimbursement obligations, and indebtedness, accrued and unpaid interest and all fees, costs, indemnities and expenses, whether primary, secondary, direct, contingent, fixed or otherwise, heretofore, now and from time to time hereafter owing, due or payable, whether before or after the filing of a Proceeding under the Bankruptcy Code, together with (a) any amendments, modifications, renewals or extensions thereof, and (b) any interest accruing thereon after the commencement of a Proceeding, without regard to whether or not such interest is an allowed claim.

**"Subordinated Loan Collateral"** means the 2014 Debentures Collateral and the 2015 Debentures Collateral.

**"Subordinated Loan Default"** means any "Event of Default" under any Subordinated Loan Document.

**"Subordinated Loan Default Notice"** means, with respect to any Subordinated Loan Default, a written notice from the Subordinated Lenders to the Senior Agent, with a copy to the Credit Parties, stating that such notice is a "Subordinated Loan Default Notice," indicating that such Subordinated Loan Default has occurred, and describing such Subordinated Loan Default in reasonable detail.

"**Subordinated Loan Documents**" means (a) the Subordinated Debentures, the Purchase Agreements and all other promissory notes, debentures and other instruments evidencing the indebtedness or obligations owed to any of the Subordinated Lenders, their agents and representatives, (b) any guaranty with respect to the items referred to in clause (a), (c) the Subordinated Security Documents, (d) the Registration Rights Agreements and (e) all other documents, agreements and instruments now existing or hereafter entered into evidencing or pertaining to all or any portion of the foregoing; provided, however, that the Subordinated Lender Warrants shall not constitute Subordinated Loan Documents for any purpose hereunder.

"**Subordinated Security Documents**" means the Subordinated Security Agreements, the Intellectual Property Security Agreement (as defined in each of the Purchase Agreements and as in effect on the date hereof) and all other security agreements and other collateral documents securing the indebtedness and guaranties referred to in the Subordinated Loan Documents.

## **2. Subordination.**

**2.1. Subordination of Subordinated Loans to Senior Loans.** Each Credit Party covenants and agrees, and each Subordinated Lender likewise covenants and agrees, notwithstanding anything to the contrary contained in any of the Subordinated Loan Documents, that the payment of any and all of the Subordinated Loans shall be subordinate and subject in right and time of payment, to the extent and in the manner hereinafter set forth, to the Payment in Full of all Senior Loans. Each holder of the Senior Loans, whether now outstanding or hereafter created, incurred, assumed or guaranteed, shall be deemed to have acquired the Senior Loans in reliance upon the provisions contained in this Agreement. Except as otherwise permitted under subsection 2.2 below, all of the Senior Loan shall first be Paid in Full before any Distribution shall be made to any Subordinated Lender on account of any Subordinated Loan.

**2.2. Subordinated Debt Payment Restrictions.** Notwithstanding the provisions of subsection 2.1 above, (a) Borrower may issue, and Subordinated Lenders may accept, Conversion Shares, and (b) Borrower may make, and Subordinated Lenders may accept, Permitted Subordinated Loan Payments unless (i) a Senior Loan Payment Default has occurred and has not been cured or waived (as evidenced by a written waiver from Senior Agent to Borrower or written confirmation of cure from Senior Agent to Borrower or Subordinated Lender Representative), (ii) there exists any Blockage Period that has not been terminated or (iii) any Credit Party is then a debtor in a Proceeding.

## **2.3. Enforcement of Security.**

(a) Subject to clause (b) below, until the Payment in Full of the Senior Loans, the Senior Lenders will have the exclusive right to (i) commence and maintain Enforcement Actions (including the rights to set-off or "credit bid" their debt), (ii) make determinations regarding the release or disposition of, or restrictions with respect to, the Collateral, and (iii) otherwise enforce the rights and remedies of a secured creditor under the UCC and other applicable law and the Bankruptcy Laws of any applicable jurisdiction in such order and in such manner as the Senior Lenders may determine in their sole discretion without consulting with or obtaining the consent of any Subordinated Lender and regardless of whether any such exercise is adverse to the interests of any Subordinated Lender, except as otherwise required pursuant to the UCC and applicable law. In conducting any public or private sale under the UCC, 10 days' notice shall be deemed to be commercially reasonable notice. The Senior Agent and the other Senior Lenders may take Enforcement Actions pursuant to the provisions of the Senior Loan Documents all in such manner as they may determine in the exercise of their sole discretion. Such Enforcement Actions may include the rights of an agent appointed by them to sell or otherwise dispose of Collateral upon foreclosure, to incur expenses in connection with such sale or disposition, and to exercise



all the rights and remedies of a secured creditor under the UCC and of a secured creditor under the Bankruptcy Laws of any applicable jurisdiction. Except as provided in this Section 2.3, notwithstanding any rights or remedies available to a Subordinated Lender under any of the Subordinated Loan Documents, applicable law or otherwise, a Subordinated Lender shall not take any Enforcement Action with respect to all or any portion of the Subordinated Loans or the Collateral. Until the Payment in Full of the Senior Loans, each Subordinated Lender (A) shall not take any action that would hinder any exercise of remedies or the taking of any Enforcement Action under the Senior Loan Documents, and (B) waives any right it may have as a junior lien creditor or otherwise to object to the manner in which the Senior Agent or the Senior Lenders may seek to take any Enforcement Action (including any right to object to a Senior Lender accepting any Collateral in full or partial satisfaction of Senior Loans under Section 9-620 of the UCC), regardless of whether any action or omission by or on behalf of the Senior Agent and the Senior Lenders is adverse to the interest of the Subordinated Lenders.

(b) Notwithstanding the preceding Section 2.3(a), Subordinated Lenders may commence and may continue (i) any Permitted Subordinated Loan Enforcement Action and (ii) an Enforcement Action (other than a Permitted Subordinated Loan Enforcement Action) with respect to a Subordinated Loan Default only if: (A) the Standstill Period with respect thereto shall have elapsed; (B) any acceleration of the Subordinated Loans has not been rescinded; (C) the Subordinated Lenders have provided the Senior Agent at least 15 days' prior written notice of its intention to take such Enforcement Action, which notice (1) may be given during, but not prior to, the pendency of any Standstill Period, and (2) if such Enforcement Action will include any disposition of Collateral, will specify the principal proposed terms of the sale, identity of the expected purchasers (if known) and the type and amount of consideration expected to be received, and in any event such disposition shall be commercially reasonable in all respects and undertaken on an arm's length basis with parties that are not affiliates of any of the Subordinated Lenders; and (D) the applicable Credit Party is not then a debtor in a Proceeding; provided, however, that notwithstanding the foregoing Subordinated Lenders may not commence or continue any Collateral Enforcement Action if: (1) the Senior Agent is then pursuing with commercially reasonable diligence a Collateral Enforcement Action with respect to all or a material portion of the Collateral or attempting with commercially reasonable diligence to vacate any stay or prohibition against such exercise or (2) the Senior Agent is then engaged in either of (x) the notification of account debtors to make payments to the Senior Agent or its agents, or (y) exercising dominion over any cash or security accounts of any Credit Party.

(c) Notwithstanding Section 2.3(a), a Subordinated Lender may (a) file a proof of claim or statement of interest, vote on a plan of reorganization (including a vote to accept or reject a plan of partial or complete liquidation, reorganization, arrangement, composition, or extension), and make other filings, arguments, and motions, with respect to the Subordinated Loans and the Collateral in any Proceeding commenced by or against any Credit Party; (b) take action to create, perfect, preserve, or protect (but not enforce) its Lien on the Subordinated Loan Collateral, so long as such actions are not adverse to the priority status in accordance with this Agreement of Liens on the Collateral securing the Senior Loans or the Senior Lenders' rights to exercise remedies or otherwise not in accordance with this Agreement; (c) file necessary pleadings in opposition to a claim objecting to or otherwise seeking the disallowance of a Subordinated Loan or a Lien securing the Subordinated Loan; (d) join (but not exercise any control over) a judicial foreclosure or Lien enforcement proceeding with respect to the Collateral initiated by the Senior Lenders and/or Senior Agent, to the extent that such action could not reasonably be expected to interfere materially with the Enforcement Action of the Senior Lenders and/or Senior Agent, but no Subordinated Lender may receive any proceeds thereof unless expressly permitted herein; and (e) bid for or purchase Collateral at any public, private, or judicial foreclosure upon such Collateral initiated by any Senior Lender, or any sale of Collateral during a Proceeding; provided that such bid may not include a "credit bid" in respect of any Subordinated Loans unless the net cash proceeds of such bid are otherwise sufficient to cause the Payment in Full of Senior Loans and are applied to cause the Payment in

Full of the Senior Loans, in each case, at the closing of such bid, in the case of each of clauses (a) through (e) in a manner not inconsistent with the other terms of this Agreement.

**2.4. Incorrect Payments.** If any Distribution on account of the Subordinated Loans not permitted to be made by any Credit Party or accepted by any Subordinated Lender under this Agreement is so made by a Credit Party and received by any Subordinated Lender, including without limitation as the result of the taking of any Enforcement Action by such Subordinated Lender whether or not permitted under Section 2.3 above, such Distribution shall be held in trust by such Subordinated Lender for the benefit of Senior Lenders, and shall be promptly paid over to Senior Agent for the benefit of Senior Lenders (in the form received, except for endorsement or assignment by any Subordinated Lender when required by Senior Agent) for application in accordance with the Senior Loan Documents to the payment of the Senior Loans then remaining unpaid, until all of the Senior Loans are Paid in Full.

