
**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): **November 14, 2019**

Verastem, Inc.

(Exact Name of Registrant as Specified in its Charter)

Delaware
(State or Other Jurisdiction
of Incorporation)

001-35403
(Commission File Number)

27-3269467
(I.R.S. Employer
Identification No.)

**117 Kendrick Street, Suite 500,
Needham, MA**
(Address of principal
executive offices)

02494
(Zip code)

(Registrant's telephone number, including area code): **(781) 292-4200**
(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))

Securities Registered pursuant to Section 12(b) of the Act:

Title of each class	Trading Symbol(s)	Name of each exchange on which registered
Common stock, \$0.0001 par value per share	VSTM	The Nasdaq Global Market

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (17 CFR §230.405) or Rule 12b-2 of the Securities Exchange Act of 1934. (17 CFR 240.12b-2).

Emerging growth company

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to section 13(a) of the Exchange Act.

Item 1.01 Entry into a Material Definitive Agreement

Indenture

On November 14, 2019, Verastem, Inc. (the “Company”) issued approximately \$62.9 million aggregate principal amount of 5.00% Convertible Senior Second Lien Notes due 2048 (the “Notes”) pursuant to an indenture by and between the Company and Wilmington Trust, National Association, as trustee and collateral agent (the “Indenture”). The Notes were issued upon settlement of previously announced privately negotiated agreements with a limited number of investors who are accredited investors (within the meaning of Rule 501 promulgated under the Securities Act of 1933, as amended (the “Securities Act”)) and/or qualified institutional buyers (as defined in Rule 144A under the Securities Act), pursuant to which such accredited investors and/or qualified institutional buyers exchanged approximately \$114.3 million aggregate principal amount of the Company’s 5.00% Convertible Senior Notes due 2048 (the “Existing Notes”) for the Notes. Following the exchange, the aggregate outstanding principal amount of the Existing Notes is approximately \$35.7 million.

The Notes are the Company’s senior, secured obligations and will be senior in right of payment to the Company’s future indebtedness that is expressly subordinated in right of payment to the Notes, and equal in right of payment with the Company’s existing and future indebtedness that is not so subordinated. The Notes are structurally subordinated to all existing and future indebtedness and other liabilities, including trade payables, and (to the extent the Company is not a holder thereof) preferred equity, if any, of the Company’s subsidiaries. The Notes will pay interest at a rate of 5.00% per year, payable semiannually in arrears on May 1 and November 1 of each year, and will mature on November 1, 2048, unless earlier converted or repurchased. In addition, the Notes will have the terms as described in the Company’s Current Report on Form 8-K filed with the Securities and Exchange Commission on November 12, 2019 (the “Prior Form 8-K”). The information set forth in the Prior Form 8-K is incorporated herein by reference.

Amendment to Credit Facility

On November 14, 2019, the Company entered into an amendment to its existing senior secured credit facility (the “Credit Facility Amendment”) with Hercules Capital, Inc., as agent (in such capacity, the “Agent”) for itself and the other lenders, pursuant to which the Agent consented to (i) the Company’s use of cash to facilitate the exchange transaction described above and (ii) the issuance of the Notes, subject to the liens securing such Notes being subordinated to the liens in favor of the Agent and to the imposition of certain liquidity thresholds and financial covenants.

Each of the foregoing descriptions of the Indenture and the Credit Facility Amendment does not purport to be complete and is qualified in its entirety by reference to the Indenture, the form of 5.00% Convertible Senior Notes due 2048, and the Credit Facility Amendment, which are filed as Exhibits 4.1, 4.2, and 10.1, respectively, to this Current Report on Form 8-K.

Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant

The information set forth under Item 1.01 is incorporated into this Item 2.03 by reference.

Item 9.01 Financial Statements and Exhibits.

<u>Exhibit No.</u>	<u>Description</u>
4.1	<u>Indenture, dated as of November 14, 2019, between Verastem, Inc. and Wilmington Trust, National Association.</u>
4.2	<u>Form of 5.00% Convertible Senior Notes due 2048 (included in exhibit 4.1)</u>
10.1	<u>Credit Facility Amendment, dated as of November 14, 2019, between Verastem, Inc. and Hercules Capital, Inc.</u>

SIGNATURES

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

VERASTEM, INC.

Dated: November 20, 2019

By: /s/ Brian M. Stuglik
Brian M. Stuglik
Chief Executive Officer

VERASTEM, INC.

and

WILMINGTON TRUST, NATIONAL ASSOCIATION

as Trustee and Collateral Agent

INDENTURE

Dated as of November 14, 2019

5.00% Convertible Senior Second Lien Notes due 2048

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Exhibits

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INDENTURE, dated as of November 14, 2019 (this “**Indenture**”), between Verastem, Inc., a Delaware corporation, as issuer (the “**Company**”), and Wilmington Trust, National Association, a national banking association, as trustee (in such capacity, the “**Trustee**”) and as collateral agent (in such capacity, the “**Collateral Agent**”).

Each party to this Indenture agrees as follows for the benefit of the other party and for the equal and ratable benefit of the Holders (as defined below) of the Company’s 5.00% Convertible Senior Second Lien Notes due 2048 (the “**Notes**”).

Article 1. Definitions; Rules of Construction

Section 1.01. Definitions.

The terms defined in this **Section 1.01** (except as herein otherwise expressly provided or unless the context otherwise requires) for all purposes of this Indenture and of any indenture supplemental hereto will have the respective meanings specified in this **Section 1.01**. All words, terms and phrases defined in the UCC (but not otherwise defined herein) have the same meanings as in the UCC.

“**Affiliate**” has the meaning set forth in Rule 144 under the Securities Act as in effect on the Issue Date.

“**Agent**” means any Registrar, Paying Agent, co-registrar or agent for service of notices and demands.

“**Authorized Denomination**” means, with respect to a Note, a principal amount thereof equal to \$1,000 or any integral multiple of \$1,000 in excess thereof.

“**Bankruptcy Law**” means Title 11, United States Code, or any similar U.S. federal or state or non-U.S. law for the relief of debtors.

“**Board of Directors**” means the board of directors of the Company or a committee of such board duly authorized to act on behalf of such board.

“**Business Day**” means any day other than a Saturday, a Sunday or any day on which the Federal Reserve Bank of New York is authorized or required by law or executive order to close or be closed.

“**Capital Stock**” of any Person means any and all shares of, interests in, rights to purchase, warrants or options for, participations in, or other equivalents of, in each case however designated, the equity of such Person, but excluding any debt securities convertible into such equity.

“**Close of Business**” means 5:00 p.m., New York City time.

“**Code**” means the Internal Revenue Code of 1986, as amended from time to time.

“**Collateral Agent**” means the Person named as such in the first paragraph of this Indenture until a successor replaces it in accordance with the provisions of this Indenture and, thereafter,

means such successor.

“**Common Stock**” means the common stock, \$0.0001 par value per share, of the Company, subject to **Section 5.09**.

“**Company**” means the Person named as such in the first paragraph of this Indenture and, subject to **Article 6**, its successors and assigns.

“**Company Mandatory Conversion Right**” means the right of the Company to cause Notes to be converted pursuant to **Section 5.04(A)**.

“**Company Order**” means a written order signed in the name of the Company by two Officers, one of whom must be its Chief Executive Officer, Chief Operating Officer, Chief Financial Officer or other officer with equivalent duties.

“**Conversion Date**” means, with respect to a Note, the first Business Day on which the requirements set forth in **Section 5.02(A)** to convert such Note are satisfied.

“**Conversion Price**” means, as of any time, an amount equal to (A) one thousand dollars (\$1,000) *divided by* (B) the Conversion Rate in effect at such time.

“**Conversion Rate**” initially means 606.0606 shares of Common Stock per \$1,000 principal amount of Notes; *provided, however*, that the Conversion Rate is subject to adjustment pursuant to **Article 5**; *provided, further*, that whenever this Indenture refers to the Conversion Rate as of a particular date without setting forth a particular time on such date, such reference will be deemed to be to the Conversion Rate immediately after the Close of Business on such date.

“**Conversion Share**” means any share of Common Stock issued or issuable upon conversion of any Note.

“**Copyright License**” means any written agreement granting any right to use any Copyright or Copyright registration, now owneded or hereafter acquired by the Company or in which the Company now holds or hereafter acquires any interest.

“**Copyrights**” means all copyrights, whether registered or unregistered, held pursuant to the laws of the United States of America, any State thereof, or of any other country.

“**Covenant Defeasance**” means any defeasance pursuant to, and subject to the terms of, **Section 10.04**.

“**Custodian**” means any receiver, trustee, assignee, liquidator or similar official under any Bankruptcy Law.

“**Daily VWAP**” means, for any VWAP Trading Day, the per share volume-weighted average price of the Common Stock as displayed under the heading “Bloomberg VWAP” on Bloomberg page “VSTM <EQUITY> AQR” (or, if such page is not available, its equivalent successor page) in respect of the period from the scheduled open of trading until the scheduled

close of trading of the primary trading session on such VWAP Trading Day (or, if such volume-weighted average price is unavailable, the market value of one (1) share of Common Stock on such VWAP Trading Day, determined, using a volume-weighted average price method, by a nationally recognized independent investment banking firm the Company selects). The Daily VWAP will be determined without regard to after-hours trading or any other trading outside of the regular trading session.

“**Default**” means any event that is, or that with the passing of time or giving of notice or both would be, an Event of Default.

“**Deposit Accounts**” means any “deposit accounts,” as such term is defined in the UCC, and includes any checking account, savings account, or certificate of deposit.

“**Depository**” means The Depository Trust Company or its successor.

“**Depository Participant**” means any member of, or participant in, the Depository.

“**Depository Procedures**” means, with respect to any conversion, transfer, exchange or transaction involving a Global Note or any beneficial interest therein, the rules and procedures of the Depository applicable to such conversion, transfer, exchange or transaction.

“**Designated Foreign Subsidiary**” means any Foreign Subsidiary, individually, and in the aggregate with other Foreign Subsidiaries, which owns personal property and assets, in each case determined as of the most recent fiscal year end, in an amount less than ten percent (10.0%) of all of the personal property and assets of the Company.

“**Domestic Subsidiary**” means any Subsidiary that is not a Foreign Subsidiary.

“**Eligible Foreign Subsidiary**” means any Foreign Subsidiary (which is not a Designated Foreign Subsidiary) who becomes a party to the Senior Credit Agreement after the Issue Date.

“**Eligible Market**” means any of The New York Stock Exchange, The Nasdaq Global Market or The Nasdaq Global Select Market (or any of their respective successors).

“**Ex-Dividend Date**” means, with respect to an issuance, dividend or distribution on the Common Stock, the first date on which shares of Common Stock trade on the applicable exchange or in the applicable market, regular way, without the right to receive such issuance, dividend or distribution (including pursuant to due bills or similar arrangements required by the relevant stock exchange). For the avoidance of doubt, any alternative trading convention on the applicable exchange or market in respect of the Common Stock under a separate ticker symbol or CUSIP number will not be considered “regular way” for this purpose.

“**Exchange Act**” means the U.S. Securities Exchange Act of 1934, as amended.

“**Excluded Account**” means (i) any Account (including, for the avoidance of doubt, any cash, cash equivalents, or other property contained therein) to the extent, and for so long as, such Account is pledged and used exclusively to secure performance of obligations arising under clauses

(vi) and (xiv) of the defined term “Permitted Liens” in the Senior Credit Agreement, and whether such pledge is by escrow or otherwise, (ii) accounts used solely to fund payroll or employee benefits, (iii) withholding tax, benefits, trust, escrow, or fiduciary accounts, (iv) other Accounts that have an aggregate balance not to exceed One Hundred Thousand Dollars (\$100,000.00) for all such Accounts at any time and (v) deposit, securities, commodity or similar accounts in jurisdictions outside the United States of America that have an aggregate balance not to exceed One Hundred Thousand Dollars (\$100,000.00) for all such accounts at any time.

“**Foreign Subsidiary**” means any Subsidiary that is not a “United States person” within the meaning of Section 7701(a)(3) of the Code.

“**Foreign Subsidiary HoldCo**” means any (a) Domestic Subsidiary substantially all the assets of which consist, directly or indirectly, of equity interests (or equity interests and indebtedness) of one or more Foreign Subsidiaries that are treated as a controlled foreign corporation within the meaning of Section 957 of the Code, or (b) Subsidiary that is disregarded for U.S. federal income tax purposes and substantially all the assets of which consist, directly or indirectly, of equity interests (or equity interests and indebtedness) of one or more Foreign Subsidiaries that are treated as a controlled foreign corporation within the meaning of Section 957 of the Code.

“**Fundamental Change**” means any of the following events:

(A) a “person” or “group” (within the meaning of Section 13(d)(3) of the Exchange Act), other than the Company or its Wholly Owned Subsidiaries, or any employee benefit plan of the Company or its Wholly Owned Subsidiaries, has become the direct or indirect “beneficial owner” (as defined below) of shares of the Company’s common equity representing more than fifty percent (50%) of the voting power of all of the Company’s then-outstanding common equity;

(B) the consummation of (i) any sale, lease or other transfer, in one transaction or a series of transactions, of all or substantially all of the assets of the Company and its Subsidiaries, taken as a whole, to any Person, other than solely to one or more of the Company’s Wholly Owned Subsidiaries; or (ii) any transaction or series of related transactions in connection with which (whether by means of merger, consolidation, share exchange, combination, reclassification, recapitalization, acquisition, liquidation or otherwise) all of the Common Stock is exchanged for, converted into, acquired for, or constitutes solely the right to receive, other securities, cash or other property; *provided, however*, that any merger, consolidation, share exchange or combination of the Company pursuant to which the Persons that directly or indirectly “beneficially owned” (as defined below) all classes of the Company’s common equity immediately before such transaction directly or indirectly “beneficially own,” immediately after such transaction, more than fifty percent (50%) of all classes of common equity of the surviving, continuing or acquiring company or other transferee, as applicable, or the parent thereof, in substantially the same proportions vis-à-vis each other as immediately before such transaction will be deemed not to be a Fundamental Change pursuant to this **clause (B)**;

(C) the Company’s stockholders approve any plan or proposal for the liquidation or dissolution of the Company; or

(D) the Common Stock ceases to be listed on any of The New York Stock Exchange, The NASDAQ Global Market or The NASDAQ Global Select Market (or any of their respective successors);

provided, however, that a transaction or event described in **clause (A)** or **(B)** above will not constitute a Fundamental Change if at least ninety percent (90%) of the consideration received or to be received by the holders of Common Stock (excluding cash payments for fractional shares or pursuant to dissenters rights), in connection with such transaction or event, consists of shares of common stock listed on any of The New York Stock Exchange, The NASDAQ Global Market or The NASDAQ Global Select Market (or any of their respective successors), or that will be so listed when issued or exchanged in connection with such transaction or event, and such transaction or event constitutes a Common Stock Change Event whose Reference Property consists of such consideration.

For the purposes of this definition, (x) any transaction or event described in both **clause (A)** and in **clause (B)(i)** or **(ii)** above (without regard to the proviso in **clause (B)**) will be deemed to occur solely pursuant to **clause (b)** above (subject to such proviso); and (y) whether a Person is a “**beneficial owner**” and whether shares are “**beneficially owned**” will be determined in accordance with Rule 13d-3 under the Exchange Act.

“**Fundamental Change Repurchase Date**” means the date fixed for the repurchase of any Notes by the Company pursuant to a Repurchase Upon Fundamental Change.

“**Fundamental Change Repurchase Notice**” means a notice (including a notice substantially in the form of the “Fundamental Change Repurchase Notice” set forth in **Exhibit A**) containing the information, or otherwise complying with the requirements, set forth in **Section 4.02(F)(i)** and **Section 4.02(F)(ii)**.

“**Fundamental Change Repurchase Price**” means the cash price payable by the Company to repurchase any Note upon its Repurchase Upon Fundamental Change, calculated pursuant to **Section 4.02(D)**.

“**Global Note**” means a Note that is represented by a certificate substantially in the form set forth in **Exhibit A**, registered in the name of the Depositary or its nominee, duly executed by the Company and authenticated by the Trustee, and deposited with the Trustee, as custodian for the Depositary.

“**Global Note Legend**” means a legend substantially in the form set forth in **Exhibit B**.

“**Holder**” means a person in whose name a Note is registered on the Registrar’s books.

“**Intellectual Property**” means all of the Company’s Copyrights; Trademarks; Patents; Licenses; trade secrets and inventions; mask works; the Company’s applications therefor and reissues, extensions, or renewals thereof; and the Company’s goodwill associated with any of the foregoing, together with the Company’s rights to sue for past, present and future infringement of Intellectual Property and the goodwill associated therewith.

“**Intercreditor Agreement**” means that certain intercreditor agreement, dated as of the Issue Date, by and among the Senior Credit Agreement Agent and the Collateral Agent, as the same may be amended, modified, restated, supplemented or replaced from time to time in accordance with its terms.

“**Interest Make-Whole**” means, with respect to the conversion of any Note, the sum of all regularly scheduled Stated Interest payments, if any, due on such Note on each Interest Payment Date occurring after the Conversion Date for such conversion and on or before November 1, 2020 (or, if November 1, 2020 is not a Business Day, the next Business Day); *provided, however*, that (A) for these purposes, the amount of Stated Interest due on the Interest Payment Date immediately after such Conversion Date will be deemed to be the following amount: (x) if such Conversion Date is after the Regular Record Date for such Interest Payment Date, zero (and, for the avoidance of doubt, interest due on such Interest Payment Date will be paid to the Holder of such Note as of the Close of Business on such Regular Record Date); and (y) in all other cases, the full amount of Stated Interest due on such Note on the Interest Payment Date immediately after such Conversion Date, less an amount equal to the Stated Interest that has accrued on such Note to, but excluding, the date the Company settles such conversion (it being understood, for the avoidance of doubt, that such accrued interest will be paid pursuant to **Section 5.03(A)(i)(1)**); (B) if such Conversion Date is after November 1, 2020 (or, if November 1, 2020 is not a Business Day, the next Business Day), then the Interest Make-Whole for such conversion will be zero; and (C) if such Conversion Date occurs after the Company has sent a Mandatory Conversion Notice, then the Interest Make-Whole for such conversion will be zero.

“**Interest Payment Date**” means, with respect to a Note, each May 1 and November 1 of each year, commencing on May 1, 2020 (or such other date specified in the certificate representing such Note). For the avoidance of doubt the Maturity Date is an Interest Payment Date.

“**Inventory**” means “inventory” as defined in Article 9 of the UCC.

“**Issue Date**” means November 14, 2019.