**2.5. Subordination of Liens and Security Interests; Agreement Not to Contest; Agreement to Release any Liens.**

(a) Until the Senior Loans have been Paid in Full, all liens and security interests of the Subordinated Lenders in the Collateral (including any Subordinated Lender Lien) shall be and hereby are subordinated for all purposes and in all respects to the liens and security interests of Senior Lenders in the Collateral, regardless of the time, manner or order of perfection of any such liens and security interests and regardless of any failure, whether intervening or continuing, of Senior Lenders' liens and security interests to be perfected.

(b) Each Subordinated Lender agrees that it will not at any time contest the validity, perfection, priority or enforceability of the Senior Loans, the Senior Loan Documents, or the liens and security interests of Senior Lenders in the Collateral securing the Senior Loans.

(c) Each Subordinated Lender agrees that it shall not request or accept (i) any lien or security interest securing any Subordinated Loan over any of the Collateral, the equity interests in any Credit Party or any other property or assets of a Credit Party except for the Subordinated Lender Lien or (ii) a guaranty from any Credit Party. Without limiting the preceding sentence, in the event that any lien or security interest arises in favor of Subordinated Lender in any of the Collateral other than the Subordinated Lender Lien, then promptly upon Senior Agent's request, each Subordinated Lender shall execute and/or deliver to Senior Agent such termination statements and releases as Senior Agent shall reasonably request to effect the release of the liens and security interests of the Subordinated Lenders in such Collateral. In furtherance of the foregoing, each Subordinated Lender hereby irrevocably appoints Senior Agent its attorney-in-fact, with full authority in the place and stead of such Subordinated Lender and in the name of such Subordinated Lender or otherwise, to execute, deliver and/or file any document or instrument which such Subordinated Lender may be required to deliver pursuant to this subsection 2.5.

(d) In the event that Senior Agent releases or agrees to release any of its liens or security interests in the Collateral in connection with the compromise or sale, transfer or other disposition thereof or any of the Collateral is sold or retained pursuant to a foreclosure or similar action, the Subordinated Lenders shall be deemed to have also, automatically and simultaneously, released their liens and security interests in such Collateral, the Senior Agent shall be authorized to file releases or termination statements, as appropriate, with respect to all UCC financing statements covering such Collateral, and the Subordinated Lenders shall (or shall cause their agent or representative to) promptly execute and deliver to Senior Agent such releases as Senior Agent shall reasonably request to effect the release of the liens and security interests of the Subordinated Lenders in such Collateral. All proceeds resulting from any such compromise or sale, transfer or other disposition shall be applied first to the Senior Loans until payment in full thereof, with the balance, if any, to the Subordinated Loans, or to any

other entitled party. In furtherance of the foregoing, Subordinated Lenders hereby waive (i) any right to notification of a disposition of any Collateral pursuant to Section 9-611 of the UCC, (ii) any right to send to Senior Agent a notification of a claim against the Collateral pursuant to Section 9-621 of the UCC, and any right to receive a notice of any acceptance by Senior Agent of Collateral in full or partial satisfaction of the Senior Loans (and Subordinated Lender is hereby deemed to have consented to any such acceptance in accordance with Section 9-620 of the UCC), (iii) the right to object to (or issue a notice of objection with respect to), the acceptance by Senior Agent of Collateral in full or partial satisfaction of the Senior Loans pursuant to Sections 9-620 and 9-621 of the UCC, and (iv) any other matter that would be the subject of any notification covered by Sections 9-611, 9-620 or 9-621 of the UCC.

(e) By the execution of this Agreement, each Subordinated Lender hereby authorizes Senior Agent to amend any financing statements filed by Subordinated Lender against the Borrower or its Subsidiaries as follows: "In accordance with a certain Subordination Agreement by and among the Secured Party, certain other subordinated lenders, the Debtor and MidCap Financial Trust (or any of its affiliates), as Senior Agent, the Secured Party has subordinated any security interest or lien that Secured Party may have in any property of the Debtor to the security interest of MidCap Financial Trust (or any of its affiliates), as Senior Agent, in all assets of the Debtor, notwithstanding the respective dates of attachment or perfection of the security interest of the Secured Party and MidCap Financial Trust (or any of its affiliates), as Senior Agent.

**2.6. Senior Agent to be First of Record.** Until such time that Senior Lenders have been Paid in Full, Senior Agent shall have a first priority perfected security interest in the Collateral, as evidenced by the order of recorded UCC financing statements on record against Company. Each Subordinated Lender hereby authorizes Senior Agent (or its designee) to file a UCC financing statement against Company on behalf of the Subordinated Lenders, naming each Subordinated Lender (or its agent or representative) as Secured Party and describing the Collateral subject to the Subordinated Lender Lien (the "**Second Financing Statement**"), which Second Financing Statement shall be filed after the UCC financing statement filed against Company naming Senior Agent as Secured Party and describing the Collateral.

**2.7. Application of Proceeds from Sale or other Disposition of the Collateral: Agreement to Release Liens.**

(a) In the event of any sale, transfer or other disposition (including a casualty loss or taking through eminent domain) of the Collateral, the proceeds resulting therefrom (including insurance proceeds) shall be applied in accordance with the terms of the Senior Loan Documents or as otherwise consented to by Senior Agent until such time as the Senior Loans are Paid in Full.

(b) Without affecting the rights of Senior Agent or Senior Lenders under this Agreement, each Subordinated Lender agrees and consents that any Collateral securing the Subordinated Loans, in whole or in part, may be exchanged, sold or surrendered by Senior Agent for other Collateral as it may deem advisable, and that any balance or balances of funds with Senior Agent at any time outstanding to the credit of Borrower may, from time to time, in whole or in part, be surrendered or released by Senior Agent as it may deem advisable, subject, however, to the terms of the Senior Loan Documents and the Subordinated Lender Lien. In the event that Senior Agent has determined to enforce its rights against any Collateral (including any sale, discounting or settlement by compromise of all or any portion of the Collateral), then upon Senior Agent's request, each Subordinated Lender shall promptly execute and/or deliver to Senior Agent such termination statements and releases as Senior Agent may

reasonably request to effect the release of the liens and security interests of such Subordinated Lender (including the Subordinated Lender Lien) in any such Collateral. In furtherance of the foregoing, each Subordinated Lender hereby irrevocably appoints Senior Agent its attorney-in-fact, with full authority in the place and stead of such Subordinated Lender and in the name of such Subordinated Lender or otherwise, to execute and/or deliver any document or instrument which such Subordinated Lender may be required to execute, deliver and/or file pursuant to this subsection 2.7(b).

**2.8. Sale, Transfer or other Disposition of Subordinated Loan.** No Subordinated Lender shall sell, assign, pledge, dispose of or otherwise transfer all or any portion of the Subordinated Loan or any Subordinated Loan Document without the prior written consent of Senior Agent, which consent may be withheld in its sole and absolute discretion, unless such Subordinated Lender and proposed transferee execute and deliver to Senior Agent a joinder to this Agreement in form and substance acceptable to Senior Agent providing for the continued subordination and forbearance of the Subordinated Loans to the Senior Loans as provided herein and for the continued effectiveness of all of the rights of the Senior Lenders arising under this Agreement.

**2.9. Legends.** Until the termination of this Agreement in accordance with Section 9 hereof, each Subordinated Lender will cause to be clearly, conspicuously and prominently inserted on the face of each Subordinated Loan Document, a legend, in form acceptable to Senior Agent, stating that the Subordinated Loan Document is subject to the terms of this Agreement. Application of such legend by omnibus amendment to the Subordinated Loan Documents is acceptable to Senior Agent.

**2.10. Liquidation, Dissolution, Bankruptcy.** In the event of any Proceeding involving Borrower:

(a) Any Distribution, whether in cash, securities or other property which would otherwise, but for the terms hereof, be payable or deliverable in respect of the Subordinated Loan shall be paid or delivered directly to Senior Agent (to be held and/or applied by Senior Lenders in accordance with the terms of the Senior Loan Documents) until all of the Senior Loans are Paid in Full. Each Subordinated Lender irrevocably authorizes, empowers and directs any debtor, debtor in possession, receiver, trustee, liquidator, custodian, conservator or other Person having authority, to pay or otherwise deliver all such Distributions to Senior Agent. Each Subordinated Lender also irrevocably authorizes and empowers Senior Agent, in the name of Subordinated Lender, to demand, sue for, collect and receive any and all such Distributions.

(b) Each Subordinated Lender agrees that Senior Agent may consent to the use of cash collateral or provide financing to any Credit Party on such terms and conditions and in such amounts as Senior Agent, in its sole discretion, may decide and, in connection therewith, any Credit Party may grant to Senior Agent for the benefit of Senior Lenders liens and security interests upon all of the property of any Credit Party, which liens and security interests (i) shall secure payment of the Senior Loans (whether such Senior Loans arose prior to the commencement of any Proceeding or at any time thereafter) and all other financing provided by Senior Lenders during the Proceeding, and (ii) shall be superior in priority to the liens and security interests, if any, in favor of each such Subordinated Lender on the property of any Credit Party. Each Subordinated Lender agrees that it will not object to or oppose a sale or other disposition of any property securing all of any part of the Senior Loans free and clear of security interests, liens or other claims of Subordinated Lenders under Section 363 of the Bankruptcy Code or any other provision of the Bankruptcy Code if Senior Agent has consented to such sale or disposition. Each Subordinated Lender agrees not to assert any right it may have to "adequate protection" of Subordinated Lender's interest in any Collateral in any Proceeding and agrees that it will not seek to have the automatic stay lifted with respect to any Collateral without the prior written consent of Senior Agent. Each Subordinated Lender waives any claim it may now or hereafter have arising out of Senior

Agent's election, in any Proceeding instituted under the Bankruptcy Code, of the application of Section 1111(b)(2) of the Bankruptcy Code, and/or any borrowing or grant of a security interest under Section 364 of the Bankruptcy Code by Borrower, as debtor in possession. Each Subordinated Lender further agrees that it will not seek to participate or participate on any creditor's committee without Senior Agent's prior written consent.