“**Last Reported Sale Price**” of the Common Stock for any Trading Day means the closing sale price per share (or, if no closing sale price is reported, the average of the last bid price and the last ask price per share or, if more than one in either case, the average of the average last bid prices and the average last ask prices per share) of Common Stock on such Trading Day as reported in composite transactions for the principal U.S. national or regional securities exchange on which the Common Stock is then listed. If the Common Stock is not listed on a U.S. national or regional securities exchange on such Trading Day, then the Last Reported Sale Price will be the last quoted bid price per share of Common Stock on such Trading Day in the over-the-counter market as reported by OTC Markets Group Inc. or a similar organization. If the Common Stock is not so quoted on such Trading Day, then the Last Reported Sale Price will be the average of the mid-point of the last bid price and the last ask price per share of Common Stock on such Trading Day from each of at least three (3) nationally recognized independent investment banking firms selected by the Company. Neither the Trustee nor the Conversion Agent will have any duty to determine the Last Reported Sale Price.

“**License**” means any Copyright License, Patent License, Trademark License or other license of rights or interests.

“**Lien**” means, with respect to any property or assets of any Person, any mortgage or deed of trust, pledge, hypothecation, assignment, deposit arrangement, security interest, lien, charge, easement, encumbrance, preference, priority or other security agreement or preferential arrangement of any kind or nature whatsoever on or with respect to such property or assets (including, without limitation, any capitalized lease obligation, conditional sales or other title retention agreement having substantially the same economic effect as any of the foregoing).

“**Make-Whole Fundamental Change**” means a Fundamental Change (determined after giving effect to the proviso immediately after **clause (D)** of the definition thereof, but without regard to the proviso to **clause (B)(ii)** of the definition thereof) that becomes effective on or before November 1, 2022.

“**Make-Whole Fundamental Change Conversion Period**” means, with respect to a Make-Whole Fundamental Change, the period from, and including, the effective date of such Make-Whole Fundamental Change to, and including, the thirty fifth (35th) Trading Day after such effective date (or, if such Make-Whole Fundamental Change also constitutes a Fundamental Change, to, but excluding, the related Fundamental Change Repurchase Date).

“**Mandatory Conversion**” means a conversion pursuant to **Section 5.04(A)**.

“**Mandatory Conversion Date**” means the Conversion Date for a Mandatory Conversion, as provided in **Section 5.04(C)**.

“**Market Disruption Event**” means, with respect to any date, the occurrence or existence, during the one-half hour period ending at the scheduled close of trading on such date on the principal U.S. national or regional securities exchange or other market on which the Common Stock is listed for trading or trades, of any material suspension or limitation imposed on trading (by reason of movements in price exceeding limits permitted by the relevant exchange or otherwise) in the Common Stock or in any options, contracts or futures contracts relating to the Common Stock.

“**Maturity Date**” means November 1, 2048.

“**Note Agent**” means any Registrar, Paying Agent or Conversion Agent.

“**Notes**” means the 5.00% Convertible Senior Second Lien Notes due 2048 issued by the Company pursuant to this Indenture.

“**Notes Secured Parties**” means, collectively, (a) the Trustee, (b) the Collateral Agent, (c) the Agents, (d) the Holders of the Notes, (e) each other Person to whom any Obligations are owed and (f) the successors, replacements and assigns of each of the foregoing; sometimes being referred to herein individually as a “Notes Secured Party.”

“**Obligations**” means all obligations of the Company owing pursuant to this Indenture and the Notes for principal, interest (including any interest accruing on or subsequent to the filing of a petition in bankruptcy, reorganization or similar proceeding at the rate provided for in the documentation with respect thereto, whether or not such interest is an allowed claim under applicable state, federal or foreign law), premium, penalties, fees, indemnifications, reimbursements (including reimbursement obligations with respect to letters of credit and banker’s acceptances), damages and other liabilities, and guarantees of payment of such principal, interest, penalties, fees, indemnifications, reimbursements, damages and other liabilities, payable under this Indenture and the Notes.

“**Officer**” means the Chief Executive Officer, the President, any Vice President, the Chief Accounting Officer, the Chief Operating Officer, the Treasurer or the Secretary of the Company, or any other officer designated by the Board of Directors, as the case may be.

“**Officer’s Certificate**” means, with respect to any Person, a certificate signed by the Chairman, Chief Executive Officer, President or any Senior or Executive Vice President, Chief Operating Officer, Chief Financial Officer or any Treasurer of such Person, that will comply with applicable provisions of this Indenture.

“**Open of Business**” means 9:00 a.m., New York City time.

“**Opinion of Counsel**” means a written opinion from legal counsel, which counsel is reasonably acceptable to the Trustee. The counsel may be an employee of or counsel to the Company.

“**Optional Repurchase**” means the repurchase of any Note by the Company pursuant to **Section 4.03**.

“**Optional Repurchase Notice**” means a notice (including a notice substantially in the form of the “Optional Repurchase Notice” set forth in **Exhibit A**) containing the information, or otherwise complying with the requirements, set forth in **Section 4.03(E)(i)** and **Section 4.03(E)(ii)**.

“**Optional Repurchase Price**” means the cash price payable by the Company to repurchase any Note upon an Optional Repurchase, calculated pursuant to **Section 4.03(C)**.

“**Patent License**” means any written agreement granting any right with respect to any invention on which a Patent is in existence or a Patent application is pending, in which agreement the Company now holds or hereafter acquires any interest.

“**Patents**” means all letters patent of, or rights corresponding thereto, in the United States of America or in any other country, all registrations and recordings thereof, and all applications for letters patent of, or rights corresponding thereto, in the United States of America or any other country.

“**Person**” or “**person**” means any individual, corporation, partnership, limited liability company, joint venture, association, joint-stock company, trust, unincorporated organization or government or other agency or political subdivision thereof.

“**Physical Note**” means a Note (other than a Global Note) that is represented by a certificate substantially in the form set forth in **Exhibit A**, not bearing the Global Note Legend, registered in the name of the Holder of such Note and duly executed by the Company and authenticated by the Trustee.

“**Receivables**” means (i) all of the Company’s Accounts, Instruments, Documents, Chattel Paper, Supporting Obligations, letters of credit, proceeds of any letter of credit, and Letter of Credit Rights, and (ii) all customer lists, software, and business records related thereto.

“**Redemption**” means the repurchase of any Note by the Company pursuant to **Section 4.04**.

“**Redemption Date**” means the date fixed for the repurchase of any Notes by the Company pursuant to a Redemption.

“**Redemption Notice Date**” means, with respect to a Redemption, the date on which the Company sends the Redemption Notice for such Redemption pursuant to **Section 4.04(F)**.

“**Redemption Price**” means the cash price payable by the Company to redeem any Note upon its Redemption, calculated pursuant to **Section 4.04(E)**.

“**Regular Record Date**” has the following meaning with respect to an Interest Payment Date: (A) if such Interest Payment Date occurs on May 1, the immediately preceding April 15; and (B) if such Interest Payment Date occurs on November 1, the immediately preceding October 15.

“**Repurchase Upon Fundamental Change**” means the repurchase of any Note by the Company pursuant to **Section 4.02**.

“**Responsible Officer**” means, when used with respect to the Trustee or the Collateral Agent, as applicable, any officer within the corporate trust department of the Trustee or the Collateral Agent, as applicable (or any successor group of the Trustee or the Collateral Agent, as applicable) or any other officer of the Trustee or the Collateral Agent, as applicable, customarily performing functions similar to those performed by any of the above designated officers, and also means, with respect to a particular corporate trust matter relating to this Indenture, any other officer to whom such matter is referred because of his knowledge of and familiarity with the particular subject, who in each case, will have primary responsibility for the administration of this Indenture.

“**Scheduled Trading Day**” means any day that is scheduled to be a Trading Day on the principal U.S. national or regional securities exchange on which the Common Stock is then listed or, if the Common Stock is not then listed on a U.S. national or regional securities exchange, on the principal other market on which the Common Stock is then traded. If the Common Stock is not so listed or traded, then “Scheduled Trading day” means a Business Day.

“**SEC**” means the United States Securities and Exchange Commission as constituted from time to time, or any successor performing a similar function.

“**Securities Act**” means the Securities Act of 1933, as amended.

“**Senior Credit Agreement**” means the Loan and Security Agreement, dated as of March 21, 2017, by and among the Company, the lenders party thereto and Hercules Capital, Inc., as administrative and collateral agent for the lenders, together with the related agreements and instruments thereto (including, without limitation, any guarantee agreements and security documents) and any other debt facilities or commercial paper facilities with banks or other institutional lenders providing for revolving credit loans, term loans or letters of credit or issuances of debt securities evidenced by notes, debentures, bonds or similar instruments that is designated as the Senior Credit Agreement by the Company, in each case, as amended as of the Issue Date or as may hereafter be amended, restated, modified, supplemented, renewed, refunded, replaced (whether upon or after termination or otherwise) or refinanced in whole or in part from time to time that extend the maturity of, refinance, replace or otherwise restructure (including increasing the amount of available borrowings thereunder or adding Subsidiaries of the Company as additional borrowers or guarantors thereunder) all or any portion of the indebtedness under such agreement or any successor or replacement agreement and whether by the same or any other agent, lender or group of lenders.

“**Senior Credit Agreement Agent**” means Hercules Capital, Inc., and its successors and assigns in its capacity as administrative agent and Senior Agent pursuant to the Loan Documents (as defined in the Intercreditor Agreement) acting for and on behalf of the Senior Lenders (as defined in the Intercreditor Agreement) and any successor or replacement agent.

“**Significant Subsidiary**” means, with respect to any Person, any Subsidiary of such Person that constitutes, or any group of Subsidiaries of such Person that, in the aggregate, would constitute, a “significant subsidiary” (as defined in Rule 1-02(w) of Regulation S-X under the Exchange Act) of such Person.

“**Special Interest**” means any interest that accrues on any Note pursuant to **Section 7.03**.

“**Stock Price**” has the following meaning for any Make-Whole Fundamental Change: (A) if the holders of Common Stock receive only cash in consideration for their shares of Common Stock in such Make-Whole Fundamental Change and such Make-Whole Fundamental Change is pursuant to **clause (B)** of the definition of “Fundamental Change,” then the Stock Price is the amount of cash paid per share of Common Stock in such Make-Whole Fundamental Change; and (B) in all other cases, the Stock Price is the average of the Last Reported Sale Prices per share of Common Stock for the five (5) consecutive Trading Days ending on, and including, the Trading Day immediately before the effective date of such Make-Whole Fundamental Change.

“**Subsidiary**” means, with respect to any Person, (A) any corporation, association or other business entity (other than a partnership or limited liability company) of which more than fifty percent (50%) of the total voting power of the Capital Stock entitled (without regard to the occurrence of any contingency, but after giving effect to any voting agreement or stockholders’ agreement that effectively transfers voting power) to vote in the election of directors, managers or trustees, as applicable, of such corporation, association or other business entity is owned or

controlled, directly or indirectly, by such Person or one or more of the other Subsidiaries of such Person; and (B) any partnership or limited liability company where (i) more than fifty percent (50%) of the capital accounts, distribution rights, equity and voting interests, or of the general and limited partnership interests, as applicable, of such partnership or limited liability company are owned or controlled, directly or indirectly, by such Person or one or more of the other Subsidiaries of such Person, whether in the form of membership, general, special or limited partnership or limited liability company interests or otherwise; and (ii) such Person or any one or more of the other Subsidiaries of such Person is a controlling general partner of, or otherwise controls, such partnership or limited liability company.

“**Trademark License**” means any written agreement granting any right to use any Trademark or Trademark registration, now owned or hereafter acquired by the Company or in which the Company now holds or hereafter acquires any interest.

“**Trademarks**” means all trademarks (registered, common law or otherwise) and any applications in connection therewith, including registrations, recordings and applications in the United States Patent and Trademark Office or in any similar office or agency of the United States of America, any State thereof or any other country or any political subdivision thereof.

“**Trading Day**” means any day on which (A) trading in the Common Stock generally occurs on the principal U.S. national or regional securities exchange on which the Common Stock is then listed or, if the Common Stock is not then listed on a U.S. national or regional securities exchange, on the principal other market on which the Common Stock is then traded; and (B) there is no Market Disruption Event. If the Common Stock is not so listed or traded, then “Trading Day” means a Business Day.

“**Trustee**” means the Person named as such in the first paragraph of this Indenture until a successor replaces it in accordance with the provisions of this Indenture and, thereafter, means such successor.

“**UCC**” means the Uniform Commercial Code as the same is, from time to time, in effect in the State of New York; provided, 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, the Collateral Agent’s Lien on any Collateral is governed by the Uniform Commercial Code as the same is, from time to time, in effect in a jurisdiction other than the State of New York, then the term “UCC” will mean the Uniform Commercial Code as in effect, from time to time, in such other jurisdiction solely for purposes of the provisions thereof relating to such attachment, perfection, priority or remedies and for purposes of definitions related to such provisions.

“**VWAP Market Disruption Event**” means, with respect to any date, (A) the failure by the principal U.S. national or regional securities exchange on which the Common Stock is then listed, or, if the Common Stock is not then listed on a U.S. national or regional securities exchange, the principal other market on which the Common Stock is then traded, to open for trading during its regular trading session on such date; or (B) the occurrence or existence, for more than one half hour period in the aggregate during the regular trading session, of any suspension or limitation imposed on trading (by reason of movements in price exceeding limits permitted by the relevant exchange or otherwise) in the Common Stock or in any options contracts or futures contracts

relating to the Common Stock, and such suspension or limitation occurs or exists at any time before 1:00 p.m., New York City time, on such date.

“**VWAP Trading Day**” means a day on which (A) there is no VWAP Market Disruption Event; and (B) trading in the Common Stock generally occurs on the principal U.S. national or regional securities exchange on which the Common Stock is then listed or, if the Common Stock is not then listed on a U.S. national or regional securities exchange, on the principal other market on which the Common Stock is then traded. If the Common Stock is not so listed or traded, then “VWAP Trading Day” means a Business Day.

“**Wholly Owned Subsidiary**” of a Person means any Subsidiary of such Person all of the outstanding Capital Stock or other ownership interests of which (other than directors’ qualifying shares) are owned by such Person or one or more Wholly Owned Subsidiaries of such Person.

Section 1.02. Other Definitions.

Term	Defined in Section
“ Additional Shares ”	5.08(A)
“ Beneficial Ownership Limit ”	5.11(B)
“ Business Combination Event ”	6.01(A)
“ Collateral ”	11.01
“ Common Stock Change Event ”	5.09(A)
“ Company Mandatory Conversion Right ”	5.04(A)
“ Conversion Agent ”	2.05(A)
“ Conversion Consideration ”	5.03(A)
“ Default Interest ”	2.04(B)
“ Defaulted Amount ”	2.04(B)
“ Equity Conditions ”	5.04(D)
“ Event of Default ”	7.01(A)
“ Expiration Date ”	5.06(A)(v)
“ Expiration Time ”	5.06(A)(v)
“ Fundamental Change Notice ”	4.02(E)
“ Fundamental Change Repurchase Right ”	4.02(A)
“ General Beneficial Ownership Limit ”	5.11(A)
“ Holder Beneficial Ownership Limit ”	5.11(B)
“ Initial Notes ”	2.02(A)
“ Mandatory Conversion ”	5.04(A)
“ Mandatory Conversion Notice ”	5.04(B)
“ Optional Repurchase Date ”	4.03(A)
“ Optional Repurchase Date Notice ”	4.03(D)
“ Optional Repurchase Right ”	4.03(A)
“ Paying Agent ”	2.05(A)
“ Redemption Notice ”	4.04(F)
“ Reference Property ”	5.09(A)
“ Reference Property Unit ”	5.09(A)

“Register”	2.05(B)
“Registrar”	2.05(A)
“Reporting Event of Default”	7.03(A)
“Spin-Off”	5.06(A)(iii)(2)
“Spin-Off Valuation Period”	5.06(A)(iii)(2)
“Stated Interest”	2.04(A)
“Successor Corporation”	6.01(A)
“Successor Person”	5.09(A)
“Tender/Exchange Offer Valuation Period”	5.06(A)(v)

Section 1.03. Rules of Construction.

For purposes of this Indenture:

- (A) “or” is not exclusive;
- (B) “including” means “including without limitation”;
- (C) “will” expresses a command;
- (D) the “average” of a set of numerical values refers to the arithmetic average of such numerical values;
- (E) a merger involving, or a transfer of assets by, a limited liability company, limited partnership or trust will be deemed to include any division of or by, or an allocation of assets to a series of, such limited liability company, limited partnership or trust, or any unwinding of any such division or allocation;
- (F) words in the singular include the plural and in the plural include the singular, unless the context requires otherwise;
- (G) “herein,” “hereof” and other words of similar import refer to this Indenture as a whole and not to any particular Article, Section or other subdivision of this Indenture, unless the context requires otherwise;
- (H) references to currency mean the lawful currency of the United States of America, unless the context requires otherwise;
- (I) the exhibits, schedules and other attachments to this Indenture are deemed to form part of this Indenture; and
- (J) the term “**interest**,” when used with respect to a Note, includes any Special Interest, unless the context requires otherwise.

Article 2. The Notes

Section 2.01. Form, Dating and Denominations.

The Notes and the Trustee's certificate of authentication will be substantially in the form set forth in **Exhibit A**. The Notes will bear the legends required by **Section 2.07** and may bear notations, legends or endorsements required by law, stock exchange rule or usage or the Depository. Each Note will be dated as of the date of its authentication.

Except to the extent otherwise provided in a Company Order delivered to the Trustee in connection with the issuance and authentication thereof, the Notes will be issued initially in the form of one or more Global Notes. Global Notes may be exchanged for Physical Notes, and Physical Notes may be exchanged for Global Notes, only as provided in **Section 2.08**.

The Notes will be issuable only in registered form without interest coupons and only in Authorized Denominations.

Each certificate representing a Note will bear a unique registration number that is not affixed to any other certificate representing another outstanding Note.

The terms contained in the Notes constitute part of this Indenture, and, to the extent applicable, the Company, the Trustee and the Collateral Agent, by their execution and delivery of this Indenture, agree to such terms and to be bound thereby; *provided, however*, that, to the extent that any provision of any Note conflicts with the provisions of this Indenture, the provisions of this Indenture will control for purposes of this Indenture and such Note.

Section 2.02. Initial Notes and Additional Notes; Execution and Authentication.

(A) *Initial Notes.* On the Issue Date, there will be originally issued SIXTY-TWO MILLION EIGHT HUNDRED SEVENTY-TWO THOUSAND dollars (\$62,872,000) aggregate principal amount of Notes, subject to the provisions of this Indenture. Notes issued pursuant to this **Section 2.02(A)**, and any Notes issued in exchange therefor or in substitution thereof, are referred to in this Indenture as the "**Initial Notes**."