(c) Each Subordinated Lender agrees to execute, verify, deliver and file any proofs of claim in respect of the Subordinated Loans requested by Senior Agent in connection with any such Proceeding and hereby irrevocably authorizes, empowers and appoints Senior Agent its agent and attorney-in-fact to (i) execute, verify, deliver and file such proofs of claim upon the failure of any Subordinated Lender promptly to do so prior to thirty (30) days before the expiration of the time to file any such proof of claim, and (ii) vote such claim in any such Proceeding upon the failure of any Subordinated Lender to do so prior to fifteen (15) days before the expiration of the time to vote any such claim; *provided, however*, that Senior Agent shall have no obligation to execute, verify, deliver, file and/or vote any such proof of claim. In the event that Senior Agent votes any claim in accordance with the authority granted hereby, the relevant Subordinated Lender shall not be entitled to change or withdraw such vote. Each Subordinated Lender hereby assigns to Senior Agent or its nominee (and will, upon request of Senior Agent, reconfirm in writing the assignment to Senior Agent or its nominee of) all rights of such Subordinated Lender under such claims.

(d) The Senior Loans shall continue to be treated as the Senior Loans and the provisions of this Agreement shall continue to govern the relative rights and priorities of Senior Lenders and Subordinated Lenders even if all or part of the Senior Loans or the security interests securing the Senior Loans are subordinated, set aside, avoided, invalidated or disallowed in connection with any such Proceeding, and this Agreement shall be reinstated if at any time any payment of any of the Senior Loans is rescinded or must otherwise be returned by any holder of the Senior Loans or any representative of such holder.

**2.11. Appointment of Subordinated Lender Representative.** Each Subordinated Lender hereby appoints the Subordinated Lender Representative to act as agent for all Subordinated Lenders for purposes of receiving notices and communications to be delivered to the Subordinated Lenders hereunder, including without limitation Blockage Notices.

### **3. Modifications.**

**3.1. Modifications to Senior Loan Documents.** Senior Lenders may at any time and from time to time without the consent of or notice to Subordinated Lenders, without incurring liability to any Subordinated Lender and without impairing or releasing the obligations of each Subordinated Lender under this Agreement, change the manner or place of payment or extend the time of payment of or renew or alter any of the terms of the Senior Loans, or amend in any manner any agreement, note, guaranty or other instrument evidencing or securing or otherwise relating to the Senior Loans. At any time and from time to time, without notice to any Subordinated Lender, Senior Agent may take such actions in accordance with the terms of the Senior Loan Agreement with respect to the Senior Loans as Senior Agent, in its sole discretion, may deem appropriate, including, without limitation, terminating advances to the Borrower, increasing the principal amount, extending the time of payment, increasing applicable interest rates, renewing, compromising or otherwise amending the terms of any documents affecting the Senior Loans and any Collateral securing the Senior Loans, and enforcing or failing to enforce any rights against any Credit Party or any other person. No such action or inaction shall impair or otherwise affect Senior Lenders' rights hereunder. All rights and interests of the Senior Lenders under this Agreement, and all agreements and obligations of the Subordinated Lenders and the Borrower hereunder, shall remain in full force and effect irrespective of: (1) any lack of validity or enforceability of any Senior Loan

Documents; (2) any change in the time, manner or place of payment of, or in any other term of, all or any of the Senior Loans, or any amendment or waiver or other modification, whether by course of conduct or otherwise, of the terms of the Senior Loan Documents; (3) any exchange, release or non-perfection of any security interest in any Collateral, or any release, amendment, waiver or other modification, whether in writing or by course of conduct or otherwise, of all or any of the Senior Loans or any guarantee thereof; or (4) any other circumstances which otherwise might constitute a defense available to, or a discharge of, the Borrower in respect of the Senior Loans, or of any Subordinated Lender or the Borrower in respect of this Agreement.

**3.2. Modifications to Subordinated Loan Documents.** Until the Senior Loans have been Paid in Full, and notwithstanding anything to the contrary contained in the Subordinated Loan Documents, Subordinated Lenders shall not, without the prior written consent of Senior Agent, agree to any amendment, modification or supplement to the Subordinated Loan Documents, other than amendments to the price at, or terms upon which, Subordinated Lenders may convert Subordinated Loans into Conversion Shares. Nothing herein, including the provisions of this Agreement pertaining to subordination of liens on the Collateral, shall be construed to imply Senior Agent's or Senior Lenders' consent to any Subordinated Loan Document which grants a lien upon any of the Collateral (other than the Subordinated Lender Lien).

**4. Waiver of Certain Rights by Subordinated Lender.**

**4.1. Marshaling; Subrogation.** Each Subordinated Lender hereby waives any rights it may have under applicable law to assert the doctrine of marshaling or to otherwise require Senior Agent or Senior Lenders to marshal any property of any Credit Party or any guarantor of the Senior Loans for the benefit of any Subordinated Lender. Each Subordinated Lender hereby subordinates the benefits, if any, of any statutory or common law rule that may permit a subordinating creditor to assert any defenses of a surety or guarantor until the Senior Loans have been Paid in Full. Each Subordinated Lender agrees that it will not assert such defenses or rights until the Senior Loans have been Paid in Full.

**4.2. Rights Relating to Senior Agent's Actions with respect to the Collateral.** Each Subordinated Lender hereby waives, to the extent permitted by applicable law, any rights which it may have to enjoin or otherwise obtain a judicial or administrative order preventing Senior Agent from taking, or refraining from taking, any action with respect to all or any part of the Collateral. Without limitation of the foregoing, each Subordinated Lender hereby agrees (a) that it has no right to direct or object to the manner in which Senior Agent applies the proceeds of the Collateral resulting from the exercise by Senior Agent of rights and remedies under the Senior Loan Documents to the Senior Loans, and (b) that Senior Agent has not assumed any obligation to act as the agent for any Subordinated Lender with respect to the Collateral.

**4.3. Rights Relating to Disclosures.** Each Subordinated Lender hereby agrees that Senior Lenders has not assumed any obligation or duty to disclose information regarding any Credit Party or the Senior Loans to any Subordinated Lender, and Senior Lenders shall have no special or fiduciary relationship to any Subordinated Lender. Each Subordinated Lender hereby fully waives and releases Senior Lenders from any affirmative disclosures which may be required of Senior Lenders under applicable law.

**5. Subordinated Lenders Purchase Option.**

**5.1. Purchase Option.** If (a) a Senior Loan Payment Default occurs, (b) a Senior Loan Covenant Default occurs and is not cured or waived within 10 days after such occurrence (as evidenced by a written waiver from Senior Agent to Borrower or written confirmation of cure from

Senior Agent to Borrower or Subordinated Lender Representative), (c) all or any portion of the Senior Loans are accelerated pursuant to any Senior Loan Document, (d) a Subordinated Loan Default occurs and is continuing and there is not any Standstill Period or Blockage Period in effect or (e) any Credit Party becomes a debtor in any Proceeding, (each a "Purchase Event"), then the Subordinated Lenders may thereafter purchase all, but not less than all, of the Senior Loans (the "Purchase Obligations") for the Purchase Price, pursuant to an assignment in accordance with the assignment provisions of the Senior Loan Agreement, (i) whereby the Subordinated Lenders assume any remaining funding commitments and obligations of Senior Lenders under the Senior Loan Documents and (ii) each Senior Lender retains all rights to indemnification provided in the relevant Senior Loan Documents for all claims and other amounts relating to facts and circumstances relating to such Senior Lender's holdings of the Senior Loans (except to the extent such claims and other amounts were included in the Purchase Price), regardless of any later amendment, modification or waiver of any indemnification provisions under the Senior Loan Documents or termination of any of the Senior Loan Documents. Notwithstanding anything in the Senior Loan Documents to the contrary, no consent of any Credit Party to such purchase will be required.

## 5.2 **Purchase Notice.**

(a) The Subordinated Lenders desiring to purchase all of the Purchase Obligations (the "**Purchasing Lenders**") will deliver a written notice (the "**Purchase Notice**") to the Senior Agent that (1) is signed by the Purchasing Lenders, (2) states that it is a Purchase Notice under this Section 5, (3) states that each Purchasing Lender is irrevocably electing to purchase, in accordance with this Section 5, the percentage of all of the Purchase Obligations stated in the Purchase Notice for that Purchasing Lender, which percentages must aggregate exactly 100% for all Purchasing Lenders, (4) contains a representation and warranty by each Purchasing Lender that the Purchase Notice conforms with the Subordinated Loan Documents and any other binding agreement among the Subordinated Lenders, and (5) designates a purchase date (the "**Purchase Date**") on which the purchase will occur, that is at least 5 but not more than 10 Business Days after the Senior Agent's receipt of the Purchase Notice. A Purchase Notice will be ineffective if it is received by the Senior Agent after the occurrence giving rise to the Purchase Event is waived, cured, or otherwise ceases to exist.