(B) *Additional Notes.* The Company may, subject to the provisions of this Indenture, originally issue additional Notes with the same terms as the Initial Notes (except, to the extent applicable, with respect to the date as of which interest begins to accrue on such additional Notes and the first Interest Payment Date of such additional Notes), which additional Notes will, subject to the foregoing, be considered to be part of the same series of, and rank equally and ratably with all other, Notes issued under this Indenture; provided, however, that if any such additional Notes are not fungible with other Notes issued under this Indenture for federal income tax or federal securities laws purposes, then such additional Notes will be identified by a separate CUSIP number or by no CUSIP number.

(C) *Execution and Authentication.*

The Notes will be executed on behalf of the Company by two Officers of the Company or

an Officer and an Assistant Secretary of the Company. Each such signature may be manual, facsimile or electronic (in “.pdf” format).

If an Officer whose signature is on a Note no longer holds that office at the time the Note is authenticated, the Note will nevertheless be valid.

A Note will not be valid until authenticated by the manual, facsimile or electronic (in “.pdf” format) signature of the Trustee or an authenticating agent. The signature will be conclusive evidence that the Note has been authenticated under this Indenture. Each Note will be dated the date of its authentication.

On the Issue Date, the Trustee will, upon receipt of a Company Order, authenticate and deliver the Initial Notes contemplated to be issued on the Issue Date by **Section 2.02(A)**.

The Trustee may appoint an authenticating agent acceptable to the Company to authenticate Notes. An authenticating agent may authenticate Notes whenever the Trustee may do so. Any appointment will be evidenced by an instrument signed by an authorized officer of the Trustee, a copy of which will be furnished to the Company. Each reference in this Indenture to authentication by the Trustee includes authentication by such agent. An authenticating agent has the same rights as an Agent to deal with the Company or an Affiliate of the Company.

Section 2.03. Method of Payment.

(A) *Global Notes.* The Company will pay, or cause the Paying Agent to pay, the principal (whether due upon maturity on the Maturity Date, Redemption on a Redemption Date, Optional Repurchase on an Optional Repurchase Date or repurchase on a Fundamental Change Repurchase Date or otherwise) of, interest on, and any cash Conversion Consideration for, any Global Note to the Depositary by wire transfer of immediately available funds no later than the time the same is due as provided in this Indenture.

(B) *Physical Notes.* The Company will pay, or cause the Paying Agent to pay, the principal (whether due upon maturity on the Maturity Date, Redemption on a Redemption Date, Optional Repurchase on an Optional Repurchase Date or repurchase on a Fundamental Change Repurchase Date or otherwise) of, interest on, and any cash Conversion Consideration for, any Physical Note no later than the time the same is due as provided in this Indenture as follows: (i) if the principal amount of such Physical Note is at least five million dollars (\$5,000,000) (or such lower amount as the Company may choose in its sole and absolute discretion) and the Holder of such Physical Note entitled to such payment has delivered to the Paying Agent or the Trustee, no later than the time set forth in the immediately following sentence, a written request that the Company make such payment by wire transfer to an account of such Holder within the United States, by wire transfer of immediately available funds to such account; and (ii) in all other cases, by check mailed to the address of the Holder of such Physical Note entitled to such payment as set forth in the Register. To be timely, such written request must be so delivered no later than the Close of Business on the following date: (x) with respect to the payment of any interest due on an Interest Payment Date, the immediately preceding Regular Record Date; (y) with respect to any cash Conversion Consideration, the relevant Conversion Date; and (z) with respect to any other payment, the date that is fifteen (15) calendar days immediately before the date such payment is

due.

Section 2.04. Accrual of Interest; Defaulted Amounts; When Payment Date is Not a Business Day.

(A) *Accrual of Interest.* Each Note will accrue interest at a rate per annum equal to 5.00% (the “**Stated Interest**”), plus any Special Interest that may accrue pursuant to **Section 7.03**. Stated Interest on each Note will (i) accrue from, and including, the most recent date to which Stated Interest has been paid or duly provided for (or, if no Stated Interest has theretofore been paid or duly provided for, the date set forth in the certificate representing such Note as the date from, and including, which Stated Interest will begin to accrue in such circumstance) to, but excluding, the date of payment of such Stated Interest; and (ii) be, subject to **Sections 4.02(D)**, **4.03(C)** and **4.04(E)** (but without duplication of any payment of interest), payable semi-annually in arrears on each Interest Payment Date, beginning on the first Interest Payment Date set forth in the certificate representing such Note, to the Holder of such Note as of the Close of Business on the immediately preceding Regular Record Date. Stated Interest, and, if applicable, Special Interest, on the Notes will be computed on the basis of a 360-day year comprised of twelve 30-day months.

(B) *Defaulted Amounts.* If the Company fails to pay any amount (a “**Defaulted Amount**”) payable on a Note on or before the due date therefor as provided in this Indenture, then, regardless of whether such failure constitutes an Event of Default, (i) such Defaulted Amount will forthwith cease to be payable to the Holder of such Note otherwise entitled to such payment; (ii) to the extent lawful, interest (“**Default Interest**”) will accrue on such Defaulted Amount at a rate per annum equal to the rate per annum at which Stated Interest accrues, from, and including, such due date to, but excluding, the date of payment of such Defaulted Amount and Default Interest; (iii) such Defaulted Amount and Default Interest will be paid on a payment date selected by the Company to the Holder of such Note as of the Close of Business on a special record date selected by the Company, *provided* that such special record date must be no more than fifteen (15), nor less than ten (10), calendar days before such payment date; and (iv) at least fifteen (15) calendar days before such special record date, the Company will send notice to the Trustee and the Holders that states such special record date, such payment date and the amount of such Defaulted Amount and Default Interest to be paid on such payment date.

(C) *Delay of Payment when Payment Date is Not a Business Day.* If the due date for a payment on a Note as provided in this Indenture is not a Business Day, then, notwithstanding anything to the contrary in this Indenture or the Notes, such payment may be made on the immediately following Business Day and no interest will accrue on such payment as a result of the related delay. Solely for purposes of the immediately preceding sentence, a day on which the applicable place of payment is authorized or required by law or executive order to close or be closed will be deemed not to be a “Business Day.”

Section 2.05. Registrar, Paying Agent and Conversion Agent.

(A) *Generally.* The Company will maintain (i) an office or agency in the contiguous United States where Notes may be presented for registration of transfer or for exchange (the “**Registrar**”); (ii) an office or agency in the contiguous United States where Notes may be

presented for payment (the “**Paying Agent**”); and (iii) an office or agency in the contiguous United States where Notes may be presented for conversion (the “**Conversion Agent**”). If the Company fails to maintain a Registrar, Paying Agent or Conversion Agent, then the Trustee will act as such; *provided* that no office of the Trustee will be an office or agency of the Company for purposes of service of legal process against the Company. For the avoidance of doubt, the Company or any of its Subsidiaries may act as Registrar, Paying Agent or Conversion Agent. The Company will give prompt written notice to the Trustee of any change in the location of any such office or agency.

(B) *Duties of the Registrar.* The Registrar will keep a record (the “**Register**”) of the names and addresses of the Holders, the Notes held by each Holder and the transfer, exchange, repurchase, Redemption and conversion of Notes. Absent manifest error, the entries in the Register will be conclusive and the Company and the Trustee may treat each Person whose name is recorded as a Holder in the Register as a Holder for all purposes. The Register will be in written form or in any form capable of being converted into written form reasonably promptly.

(C) *Co-Agents; Company’s Right to Appoint Successor Registrars, Paying Agents and Conversion Agents.* The Company may appoint one or more co-Registrars, co-Paying Agents and co-Conversion Agents, each of whom will be deemed to be a Registrar, Paying Agent or Conversion Agent, as applicable, under this Indenture. Subject to **Section 2.05(A)**, the Company may change any Registrar, Paying Agent or Conversion Agent (including appointing itself or any of its Subsidiaries to act in such capacity) without notice to any Holder. The Company will notify the Trustee (and, upon request, any Holder) of the name and address of each Note Agent, if any, not a party to this Indenture and will enter into an appropriate agency agreement with each such Note Agent, which agreement will implement the provisions of this Indenture that relate to such Note Agent.

(D) *Initial Appointments.* The Company hereby appoints the Trustee as the initial Paying Agent, the initial Registrar and the initial Conversion Agent.

Section 2.06. Paying Agent and Conversion Agent to Hold Property in Trust.

The Company will require each Paying Agent or Conversion Agent that is not the Trustee to agree in writing that such Note Agent will (A) hold in trust for the benefit of Holders or the Trustee all money and other property held by such Note Agent for payment or delivery due on the Notes; and (B) notify the Trustee of any default by the Company in making any such payment or delivery. The Company, at any time, may, and the Trustee, while any Default continues, may, require a Paying Agent or Conversion Agent to pay or deliver, as applicable, all money and other property held by it to the Trustee, after which payment or delivery, as applicable, such Note Agent (if not the Company or any of its Subsidiaries) will have no further liability for such money or property. If the Company or any of its Subsidiaries acts as Paying Agent or Conversion Agent, then (A) it will segregate and hold in a separate trust fund for the benefit of the Holders or the Trustee all money and other property held by it as Paying Agent or Conversion Agent; and (B) references in this Indenture or the Notes to the Paying Agent or Conversion Agent holding cash or other property, or to the delivery of cash or other property to the Paying Agent or Conversion Agent, in each case for payment or delivery to any Holders or the Trustee or with respect to the Notes, will be deemed to refer to cash or other property so segregated and held separately, or to the segregation and separate holding of such cash or other property, respectively. Upon the

occurrence of any event pursuant to in **clause (ix) or (x) of Section 7.01(A)** with respect to the Company (or with respect to any Subsidiary of the Company acting as Paying Agent or Conversion Agent), the Trustee will serve as the Paying Agent or Conversion Agent, as applicable, for the Notes.

Section 2.07. Legends.

(A) *Global Note Legend.* Each Global Note will bear the Global Note Legend (or any similar legend, not inconsistent with this Indenture, required by the Depository for such Global Note).

(B) *Other Legends.* A Note may bear any other legend or text, not inconsistent with this Indenture, as may be required by applicable law or by any securities exchange or automated quotation system on which such Note is traded or quoted.

(C) *Acknowledgement and Agreement by the Holders.* A Holder's acceptance of any Note bearing any legend required by this **Section 2.07** will constitute such Holder's acknowledgement of, and agreement to comply with, the restrictions set forth in such legend.

Section 2.08. Transfers and Exchanges.

(A) *Provisions Applicable to All Transfers and Exchanges.*

(i) Subject to this **Section 2.08**, Physical Notes and beneficial interests in Global Notes may be transferred or exchanged from time to time and the Registrar will record each such transfer or exchange in the Register.

(ii) Each Note issued upon transfer or exchange of any other Note (such other Note being referred to as the "old Note" for purposes of this **Section 2.08(A)(ii)**) or portion thereof in accordance with this Indenture will be the valid obligation of the Company, evidencing the same indebtedness, and entitled to the same benefits under this Indenture, as such old Note or portion thereof, as applicable.

(iii) The Company, the Trustee and the Note Agents will not impose any service charge on any Holder for any transfer, exchange or conversion of Notes, but the Company, the Trustee, the Registrar and the Conversion Agent may require payment of a sum sufficient to cover any transfer tax or similar governmental charge that may be imposed in connection with any transfer, exchange or conversion of Notes, other than exchanges pursuant to **Sections 2.09, 2.12 or 9.05** not involving any transfer.

(iv) Notwithstanding anything to the contrary in this Indenture or the Notes, a Note may not be transferred or exchanged in part unless the portion to be so transferred or exchanged is in an Authorized Denomination.

(v) The Trustee will have no obligation or duty to monitor, determine or inquire as to compliance with any transfer restrictions imposed by applicable law or under this Indenture with respect to any transfer of any interest in any Note or any share of Common Stock issued upon conversion of any Note (including any transfers between or among the

Depository, participants, members or beneficial owners in any Global Note) other than to require delivery of such certificates and other documentation or evidence as are expressly required by, and to do so if and when expressly required by, the terms of this Indenture, and to examine the same to determine substantial compliance as to form with the express requirements hereof.

(vi) Each Note issued upon transfer of, or in exchange for, another Note will bear each legend, if any, required by **Section 2.07**.

(vii) Upon satisfaction of the requirements of this Indenture to effect a transfer or exchange of any Note, the Company will cause such transfer or exchange to be effected as soon as reasonably practicable but in no event later than the second (2nd) Business Day after the date of such satisfaction.

(viii) None of the Trustee, the Collateral Agent nor any Note Agent will have any responsibility or liability for any actions taken or not taken by the Depository.

(B) *Transfers and Exchanges of Global Notes.*

(i) Subject to the immediately following sentence, no Global Note may be transferred or exchanged in whole except (x) by the Depository to a nominee of the Depository; (y) by a nominee of the Depository to the Depository or to another nominee of the Depository; or (z) by the Depository or any such nominee to a successor Depository or a nominee of such successor Depository. No Global Note (or any portion thereof) may be transferred to, or exchanged for, a Physical Note; *provided, however*, that a Global Note will be exchanged, pursuant to customary procedures, for one or more Physical Notes if:

(1) (x) the Depository notifies the Company or the Trustee that the Depository is unwilling or unable to continue as depository for such Global Note or (y) the Depository ceases to be a “clearing agency” registered under Section 17A of the Exchange Act and, in each case, the Company fails to appoint a successor Depository within ninety (90) days of such notice or cessation;

(2) an Event of Default has occurred and is continuing and a holder of a beneficial interest in such Global Note requests to exchange such Global Note or beneficial interest, as applicable, for one or more Physical Notes; or

(3) the Company, in its sole discretion, permits the exchange of any beneficial interest in such Global Note for one or more Physical Notes at the request of the owner of such beneficial interest.

(ii) Upon satisfaction of the requirements of this Indenture to effect a transfer or exchange of any Global Note (or any portion thereof):

(1) the Trustee will reflect any resulting decrease of the principal amount of such Global Note by notation on the “Schedule of Exchanges of Interests in the Global Note” forming part of such Global Note (and, if such notation results in such Global Note having a principal amount of zero, the Company may (but is not required to) instruct

the Trustee to cancel such Global Note pursuant to **Section 2.15**);

(2) if required to effect such transfer or exchange, then the Trustee will reflect any resulting increase of the principal amount of any other Global Note by notation on the “Schedule of Exchanges of Interests in the Global Note” forming part of such other Global Note;

(3) if required to effect such transfer or exchange, then the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, a new Global Note bearing each legend, if any, required by **Section 2.07**; and

(4) if such Global Note (or such portion thereof), or any beneficial interest therein, is to be exchanged for one or more Physical Notes, then the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Physical Notes that are in Authorized Denominations (not to exceed, in the aggregate, the principal amount of such Global Note to be so exchanged), are registered in such name(s) as the Depository specifies (or as otherwise determined pursuant to customary procedures) and bear each legend, if any, required by **Section 2.07**.

(iii) Each transfer or exchange of a beneficial interest in any Global Note will be made in accordance with the Depository Procedures.

(C) *Transfers and Exchanges of Physical Notes.*

(i) Subject to this **Section 2.08**, a Holder of a Physical Note may (x) transfer such Physical Note (or any portion thereof in an Authorized Denomination) to one or more other Person(s); (y) exchange such Physical Note (or any portion thereof in an Authorized Denomination) for one or more other Physical Notes in Authorized Denominations having an aggregate principal amount equal to the aggregate principal amount of the Physical Note (or portion thereof) to be so exchanged; and (z) if then permitted by the Depository Procedures, transfer such Physical Note (or any portion thereof in an Authorized Denomination) in exchange for a beneficial interest in one or more Global Notes; *provided, however,* that, to effect any such transfer or exchange, such Holder must surrender such Physical Note to be transferred or exchanged to the office of the Registrar, together with any endorsements or transfer instruments reasonably required by the Company, the Trustee or the Registrar.

(ii) Upon the satisfaction of the requirements of this Indenture to effect a transfer or exchange of any Physical Note (such Physical Note being referred to as the “old Physical Note” for purposes of this **Section 2.08(C)(ii)**) of a Holder (or any portion of such old Physical Note in an Authorized Denomination):

(1) such old Physical Note will be promptly cancelled pursuant to **Section 2.15**;

(2) if such old Physical Note is to be transferred or exchanged only in part, then the Company will issue, execute and deliver, and the Trustee will authenticate,

in each case in accordance with **Section 2.02**, one or more Physical Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount of such old Physical Note not to be transferred or exchanged; (y) are registered in the name of such Holder; and (z) bear each legend, if any, required by **Section 2.07**;

(3) in the case of a transfer:

(a) to the Depositary or a nominee thereof that will hold its interest in such old Physical Note (or such portion thereof) to be so transferred in the form of one or more Global Notes, the Trustee will reflect an increase of the principal amount of one or more existing Global Notes by notation on the “Schedule of Exchanges of Interests in the Global Note” forming part of such Global Note(s), which increase(s) are in Authorized Denominations and aggregate to the principal amount to be so transferred, and which Global Note(s) bear each legend, if any, required by **Section 2.07**; *provided, however*, that if such transfer cannot be so effected by notation on one or more existing Global Notes (whether because no Global Notes bearing each legend, if any, required by **Section 2.07** then exist, because any such increase will result in any Global Note having an aggregate principal amount exceeding the maximum aggregate principal amount permitted by the Depositary or otherwise), then the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Global Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount to be so transferred; and (y) bear each legend, if any, required by **Section 2.07**; and

(b) to a transferee that will hold its interest in such old Physical Note (or such portion thereof) to be so transferred in the form of one or more Physical Notes, the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Physical Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount to be so transferred; (y) are registered in the name of such transferee; and (z) bear each legend, if any, required by **Section 2.07**; and

(4) in the case of an exchange, the Company will issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Physical Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount to be so exchanged; (y) are registered in the name of the Person to whom such old Physical Note was registered; and (z) bear each legend, if any, required by **Section 2.07**.

(D) *Transfers of Notes Subject to Redemption, Repurchase or Conversion.* Notwithstanding anything to the contrary in this Indenture or the Notes, the Company, the Trustee and the Registrar will not be required to register the transfer of or exchange any Note that (i) has been surrendered for conversion, except to the extent that any portion of such Note is not subject

to conversion; (ii) is subject to a Fundamental Change Repurchase Notice or Optional Repurchase Notice validly delivered, and not withdrawn, pursuant to **Section 4.02(F)** or **4.03(E)**, respectively, except to the extent that any portion of such Note is not subject to such notice or the Company fails to pay the applicable Fundamental Change Repurchase Price or Optional Repurchase Price, as applicable, when due; or (iii) has been selected for Redemption pursuant to a Redemption Notice, except to the extent that any portion of such Note is not subject to Redemption or the Company fails to pay the applicable Redemption Price when due.

Section 2.09. Exchange and Cancellation of Notes to Be Converted, Redeemed or Repurchased.

(A) *Partial Conversions, Redemptions and Repurchases of Physical Notes.* If only a portion of a Physical Note of a Holder is to be converted pursuant to **Article 5** or repurchased pursuant to a Repurchase Upon Fundamental Change, Optional Repurchase or Redemption, then, as soon as reasonably practicable after such Physical Note is surrendered for such conversion, Redemption or repurchase, the Company will cause such Physical Note to be exchanged, pursuant and subject to **Section 2.08(C)**, for (i) one or more Physical Notes that are in Authorized Denominations and have an aggregate principal amount equal to the principal amount of such Physical Note that is not to be so converted, redeemed or repurchased, as applicable, and deliver such Physical Note(s) to such Holder; and (ii) a Physical Note having a principal amount equal to the principal amount to be so converted, redeemed or repurchased, as applicable, which Physical Note will be converted, redeemed or repurchased, as applicable, pursuant to the terms of this Indenture; *provided, however,* that the Physical Note referred to in this clause (ii) need not be issued at any time after which such principal amount subject to such conversion, Redemption or repurchase, as applicable, is deemed to cease to be outstanding pursuant to **Section 2.13**.

(B) *Cancellation of Converted, Redeemed and Repurchased Notes.*

(i) *Physical Notes.* If a Physical Note (or any portion thereof that has not theretofore been exchanged pursuant to **Section 2.09(A)**) of a Holder is to be converted pursuant to **Article 5** or repurchased pursuant to a Repurchase Upon Fundamental Change, Optional Repurchase or Redemption, then, promptly after the later of the time such Physical Note (or such portion) is deemed to cease to be outstanding pursuant to **Section 2.13** and the time such Physical Note is surrendered for such conversion or repurchase, as applicable, (1) such Physical Note will be cancelled pursuant to **Section 2.15**; and (2) in the case of a partial conversion, Redemption or repurchase, the Company will issue, execute and deliver to such Holder, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, one or more Physical Notes that (x) are in Authorized Denominations and have an aggregate principal amount equal to the principal amount of such Physical Note that is not to be so converted, redeemed or repurchased; (y) are registered in the name of such Holder; and (z) bear each legend, if any, required by **Section 2.07**.

(ii) *Global Notes.* If a Global Note (or any portion thereof) is to be converted pursuant to **Section 4.04** or repurchased pursuant to a Repurchase Upon Fundamental Change, Optional Repurchase or Redemption, then, promptly after the time such Note (or such portion) is deemed to cease to be outstanding pursuant to **Section 2.13**, the Trustee

will reflect a decrease of the principal amount of such Global Note in an amount equal to the principal amount of such Global Note to be so converted, redeemed or repurchased, as applicable, by notation on the “Schedule of Exchanges of Interests in the Global Note” forming part of such Global Note (and, if the principal amount of such Global Note is zero following such notation, cancel such Global Note pursuant to **Section 2.15**).

Section 2.10. Registered Holders; Certain Rights with Respect to Global Notes.

Only the Holder of a Note will have rights under this Indenture as the owner of such Note. Without limiting the generality of the foregoing, Depositary Participants will have no rights as such under this Indenture with respect to any Global Note held on their behalf by the Depositary or its nominee, or by the Trustee as its custodian, and the Company, the Trustee, the Collateral Agent and the Note Agents, and their respective agents, may treat the Depositary as the absolute owner of such Global Note for all purposes whatsoever; *provided, however*, that (A) the Holder of any Global Note may grant proxies and otherwise authorize any Person, including Depositary Participants and Persons that hold interests in Notes through Depositary Participants, to take any action that such Holder is entitled to take with respect to such Global Note under this Indenture or the Notes; and (B) the Company, the Trustee and the Collateral Agent, and their respective agents, may give effect to any written certification, proxy or other authorization furnished by the Depositary.

None of the Trustee, the Collateral Agent nor any Note Agent will have any responsibility or obligation to any beneficial owner of a Global Note, a member of, or a participant in the Depositary, or any other Person with respect to the accuracy of the records of the Depositary, or its nominee or of any participant or member thereof, with respect to any ownership interest in the Notes or with respect to the delivery to any participant, member, beneficial owner or other Person (other than the Depositary) of any notice (including any notice of redemption or repurchase) or the payment of any amount, under or with respect to such Notes. All notices and communications to be given to the Holders and all payments to be made to the Holders under the Notes will be given or made only to the registered Holders (which will be the Depositary or its nominee in the case of a Global Note). The rights of beneficial owners in any Global Note will be exercised only through the Depositary subject to the applicable rules and procedures of the Depositary. The Trustee, Collateral Agent and Note Agents may rely and will be fully protected in relying upon information furnished by the Depositary, with respect to its members, participants and any beneficial owners.

Section 2.11. Notes Held by the Company or its Affiliates.

Without limiting the generality of **Section 3.03**, in determining whether the Holders of the required aggregate principal amount of Notes have concurred in any direction, waiver or consent, Notes owned by the Company or any of its Affiliates will be deemed not to be outstanding; *provided, however*, that, for purposes of determining whether the Trustee or Collateral Agent are protected in relying on any such direction, waiver or consent, only Notes that the Trustee or Collateral Agent, as applicable, knows are so owned will be so disregarded.

Section 2.12. Temporary Notes.

Until definitive Notes are ready for delivery, the Company may issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, temporary Notes. Temporary Notes will be substantially in the form of definitive Notes but may have variations that the Company considers appropriate for temporary Notes. The Company will promptly prepare, issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, definitive Notes in exchange for temporary Notes. Until so exchanged, each temporary Note will in all respects be entitled to the same benefits under this Indenture as definitive Notes.

Section 2.13. Outstanding Notes.

(A) *Generally.* The Notes that are outstanding at any time will be deemed to be those Notes that, at such time, have been duly executed and authenticated, excluding those Notes (or portions thereof) that have theretofore been (i) cancelled by the Trustee or delivered to the Trustee for cancellation in accordance with **Section 2.15**; (ii) assigned a principal amount of zero by notation on the “Schedule of Exchanges of Interests in the Global Note” forming part of any a Global Note representing such Note; (iii) paid in full in accordance with this Indenture; or (iv) deemed to cease to be outstanding to the extent provided in, and subject to, **clause (B), (C) or (D)** of this **Section 2.13**.

(B) *Replaced Notes.* If a Note is replaced pursuant to Section 2.16, then such Note will cease to be outstanding at the time of its replacement, unless the Trustee and the Company receive proof reasonably satisfactory to them that such Note is held by a “*bona fide* purchaser” under applicable law.

(C) *Maturing Notes and Notes Called for Redemption or Subject to Repurchase.* If, on a Redemption Date, a Fundamental Change Repurchase Date, an Optional Repurchase Date or the Maturity Date, the Paying Agent holds money sufficient to pay the aggregate Redemption Price, Fundamental Change Repurchase Price, Optional Repurchase Price or principal amount, respectively, together, in each case, with the aggregate interest, in each case due on such date, then (unless there occurs a Default in the payment of any such amount) (i) the Notes (or portions thereof) to be redeemed or repurchased, or that mature, on such date will be deemed, as of such date, to cease to be outstanding, except to the extent provided in **Sections 4.02(D), 4.03(C) and 4.04(E)**; and (ii) the rights of the Holders of such Notes (or such portions thereof), as such, will terminate with respect to such Notes (or such portions thereof), other than the right to receive the Redemption Price, Fundamental Change Repurchase Price, Optional Repurchase Price or principal amount, as applicable, of, and accrued and unpaid interest on, such Notes (or such portions thereof), in each case as provided in this Indenture.

(D) *Notes to Be Converted.* At the Close of Business on the Conversion Date for any Note (or any portion thereof) to be converted, such Note (or such portion) will (unless there occurs a Default in the delivery of the Conversion Consideration or interest due, pursuant to **Section 5.03(A)**, upon such conversion) be deemed to cease to be outstanding, except to the extent provided in **Section 5.03(A)**. For the avoidance of doubt, the Company’s withholding, pursuant to **Section 5.11**, of the delivery of any such Conversion Consideration for such Note will not be considered

to be a Default for purposes of this **Section 2.13(D)**, nor will it affect the operation of **Section 2.13(E)**.

(E) *Cessation of Accrual of Interest.* Except as provided in **Sections 4.02(D)**, **4.03(C)** and **4.04(E)**, interest will cease to accrue on each Note from, and including, the date that such Note is deemed, pursuant to this **Section 2.13**, to cease to be outstanding, unless there occurs a default in the payment or delivery of any cash or other property due on such Note.

Section 2.14. Repurchases by the Company.

Without limiting the generality of **Section 2.15**, the Company may, from time to time, repurchase Notes in open market purchases or in negotiated transactions without delivering prior notice to Holders.

Section 2.15. Cancellation.

All Notes surrendered for payment, conversion, redemption or registration of transfer or exchange will, if surrendered to any Person other than the Trustee, be delivered to the Trustee for cancellation. The Company may at any time deliver to the Trustee for cancellation any Notes previously authenticated and delivered hereunder which the Company may have acquired in any manner whatsoever, and may deliver to the Trustee (or to any other Person for delivery to the Trustee) for cancellation any Notes previously authenticated hereunder which the Company has not issued and sold. The Registrar and the Paying Agent will forward to the Trustee any Notes surrendered to them for transfer, exchange or payment. The Trustee or, at the direction of the Trustee, the Registrar or the Paying Agent, and no one else, will cancel all Notes surrendered for transfer, exchange, payment or cancellation. If the Company will acquire any of the Notes, such acquisition will not operate as a redemption or satisfaction of the Indebtedness represented by such Notes unless and until the same are surrendered to the Trustee for cancellation pursuant to this **Section 2.15**. No Notes will be authenticated in lieu of or in exchange for any Notes cancelled as provided in this **Section 2.15**, except as expressly permitted by this Indenture.

Section 2.16. Replacement Notes.

If a mutilated Note is surrendered to the Trustee, or if the Holder of a Note presents evidence to the satisfaction of the Company and the Trustee that the Note has been lost, destroyed or wrongfully taken, the Company will issue and the Trustee (upon Company Order) will authenticate a replacement Note of like tenor and principal amount and bearing a number not contemporaneously outstanding. An indemnity bond may be required by the Company or the Trustee that is sufficient in the judgment of the Company or the Trustee, as the case may be, to protect the Company, the Trustee, the Collateral Agent or any Note Agent from any loss which any of them may suffer if a Note is replaced. The Company may charge such Holder for the Company's out-of-pocket expenses in replacing a Note, including the fees and expenses of the Trustee. Every replacement Note will constitute an original additional obligation of the Company, whether or not the destroyed, lost or stolen Note will be at any time enforceable by anyone, and will be entitled to all the benefits of this Indenture equally and proportionately with any and all other Notes.

Section 2.17. CUSIP and ISIN Numbers.

The Company in issuing the Notes may use one or more “CUSIP” or “ISIN” numbers, and, if the Company does so, the Trustee will use the CUSIP or ISIN number(s) in notices of redemption or exchange as a convenience to Holders; *provided*, that any such notice may state that no representation is made as to the correctness or accuracy of the CUSIP or ISIN number(s) printed in the notice or on the Notes, and that reliance may be placed only on the other identification numbers printed on the Notes, and that any such redemption or exchange will not be affected by any defect in or omission of any such numbers.

Section 2.18. Holder Lists.

The Trustee will preserve in as current a form as is reasonably practicable the most recent list available to it of the names and addresses of Holders. If the Trustee is not the Registrar, the Company will furnish, or cause the Registrar to furnish, to the Trustee, in writing at least five Business Days before each Interest Payment Date and at such other times as the Trustee may request in writing, a list in such form and as of such date as the Trustee may reasonably require of the names and addresses of Holders.

Article 3. Covenants

Section 3.01. Payment on Notes.

(A) *Generally.* The Company will pay or cause to be paid all the principal of, the Fundamental Change Repurchase Price, Redemption Price and Optional Repurchase Price for, interest on, and other amounts due with respect to, the Notes on the dates and in the manner set forth in this Indenture.

(B) *Deposit of Funds.* Before 10:00 A.M., New York City time, on each Redemption Date, Fundamental Change Repurchase Date, Optional Repurchase Date or Interest Payment Date, and on the Maturity Date or any other date on which any cash amount is due on the Notes, the Company will deposit, or will cause there to be deposited, with the Paying Agent cash, in funds immediately available on such date, sufficient to pay the cash amount due on the applicable Notes on such date. The Paying Agent will return to the Company, as soon as practicable, any money not required for such purpose.

Section 3.02. Exchange Act Reports.

(A) *Generally.* The Company will send to the Trustee copies of all reports that the Company is required to file with or furnish to the SEC pursuant to Section 13(a) or 15(d) of the Exchange Act within fifteen (15) calendar days after the date that the Company is required to file or furnish the same (after giving effect to all applicable grace periods under the Exchange Act); *provided, however*, that the Company need not send to the Trustee any material for which the Company has received, or is seeking in good faith and has not been denied, confidential treatment by the SEC. Any report that the Company files with or furnishes to the SEC through the EDGAR system (or any successor thereto) will be deemed to be sent to the Trustee at the time such report is so filed or furnished via the EDGAR system (or such successor). Upon the request of any

Holder, the Company will provide to such Holder a copy of any report that the Company has sent the Trustee pursuant to this **Section 3.02(A)**, other than a report that is deemed to be sent to the Trustee pursuant to the preceding sentence.

(B) *Trustee's Disclaimer.* The Trustee need not determine whether the Company has filed or furnished any material via the EDGAR system (or such successor). The sending, filing or furnishing of reports pursuant to **Section 3.02(A)** will not be deemed to constitute actual or constructive notice to the Trustee of any information contained, or determinable from information contained, therein, including the Company's compliance with any of its covenants under this Indenture, as to which the Trustee is entitled to rely exclusively on Officer's Certificates.

Section 3.03. Restriction on Acquisition of Notes by the Company and its Affiliates.

The Company will promptly deliver to the Trustee for cancellation all Notes that the Company or any of its Subsidiaries have purchased or otherwise acquired. The Company will use commercially reasonable efforts to prevent any of its controlled Affiliates from acquiring any Note (or any beneficial interest therein).

Section 3.04. Further Instruments and Acts.

At the Trustee's request, the Company will execute and deliver such further instruments and do such further acts as may be reasonably necessary or proper to more effectively carry out the purposes of this Indenture.

Section 3.05. Compliance Certificates.

(A) The Company will deliver to the Trustee, within 120 days after the end of each fiscal year of the Company, an Officer's Certificate stating that a review of the activities of the Company and its Subsidiaries during such fiscal year has been made under the supervision of the signing Officer with a view to determining whether the Company has kept, observed, performed and fulfilled its obligations under this Indenture, and further stating, as to such Officer signing such certificate, that to the best of his or her knowledge the Company has kept, observed, performed and fulfilled each and every covenant contained in this Indenture and that there is no default in the performance or observance of any of the terms, provisions and conditions hereof (or, if a Default or Event of Default will have occurred, describing all such Defaults or Events of Default of which he or she may have knowledge and what action the Company is taking or proposes to take with respect thereto).

(B) If any Event of Default has occurred and is continuing, within five Business Days after the Company becoming aware of such Event of Default the Company will deliver to the Trustee an Officer's Certificate specifying such Event of Default and what action the Company is taking or proposes to take with respect thereto.

Section 3.06. Stay, Extension and Usury Laws.

To the extent that it may lawfully do so, the Company (A) agrees that it will not at

any time insist upon, plead, or in any manner whatsoever claim or take the benefit or advantage of, any stay, extension or usury law (wherever or whenever enacted or in force) that may affect the covenants or the performance of this Indenture; and (B) expressly waives all benefits or advantages of any such law and agrees that it will not, by resort to any such law, hinder, delay or impede the execution of any power granted to the Trustee or the Collateral Agent by this Indenture, but will suffer and permit the execution of every such power as though no such law has been enacted.

Section 3.07. Secured Indebtedness.

(A) The Company will not, and will not allow any Subsidiary to, issue or incur any indebtedness for borrowed money (including, without limitation, additional Notes issued pursuant to **Section 2.02(B)**) secured by a Lien on all or any portion of the Collateral (i) on a basis senior to the Lien of the Collateral Agent in an aggregate principal amount in excess of \$75,000,000 at any time outstanding; or (ii) on a basis pari passu with the Lien of the Collateral Agent in an aggregate principal amount in excess of \$65,000,000 at any time outstanding; provided that this **Section 3.07** will no longer be in effect at any time when the aggregate principal amount of Initial Notes then outstanding is less than \$22,000,000.

Article 4. Repurchase and Redemption

Section 4.01. No Sinking Fund.

No sinking fund is required to be provided for the Notes.

Section 4.02. Right of Holders to Require the Company to Repurchase Notes upon a Fundamental Change.

(A) *Right of Holders to Require the Company to Repurchase Notes Upon a Fundamental Change.* Subject to the other terms of this **Section 4.02**, if a Fundamental Change occurs, then each Holder will have the right (the “**Fundamental Change Repurchase Right**”) to require the Company to repurchase such Holder’s Notes (or any portion thereof in an Authorized Denomination) on the Fundamental Change Repurchase Date for such Fundamental Change for a cash purchase price equal to the Fundamental Change Repurchase Price.

(B) *Repurchase Prohibited in Certain Circumstances.* If the principal amount of the Notes has been accelerated and such acceleration has not been rescinded on or before the Fundamental Change Repurchase Date for a Repurchase Upon Fundamental Change (including as a result of the payment of the related Fundamental Change Repurchase Price, and any related interest pursuant to the proviso to **Section 4.02(D)**, on such Fundamental Change Repurchase Date), then (i) the Company may not repurchase any Notes pursuant to this **Section 4.02**; and (ii) the Company will cause any Notes theretofore surrendered for such Repurchase upon Fundamental Change to be returned to the Holders thereof (or, if applicable with respect to Global Notes, cancel any instructions for book-entry transfer to the Company, the Trustee or the Paying Agent of the applicable beneficial interest in such Notes in accordance with the Depositary Procedures).