(b) Upon the Senior Agent's receipt of an effective Purchase Notice conforming to this Section 5.2, the Purchasing Lenders will be irrevocably obligated to purchase, and the Senior Lenders will be irrevocably obligated to sell, the Senior Loans in accordance with and subject to this Section 5. If so instructed by the Subordinated Lenders in the Purchase Notice, the Senior Lenders shall not complete any Enforcement Action (other than (1) the exercise of control over any Credit Party's deposit or securities accounts, (2) the collection of proceeds of accounts and payment intangibles, and (3) Enforcement Actions taken under circumstances that the Senior Agent reasonably believes render necessary or appropriate an Enforcement Action to prevent or mitigate the destruction of, physical harm to, impairment of or decrease in value of the Collateral or the rights and interests of the Senior Lenders therein (including without limitation any loss of priority of the Liens of the Senior Lenders), as long as the purchase and sale of the Senior Loans provided for in this Section 5 shall have closed within 10 Business Days of the Subordinated Lender's delivery of a Purchase Notice to the Senior Lenders and the Senior Lenders shall have received payment in full of the Senior Loans as provided for in Section 5.3 within such 10 Business Day period.

## 5.3 **Purchase Price.** The purchase price ("**Purchase Price**") for the Purchase Obligations will equal the sum of, as certified to the Purchasing Lenders by the Senior Agent on behalf of the Senior Lenders,

(a) the principal amount of all loans, advances, or similar extensions of credit included in the Purchase Obligations, and all accrued and unpaid fees and interest thereon through the

Purchase Date (including any prepayment penalties or premiums, final payment fees and breakage costs that would be required to be paid to the Senior Lenders if the Senior Loans were prepaid on the Purchase Date), (b) all accrued and unpaid fees, expenses, indemnities, and other amounts owed to the Senior Lenders under the Senior Loan Documents on the Purchase Date, and (c) amounts according to the good faith estimate of the Senior Agent of contingent obligations in respect of claims which are known to the Senior Agent or Senior Lenders.

**5.4 Purchase Closing.** On the Purchase Date, (a) the Purchasing Lenders will execute and deliver an assignment agreement in accordance with Section 5.1, (b) the Purchasing Lenders will pay the Purchase Price to Senior Agent by wire transfer of immediately available funds, and (c) each of the Purchasing Lenders will execute and deliver to the Senior Agent a waiver and release of, and covenant not to sue in respect of, all claims arising out of this Agreement, the relationship between the Senior Lenders and the Subordinated Lenders in connection with Senior Loan Documents and the Subordinated Loan Documents, and the transactions contemplated hereby as a result of exercising the purchase option contemplated by this Section 5.

**5.5 Actions After Purchase Closing.** Promptly after the closing of the purchase of all Purchase Obligations, the Senior Agent will distribute the Purchase Price to the Senior Lenders in accordance with the terms of the Senior Loan Documents.

**5.6 No Recourse or Warranties; Defaulting Creditors.**

(a) The Senior Lenders will be entitled to rely on the statements, representations, and warranties in the Purchase Notice without investigation, even if the Senior Lenders are notified that any such statement, representation, or warranty is not or may not be true.

(b) The purchase and sale of the Purchase Obligations under this Section 5 will be without recourse and without any representation or warranty whatsoever by the Senior Lenders, except that the Senior Lenders shall represent and warrant that on the Purchase Date, immediately before giving effect to the purchase, the Senior Lenders own the Purchase Obligations free and clear of all Liens.

(c) The obligations of the Senior Lenders to sell their respective Purchase Obligations under this Section 5 are several and not joint and several. If a Senior Lender breaches its obligation to sell its Purchase Obligations under this Section 5 (a "Defaulting Creditor"), no other Senior Lender will be obligated to purchase the Defaulting Creditor's Purchase Obligations for resale to the Subordinated Lenders. A Senior Lender that complies with this Section 5 will not be in default of this Agreement or otherwise be deemed liable for any action or inaction of any Defaulting Creditor.

(d) Each Credit Party hereby consents to any assignment effected to one or more Purchasing Lenders pursuant to this Section 5.

**6. Construction.** The terms of this Agreement were negotiated among business persons sophisticated in the area of business finance, and accordingly, in construing the terms of this Agreement, no rule or law which would require that this instrument be construed against the party who drafted this instrument shall be given any force or effect.

**7. Modification of this Agreement.** Any modification or waiver of any provision of this Agreement, or any consent to any departure by any party from the terms hereof, shall not be effective in any event unless the same is in writing and signed by Senior Agent and each Subordinated Lender to be



bound thereby, and then such modification, waiver or consent shall be effective only in the specific instance and for the specific purpose given. Any notice to or demand on any party hereto in any event not specifically required hereunder shall not entitle the party receiving such notice or demand to any other or further notice or demand in the same, similar or other circumstances unless specifically required hereunder.

8. **Further Assurances.** Each party to this Agreement promptly will execute and deliver such further instruments and agreements and do such further acts and things as may be reasonably requested in writing by any other party hereto that may be necessary or desirable in order to effect fully the purposes of this Agreement.

9. **Continuing Agreement.** This Agreement is a continuing agreement and will remain in full force and effect until all of the obligations under the Senior Loan Documents have been Paid in Full. Notwithstanding the preceding sentence, this Agreement will continue to be effective or will be reinstated, as the case may be, if at any time payment of all or any part of the Senior Loan Documents or the obligations thereunder is rescinded or must otherwise be returned by Senior Agent and/or Senior Lenders upon insolvency, bankruptcy, or reorganization of any Credit Party or otherwise, all as though such payment had not been made.

10. **Notices.** Any notice or other communication required or permitted under this Agreement shall be in writing and personally delivered, mailed by registered or certified mail (return receipt requested and postage prepaid), sent by facsimile (with a confirming copy sent by regular mail), or sent by prepaid overnight courier service, and addressed to the relevant party at its address set forth below, or at such other address as such party may, by written notice, designate as its address for purposes of notice under this Agreement:

If to Senior Lenders, to Senior Agent at:

MidCap Financial Trust  
c/o MidCap Financial Services, LLC, as servicer  
7255 Woodmont Ave, Suite 200  
Bethesda, MD 20814  
Attn: Account Manager for Mela Sciences transaction  
Facsimile: 301-941-1450  
Email: [notices@midcapfinancial.com](mailto:notices@midcapfinancial.com)

With a copy to:

MidCap Financial Trust  
c/o MidCap Financial Services, LLC, as servicer  
7255 Woodmont Ave, Suite 200  
Bethesda, MD 20814  
Attn: Legal  
Facsimile: 301-941-1450  
Email: [legalnotices@midcapfinancial.com](mailto:legalnotices@midcapfinancial.com)

If to Borrower or any other Credit Party, at:

MELA Sciences, Inc.  
100 Lakeside Drive Suite 100  
Horsham, PA 19044  
Attention: Christina Allgeier, Chief Financial Officer  
Fax: (215) 619-3209  
E-Mail: callgeier@melasciences.com

If to the Subordinated Lender Representative, at:

Broadfin Capital, LLC  
300 Park Avenue, 25<sup>th</sup> Floor  
New York, New York 10022

With a copy to:

Goodwin Procter LLP  
53 State Street  
Boston, MA 02109-2802  
Fax: 617-523-1231  
Attn: Robert Puopolo, Esq.

If mailed, notice shall be deemed to be given five (5) days after being sent, and if sent by personal delivery, facsimile or prepaid courier, notice shall be deemed to be given when delivered.

**11. Successors and Assigns.** This Agreement shall inure to the benefit of, and shall be binding upon, the respective successors and assigns of Senior Lenders, Subordinated Lenders and the Credit Parties; *provided*, however, that no Subordinated Lender nor any Credit Party may assign this Agreement in whole or in part without the prior written consent of Senior Agent, other than transfers by a Subordinated Lender made in compliance with Section 2.8. Senior Lenders may, from time to time, without notice to any Subordinated Lender, assign or transfer any or all of the Senior Loans or any interest therein to any Person and, notwithstanding any such assignment or transfer, or any subsequent assignment or transfer, the Senior Loans shall, subject to the terms hereof, be and remain the Senior Loans for purposes of this Agreement, and every permitted assignee or transferee of any of the Senior Loans or of any interest therein shall, to the extent of the interest of such permitted assignee or transferee in the Senior Loans, be entitled to rely upon the subordination provided under this Agreement and shall be entitled to enforce the terms and provisions hereof to the same extent as if such assignee or transferee were initially a party hereto. This Agreement is not for the benefit of the Borrower or any guarantor of the Senior Loans. Each Subordinated Lender further agrees that if the Borrower is in the process of refinancing any portion of the Senior Loans with a new lender, and if Senior Agent makes a request of the Subordinated Lenders, each Subordinated Lender agrees to enter into a new subordination agreement with the new lender on substantially the same terms and conditions of this Agreement.

**12. No Waiver or Novation.** No waiver shall be deemed to have been made by any party to this Agreement of any of its rights under this Agreement unless the same shall be in writing and duly signed by its duly authorized officers, and each waiver, if any, shall be a waiver only with respect to the specific instance involved and shall in no way impair the rights of any party to this Agreement in any other respect at any time. No executory agreement shall be effective to change, modify or to discharge, in

whole or in part, this Agreement, unless such executory agreement is in writing and duly signed by the duly authorized officers of each party to this Agreement.

13. **CONSENT TO JURISDICTION.** EACH SUBORDINATED LENDER AND EACH OF THE CREDIT PARTIES HEREBY CONSENTS TO THE JURISDICTION OF ANY STATE OR FEDERAL COURT LOCATED WITHIN THE STATE OF MARYLAND AND IRREVOCABLY AGREES THAT, SUBJECT TO SENIOR LENDERS' ELECTION, ALL ACTIONS OR PROCEEDINGS ARISING OUT OF OR RELATING TO THIS AGREEMENT SHALL BE LITIGATED IN SUCH COURTS. EACH SUBORDINATED LENDER AND EACH OF THE CREDIT PARTIES EXPRESSLY SUBMITS AND CONSENTS TO THE JURISDICTION OF THE AFORESAID COURTS AND WAIVES ANY DEFENSE OF FORUM NON CONVENIENS. EACH SUBORDINATED LENDER AND EACH OF THE CREDIT PARTIES HEREBY WAIVES PERSONAL SERVICE OF ANY AND ALL PROCESS AND AGREES THAT ALL SUCH SERVICE OF PROCESS MAY BE MADE UPON IT BY CERTIFIED OR REGISTERED MAIL, RETURN RECEIPT REQUESTED, ADDRESSED TO EACH SUBORDINATED LENDER AND EACH OF THE CREDIT PARTIES AT THEIR RESPECTIVE ADDRESSES SET FORTH IN THIS AGREEMENT AND SERVICE SO MADE SHALL BE COMPLETE TEN (10) DAYS AFTER THE SAME HAS BEEN POSTED.

14. **WAIVER OF JURY TRIAL.** EACH SUBORDINATED LENDER, EACH OF THE CREDIT PARTIES AND SENIOR LENDERS HEREBY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THIS AGREEMENT, ANY OF THE SUBORDINATED LOAN DOCUMENTS OR ANY OF THE SENIOR LOAN DOCUMENTS. EACH SUBORDINATED LENDER, EACH OF THE CREDIT PARTIES AND SENIOR LENDERS ACKNOWLEDGE THAT THIS WAIVER IS A MATERIAL INDUCEMENT TO ENTER INTO A BUSINESS RELATIONSHIP, THAT EACH HAS RELIED ON THE WAIVER IN ENTERING INTO THIS AGREEMENT AND THE SENIOR LOAN DOCUMENTS AND THAT EACH WILL CONTINUE TO RELY ON THE WAIVER IN THEIR RELATED FUTURE DEALINGS. EACH SUBORDINATED LENDER, EACH OF THE CREDIT PARTIES AND SENIOR LENDERS WARRANTS AND REPRESENTS THAT EACH HAS HAD THE OPPORTUNITY OF REVIEWING THIS JURY WAIVER WITH LEGAL COUNSEL, AND THAT EACH KNOWINGLY AND VOLUNTARILY WAIVES ITS JURY TRIAL RIGHTS.

15. **Miscellaneous.**

15.1. **Conflict.** In the event of any conflict between any term, covenant or condition of this Agreement and any term, covenant or condition of any of the Subordinated Loan Documents, the provisions of this Agreement shall control and govern.

15.2. **Headings.** The paragraph headings used in this Agreement are for convenience only and shall not affect the interpretation of any of the provisions hereof.

15.3. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument, but in making proof hereof, it shall only be necessary to produce one such counterpart containing signatures pages signed by each party.

15.4. **Severability.** In the event that any provision of this Agreement is deemed to be invalid, illegal or unenforceable by reason of the operation of any law or by reason of the interpretation placed thereon by any court or governmental authority, the validity, legality and enforceability of the

remaining provisions of this Agreement shall not in any way be affected or impaired thereby, and the affected provision shall be modified to the minimum extent permitted by law so as most fully to achieve the intention of this Agreement.

15.5. **Governing Law.** This Agreement shall be governed by and shall be construed and enforced in accordance with the internal laws of the State of Maryland, without regard to conflicts of law principles.

15.6. **Relative Rights.** This Agreement shall define the relative rights of Senior Lenders and Subordinated Lenders. Nothing in this Agreement shall (a) impair, as between the Credit Parties and Senior Lenders, the obligation of the Credit Parties with respect to the payment of the Senior Loans and the Subordinated Loans in accordance with their respective terms, or (b) affect the relative rights of Senior Lenders or Subordinated Lenders with respect to any other creditors of the Credit Parties.

15.7. **Entire Agreement.** This Agreement (including the documents and instruments referred to herein) constitutes the entire agreement and supersedes all other prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof.

15.8. **Status of Subordinated Loans.** Borrower represents and warrants to the Senior Lenders that (a) the Subordinated Lenders constitute all holders of the Subordinated Debentures, the Subordinated Loan and the Subordinated Lender Lien, (b) the Subordinated Loans are not secured by any collateral other than Collateral that also secures the Senior Loans and (c) no Event of Default, as such term is defined in the applicable Subordinated Loan Documents, has occurred and is continuing or would result under any Subordinated Loan Documents from the execution, delivery and performance of the Senior Loan Documents or this Agreement. Borrower and each Subordinated Lender represent and warrant to the Senior Lenders that (i) there is no indebtedness or guaranty of Borrower or its subsidiaries owed under the Purchase Agreements or any other agreement with the Subordinated Lenders or their affiliates other than as evidenced by the Subordinated Debentures, (ii) there are no liens or security interests granted to the Subordinated Lenders or their affiliates in any assets of the Borrower or its subsidiaries or in any equity interests of the Borrower or its subsidiaries other than the Subordinated Lender Lien granted pursuant to the Subordinated Security Documents, (iii) none of the Subordinated Loans nor any portion thereof are guaranteed by any Credit Party, (iv) there are no agents or representatives that hold the liens or security interests securing the Subordinated Loans on behalf of the Subordinated Lenders and (v) to the knowledge, without any inquiry, of such Subordinated Lender, no Event of Default, as such term is defined in the applicable Subordinated Loan Documents, exists and is continuing.

15.9. **Senior Loan Transaction.** The Subordinated Lenders acknowledge and consent to the terms and conditions of the Senior Loan Documents, the execution, delivery and performance thereof by the Credit Parties, the incurrence of the indebtedness and guaranties contemplated thereby, and the grant of liens and security interests in any and all assets and equity interests of the Borrower and its subsidiaries, in each case notwithstanding anything to the contrary contained in the Subordinated Loan Documents, the 2014 Purchase Agreement, the 2015 Purchase Agreement, and any other document, instrument or agreement to which any of the Subordinated Lenders or its affiliates is a party.

[SIGNATURES APPEAR ON FOLLOWING PAGE]

IN WITNESS WHEREOF, intending to be legally bound, and intending that this Agreement constitute an instrument executed and delivered under seal, the parties have caused this Agreement to be executed under seal as of the date first written above.

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-

**AGENT:** **SENIOR**  
**FINANCIAL TRUST** **MIDCAP**  
Delaware statutory trust, as Agent for Senior Lenders<sup>a</sup>

By: Apollo  
Capital Management, L.P,  
its investment manager

By: Apollo  
Capital Management GP, LLC,  
its general partner

By: /s/ Maurice Amsellem (SEAL)  
Name: Maurice Amsellem  
Title: Authorized Signatory



**SUBORDINATED LENDERS:**

**BROADFIN HEALTHCARE MASTER FUND, LTD.**

By: /s/ Kevin Kotler (SEAL)  
Name: Kevin Kotler  
Title: Director

**SABBY HEALTHCARE MASTER FUND, LTD.,**

By: /s/ Robert Grunstein (SEAL)  
Name: Robert Grunstein  
Title: COO

**SABBY VOLATILITY WARRANT MASTER FUND, LTD.**

By: /s/ Robert Grunstein (SEAL)  
Name: Robert Grunstein  
Title: COO

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Acknowledged and agreed:

**BORROWER:**

MELA SCIENCES, INC.,  
a Delaware corporation

By: /s/ Michael Stewart (SEAL)  
Name: Michael Stewart  
Title: President & Chief Executive Officer

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## OMNIBUS AMENDMENT TO 2014 TRANSACTION DOCUMENTS AND 2015 TRANSACTION DOCUMENTS

This Omnibus Amendment to 2014 Transaction Documents and 2015 Transaction Documents (this "Amendment") dated as of December 30, 2015 (the "Effective Date"), is entered into by and among (i) MELA Sciences, Inc., a Delaware corporation (the "Company"), (ii) the holders identified on the signature pages hereto (the "2015 Purchasers" and each, a "2015 Purchaser") of (A) the Company's 2.25% Series A Senior Secured Convertible Debentures due June 22, 2020 (the "2015 Series A Debentures"), (B) the Company's 2.25% Series B Unsecured Convertible Debentures due June 22, 2020 (the "2015 Series B Debentures" and together with the 2015 Series A Debentures, the "2015 Debentures"), and (C) the Company's 9% Senior Secured Notes (the "Notes" and, together with the 2015 Debentures, the "2015 Debt Securities"), in each case issued pursuant to that certain Securities Purchase Agreement dated as of June 22, 2015 (as amended, the "Purchase Agreement") entered into by and among, *inter alios*, the Company and the 2015 Purchasers, and (iii) the holders identified on the signature pages hereto (the "2014 Purchasers" and each, a "2014 Purchaser" and, the 2014 Purchasers together with the 2015 Purchasers, the "Purchasers") of the Company's 4% Senior Secured Convertible Debentures due July 24, 2019 (the "2014 Debentures" and, together with the 2015 Debentures, the "Debentures"), issued pursuant to that certain Securities Purchase Agreement dated as of July 21, 2014 (as amended, the "2014 Purchase Agreement" and, together with the 2015 Purchase Agreement, the "Purchase Agreements") entered into by and among, *inter alios*, the Company and the 2014 Purchasers.