(C) *Fundamental Change Repurchase Date.* The Fundamental Change Repurchase Date for any Fundamental Change will be a Business Day of the Company’s choosing that is no

more than thirty five (35), nor less than twenty (20), Business Days after the date the Company sends the related Fundamental Change Notice pursuant to **Section 4.02(E)**.

(D) *Fundamental Change Repurchase Price.* The Fundamental Change Repurchase Price for any Note to be repurchased upon a Repurchase Upon Fundamental Change following a Fundamental Change is an amount in cash equal to the principal amount of such Note plus accrued and unpaid interest on such Note to, but excluding, the Fundamental Change Repurchase Date for such Fundamental Change; *provided, however*, that if such Fundamental Change Repurchase Date is after a Regular Record Date and on or before the next Interest Payment Date, then (i) the Holder of such Note at the Close of Business on such Regular Record Date will be entitled, notwithstanding such Repurchase Upon Fundamental Change, to receive, on or, at the Company's election, before such Interest Payment Date, the unpaid interest that would have accrued on such Note to, but excluding, such Interest Payment Date (assuming, solely for these purposes, that such Note remained outstanding through such Interest Payment Date, if such Fundamental Change Repurchase Date is before such Interest Payment Date); and (ii) the Fundamental Change Repurchase Price will not include accrued and unpaid interest on such Note to, but excluding, such Fundamental Change Repurchase Date. For the avoidance of doubt, if an Interest Payment Date is not a Business Day within the meaning of **Section 2.04(C)** and such Fundamental Change Repurchase Date occurs on the Business Day immediately after such Interest Payment Date, then (x) accrued and unpaid interest on Notes to, but excluding, such Interest Payment Date will be paid, in accordance with **Section 2.04(C)**, on the next Business Day to Holders as of the Close of Business on the immediately preceding Regular Record Date; and (y) the Fundamental Change Repurchase Price will include interest on Notes to be repurchased from, and including, such Interest Payment Date.

(E) *Fundamental Change Notice.* On or before the twentieth (20th) calendar day after the occurrence of a Fundamental Change, the Company will (x) send to each Holder, the Trustee and the Paying Agent a notice of such Fundamental Change (a "**Fundamental Change Notice**") and (y) substantially contemporaneously therewith, issue a press release through such national newswire service as the Company then uses (or publish the same through such other widely disseminated public medium as the Company then uses, including its website) containing the information set forth in the Fundamental Change Notice.

Such Fundamental Change Notice must state:

- (i) briefly, the events causing such Fundamental Change;
- (ii) the effective date of such Fundamental Change;
- (iii) the procedures that a Holder must follow to require the Company to repurchase its Notes pursuant to this **Section 4.02**, including the deadline for exercising the Fundamental Change Repurchase Right and the procedures for submitting and withdrawing a Fundamental Change Repurchase Notice;
- (iv) the Fundamental Change Repurchase Date for such Fundamental Change;
- (v) the Fundamental Change Repurchase Price per \$1,000 principal amount of Notes for such Fundamental Change (and, if such Fundamental Change Repurchase Date

is after a Regular Record Date and on or before the next Interest Payment Date, the amount, manner and timing of the interest payment payable pursuant to the proviso to **Section 4.02(D)**);

(vi) the name and address of the Paying Agent and the Conversion Agent;

(vii) the Conversion Rate in effect on the date of such Fundamental Change Notice and a description and quantification of any adjustments to the Conversion Rate that may result from such Fundamental Change (including pursuant to **Section 5.08**);

(viii) that Notes for which a Fundamental Change Repurchase Notice has been duly tendered and not duly withdrawn must be delivered to the Paying Agent for the Holder thereof to be entitled to receive the Fundamental Change Repurchase Price;

(ix) that Notes (or any portion thereof) that are subject to a Fundamental Change Repurchase Notice that has been duly tendered may be converted only if such Fundamental Change Repurchase Notice is withdrawn in accordance with this Indenture; and

(x) the CUSIP and ISIN numbers, if any, of the Notes.

Neither the failure to deliver a Fundamental Change Notice nor any defect in a Fundamental Change Notice will limit the Fundamental Change Repurchase Right of any Holder or otherwise affect the validity of any proceedings relating to any Repurchase Upon Fundamental Change.

(F) *Procedures to Exercise the Fundamental Change Repurchase Right.*

(i) *Delivery of Fundamental Change Repurchase Notice and Notes to Be Repurchased.* To exercise its Fundamental Change Repurchase Right for a Note following a Fundamental Change, the Holder thereof must deliver to the Paying Agent:

(1) before the Close of Business on the Business Day immediately before the related Fundamental Change Repurchase Date (or such later time as may be required by law), a duly completed, written Fundamental Change Repurchase Notice with respect to such Note; and

(2) such Note, duly endorsed for transfer (if such Note is a Physical Note) or by book-entry transfer (if such Note is a Global Note).

The Paying Agent will promptly deliver to the Company a copy of each Fundamental Change Repurchase Notice that it receives.

(ii) *Contents of Fundamental Change Repurchase Notices.* Each Fundamental Change Repurchase Notice with respect to a Note must state:

(1) if such Note is a Physical Note, the certificate number of such Note;

(2) the principal amount of such Note to be repurchased, which must be

an Authorized Denomination; and

(3) that such Holder is exercising its Fundamental Change Repurchase Right with respect to such principal amount of such Note;

provided, however, that if such Note is a Global Note, then such Fundamental Change Repurchase Notice must comply with the Depository Procedures (and any such Fundamental Change Repurchase Notice delivered in compliance with the Depository Procedures will be deemed to satisfy the requirements of this **Section 4.02(F)**).

(iii) *Withdrawal of Fundamental Change Repurchase Notice.* A Holder that has delivered a Fundamental Change Repurchase Notice with respect to a Note may withdraw such Fundamental Change Repurchase Notice by delivering a written notice of withdrawal to the Paying Agent at any time before the Close of Business on the Business Day immediately before the related Fundamental Change Repurchase Date. Such withdrawal notice must state:

(1) if such Note is a Physical Note, the certificate number of such Note;

(2) the principal amount of such Note to be withdrawn, which must be an Authorized Denomination; and

(3) the principal amount of such Note, if any, that remains subject to such Fundamental Change Repurchase Notice, which must be an Authorized Denomination;

provided, however, that if such Note is a Global Note, then such withdrawal notice must comply with the Depository Procedures (and any such withdrawal notice delivered in compliance with the Depository Procedures will be deemed to satisfy the requirements of this **Section 4.02(F)**).

Upon receipt of any such withdrawal notice with respect to a Note (or any portion thereof), the Paying Agent will (x) promptly deliver a copy of such withdrawal notice to the Company; and (y) if such Note is surrendered to the Paying Agent, cause such Note (or such portion thereof in accordance with **Section 2.09**, treating such Note as having been then surrendered for partial repurchase in the amount set forth in such withdrawal notice as remaining subject to repurchase) to be returned to the Holder thereof (or, if applicable with respect to any Global Note, cancel any instructions for book-entry transfer to the Company, the Trustee or the Paying Agent of the applicable beneficial interest in such Note in accordance with the Depository Procedures).

(G) *Payment of the Fundamental Change Repurchase Price.* Without limiting the Company's obligation to deposit the Fundamental Change Repurchase Price within the time proscribed by **Section 3.01(B)**, the Company will cause the Fundamental Change Repurchase Price for a Note (or portion thereof) to be repurchased pursuant to a Repurchase Upon Fundamental Change to be paid to the Holder thereof on or before the later of (i) the applicable Fundamental Change Repurchase Date; and (ii) the date (x) such Note is delivered to the Paying Agent (in the

case of a Physical Note) or (y) the Depositary Procedures relating to the repurchase, and the delivery to the Paying Agent, of such Holder's beneficial interest in such Note to be redeemed are complied with (in the case of a Global Note). For the avoidance of doubt, interest payable pursuant to the proviso to **Section 4.02(D)** on any Note to be repurchased pursuant to a Repurchase Upon Fundamental Change must be paid pursuant to such proviso regardless of whether such Note is delivered or such Depositary Procedures are complied with pursuant to the first sentence of this **Section 4.02(G)**.

(H) *Compliance with Applicable Securities Laws.* To the extent applicable, the Company will comply with all federal and state securities laws in connection with a Repurchase Upon Fundamental Change (including complying with Rules 13e-4 and 14e-1 under the Exchange Act and filing any required Schedule TO, to the extent applicable) so as to permit effecting such Repurchase Upon Fundamental Change in the manner set forth in this Indenture.

(I) *Repurchase in Part.* Subject to the terms of this **Section 4.02**, Notes may be repurchased pursuant to a Repurchase Upon Fundamental Change in part, but only in Authorized Denominations. Provisions of this **Section 4.02** applying to the repurchase of a Note in whole will equally apply to the repurchase of a permitted portion of a Note.

Section 4.03. Right of Holders to Require the Company to Repurchase Notes on the Optional Repurchase Dates.

(A) *Right of Holders to Require the Company to Repurchase Notes on each Optional Repurchase Date.* Subject to the terms of this **Section 4.03**, each Holder will have the right (the "**Optional Repurchase Right**") to require the Company to repurchase such Holder's Notes (or any portion thereof in an Authorized Denomination) on each of November 1, 2023, November 1, 2028, November 1, 2033, November 1, 2038 and November 1, 2043 (or, if any such date is not a Business Day, the next Business Day) (each such date, after giving effect to the immediately preceding parenthetical, an "**Optional Repurchase Date**") for a cash repurchase price equal to the Optional Repurchase Price.

(B) *Repurchase Prohibited in Certain Circumstances.* If the principal amount of the Notes has been accelerated and such acceleration has not been rescinded on or before an Optional Repurchase Date (including as a result of the payment of the related Optional Repurchase Price), then (i) the Company may not repurchase any Notes otherwise subject to Optional Repurchase on such Optional Repurchase Date pursuant to this **Section 4.03**; and (ii) the Company will cause any Notes theretofore surrendered for such Optional Repurchase to be returned to the Holders thereof (or, if applicable with respect to Global Notes, cancel any instructions for book-entry transfer to the Company, the Trustee or the Paying Agent of the applicable beneficial interest in such Notes in accordance with the Depositary Procedures).

(C) *Optional Repurchase Price.* The Optional Repurchase Price for any Note to be repurchased on any Optional Repurchase Date pursuant to an Optional Repurchase is an amount in cash equal to the principal amount of such Note plus accrued and unpaid interest on such Note to, but excluding, such Optional Repurchase Date; *provided, however*, that if such Optional Repurchase Date is after a Regular Record Date and on or before the next Interest Payment Date, then (i) the Holder of such Note at the Close of Business on such Regular Record Date will be

entitled, notwithstanding such Optional Repurchase, to receive, on or, at the Company's election, before such Interest Payment Date, the unpaid interest that would have accrued on such Note to, but excluding, such Interest Payment Date (assuming, solely for these purposes, that such Note remained outstanding through such Interest Payment Date, if such Optional Repurchase Date is before such Interest Payment Date); and (ii) the Optional Repurchase Price will not include accrued and unpaid interest on such Note to, but excluding, such Optional Repurchase Date. For the avoidance of doubt, if an Interest Payment Date is not a Business Day within the meaning of **Section 2.04(C)** and such Optional Repurchase Date occurs on the Business Day immediately after such Interest Payment Date, then (x) accrued and unpaid interest on Notes to, but excluding, such Interest Payment Date will be paid, in accordance with **Section 2.04(C)**, on the next Business Day to Holders at of the Close of Business on the immediately preceding Regular Record Date; and (y) the Optional Repurchase Price will include interest, if any, on Notes to be repurchased from, and including, such Interest Payment Date.

(D) *Optional Repurchase Date Notice.* No later than twenty (20) Business Days before each Optional Repurchase Date, the Company will (x) send to each Holder, the Trustee and the Paying Agent a notice (an "**Optional Repurchase Date Notice**") and (y) substantially contemporaneously therewith, issue a press release through such national newswire service as the Company then uses or publish the same through such other widely disseminated public medium as the Company then uses (including its website) containing the information set forth in the Optional Repurchase Date Notice.

Such Optional Repurchase Date Notice must state:

(i) the procedures that a Holder must follow to require the Company to repurchase its Notes pursuant to this **Section 4.03**, including the deadline for exercising the Optional Repurchase Right with respect to such Optional Repurchase Date and the procedures for submitting and withdrawing an Optional Repurchase Notice,

(ii) such Optional Repurchase Date;

(iii) the Optional Repurchase Price and that the Holder of any Note at the Close of Business on the Regular Record Date immediately before such Optional Repurchase Date will be entitled to receive, on the Interest Payment Date falling on such Optional Repurchase Date, the unpaid interest that has accrued on such Note to, but excluding, such Interest Payment Date;

(iv) the name and address of the Paying Agent and the Conversion Agent;

(v) the current Conversion Rate;

(vi) that Notes for which an Optional Repurchase Notice has been duly tendered and not duly withdrawn must be delivered to the Paying Agent for the Holder thereof to be entitled to receive the Optional Repurchase Price;

(vii) that Notes (or any portion thereof) that are subject to an Optional Repurchase Notice that has been duly tendered may be converted (if otherwise then convertible pursuant to **Article 5**) only if such Optional Repurchase Notice is withdrawn

in accordance with this Indenture; and

- (viii) the CUSIP and ISIN numbers, if any, of the Notes.

Neither the failure to deliver an Optional Repurchase Date Notice nor any defect in an Optional Repurchase Date Notice will limit the Optional Repurchase Right of any Holder or otherwise affect the validity of any proceedings relating to any Optional Repurchase.

(E) *Procedures to Exercise the Optional Repurchase Right.*

(i) *Delivery of Optional Repurchase Notice and Notes to Be Repurchased.* To exercise its Optional Repurchase Right with respect to an Optional Repurchase Date for a Note, the Holder thereof must deliver to the Paying Agent:

- (1) before the Close of Business on the Business Day immediately before such Optional Repurchase Date (or such later time as may be required by law), a duly completed, written Optional Repurchase Notice with respect to such Note; and

- (2) such Note, duly endorsed for transfer (if such Note is a Physical Note) or by book-entry transfer (if such Note is a Global Note).

The Paying Agent will promptly deliver to the Company a copy of each Optional Repurchase Notice that it receives.

(ii) *Contents of Optional Repurchase Notices.* Each Optional Repurchase Notice with respect to a Note must state:

- (1) if such Note is a Physical Note, the certificate number of such Note;

- (2) the principal amount of such Note to be repurchased, which must be an Authorized Denomination; and

- (3) that such Holder is exercising its Optional Repurchase Right with respect to such principal amount of such Note;

provided, however, that if such Note is a Global Note, then such Optional Repurchase Notice must comply with the Depositary Procedures (and any such Optional Repurchase Notice delivered in compliance with the Depositary Procedures will be deemed to satisfy the requirements of this **Section 4.03(E)**).

(iii) *Withdrawal of Optional Repurchase Notice.* A Holder that has delivered an Optional Repurchase Notice with respect to a Note for an Optional Repurchase Date may withdraw such Optional Repurchase Notice by delivering a written notice of withdrawal to the Paying Agent at any time before the Close of Business on the Business Day immediately before such Optional Repurchase Date. Such withdrawal notice must state:

- (1) if such Note is a Physical Note, the certificate number of such Note;

(2) the principal amount of such Note to be withdrawn, which must be an Authorized Denomination; and

(3) the principal amount of such Note, if any, that remains subject to such Optional Repurchase Notice, which must be an Authorized Denomination;

provided, however, that if such Note is a Global Note, then such withdrawal notice must comply with the Depositary Procedures (and any such withdrawal notice delivered in compliance with the Depositary Procedures will be deemed to satisfy the requirements of this **Section 4.03(E)**).

Upon receipt of any such withdrawal notice with respect to a Note (or any portion thereof), the Paying Agent will (x) promptly deliver a copy of such withdrawal notice to the Company; and (y) if such Note is surrendered to the Paying Agent, cause such Note (or such portion thereof in accordance with **Section 2.09**, treating such Note as having been then surrendered for partial repurchase in the amount set forth in such withdrawal notice as remaining subject to repurchase) to be returned to the Holder thereof (or, if applicable with respect to any Global Note, cancel any instructions for book-entry transfer to the Company, the Trustee or the Paying Agent of the applicable beneficial interest in such Note in accordance with the Depositary Procedures).

(F) *Payment of the Optional Repurchase Price.* Without limiting the Company's obligation to deposit the Optional Repurchase Price within the time proscribed by **Section 3.01(B)**, the Company will cause the Optional Repurchase Price for a Note (or portion thereof) to be repurchased pursuant to an Optional Repurchase to be paid to the Holder thereof on or before the later of (i) the applicable Optional Repurchase Date; and (ii) the date (x) such Note is delivered to the Paying Agent (in the case of a Physical Note) or (y) the Depositary Procedures relating to the repurchase, and the delivery to the Paying Agent, of such Holder's beneficial interest in such Note to be repurchased are complied with (in the case of a Global Note). For the avoidance of doubt, interest payable as described in **Section 4.03(C)** on any Note to be repurchased pursuant to an Optional Repurchase must be paid as so described regardless of whether such Note is delivered or such Depositary Procedures are complied with pursuant to the first sentence of this **Section 4.03(F)**.

(G) *Compliance with Applicable Securities Laws.* To the extent applicable, the Company will comply with all federal and state securities laws in connection with an Optional Repurchase (including complying with Rules 13e-4 and 14e-1 under the Exchange Act and filing any required Schedule TO, to the extent applicable) so as to permit effecting such Optional Repurchase in the manner set forth in this Indenture.

(H) *Repurchase in Part.* Subject to the terms of this **Section 4.03**, Notes may be repurchased pursuant to an Optional Repurchase in part, but only in Authorized Denominations. Provisions of this **Section 4.03** applying to the repurchase of a Note in whole will equally apply to the repurchase of a permitted portion of a Note.

Section 4.04. Right of the Company to Redeem the Notes.

(A) *No Right to Redeem Before November 1, 2022.* The Company may not redeem the Notes at its option at any time before November 1, 2022.

(B) *Right to Redeem the Notes on or After November 1, 2022.* Subject to the terms of this **Section 4.04**, the Company has the right, at its election, to redeem all, or any portion in an Authorized Denomination, of the Notes, at any time, and from time to time, on a Redemption Date on or after November 1, 2022, for a cash purchase price equal to the Redemption Price.

(C) *Redemption Prohibited in Certain Circumstances.* If the principal amount of the Notes has been accelerated and such acceleration has not been rescinded on or before the Redemption Date (including as a result of the payment of the related Redemption Price, and any related interest pursuant to the proviso to **Section 4.04(E)**, on such Redemption Date), then (i) the Company may not call for Redemption or otherwise redeem any Notes pursuant to this **Section 4.04**; and (ii) the Company will cause any Notes theretofore surrendered for such Redemption to be returned to the Holders thereof (or, if applicable with respect to Global Notes, cancel any instructions for book-entry transfer to the Company, the Trustee or the Paying Agent of the applicable beneficial interests in such Notes in accordance with the Depository Procedures).

(D) *Redemption Date.* The Redemption Date for any Redemption will be a Business Day of the Company's choosing that is no more than sixty (60), nor less than thirty (30), calendar days after the Redemption Notice Date for such Redemption.

(E) *Redemption Price.* The Redemption Price for any Note called for Redemption is an amount in cash equal to the principal amount of such Note plus accrued and unpaid interest on such Note to, but excluding, the Redemption Date for such Redemption; *provided, however*, that if such Redemption Date is after a Regular Record Date and on or before the next Interest Payment Date, then (i) the Holder of such Note at the Close of Business on such Regular Record Date will be entitled, notwithstanding such Redemption, to receive, on or, at the Company's election, before such Interest Payment Date, the unpaid interest that would have accrued on such Note to, but excluding, such Interest Payment Date (assuming, solely for these purposes, that such Note remained outstanding through such Interest Payment Date, if such Redemption Date is before such Interest Payment Date); and (ii) the Redemption Price will not include accrued and unpaid interest on such Note to, but excluding, such Redemption Date. For the avoidance of doubt, if an Interest Payment Date is not a Business Day within the meaning of **Section 2.04(C)** and such Redemption Date occurs on the Business Day immediately after such Interest Payment Date, then (x) accrued and unpaid interest on Notes to, but excluding, such Interest Payment Date will be paid, in accordance with **Section 2.04(C)**, on the next Business Day to Holders at of the Close of Business on the immediately preceding Regular Record Date; and (y) the Redemption Price will include interest on Notes to be redeemed from, and including, such Interest Payment Date.

(F) *Redemption Notice.* To call any Notes for Redemption, the Company must send to each applicable Holder of such Notes (and to any beneficial owner of a Global Note, if required by applicable law), the Trustee and the Paying Agent a written notice of such Redemption (a "**Redemption Notice**").

Such Redemption Notice must state:

- (i) that the Notes have been called for Redemption, briefly describing the Company's Redemption right under this Indenture;
- (ii) the Redemption Date for such Redemption;
- (iii) the Redemption Price per \$1,000 principal amount of Notes for such Redemption (and, if the Redemption Date is after a Regular Record Date and on or before the next Interest Payment Date, the amount, manner and timing of the interest payment payable pursuant to the proviso to **Section 4.04(E)**);
- (iv) the name and address of the Paying Agent and the Conversion Agent;
- (v) that Notes called for Redemption may be converted at any time before the Close of Business on the Business Day immediately before the Redemption Date (or, if the Company fails to pay the Redemption Price due on such Redemption Date in full, at any time until such time as the Company pays such Redemption Price in full);
- (vi) the Conversion Rate in effect on the Redemption Notice Date for such Redemption;
- (vii) that Notes called for Redemption must be delivered to the Paying Agent (in the case of Physical Notes) or the Depository Procedures must be complied with (in the case of Global Notes) for the Holder thereof to be entitled to receive the Redemption Price; and
- (viii) the CUSIP and ISIN numbers, if any, of the Notes.

On or before the Redemption Notice Date, the Company will send a copy of such Redemption Notice to the Trustee and the Paying Agent.

(G) *Selection, Conversion and Transfer of Notes to be Redeemed in Part.* If less than all Notes then outstanding are called for Redemption, then:

- (i) the Notes to be redeemed will be selected by the Company as follows: (1) in the case of Global Notes, in accordance with the Depository Procedures; and (2) in the case of Physical Notes, pro rata, by lot or by such other method the Company considers fair and appropriate; and
- (ii) if only a portion of a Note is subject to Redemption and such Note is converted in part, then the converted portion of such Note will be deemed to be from the portion of such Note that was subject to Redemption.

(H) *Payment of the Redemption Price.* Without limiting the Company's obligation to deposit the Redemption Price by the time proscribed by **Section 3.01(B)**, the Company will cause the Redemption Price for a Note (or portion thereof) subject to Redemption to be paid to the Holder thereof on or before the later of (i) the applicable Redemption Date; and (ii) the date (x) such Note

is delivered to the Paying Agent (in the case of a Physical Note) or (y) the Depositary Procedures relating to the Redemption, and the delivery to the Paying Agent, of such Holder's beneficial interest in such Note to be redeemed are complied with (in the case of a Global Note). For the avoidance of doubt, interest payable pursuant to the proviso to **Section 4.04(E)** on any Note (or portion thereof) subject to Redemption must be paid pursuant to such proviso regardless of whether such Note is delivered or such Depositary Procedures are complied with pursuant to the first sentence of this **Section 4.04(H)**.

Article 5. Conversion

Section 5.01. Right to Convert.

(A) *Generally.* Subject to the provisions of this **Article 5**, each Holder may, at its option, convert such Holder's Notes into Conversion Consideration.

(B) *Conversions in Part.* Subject to the terms of this Indenture, Notes may be converted in part, but only in Authorized Denominations. Provisions of this **Article 5** applying to the conversion of a Note in whole will equally apply to conversions of a permitted portion of a Note.

(C) *When Notes May Be Converted.*

(i) *Generally.* A Holder may convert its Notes at any time until the Close of Business on the Scheduled Trading Day immediately before the Maturity Date.

(ii) *Limitations and Closed Periods.* Notwithstanding anything to the contrary in this Indenture or the Notes:

(1) Notes may be surrendered for conversion only after the Open of Business and before the Close of Business on a day that is a Business Day;

(2) in no event may any Note be converted after the Close of Business on the Scheduled Trading Day immediately before the Maturity Date;

(3) if the Company calls any Note for Redemption pursuant to **Section 4.04**, then the Holder of such Note may not convert such Note after the Close of Business on the Business Day immediately before the applicable Redemption Date, except to the extent the Company fails to pay the Redemption Price for such Note in accordance with this Indenture; and

(4) if a Fundamental Change Repurchase Notice or Optional Repurchase Notice is validly delivered pursuant to **Section 4.02(F)** or **4.03(E)**, respectively, with respect to any Note, then such Note may not be converted, except to the extent (a) such Note is not subject to such notice; (b) such notice is withdrawn in accordance with **Section 4.02(F)** or **4.03(E)**, as applicable; or (c) the Company fails to pay the Fundamental Change Repurchase Price or Optional Repurchase Price, as applicable, for such Note in accordance with this Indenture.

Section 5.02. Conversion Procedures.

(A) *Generally.*

(i) *Global Notes.* To convert a beneficial interest in a Global Note, the owner of such beneficial interest must (1) comply with the Depositary Procedures for converting such beneficial interest (at which time such conversion will become irrevocable); and (2) pay any amounts due pursuant to **Section 5.02(D)**.

(ii) *Physical Notes.* To convert all or a portion of a Physical Note, the Holder of such Note must (1) complete, manually sign and deliver to the Conversion Agent the conversion notice attached to such Physical Note or a facsimile of such conversion notice; (2) deliver such Physical Note to the Conversion Agent (at which time such conversion will become irrevocable); (3) furnish any endorsements and transfer documents that the Company or the Conversion Agent may require; and (4) pay any amounts due pursuant to **Section 5.02(D)**.

(B) *Effect of Converting a Note.* At the Close of Business on the Conversion Date for a Note (or any portion thereof), such Note (or such portion thereof) will be deemed to cease to be outstanding (and, for the avoidance of doubt, no Person will be deemed to be a Holder of such Note (or such portion thereof) as of the Close of Business on such Conversion Date), except to the extent provided in **Section 5.03(A)(i)**.

(C) *Holder of Record of Conversion Shares.* The Person in whose name any share of Common Stock is issuable upon conversion of any Note will be deemed to become the holder of record of such share as of the Close of Business on the Conversion Date for such conversion.

(D) *Taxes and Duties.* If a Holder converts a Note, the Company will pay any documentary, stamp or similar issue or transfer tax or duty due on the issue of any shares of Common Stock upon such conversion; *provided, however,* that if any tax or duty is due because such Holder requested such shares to be registered in a name other than such Holder's name, then such Holder will pay such tax or duty and, until having received a sum sufficient to pay such tax or duty, the Conversion Agent may refuse to deliver any such shares to be issued in a name other than that of such Holder.

(E) *Conversion Agent to Notify Company of Conversions.* If any Note is submitted for conversion to the Conversion Agent or the Conversion Agent receives any notice of conversion with respect to a Note, then the Conversion Agent will promptly notify the Company and the Trustee of such occurrence, together with any other information reasonably requested by the Company, and will cooperate with the Company to determine the Conversion Date for such Note.

Section 5.03. Settlement upon Conversion.

(A) *Conversion Consideration.*

(i) *Generally.* Subject to **Section 5.03(A)(ii)** and **Section 5.03(A)(iii)**, the type and amount of consideration (the "**Conversion Consideration**") due in respect of any Note (or portion thereof) to be converted will be (a) a number of shares of Common Stock, per

\$1,000 principal amount of such Note to be converted, equal to the Conversion Rate in effect on the Conversion Date for such conversion; and (b) a cash amount equal to the sum of the following:

(1) unpaid interest that has accrued on such Note (or such portion thereof) to, but excluding, the date the Company settles such conversion (unless such Conversion Date is after a Regular Record Date and before the next Interest Payment Date, in which case (y) the Holder of such Note at the Close of Business on such Regular Record Date will be entitled, notwithstanding such conversion, to receive, on or, at the Company's election, before such Interest Payment Date, the unpaid interest that would have accrued on such Note to, but excluding, such Interest Payment Date (assuming, solely for these purposes, that such Note remained outstanding through such Interest Payment Date, if such Conversion Date is before such Interest Payment Date); and (z) the Company will not pay any separate cash amount pursuant to this **Section 5.03(A)(i)(1)** for interest as part of the consideration due upon such conversion); and

(2) the Interest Make-Whole for such conversion.

(ii) *Cash in Lieu of Fractional Shares.* If the number of shares of Common Stock deliverable pursuant to **Section 5.03(A)(i)** upon conversion of any Note is not a whole number, then such number will be rounded down to the nearest whole number and the Company will deliver, in addition to the other consideration due upon such conversion, cash in lieu of the related fractional share in an amount equal to the product of (1) such fraction and (2) the Daily VWAP per share of Common Stock on the Conversion Date for such conversion (or, if such Conversion Date is not a VWAP Trading Day, the immediately preceding VWAP Trading Day).

(iii) *Conversion of Multiple Notes by a Single Holder.* If a Holder converts more than one (1) Note on a single Conversion Date, then the Conversion Consideration due in respect of such conversion will (in the case of any Global Note, to the extent permitted by, and practicable under, the Depositary Procedures) be computed based on the total principal amount of Notes converted on such Conversion Date by such Holder.

(B) *Delivery of the Conversion Consideration.* Except as set forth in **Sections 5.06(A)** and **5.06(C)** or in the proviso to this sentence, the Company will pay or deliver, as applicable, the Conversion Consideration due upon the conversion of any Note to the Holder on or before the second (2nd) Business Day immediately after the Conversion Date for such conversion.

(C) *Accrued Interest Notwithstanding Conversion.* Without limiting the Company's obligation to pay interest pursuant to **Section 5.03(A)(i)**, if a Holder converts a Note, then the Company will not adjust the Conversion Rate to account for any accrued and unpaid interest on such Note.

Section 5.04. Company's Mandatory Conversion Option.

(A) *Mandatory Conversion.* Subject to **Section 5.04(D)**, if, at any time prior to the Maturity Date, the Daily VWAP per share of the Common Stock equals or exceeds one hundred and twenty-one (121%) of the Conversion Price on each of at least twenty (20) VWAP Trading

Days, whether or not consecutive, during any thirty (30) consecutive VWAP Trading Day period commencing on or after the Issue Date, then the Company will have the right (the “**Company Mandatory Conversion Right**”), exercisable at the Company’s election, to cause all (and not less than all) Notes then outstanding to be automatically converted (any such conversion, a “**Mandatory Conversion**”).

(B) *Mandatory Conversion Notice.* To exercise the Company Mandatory Conversion Right, the Company will send notice of the Company’s election (a “**Mandatory Conversion Notice**”) to Holders, the Trustee and the Conversion Agent no later than the fifth (5th) Business Day after the last VWAP Trading Day of such 30 consecutive VWAP Trading Day period.

Such Mandatory Conversion Notice must state:

- (i) that the Notes have been called for Mandatory Conversion, briefly describing the Company Mandatory Conversion Right under this Indenture;
- (ii) the Mandatory Conversion Date;
- (iii) the current Conversion Rate;
- (iv) the name and address of the Paying Agent and the Conversion Agent; and
- (v) the CUSIP and ISIN numbers, if any, of the Notes.

(C) *Effect of Mandatory Conversion; Mandatory Conversion Date.* If the Company exercises the Company Mandatory Conversion Right in accordance with this **Section 5.04**, then a Conversion Date will automatically, and without the need for any action on the part of any Holder, the Trustee or the Conversion Agent, be deemed to occur, with respect to each Note then outstanding, on the Mandatory Conversion Date. The Mandatory Conversion Date will be a Business Day of the Company’s choosing that is no more than thirty (30), nor less than ten (10), Business Days after the Company sends the Mandatory Conversion Notice.

(D) *Mandatory Conversion Prohibited in Certain Circumstances.* Notwithstanding anything to the contrary in this **Section 5.04**, the Company may not exercise its Company Mandatory Conversion Right at any time during the period beginning on the effective date of a Fundamental Change or Make-Whole Fundamental Change and ending on the thirty-fifth (35th) Trading Day after such effective date (or, in the case of a Fundamental Change, ending on the related Fundamental Change Repurchase Date). In addition, notwithstanding anything to the contrary in this **Section 5.04**, the Company may not exercise its Company Mandatory Conversion Right unless all of the following conditions (collectively, the “**Equity Conditions**”) are satisfied on each day from, and including, the date the Company sends the Mandatory Conversion Notice to, and including, the Mandatory Conversion Date:

- (i) either (x) all shares of the Common Stock issuable upon Mandatory Conversion will be eligible for resale, by a person that is not an Affiliate of the Company, without registration under any applicable federal or state securities laws; or (y) a shelf registration statement registering the resale of the shares of Common Stock issuable upon

conversion of the Notes is effective under the Securities Act and available for use by the persons to whom such shares are to be issued, and the Company expects such shelf registration statement to remain effective and so available for use from the date the Company sends the Mandatory Conversion Notice through the date that is thirty (30) calendar days following such Mandatory Conversion Date;

(ii) the Common Stock is listed on any Eligible Market and has not been suspended from trading on such Eligible Market (other than suspensions of not more than two (2) Trading Days and occurring before the applicable date of determination due to business announcements by the Company);

(iii) the delisting or suspension of the Common Stock is not pending and has not been threatened in writing by the applicable Eligible Market, and the Company is not then in violation of the then effective minimum listing maintenance requirements of such Eligible Market;

(iv) all shares of Common Stock issuable upon Mandatory Conversion may be issued in full without violating the listing rules of The Nasdaq Global Market or any other applicable Eligible Market on which the Common Stock is then listed or trading; and

(v) the Company has not defaulted on its obligation to convert any Note before the date the Company sends the Mandatory Conversion Notice, and no Default or Event of Default has occurred and is continuing.

If any of the Equity Conditions ceases to be satisfied at any time after the Company sends a Mandatory Conversion Notice, the Company will promptly (and no later than the scheduled Mandatory Conversion Date) notify Holders, the Trustee and the Conversion Agent of the same, specifying that the Mandatory Conversion ceases to apply. Except as set forth in the preceding sentence, the Company's issuance of a Mandatory Conversion Notice will be irrevocable.

Section 5.05. Reserve and Status of Common Stock Issued upon Conversion.

(A) *Stock Reserve.* At all times from and after the Issue Date, when any Notes are outstanding, the Company will reserve, out of its authorized but unissued and unreserved shares of Common Stock, a number of shares of Common Stock sufficient to permit the conversion of all then-outstanding Notes, assuming the Conversion Rate is increased by the maximum amount pursuant to which the Conversion Rate may be increased pursuant to **Section 5.08**.

(B) *Status of Conversion Shares; Listing.* Each Conversion Share delivered upon conversion of any Note will be a newly issued or treasury share and will be duly and validly issued, fully paid, non-assessable, free from preemptive rights and free of any lien or adverse claim (except to the extent of any lien or adverse claim created by the action or inaction of the Holder of such Note or the Person to whom such Conversion Share will be delivered). If the Common Stock is then listed on any securities exchange, or quoted on any inter-dealer quotation system, then the Company will cause each Conversion Share, when delivered upon conversion of any Note, to be admitted for listing on such exchange or quotation on such system.

Section 5.06. Adjustments to the Conversion Rate.

(A) *Events Requiring an Adjustment to the Conversion Rate.* The Conversion Rate will be adjusted, without duplication, from time to time as follows:

(i) *Stock Dividends, Splits and Combinations.* If the Company issues solely shares of Common Stock as a dividend or distribution on all or substantially all shares of the Common Stock, or if the Company effects a stock split or a stock combination of the Common Stock (in each case excluding an issuance solely pursuant to a Common Stock Change Event, as to which **Section 5.09** will apply), then the Conversion Rate will be adjusted based on the following formula:

$$CR_1 = CR_0 \times \frac{OS_1}{OS_0}$$

where:

CR_0 = the Conversion Rate in effect immediately before the Open of Business on the Ex-Dividend Date for such dividend or distribution, or immediately before the Open of Business on the effective date of such stock split or stock combination, as applicable;

CR_1 = the Conversion Rate in effect immediately after the Open of Business on such Ex-Dividend Date or the Open of Business on such effective date, as applicable;

OS_0 = the number of shares of Common Stock outstanding immediately before the Open of Business on such Ex-Dividend Date or effective date, as applicable, without giving effect to such dividend, distribution, stock split or stock combination; and

OS_1 = the number of shares of Common Stock outstanding immediately after giving effect to such dividend, distribution, stock split or stock combination.

For the avoidance of doubt, an adjustment made pursuant to this **Section 5.06(A)(i)** will become effective at the time set forth in the definition of CR_1 above. If any dividend, distribution, stock split or stock combination of the type described in this **Section 5.06(A)(i)** is declared or announced, but not so paid or made, then the Conversion Rate will be readjusted, effective as of the date the Board of Directors determines not to pay such dividend or distribution or to effect such stock split or stock combination, to the Conversion Rate that would then be in effect had such dividend, distribution, stock split or stock combination not been declared or announced.