1. Purpose. In connection with a Credit and Security Agreement dated as of the date of this Amendment (the "Senior Loan Agreement") among, *inter alios*, the Company and Midcap Financial Trust, a Delaware statutory trust (the "Senior Agent"), the proceeds of the loan advanced under which are being used, in part, to repay in full the Notes, the Company has requested that the Purchasers agree to amend, as set forth herein, (i) each of the Transaction Documents (as such term is defined in the 2014 Purchase Agreement, being hereinafter referred to as the "2014 Transaction Documents"), and (ii) each of the Transaction Documents (as such term is defined in the 2015 Purchase Agreement, being hereinafter referred to as the "2015 Transaction Documents" and, together with the 2014 Transaction Documents, the "Transaction Documents"), and each of the Purchasers agrees to such amendments on and subject to the terms and conditions set forth herein and in reliance upon the representations and warranties of the Company, and the other purchasers set forth herein.

2. Amendments to 2014 Transaction Documents.

(a) The 2014 Purchase Agreement is hereby amended as follows:

i The following is inserted at the top of the first page thereof:

"THIS AGREEMENT IS SUBJECT TO THAT CERTAIN SUBORDINATION AGREEMENT AMONG, *INTER ALIOS*, THE COMPANY AND MIDCAP FINANCIAL TRUST. IN THE EVENT OF ANY CONFLICT BETWEEN THE TERMS OF THE SUBORDINATION AGREEMENT AND THIS AGREEMENT, THE TERMS OF THE SUBORDINATION AGREEMENT SHALL CONTROL."



ii The following new definitions are inserted into Section 1.1 therein, each in its alphabetical order:

"IC Subordination Agreement" means that certain Subordination Agreement dated on or about December 30, 2015 made by and among the Company, Intracoastal Capital, LLC, and Midcap Financial Trust.

"Subordination Agreement" means that certain Subordination Agreement dated on or about December 30, 2015 made by and among the Company, Broadfin Healthcare Master Fund, Ltd., Sabby Healthcare Master Fund, Ltd., Sabby Volatility Warrant Master Fund, Ltd., and Midcap Financial Trust.

iii The definition of "Trading Market" in Section 1.1 therein is amended and restated as follows:

"Trading Market" means any of the following markets or exchanges on which the Common Stock is listed or quoted for trading on the date in question: the NYSE MKT, the Nasdaq Capital Market, the Nasdaq Global Market, the Nasdaq Global Select Market, the New York Stock Exchange, the Over-the-Counter Bulletin Board, the OTCBX or the OTCBQ (or any successor to any of the foregoing).

iv Sub-section 4.21(f) therein is amended and restated as follows:

(f) Transfers. Except as expressly permitted by this Agreement or by the Senior Loan Documents (as defined in the Subordination Agreement), the Company and its Subsidiaries will not transfer or permit to be transferred, voluntarily or by operation of law, any interest in the Collateral, the Subsidiaries or assets of the Company or its Subsidiaries. The Company or its Subsidiaries may create Subsidiaries so long as the Company and its Subsidiaries maintain the ownership and distributable equity interest percentages of not less than 100% as to new Subsidiaries and provides notice to the Major Investors thereof and delivers such additional assignments or amendments to the Security Documents satisfactory to the Major Investors covering such interests.

v Sub-section 4.21(g) therein is amended and restated as follows:

(g) Other Agreements. The Company and its Subsidiaries will not enter into any agreement that limits or restricts the ability of the Company or the Subsidiaries to comply with the terms of this Agreement and the other Transaction Documents, other than the Subordination Agreement, the Senior Loan Documents (as defined in the Subordination Agreement and the IC Subordination Agreement).

(b) The Security Agreement (as defined in the 2014 Purchase Agreement) is hereby amended as follows:

i The following is inserted at the top of the first page thereof:

"THIS AGREEMENT IS SUBJECT TO THAT CERTAIN SUBORDINATION AGREEMENT AMONG, *INTER ALIOS*, THE COMPANY AND MIDCAP FINANCIAL TRUST. IN THE

EVENT OF ANY CONFLICT BETWEEN THE TERMS OF THE SUBORDINATION AGREEMENT AND THIS AGREEMENT, THE TERMS OF THE SUBORDINATION AGREEMENT SHALL CONTROL."

ii Sub-section 4(c) therein is amended and restated as follows:

(c) Except for Permitted Liens, each of the Debtors is the sole owner of the Collateral it purports to own (except for non-exclusive licenses granted by any Debtor in the ordinary course of business), free and clear of any Liens and is fully authorized to grant the Security Interests. Except as set forth on Schedule 4.(c), attached hereto, there is not on file in any governmental or regulatory authority, agency or recording office an effective financing statement, security agreement, license or transfer or any notice of any of the foregoing (other than those that will be filed in favor of the Secured Parties pursuant to this Agreement) covering or affecting any of the Collateral, other than in respect of Senior Loans. Except as set forth on Schedule 4.(c), attached hereto and except pursuant to this Agreement, as long as this Agreement shall be in effect, the Debtors shall not execute and shall not knowingly permit to be on file in any such office or agency any other financing statement or other document or instrument (except to the extent filed or recorded in favor of the Secured Parties pursuant to the terms of this Agreement), other than in respect of Senior Loans.

(c) Each of the 2014 Debentures is hereby amended as follows:

i The term "Maturity Date" in each of the 2014 Debentures is amended to June 30, 2021.

ii The first page of each of the 2014 Debentures is amended by inserting at the top thereof the following:

"THIS DEBENTURE IS SUBJECT TO THAT CERTAIN SUBORDINATION AGREEMENT AMONG, *INTER ALIOS*, THE HOLDER AND MIDCAP FINANCIAL TRUST. IN THE EVENT OF ANY CONFLICT BETWEEN THE TERMS OF THE SUBORDINATION AGREEMENT AND THIS DEBENTURE, THE TERMS OF THE SUBORDINATION AGREEMENT SHALL CONTROL."

iii Section 1 of each of the 2014 Debentures is amended by deleting the definition of "Permitted Indebtedness" therein and replacing such definition with the following:

"Permitted Indebtedness" means (a) the indebtedness evidenced by the Debentures, (b) the Indebtedness set forth on Schedule 3.1(aa) attached to the Purchase Agreement, (c) lease obligations and purchase money indebtedness of up to \$150,000, in the aggregate per year, incurred in connection with the acquisition of capital assets and lease obligations with respect to newly acquired or leased assets, (d) other indebtedness incurred in the ordinary course of business up to \$250,000 at any time outstanding, and (e) the Senior Loans (as defined in the Subordination Agreement).

iv Section 1 of each of the 2014 Debentures is amended by deleting the definition of "Permitted Liens" therein and replacing such definition with the following:

"Permitted Lien" means the individual and collective reference to the following: (a) Liens for taxes, assessments and other governmental charges or levies not yet due or Liens for taxes, assessments and other governmental charges or levies being contested in good faith and by appropriate proceedings for which adequate reserves (in the good faith judgment of the management of the Company) have been established in accordance with GAAP, (b) Liens imposed by law which were incurred in the ordinary course of the Company's business, such as carriers', warehousemen's and mechanics' Liens, statutory landlords' Liens, and other similar Liens arising in the ordinary course of the Company's business, and which (x) do not individually or in the aggregate materially detract from the value of such property or assets or materially impair the use thereof in the operation of the business of the Company and its consolidated Subsidiaries or (y) are being contested in good faith by appropriate proceedings, which proceedings have the effect of preventing for the foreseeable future the forfeiture or sale of the property or asset subject to such Lien, (c) Liens incurred in connection with Permitted Indebtedness under clauses (a), (b) and (e) thereunder, and (d) Liens incurred in connection with Permitted Indebtedness under clause (c) thereunder, provided that such Liens are not secured by assets of the Company or its Subsidiaries other than the assets so acquired or leased.

v Section 7 of each of the 2014 Debentures is amended by deleting sub-section (e) therein and replacing it with the following:

"e) except for regularly scheduled principal and interest payments as such terms are in effect as of the Original Issue Date or otherwise permitted hereunder during periods when no Event of Default exists or would be result from the making of such payment, repay, repurchase or offer to repay, repurchase or otherwise acquire any Indebtedness other than (i) the Debentures, repaid on a pro-rata basis, or (ii) Senior Loans;

vi Section 8 of each of the 2014 Debentures is amended by deleting sub-section (a)(vi) therein and replacing it with the following:

"(vi) the Company or any Subsidiary shall default on any of its obligations under any mortgage, credit agreement or other facility, indenture agreement, factoring agreement or other instrument under which there may be issued, or by which there may be secured or evidenced, any indebtedness for borrowed money or money due under any long term leasing or factoring arrangement, other than Senior Loans, that (a) involves an obligation greater than \$150,000, whether such; indebtedness now exists or shall hereafter be created, and (b) results in such indebtedness becoming or being declared due and payable prior to the date on which it would otherwise become due and payable;

3. Amendments to 2015 Transaction Documents.

(a) The 2015 Purchase Agreement is hereby amended as follows:

i The following is inserted at the top of the first page thereof:

"THIS AGREEMENT IS SUBJECT TO THAT CERTAIN SUBORDINATION AGREEMENT AMONG, *INTER ALIOS*, THE COMPANY AND MIDCAP FINANCIAL TRUST. IN THE EVENT OF ANY CONFLICT BETWEEN THE TERMS OF THE SUBORDINATION

AGREEMENT AND THIS AGREEMENT, THE TERMS OF THE SUBORDINATION AGREEMENT SHALL CONTROL."

ii The following new definitions are inserted into Section 1.1 therein, each in its alphabetical order:

"IC Subordination Agreement" means that certain Subordination Agreement dated on or about December 30, 2015 made by and among the Company, Intracoastal Capital, LLC, and Midcap Financial Trust.