(ii) *Rights, Options and Warrants.* If the Company distributes, to all or substantially all holders of Common Stock, rights, options or warrants (other than rights issued or otherwise distributed pursuant to a stockholder rights plan, as to which the

provisions set forth in **Sections 5.06(A)(iii)(1)** and **5.06(E)** will apply) entitling such holders, for a period of not more than forty-five (45) calendar days after the record date of such distribution, to subscribe for or purchase shares of Common Stock at a price per share that is less than the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date such distribution is announced, then the Conversion Rate will be increased based on the following formula:

$$CR_1 = CR_0 \times \frac{OS + X}{OS + Y}$$

where:

CR_0 = the Conversion Rate in effect immediately before the Open of Business on the Ex-Dividend Date for such distribution;

CR_1 = the Conversion Rate in effect immediately after the Open of Business on such Ex-Dividend Date;

OS = the number of shares of Common Stock outstanding immediately before the Open of Business on such Ex-Dividend Date;

X = the total number of shares of Common Stock issuable pursuant to such rights, options or warrants; and

Y = a number of shares of Common Stock obtained by dividing (x) the aggregate price payable to exercise such rights, options or warrants by (y) the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date such distribution is announced.

For the avoidance of doubt, an adjustment made pursuant to this **Section 5.06(A)(ii)** will become effective at the time set forth in the definition of CR_1 above. To the extent that shares of Common Stock are not delivered after the expiration of such rights, options or warrants (including as a result of such rights, options or warrants not being exercised), the Conversion Rate will be readjusted to the Conversion Rate that would then be in effect had the increase to the Conversion Rate for such distribution been made on the basis of delivery of only the number of shares of Common Stock actually delivered upon exercise of such rights, option or warrants. To the extent such rights, options or warrants are not so distributed, the Conversion Rate will be readjusted to the Conversion Rate that would then be in effect had the Ex-Dividend Date for the distribution of such rights, options or warrants not occurred.

For purposes of this **Section 5.06(A)(ii)**, in determining whether any rights, options or warrants entitle holders of Common Stock to subscribe for or purchase shares of Common Stock at a price per share that is less than the average of the Last Reported Sale Prices per

share of Common Stock for the ten (10) consecutive Trading Days ending on, and including, the Trading Day immediately before the date of the distribution of such rights, options or warrants is announced, and in determining the aggregate price payable to exercise such rights, options or warrants, there will be taken into account any consideration the Company receives for such rights, options or warrants and any amount payable on exercise thereof, with the value of such consideration, if not cash, to be determined by the Board of Directors.

(iii) *Spin-Offs and Other Distributed Property.*

(1) *Distributions Other than Spin-Offs.* If the Company distributes shares of its Capital Stock, evidences of its indebtedness or other assets or property of the Company, or rights, options or warrants to acquire Capital Stock of the Company or other securities, to all or substantially all holders of the Common Stock, excluding:

(v) dividends, distributions, rights, options or warrants for which an adjustment to the Conversion Rate is required pursuant to **Section 5.06(A)(i)** or **5.06(A)(ii)**;

(w) dividends or distributions paid exclusively in cash for which an adjustment to the Conversion Rate is required pursuant to **Section 5.06(A)(iv)**;

(x) rights issued or otherwise distributed pursuant to a stockholder rights plan, except to the extent provided in **Section 5.06(E)**;

(y) Spin-Offs for which an adjustment to the Conversion Rate is required pursuant to **Section 5.06(A)(iii)(2)**; and

(z) a distribution solely pursuant to a Common Stock Change Event, as to which **Section 5.09** will apply,

then the Conversion Rate will be increased based on the following formula:

$$CR_1 = CR_0 \times \frac{SP}{SP - FMV}$$

where:

CR_0 = the Conversion Rate in effect immediately before the Open of Business on the Ex-Dividend Date for such distribution;

CR_1 = the Conversion Rate in effect immediately after the Open of Business on such Ex-Dividend Date;

SP = the average of the Last Reported Sale Prices per share of Common Stock for the ten (10) consecutive Trading Days ending on, and

including, the Trading Day immediately before such Ex-Dividend Date; and

FMV = the fair market value (as determined by the Board of Directors), as of such Ex-Dividend Date, of the shares of Capital Stock, evidences of indebtedness, assets, property, rights, options or warrants distributed per share of Common Stock pursuant to such distribution;

provided, however, that if FMV is equal to or greater than SP , then, in lieu of the foregoing adjustment to the Conversion Rate, each Holder will receive, for each \$1,000 principal amount of Notes held by such Holder on the record date for such distribution, at the same time and on the same terms as holders of Common Stock, the amount and kind of shares of Capital Stock, evidences of indebtedness, assets, property, rights, options or warrants that such Holder would have received if such Holder had owned, on such record date, a number of shares of Common Stock equal to the Conversion Rate in effect on such record date.

For the avoidance of doubt, an adjustment made pursuant to this **Section 5.06(A)(iii)(1)** will become effective at the time set forth in the definition of CR_1 above. To the extent such distribution is not so paid or made, or such rights, options or warrants are not exercised before their expiration (including as a result of being redeemed or terminated), the Conversion Rate will be readjusted to the Conversion Rate that would then be in effect had the adjustment been made on the basis of only the distribution, if any, actually made or paid or on the basis of the distribution of only such rights, options or warrants, if any, that were actually exercised, if at all.

(2) *Spin-Offs.* If the Company distributes or dividends shares of Capital Stock of any class or series, or similar equity interest, of or relating to an Affiliate, a Subsidiary or other business unit of the Company to all or substantially all holders of the Common Stock (other than solely pursuant to a Common Stock Change Event, as to which **Section 5.09** will apply), and such Capital Stock or equity interest is listed or quoted (or will be listed or quoted upon the consummation of the transaction) on a U.S. national securities exchange (a “**Spin-Off**”), then the Conversion Rate will be increased based on the following formula:

$$CR_1 = CR_0 \times \frac{FMV + SP}{SP}$$

where:

CR_0 = the Conversion Rate in effect immediately before the Open of Business on the Ex-Dividend Date for such Spin-Off;

CR_1 = the Conversion Rate in effect immediately after the Open of Business on such Ex-Dividend Date;

FMV = the product of (x) the average of the Last Reported Sale Prices per share or unit of the Capital Stock or equity interests distributed in such Spin-Off over the ten (10) consecutive Trading Day period (the “**Spin-Off Valuation Period**”) beginning on, and including, such Ex-Dividend Date (such average to be determined as if references to Common Stock in the definitions of Last Reported Sale Price and Trading Day were instead references to such Capital Stock or equity interests); and (y) the number of shares or units of such Capital Stock or equity interests distributed per share of Common Stock in such Spin-Off; and

SP = the average of the Last Reported Sale Prices per share of Common Stock for each Trading Day in the Spin-Off Valuation Period.

The adjustment to the Conversion Rate pursuant to this **Section 5.06(A)(iii)(2)** will be calculated as of the last Trading Day of the Spin-Off Valuation Period but will be given effect immediately after the Open of Business on the Ex-Dividend Date for the Spin-Off, with retroactive effect. If a Note is converted and the Conversion Date occurs during the Spin-Off Valuation Period, then, notwithstanding anything to the contrary in this Indenture or the Notes, the Company will, if necessary, delay the settlement of such conversion until the second (2nd) Business Day after the last day of the Spin-Off Valuation Period.

To the extent any dividend or distribution of the type set forth in this **Section 5.06(A)(iii)(2)** is declared but not made or paid, the Conversion Rate will be readjusted to the Conversion Rate that would then be in effect had the adjustment been made on the basis of only the dividend or distribution, if any, actually made or paid.

(iv) *Cash Dividends or Distributions.* If any cash dividend or distribution is made to all or substantially all holders of Common Stock, then the Conversion Rate will be increased based on the following formula:

$$CR_1 = CR_0 \times \frac{SP}{SP - D}$$

where:

CR₀ = the Conversion Rate in effect immediately before the Open of Business on the Ex-Dividend Date for such dividend or distribution;

CR₁ = the Conversion Rate in effect immediately after the Open of Business on such Ex-Dividend Date;

SP = the Last Reported Sale Price per share of Common Stock on the Trading Day immediately before such Ex-Dividend Date; and

D = the cash amount distributed per share of Common Stock in such dividend or distribution;

provided, however, that if D is equal to or greater than SP , then, in lieu of the foregoing adjustment to the Conversion Rate, each Holder will receive, for each \$1,000 principal amount of Notes held by such Holder on the record date for such dividend or distribution, at the same time and on the same terms as holders of Common Stock, the amount of cash that such Holder would have received if such Holder had owned, on such record date, a number of shares of Common Stock equal to the Conversion Rate in effect on such record date. For the avoidance of doubt, an adjustment made pursuant to this **Section 5.06(A)(iv)** will become effective at the time set forth in the definition of CR_1 above.

To the extent such dividend or distribution is declared but not made or paid, the Conversion Rate will be readjusted to the Conversion Rate that would then be in effect had the adjustment been made on the basis of only the dividend or distribution, if any, actually made or paid.

(v) *Tender Offers or Exchange Offers.* If the Company or any of its Subsidiaries makes a payment in respect of a tender offer or exchange offer for shares of Common Stock, and the value (determined as of the Expiration Time by the Board of Directors) of the cash and other consideration paid per share of Common Stock in such tender or exchange offer exceeds the Last Reported Sale Price per share of Common Stock on the Trading Day immediately after the last date (the “**Expiration Date**”) on which tenders or exchanges may be made pursuant to such tender or exchange offer (as it may be amended), then the Conversion Rate will be increased based on the following formula:

$$CR_1 = CR_0 \times \frac{AC + (SP \times OS_1)}{OS_0 \times SP}$$

where:

CR_0 = the Conversion Rate in effect immediately before the time (the “**Expiration Time**”) such tender or exchange offer expires;

CR_1 = the Conversion Rate in effect immediately after the Expiration Time;

AC = the aggregate value (determined as of the Expiration Time by the Board of Directors) of all cash and other consideration paid or payable for shares of Common Stock purchased in such tender or exchange offer;

OS_0 = the number of shares of Common Stock outstanding immediately before the Expiration Time (before giving effect to the purchase of all shares of Common Stock accepted for purchase or exchange in such tender or exchange offer);

OS_1 = the number of shares of Common Stock outstanding immediately after the Expiration Time (excluding all shares of Common Stock accepted for purchase or exchange in such tender or exchange offer); and

SP = the average of the Last Reported Sale Prices per of Common Stock over the ten (10) consecutive Trading Day period (the “**Tender/Exchange Offer Valuation Period**”) beginning on, and including, the Trading Day immediately after the Expiration Date;

provided, however, that the Conversion Rate will in no event be adjusted down pursuant to this **Section 5.06(A)(v)**, except to the extent provided in the immediately following paragraph. The adjustment to the Conversion Rate pursuant to this **Section 5.06(A)(v)** will be calculated as of the Close of Business on the last Trading Day of the Tender/Exchange Offer Valuation Period but will be given effect immediately after the Expiration Time, with retroactive effect. If a Note is converted and the Conversion Date occurs on the Expiration Date or during the Tender/Exchange Offer Valuation Period, then, notwithstanding anything to the contrary in this Indenture or the Notes, the Company will, if necessary, delay the settlement of such conversion until the second (2nd) Business Day after the last day of the Tender/Exchange Offer Valuation Period.

To the extent such tender or exchange offer is announced but not consummated (including as a result of the Company being precluded from consummating such tender or exchange offer under applicable law), or any purchases or exchanges of shares of Common Stock in such tender or exchange offer are rescinded, the Conversion Rate will be readjusted to the Conversion Rate that would then be in effect had the adjustment been made on the basis of only the purchases or exchanges of shares of Common Stock, if any, actually made, and not rescinded, in such tender or exchange offer.

(B) *No Adjustments in Certain Cases.*

(i) *Where Holders Participate in the Transaction or Event Without Conversion.* Notwithstanding anything to the contrary in **Section 5.06(A)**, the Company will not be obligated to adjust the Conversion Rate on account of a transaction or other event otherwise requiring an adjustment pursuant to **Section 5.06(A)** (other than a stock split or combination of the type set forth in **Section 5.06(A)(i)** or a tender or exchange offer of the type set forth in **Section 5.06(A)(v)**) if each Holder participates, at the same time and on the same terms as holders of Common Stock, and solely by virtue of being a Holder of Notes, in such transaction or event without having to convert such Holder’s Notes and as if such Holder held a number of shares of Common Stock equal to the product of (i) the Conversion Rate in effect on the related record date, effective date or Expiration Date, as applicable; and (ii) the aggregate principal amount (expressed in thousands) of Notes held by such Holder on such date.

(ii) *Certain Events.* The Company will not be required to adjust the Conversion Rate except as provided in **Section 5.06** or **Section 5.08**. Without limiting the foregoing,

the Company will not be obligated to adjust the Conversion Rate on account of:

(1) except as otherwise provided in **Section 5.06**, the sale of shares of Common Stock for a purchase price that is less than the market price per share of Common Stock or less than the Conversion Price;

(2) the issuance of any shares of Common Stock pursuant to any present or future plan providing for the reinvestment of dividends or interest payable on the Company's securities and the investment of additional optional amounts in shares of Common Stock under any such plan;

(3) the issuance of any shares of Common Stock or options or rights to purchase shares of Common Stock pursuant to any present or future employee, director or consultant benefit plan or program of, or assumed by, the Company or any of its Subsidiaries;

(4) the issuance of any shares of Common Stock pursuant to any option, warrant, right or convertible or exchangeable security of the Company not described in **clause (3)** above and outstanding as of the Issue Date;

(5) solely a change in the par value of the Common Stock; or

(6) accrued and unpaid interest on the Notes.

(C) *Adjustments Not Yet Effective.* Notwithstanding anything to the contrary in this Indenture or the Notes, if:

(i) a Note is to be converted;

(ii) the record date, effective date or Expiration Time for any event that requires an adjustment to the Conversion Rate pursuant to **Section 5.06(A)** has occurred on or before the Conversion Date for such conversion, but an adjustment to the Conversion Rate for such event has not yet become effective as of such Conversion Date;

(iii) the Conversion Consideration due upon such conversion includes any whole shares of Common Stock; and

(iv) such shares are not entitled to participate in such event (because they were not held on the related record date or otherwise),

then, solely for purposes of such conversion, the Company will, without duplication, give effect to such adjustment on such Conversion Date (and, for the avoidance of doubt, the shares issuable upon such conversion will not be entitled to participate in such event). In such case, if the date on which the Company is otherwise required to deliver the consideration due upon such conversion is before the first date on which the amount of such adjustment can be determined, then the Company will delay the settlement of such conversion until the second (2nd) Business Day after such first date.

(D) *Conversion Rate Adjustments where Converting Holders Participate in the Relevant Transaction or Event.* Notwithstanding anything to the contrary in this Indenture or the Notes, if:

- (i) a Conversion Rate adjustment for any dividend or distribution becomes effective on any Ex-Dividend Date pursuant to **Section 5.06(A)**;
- (ii) a Note is to be converted;
- (iii) the Conversion Date for such conversion occurs on or after such Ex-Dividend Date and on or before the related record date;
- (iv) the Conversion Consideration due upon such conversion includes any whole shares of Common Stock based on a Conversion Rate that is adjusted for such dividend or distribution; and
- (v) such shares would be entitled to participate in such dividend or distribution (including pursuant to **Section 5.02(C)**),

then (x) such Conversion Rate adjustment will not be given effect for such conversion; and (y) the shares of Common Stock issuable upon such conversion based on such unadjusted Conversion Rate will be entitled to participate in such dividend or distribution.

(E) *Stockholder Rights Plans.* If any shares of Common Stock are to be issued upon conversion of any Note and, at the time of such conversion, the Company has in effect any stockholder rights plan, then the Holder of such Note will be entitled to receive, in addition to, and concurrently with the delivery of, the Conversion Consideration otherwise payable under this Indenture upon such conversion, the rights set forth in such stockholder rights plan, unless such rights have separated from the Common Stock at such time, in which case, and only in such case, the Conversion Rate will be adjusted pursuant to **Section 5.06(A)(iii)(1)** on account of such separation as if, at the time of such separation, the Company had made a distribution of the type referred to in such Section to all holders of the Common Stock, subject to readjustment in accordance with such Section if such rights expire, terminate or are redeemed.

(F) *Limitation on Effecting Transactions Resulting in Certain Adjustments.* The Company will not engage in or be a party to any transaction or event that would require the Conversion Rate to be adjusted pursuant to **Section 5.06(A)** or **Section 5.08** to an amount that would result in the Conversion Price per share of Common Stock being less than the par value per share of Common Stock.

(G) *Equitable Adjustments to Prices.* Whenever any provision of this Indenture requires the Company to calculate the average of the Last Reported Sale Prices or Daily VWAPs, or any function thereof, over a period of multiple days (including to calculate the Stock Price or an adjustment to the Conversion Rate), the Company will make proportionate adjustments, if any, to such calculations to account for any adjustment to the Conversion Rate pursuant to **Section 5.06(A)(i)** that becomes effective, or any event requiring such an adjustment to the Conversion Rate where the Ex-Dividend Date or effective date, as applicable, of such event occurs, at any time during such period.

(H) *Calculation of Number of Outstanding Shares of Common Stock.* For purposes of **Section 5.06(A)**, the number of shares of Common Stock outstanding at any time will (i) include shares issuable in respect of scrip certificates issued in lieu of fractions of shares of Common Stock; and (ii) exclude shares of Common Stock held in the Company's treasury (unless the Company pays any dividend or makes any distribution on shares of Common Stock held in its treasury).

(I) *Calculations.* All calculations with respect to the Conversion Rate and adjustments thereto will be made to the nearest 1/10,000th of a share of Common Stock (with 5/100,000ths rounded upward to the nearest 1/10,000th), as applicable.

(J) *Notice of Conversion Rate Adjustments.* Upon the effectiveness of any adjustment to the Conversion Rate pursuant to **Section 5.06(A)**, the Company will promptly send notice to the Holders, the Trustee and the Conversion Agent containing (i) a brief description of the transaction or other event on account of which such adjustment was made; (ii) the Conversion Rate in effect immediately after such adjustment; and (iii) the effective time of such adjustment.

Section 5.07. Voluntary Adjustments.