"Subordination Agreement" means that certain Subordination Agreement dated on or about December 30, 2015 made by and among the Company, Broadfin Healthcare Master Fund, Ltd., Sabby Healthcare Master Fund, Ltd., Sabby Volatility Warrant Master Fund, Ltd., and Midcap Financial Trust.

iii The definition of "Trading Market" in Section 1.1 therein is amended and restated as follows:

"Trading Market" means any of the following markets or exchanges on which the Common Stock is listed or quoted for trading on the date in question: the NYSE MKT, the Nasdaq Capital Market, the Nasdaq Global Market, the Nasdaq Global Select Market, the New York Stock Exchange, the Over-the-Counter Bulletin Board, the OTCBX or the OTCBQ (or any successor to any of the foregoing).

iv Sub-section 4.21(f) therein is amended and restated as follows:

(f) Transfers. Except as expressly permitted by this Agreement or by the Senior Loan Documents (as defined in the Subordination Agreement), the Company and its Subsidiaries will not transfer or permit to be transferred, voluntarily or by operation of law, any interest in the Collateral, the Subsidiaries or assets of the Company or its Subsidiaries. The Company or its Subsidiaries may create Subsidiaries so long as the Company and its Subsidiaries maintain the ownership and distributable equity interest percentages of not less than 100% as to new Subsidiaries and provides notice to the Major Investors thereof and delivers such additional assignments or amendments to the Security Documents satisfactory to the Major Investors covering such interests.

v Sub-section 4.21(g) therein is amended and restated as follows:

(g) Other Agreements. The Company and its Subsidiaries will not enter into any agreement that limits or restricts the ability of the Company or the Subsidiaries to comply with the terms of this Agreement and the other Transaction Documents, other than the Subordination Agreement, the Senior Loan Documents (as defined in the Subordination Agreement and the IC Subordination Agreement).

(b) The Security Agreement (as defined in the 2015 Purchase Agreement) is hereby amended as follows:

i The following is inserted at the top of the first page thereof:

"THIS AGREEMENT IS SUBJECT TO THAT CERTAIN SUBORDINATION AGREEMENT AMONG, *INTER ALIOS*, THE COMPANY AND MIDCAP FINANCIAL TRUST. IN THE EVENT OF ANY CONFLICT BETWEEN THE TERMS OF THE SUBORDINATION AGREEMENT AND THIS AGREEMENT, THE TERMS OF THE SUBORDINATION AGREEMENT SHALL CONTROL."

ii Sub-section 4(c) therein is amended and restated as follows:

(c) Except for Permitted Liens, each of the Debtors is the sole owner of the Collateral it purports to own (except for non-exclusive licenses granted by any Debtor in the ordinary course of business), free and clear of any Liens and is fully authorized to grant the Security Interests. Except as set forth on Schedule 4.(c), attached hereto, there is not on file in any governmental or regulatory authority, agency or recording office an effective financing statement, security agreement, license or transfer or any notice of any of the foregoing (other than those that will be filed in favor of the Secured Parties pursuant to this Agreement) covering or affecting any of the Collateral, other than in respect of Senior Loans. Except as set forth on Schedule 4.(c), attached hereto and except pursuant to this Agreement, as long as this Agreement shall be in effect, the Debtors shall not execute and shall not knowingly permit to be on file in any such office or agency any other financing statement or other document or instrument (except to the extent filed or recorded in favor of the Secured Parties pursuant to the terms of this Agreement), other than in respect of Senior Loans.

(c) Each of the 2015 Debentures is hereby amended as follows:

i The term "Maturity Date" in each of the 2015 Debentures is amended to June 30, 2021.

ii The first page of each of the 2015 Debentures is amended by inserting at the top thereof the following:

"THIS DEBENTURE IS SUBJECT TO THAT CERTAIN SUBORDINATION AGREEMENT AMONG, *INTER ALIOS*, THE HOLDER AND MIDCAP FINANCIAL TRUST. IN THE EVENT OF ANY CONFLICT BETWEEN THE TERMS OF THE SUBORDINATION AGREEMENT AND THIS DEBENTURE, THE TERMS OF THE SUBORDINATION AGREEMENT SHALL CONTROL."

iii Section 1 of each of the 2015 Debentures is amended by deleting the definition of "Permitted Indebtedness" therein and replacing such definition with the following:

"Permitted Indebtedness" means (a) the indebtedness evidenced by the Series A Debentures and the Notes, (b) the Indebtedness existing on the Original Issue Date and set forth on Schedule 3.1(aa) attached to the Purchase Agreement, (c) the indebtedness evidenced by the Series B Debentures, (d) lease obligations and purchase money indebtedness of up to \$150,000, in the aggregate per year, incurred in connection with the acquisition of capital assets and lease obligations with respect to newly acquired or leased assets, (e) other indebtedness incurred in the ordinary course of business up to \$250,000 at any time outstanding, and (f) the Senior Loans (as defined in the Purchase Agreement).

iv Section 1 of each of the 2015 Debentures is amended by deleting the definition of "Permitted Lien" therein and replacing such definition with the following:

"Permitted Lien" means the individual and collective reference to the following: (a) Liens for taxes, assessments and other governmental charges or levies not yet due or Liens for taxes, assessments and other governmental charges or levies being contested in good faith and by appropriate proceedings for which adequate reserves (in the good faith judgment of the management of the Company) have been established in accordance with GAAP, (b) Liens imposed by law which were incurred in the ordinary course of the Company's business, such as carriers', warehousemen's and mechanics' Liens, statutory landlords' Liens, and other similar Liens arising in the ordinary course of the Company's business, and which (x) do not individually or in the aggregate materially detract from the value of such property or assets or materially impair the use thereof in the operation of the business of the Company and its consolidated Subsidiaries or (y) are being contested in good faith by appropriate proceedings, which proceedings have the effect of preventing for the foreseeable future the forfeiture or sale of the property or asset subject to such Lien, (c) Liens incurred in connection with Permitted Indebtedness under clauses (a), (b) and (f) thereunder, and (d) Liens incurred in connection with Permitted Indebtedness under clause (d) thereunder, provided that such Liens are not secured by assets of the Company or its Subsidiaries other than the assets so acquired or leased.

v Section 7 of each of the 2015 Debentures is amended by deleting sub-section (e) therein and replacing it with the following:

"e) except for regularly scheduled principal and interest payments as such terms are in effect as of the Original Issue Date or otherwise permitted hereunder during periods when no Event of Default exists or would be result from the making of such payment, repay, repurchase or offer to repay, repurchase or otherwise acquire any Indebtedness other than (i) the Debt Securities, repaid on a pro-rata basis, or (ii) Senior Loans;

vi Section 8 of each of the 2015 Debentures is amended by deleting sub-section (a)(vi) therein and replacing it with the following:

"(vi) the Company or any Subsidiary shall default on any of its obligations under any mortgage, credit agreement or other facility, indenture agreement, factoring agreement or other instrument under which there may be issued, or by which there may be secured or evidenced, any indebtedness for borrowed money or money due under any long term leasing or factoring arrangement, other than Senior Loans, that (a) involves an obligation greater than \$150,000, whether such; indebtedness now exists or shall hereafter be created, and (b) results in such indebtedness becoming or being declared due and payable prior to the date on which it would otherwise become due and payable;

4. Representations and Warranties.

(a) The Company represents and warrants to the Purchasers that (i) the Purchasers are the only holders of Debentures registered on the Debenture Register (as defined in the Debentures) as of the date of this Amendment, (ii) there are no debt securities issued by the Company outstanding as of the date of this Amendment other than the Debentures, the Notes and

(b) the Senior Loans (as defined in the Subordination Agreement), (iii) concurrently with the execution of this Amendment, Intracoastal Capital, LLC ("IC"), the Company and Senior Agent are entering into a Subordination Agreement in the form attached hereto as Exhibit A (the "IC Subordination Agreement"), pursuant to which IC is subordinating the 2015 Series B Debentures held by IC on substantially the same terms as Broadfin Healthcare Master Fund Ltd. ("Broadfin HMF"), Sabby Healthcare Master Fund, Ltd. ("Sabby HMF") and Sabby Volatility Warrant Master Fund, Ltd. ("Sabby VWMF" and, together with Sabby HMF, "Sabby") are subordinating the 2015 Series A Debentures and 2014 Debentures held by them, respectively, pursuant to the Subordination Agreement (as defined the Purchase Agreements after giving effect to this Amendment); (iv) according to the Company's share register, as of the date hereof the Purchasers are the only holders of Securities (as such term is defined in each of the Debentures), (v) after giving effect to this Amendment, no Event of Default (as such term is defined in each of the Debentures) exists; (vi) the Company has performed and complied with all covenants, agreements, obligations and conditions contained in each of the Purchase Agreements and the other Transaction Documents that are required to be performed or complied with by it; and (vii) no injunction or restraining order is in effect prohibiting the transactions contemplated hereby. The Company acknowledges, confirms and agrees that, as of the date hereof, the Company has no knowledge of any offsets, defenses, claims or counterclaims against any Purchaser with respect to any of the Company's liabilities and obligations to any of the Purchasers under the Transaction Documents.

(c) Each of the Purchasers represents and warrants to the Company that such Purchaser, without having conducted any investigation, does not know of any injunction or restraining order in effect prohibiting such Purchaser from consummating the transactions contemplated hereby.

(d) IC represents and warrants to each of the other Purchasers that (i) neither IC nor any of its Affiliates (as defined in the Purchase Agreements) holds any Debentures or any other debt securities of the Company, except as set forth on the signature pages hereto, and (ii) concurrently with the execution of this Amendment, the Company, IC and Senior Agent are entering into the IC Subordination Agreement.

5. Conditions Precedent to Effectiveness. This Amendment will become effective upon (the "Effective Date"):

- (a) receipt by each of Broadfin HMF and Sabby of counterparts, executed by the Company and each Purchaser, of this Amendment;
- (b) receipt by Broadfin HMF of the amount set forth opposite its name on Schedule A hereto, in repayment of the Note held by Broadfin HMF and for reimbursement of expenses in connection herewith;
- (c) receipt by Sabby HMF of the amount set forth opposite its name on Schedule A hereto, in repayment of the Note held by Sabby HMF; and
- (d) receipt by each of Broadfin HMF and Sabby of:

- i a copy of the IC Subordination agreement, executed by each of IC, Senior Agent and the Company; and
- ii counterparts, executed by the Company and the Senior Agent, of the Subordination Agreement.

6. Consents. Each of the Purchasers hereby consents to (a) repayment of the Notes in accordance with this Amendment, and (b) repayment in full, substantially concurrently with the execution of this Amendment, of the 2014 Debentures held by IC in the amount of \$102,512.04.

7. Miscellaneous. Except as expressly amended herein, all of the terms and conditions of the Transaction Documents remain unchanged and in full force and effect, and each Transaction Document is hereby ratified and confirmed. This Amendment may be executed in counterparts, each of which shall constitute an original but all of which shall together constitute one and the same Amendment. The execution of this Amendment and acceptance of any documents related hereto will not be deemed to be a waiver of any breach, or Event of Default (as such term is defined in each of the Purchase Agreements) under the Transaction Documents, whether or not known to any Purchaser and whether or not existing on the date of this Amendment. Any determination that any provision of this Amendment or any application hereof is invalid, illegal or unenforceable in any respect and in any instance will not affect the validity, legality, or enforceability of such provision in any other instance, or the validity, legality or enforceability of any other provisions of this Amendment. All rights and obligations hereunder, including matters of construction, validity, and performance, will be governed by and construed in accordance with the law of the State of New York, without regard to the conflicts of law provisions of the State of New York or of any other state.

[Signature Pages Follow]



IN WITNESS WHEREOF, the parties have caused this Omnibus Amendment to 2014 Transaction Documents and 2015 Transaction Documents to be duly executed and delivered by their proper and duly authorized representatives as of the date and year first written above.

**COMPANY:**

**MELA SCIENCES, INC.**

By: /s/ Michael R. Stewart  
Michael R. Stewart  
Chief Executive Officer

[SIGNATURE PAGES OF PURCHASERS FOLLOW]

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Name of Investing Entity: BROADFIN HEALTHCARE MASTER FUND, LTD.

Signature of Authorized Signatory of Investing Entity: /s/ Kevin Kotler

Name of Authorized Signatory: Kevin Kotler

Title of Authorized Signatory: Director

Debt Securities held:

2014 Debentures: \$967,458.69

2015 Series A Debentures: \$15,000,000

2015 Series B Debentures: none

Notes: \$5,000,000

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Name of Investing Entity: SABBY HEALTHCARE MASTER FUND, LTD.

Signature of Authorized Signatory of Investing Entity: /s/ Robert Grunstein

Name of Authorized Signatory: Robert Grunstein

Title of Authorized Signatory: COO

Debt Securities held:

2014 Debentures: \$5,600,941.70

2015 Series A Debentures: \$12,000,000

2015 Series B Debentures: none

Notes: \$5,000,000

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Name of Investing Entity: SABBY VOLATILITY WARRANT MASTER FUND, LTD.

Signature of Authorized Signatory of Investing Entity: /s/ Robert Grunstein

Name of Authorized Signatory: Robert Grunstein

Title of Authorized Signatory: COO

Debt Securities held:

2014 Debentures: \$1,505,778.12

2015 Series A Debentures: \$5,000,000

2015 Series B Debentures: none

Notes: none

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Name of Investing Entity: INTRACOASTAL CAPITAL, LLC

Signature of Authorized Signatory of Investing Entity: /s/ Keith Goodman

Name of Authorized Signatory: Keith Goodman

Title of Authorized Signatory: Authorized Signatory

Debt Securities held:

2014 Debentures: \$102,512.04

2015 Series A Debentures: none

2015 Series B Debentures: \$465,473.75

Notes: none

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Schedule A

Note Payoff Amounts

1. Broadfin HMF

Note Repayment:	\$	5,123,333.33
Expense Reimbursement:	\$	35,000.00
Total:	\$	5,158,333.33

plus \$1,666.67 per diem interest if paid later than December 30, 2015.

UBS AG Stamford Branch  
a/c UBS Securities LLC HFS Intl. Settl.  
ABA 026007993  
Account 101- WA-797414-000  
Ref: 750-01147 Broadfin Healthcare Master Fund, Ltd.

2. Sabby

Note Repayment:	\$	5,123,333.33
Total:	\$	5,123,333.33

plus \$1,666.67 per diem interest if paid later than December 30, 2015.

[!]

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Exhibit A

IC Subordination Agreement

**STRATA Skin Sciences, Inc. Announces Refinancing of \$10.0 Million of Short-Term Debt**

**HORSHAM, Pennsylvania – January 5, 2016** – (NASDAQ:SSKN) On December 30, 2015, STRATA Skin Sciences, Inc. ("STRATA Skin") entered into a \$12.0 million Credit and Security Agreement (the "Agreement") and related financing documents with a group led by MidCap Financial Trust ("MidCap"). Under the Agreement, the credit facility may be drawn down in two tranches, the first of which was drawn for \$10.5 million on December 30, 2015. The proceeds of this first tranche were used to repay \$10.0 million principal amount of short-term senior secured promissory notes, plus associated interest, loan fees and expenses. The second tranche may be drawn after January 1, 2016. The Company's obligations under the credit facility are secured by a first priority lien on all of STRATA Skin's assets. Other financing documents included subordination agreements and other amendments with STRATA Skin's existing debenture holders from its 2014 and 2015 financings. In connection with the repayment of the short-term notes, STRATA Skin also repurchased a debenture from its July 2014 financing for approximately \$118,000 from an unrelated party.

The credit facility bears an interest rate of LIBOR plus 8.25%, which was 8.75% as of December 30, 2015. The loan period is 60 months and is payable as interest only for the first 18 months. Thereafter the loans are amortized on a straight-line basis and due in full on the maturity date, which is 60 months from the draw of the initial tranche, December 30, 2020.

In connection with entering into the credit facility, STRATA Skin issued warrants to the lenders to purchase an aggregate of 650,442 shares of the Company's common stock at an exercise price of \$1.13 per share, which equals the volume weighted average price ("VWAP") for the ten-day period prior to the closing date. The warrants are exercisable for five years from the date of issuance. Upon drawdown of the second tranche for \$1.5 million, another warrant or warrants will be issued for the aggregate number of shares equal to 7.0% of 1,500,000 divided by the exercise price, which will equal the VWAP for the ten-day period prior to the closing date of the second tranche. The Warrants have not been registered under the Securities Act of 1933, as amended.

**About STRATA Skin Sciences (Formerly MELA Sciences, Inc.)**

STRATA Skin Sciences is a medical technology company focused on the therapeutic and diagnostic dermatology market. Its products include the XTRAC laser and VTRAC excimer lamp systems utilized in the treatment of psoriasis, vitiligo and various other skin conditions; and the MelaFind® system used to assist in the identification and management of melanoma skin cancer.

**Safe Harbor**

This press release includes "forward-looking statements" within the meaning of the Securities Litigation Reform Act of 1995. These statements include but are not limited to the Company's plans, objectives, expectations and intentions and may contain words such as "will," "may," "seeks," and "expects," that suggest future events or trends. These statements, including the Company's ability to generate the anticipated revenue stream, the Company's ability to generate sufficient cash flow to fund the Company's ongoing operations at any time in the future, and the Company's ability to build a leading franchise in medical dermatology, are based on the Company's current expectations and are inherently subject to significant uncertainties and changes in circumstances. Actual results may differ materially from the Company's expectations due to financial, economic, business, competitive, market, regulatory and political factors or conditions affecting the Company and the medical device industry in general, as well as more specific



risks and uncertainties set forth in the Company's SEC reports on Forms 10-Q and 10-K. Given such uncertainties, any or all of these forward-looking statements may prove to be incorrect or unreliable. The Company assumes no duty to update its forward-looking statements and urges investors to carefully review its SEC disclosures available at [www.sec.gov](http://www.sec.gov) and [www.strataskin.com](http://www.strataskin.com).

**CONTACT:**

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Bob Yedid  
LifeSci Advisors, LLC  
646-597-6989  
[Bob@LifeSciAdvisors.com](mailto:Bob@LifeSciAdvisors.com)

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