(A) *Generally.* To the extent permitted by law and applicable stock exchange rules, the Company, from time to time, may (but is not required to) increase the Conversion Rate by any amount if (i) the Board of Directors determines that such increase is either (x) in the best interest of the Company; or (y) advisable to avoid or diminish any income tax imposed on holders of Common Stock or rights to purchase Common Stock as a result of any dividend or distribution of shares (or rights to acquire shares) of Common Stock or any similar event; (ii) such increase is in effect for a period of at least twenty (20) Business Days; and (iii) such increase is irrevocable during such period.

(B) *Notice of Voluntary Increases.* If the Board of Directors determines to increase the Conversion Rate pursuant to this **Section 5.07**, then, at least fifteen (15) Business Days before such increase, the Company will send notice to each Holder, the Trustee and the Conversion Agent of such increase, the amount thereof and the period during which such increase will be in effect.

Section 5.08. Adjustments to the Conversion Rate in Connection with a Make-Whole Fundamental Change.

(A) *Generally.* If a Make-Whole Fundamental Change occurs on or before November 1, 2022 and the Conversion Date for the conversion of a Note occurs during the related Make-Whole Fundamental Change Conversion Period, then, subject to this **Section 5.08**, the Conversion Rate applicable to such conversion will be increased by a number of shares (the "Additional Shares") set forth in the table below corresponding (after interpolation as provided in, and subject to, the provisions below) to the effective date and the Stock Price of such Make-Whole Fundamental Change:

Effective Date	Stock Price						
	\$	1.08\$	1.20\$	1.40\$	1.65\$	1.80\$	1.90 \$2.00
November 14, 2019.....	319.8653	227.2727	130.3680	65.8788	48.3838	34.8341	0.0000
November 1, 2020.....	319.8653	227.2727	130.3680	62.5455	47.4950	34.0973	0.0000
November 1, 2021.....	319.8653	227.2727	123.4394	60.4849	42.2727	30.0447	0.0000
November 1, 2022.....	319.8653	227.2727	108.2251	0.0000	0.0000	0.0000	0.0000

If such effective date or Stock Price is not set forth in the table above, then:

(i) if such Stock Price is between two Stock Prices in the table above or the effective date is between two effective dates in the table above, then the number of Additional Shares will be determined by a straight-line interpolation between the numbers of Additional Shares set forth for the higher and lower Stock Prices in the table and the earlier and later effective dates in the table above, as applicable, based on a 365- or 366-day year, as applicable; and

(ii) if the Stock Price is greater than \$2.00 (subject to adjustment in the same manner as the Stock Prices set forth in the column headings of the table above are adjusted pursuant to **Section 5.08(B)**), or less than \$1.08 (subject to adjustment in the same manner), per share, then no Additional Shares will be added to the Conversion Rate.

Notwithstanding anything to the contrary in this Indenture or the Notes, in no event will the Conversion Rate be increased to an amount that exceeds 925.9259 shares of Common Stock per \$1,000 principal amount of Notes, which amount is subject to adjustment in the same manner as, and at the same time and for the same events for which, the Conversion Rate is required to be adjusted pursuant to **Section 5.06(A)**.

(B) *Adjustment of Stock Prices and Additional Shares.* The Stock Prices in the first row (*i.e.*, the column headers) of the table set forth in **Section 5.08(A)** will be adjusted in the same manner as, and at the same time and for the same events for which, the Conversion Price is adjusted as a result of the operation of **Section 5.06(A)**. The numbers of Additional Shares in the table set forth in **Section 5.08(A)** will be adjusted in the same manner as, and at the same time and for the same events for which, the Conversion Rate is adjusted pursuant to **Section 5.08(A)**.

(C) *Notice of the Occurrence of a Make-Whole Fundamental Change.* If a Make-Whole Fundamental Change occurs, then, promptly and in no event later than five (5) Business Days immediately after the effective date of such Make-Whole Fundamental Change, the Company will notify the Holders and the Trustee of the occurrence of such Make-Whole Fundamental Change and of such effective date, briefly stating the circumstances under which the Conversion Rate will be increased pursuant to this **Section 5.08** in connection with such Make-Whole Fundamental Change.

(D) *Settlement of Cash Make-Whole Fundamental Changes.* For the avoidance of doubt, if holders of Common Stock receive solely cash in a Make-Whole Fundamental Change, then, pursuant to **Section 5.09**, conversions of Notes will thereafter be settled no later than the third (3rd) Business Day after the relevant Conversion Date.

Section 5.09. Effect of Common Stock Change Event.

(A) *Generally.* If there occurs any:

(i) recapitalization, reclassification or change of the Common Stock (other than (x) changes solely resulting from a subdivision or combination of the Common Stock, (y) a change only in par value or from par value to no par value or no par value to par value or (z) stock splits and stock combinations that do not involve the issuance of any other series or class of securities);

(ii) consolidation, merger, combination or binding or statutory share exchange involving the Company;

(iii) sale, lease or other transfer of all or substantially all of the assets of the Company and its Subsidiaries, taken as a whole, to any Person; or

(iv) other similar event,

and, as a result of which, the Common Stock is converted into, or is exchanged for, or represents solely the right to receive, other securities, cash or other property, or any combination of the foregoing (such an event, a “**Common Stock Change Event**,” and such other securities, cash or property, the “**Reference Property**,” and the amount and kind of Reference Property that a holder of one (1) share of Common Stock would be entitled to receive on account of such Common Stock Change Event (without giving effect to any arrangement not to issue or deliver a fractional portion of any security or other property), a “**Reference Property Unit**”), then, notwithstanding anything to the contrary in this Indenture or the Notes,

(1) from and after the effective time of such Common Stock Change Event, (I) the Conversion Consideration due upon conversion of any Note will be determined in the same manner as if each reference to any number of shares of Common Stock in this **Article 5** (or in any related definitions) were instead a reference to the same number of Reference Property Units; (II) for purposes of **Section 5.04**, each reference to any number of shares of Common Stock in such Section (or in any related definitions) will instead be deemed to be a reference to the same number of Reference Property Units; and (III) for purposes of the definition of “Fundamental Change” and “Make-Whole Fundamental Change,” the terms “Common Stock” and “common equity” will be deemed to mean the common equity, if any, forming part of such Reference Property; and

(2) for these purposes, the Last Reported Sale Price of any Reference Property Unit or portion thereof that does not consist of a class of securities will be the fair value of such Reference Property Unit or portion thereof, as applicable, determined in good faith by the Company (or, in the case of cash denominated in U.S. dollars, the face amount thereof).

If the Reference Property consists of more than a single type of consideration to be determined based in part upon any form of stockholder election, then the composition of the Reference Property Unit will be deemed to be the weighted average, per share of the Common

Stock, of the types and amounts of consideration actually received, per share of the Common Stock, by the holders of Common Stock. The Company will notify Holders, the Trustee and the Conversion Agent of the weighted average as soon as practicable after such determination is made.

At or before the effective time of such Common Stock Change Event, the Company and the resulting, surviving or transferee Person (if not the Company) of such Common Stock Change Event (the “**Successor Person**”) will execute and deliver to the Trustee a supplemental indenture pursuant to **Section 9.01(G)**, which supplemental indenture will (x) provide for subsequent conversions of Notes in the manner set forth in this **Section 5.09**; (y) provide for anti-dilution and other adjustments to the Conversion Rate pursuant to **Section 5.08(A)** that are as nearly as equivalent as possible to, and in a manner consistent with this **Section 5.09**; and (z) contain such other provisions as the Company reasonably determines are appropriate to preserve the economic interests of the Holders and to give effect to the provisions of this **Section 5.09(A)**. If the Reference Property includes shares of stock or other securities or assets of a Person other than the Successor Person, then such other Person will also execute such supplemental indenture and such supplemental indenture will contain such additional provisions the Company reasonably determines are appropriate to preserve the economic interests of the Holders, including the right of Holders to require the Company to repurchase their Notes pursuant to **Section 4.02** or **4.03**, as the Board of Directors, acting in good faith and in a commercially reasonable manner, determines is necessary by reason of the foregoing.

(B) *Notice of Common Stock Change Events.* The Company will provide notice of each Common Stock Change Event to Holders, the Trustee and the Conversion Agent no later than the effective date of such Common Stock Change Event.

(C) *Compliance Covenant.* The Company will not become a party to any Common Stock Change Event unless its terms are consistent with this **Section 5.09**.

Section 5.10. Responsibility of the Trustee.

The Trustee and any other Conversion Agent will not at any time be under any duty or responsibility to any Holder to determine the Conversion Rate (or any adjustment thereto) or whether any facts exist that may require any adjustment (including any increase) of the Conversion Rate, or with respect to the nature or extent or calculation of any such adjustment when made, or with respect to the method employed, or herein or in any supplemental indenture provided to be employed, in making the same. The Trustee and any other Conversion Agent will not be accountable with respect to the validity or value (or the kind or amount) of any shares of Common Stock, or of any securities, property or cash that may at any time be issued or delivered upon the conversion of any Note; and the Trustee and any other Conversion Agent make no representations with respect thereto. Neither the Trustee nor any Conversion Agent will be responsible for any failure of the Company to issue, transfer or deliver any shares of Common Stock or stock certificates or other securities or property or cash upon the surrender of any Note for the purpose of conversion or to comply with any of the duties, responsibilities or covenants of the Company contained in this Article. Neither the Trustee nor any other agent acting under this Indenture (other than the Company, if acting in such capacity) will have any obligation to make any calculation or to determine whether the Notes may be surrendered for conversion pursuant to this Indenture, or to notify the Company or the Depositary or any of the Holders if the Notes have become

convertible pursuant to the terms of this Indenture.

Section 5.11. Limits Upon Issuance of Shares of Common Stock Upon Conversion.

(A) Notwithstanding anything to the contrary herein, no Person will be entitled to receive any shares of Common Stock otherwise deliverable upon conversion of the Notes to the extent, but only to the extent, that such receipt would cause such Person to become, directly or indirectly, a Beneficial Owner of more than 9.99% of the shares of the Common Stock outstanding at such time (such restriction, the “**General Beneficial Ownership Limit**”). For purposes of this **Section 5.11** only, a Person will be deemed the “Beneficial Owner” of and will be deemed to beneficially own any shares of Common Stock that such Person or any of such person’s Affiliates (as defined in Rule 12b-2 under the Exchange Act) or associates (as defined in Rule 12b-2 under the Exchange Act) is deemed to beneficially own, together with any shares of Common Stock beneficially owned by any other persons whose beneficial ownership would be aggregated with such Person for purposes of Section 13(d) of the Exchange Act. Subject to the following proviso, for purposes of the this **Section 5.11** only, beneficial ownership will be determined in accordance with Section 13(d) of the Exchange Act and the rules and regulations promulgated thereunder as in effect on the Issue Date; provided that the number of shares of Common Stock beneficially owned by such Person and its Affiliates and associates and any other persons whose beneficial ownership would be aggregated with such Person for purposes of Section 13(d) of the Exchange Act will include the number of shares of Common Stock issuable upon exercise or conversion of any of the Company’s securities or rights to acquire the Common Stock, whether or not such securities or rights are currently exercisable or convertible or are exercisable or convertible only after the passage of time (including the number of shares of Common Stock issuable upon conversion of the Notes in respect of which the beneficial ownership determination is being made), but will exclude the number of shares of Common Stock that would be issuable upon (A) conversion of the remaining, unconverted portion of any Notes beneficially owned by such Person or any of its Affiliates or associates and any other persons whose beneficial ownership would be aggregated with such Person for purposes of Section 13(d) of the Exchange Act and (B) exercise or conversion of the unexercised or unconverted portion of any of the Company’s other securities subject to a limitation on conversion or exercise analogous to the limitation contained herein beneficially owned by such Person or any of its Affiliates or associates and any other persons whose beneficial ownership would be aggregated with such Person for purposes of Section 13(d) of the Exchange Act. For the avoidance of doubt, the term “Beneficial Owner” as used in this **Section 5.11** will not include (i) with respect to any Global Note, the nominee of the Depositary or any Person having an account with the Depositary or its nominee or (ii) with respect to any certificated Note, the Holder of such certificated Note unless, in each case, such nominee, account holder or Holder will also be a Beneficial Owner of such Note.

(B) In addition, a Holder at its option may elect a beneficial ownership limit as to such Holder (but not as to any other Holder) that is less than or equal to the general beneficial ownership limit then applicable to the Holders in general upon written notice delivered to the Company prior to the issuance of the Notes or, if thereafter, at least 61 days prior to the date of effectiveness of such lower beneficial ownership limit, specifying the percentage of shares of Common Stock for the beneficial ownership limit that will apply to such Holder (such beneficial ownership limit, a “**Holder Beneficial Ownership Limit**” and together with the general beneficial ownership limit, the “**Beneficial Ownership Limits**”). Written notices sent by Holders electing a Holder Beneficial

Ownership Limit pursuant to this **Section 5.11(B)** received prior to the Issue Date and the issuance of the Notes are listed on Schedule 1 to this Indenture.

(C) Any purported delivery of shares of Common Stock upon conversion of the Notes will be void and have no effect to the extent, but only to the extent, that such delivery would result in any Person becoming the Beneficial Owner of shares of Common Stock outstanding at such time in excess of the Beneficial Ownership Limits applicable to such Person.

(D) Unless the Company has waived the General Beneficial Ownership Limit as set forth in **Section 5.11(F)** and there is no Holder Beneficial Ownership Limit applicable to a Holder, when such Holder tenders Notes for conversion, that Holder must provide a certification to the Company as to whether the Person (or Persons) receiving shares of Common Stock upon conversion is, or would, as a result of such conversion, become the beneficial owner of shares of Common Stock outstanding at such time in excess of any beneficial ownership limit then applicable to such Person (or Persons).

(E) If any delivery of shares of Common Stock otherwise owed to any Person (or persons) upon conversion of the Notes is not made, in whole or in part, as a result of the applicable Beneficial Ownership Limits, the Company's obligation to make such delivery will not be extinguished and, such Holder may either:

(i) unless such conversion is in connection with the Company's exercise of the Company Mandatory Conversion Right, request the return of the Notes surrendered by such Holder for conversion, after which the Company will deliver such Notes to such Holder within two Trading Days after receipt of such request; or

(ii) certify to the Company that the Person (or persons) receiving shares of Common Stock upon conversion is not, and would not, as a result of such conversion, become the Beneficial Owner of shares of Common Stock outstanding at such time in excess of the applicable Beneficial Ownership Limits, after which the Company will deliver any such shares of Common Stock withheld on account of such applicable Beneficial Ownership Limits by the later of (i) the date such shares were otherwise due to such Person (or persons) and (ii) two Trading Days after receipt of such certification; provided, however, until such time as the affected Holder gives such notice, no Person will be deemed to be the stockholder of record with respect to the shares of Common Stock otherwise deliverable upon conversion in excess of any applicable Beneficial Ownership Limit. Upon delivery of such notice, the provisions under Sections 5.02 and 5.03 will apply to the shares of Common Stock to be delivered pursuant to such notice.

(F) The Company may, at their option with the approval of the Board of Directors and subject to the applicable listing standards of The Nasdaq Global Market, waive the General Beneficial Ownership Limit (as to a particular Person or as to all persons). In the event that the Company exercises its right to waive the General Beneficial Ownership Limit to all Persons, the Company or, at the Company's written request and expense, the Trustee, will deliver or cause to be delivered to each Holder 61 days prior to the effective waiver date an irrevocable notice stating that as of an effective date specified therein, the Company waives any restrictions that limit a Holder from converting its Notes in the event that such Holder is, or would, as a result of a

conversion of Notes, become, a restricted converting Holder. Any such waiver of the General Beneficial Ownership Limit would not effect a waiver of any Holder Beneficial Ownership Limit.

Article 6. Successors

Section 6.01. When the Company May Merge, Etc.

(A) *Generally.* The Company will not consolidate with or merge with or into, or sell, lease or otherwise transfer, in one transaction or a series of transactions, all or substantially all of the assets of the Company and its Subsidiaries, taken as a whole, to another Person (a “**Business Combination Event**”), unless:

(i) the resulting, surviving or transferee Person either (x) is the Company or (y) if not the Company, is a corporation (the “**Successor Corporation**”) duly organized and existing under the laws of the United States of America, any State thereof or the District of Columbia that expressly assumes (by executing and delivering to the Trustee, at or before the effective time of such Business Combination Event, a supplemental indenture pursuant to **Section 9.01(F)**) all of the Company’s obligations under this Indenture and the Notes, and Successor Corporation will take such action (or agree to take such action) and deliver such agreements, instruments, or documents as may be necessary or appropriate to cause any property or assets that constitute Collateral owned by or transferred to the Successor Corporation to be subject to the Liens of the Collateral Agent in the manner and to the extent required under this Indenture; and

(ii) immediately after giving effect to such Business Combination Event, no Default or Event of Default will have occurred and be continuing.

(B) *Delivery of Officer’s Certificate and Opinion of Counsel to the Trustee and Collateral Agent.* Before the effective time of any Business Combination Event, the Company will deliver to the Trustee and the Collateral Agent an Officer’s Certificate and Opinion of Counsel, each stating that (i) such Business Combination Event (and, if applicable, the related supplemental indenture) comply with **Section 6.01(A)** and **Article 11**; and (ii) all conditions precedent to such Business Combination Event provided in this Indenture have been satisfied.

Section 6.02. Successor Corporation Substituted.

At the effective time of any Business Combination Event that complies with **Section 6.01**, the Successor Corporation (if not the Company) will succeed to, and may exercise every right and power of, the Company under this Indenture and the Notes with the same effect as if such Successor Corporation had been named as the Company in this Indenture and the Notes, and, except in the case of a lease, the predecessor Company will be discharged from its obligations under this Indenture and the Notes.

Article 7. Defaults and Remedies

Section 7.01. Events of Default.

(A) *Definition of Events of Default.* “**Event of Default**” means the occurrence of any

of the following:

(i) a default in the payment when due (whether at maturity, upon Redemption or Repurchase Upon Fundamental Change or Optional Redemption or otherwise) of the principal of, or the Redemption Price, Fundamental Change Repurchase Price or Optional Repurchase Price for, any Note;

(ii) a default for thirty (30) days in the payment when due of interest on any Note;

(iii) the Company's failure to deliver, when required by this Indenture, a Fundamental Change Notice, an Optional Repurchase Date Notice or a notice pursuant to **Section 5.08(C)**, if such failure is not cured within five (5) Business Days after its occurrence;

(iv) a default in the Company's obligation to convert a Note in accordance with **Article 5** upon the exercise of the conversion right with respect thereto;

(v) a default in the Company's obligations under **Article 6**;

(vi) a default in any of the Company's obligations or agreements under this Indenture or the Notes (other than a default set forth in **clause (i), (ii), (iii), (iv) or (v)** of this **Section 7.01(A)**) where such default is not cured or waived within sixty (60) days after notice to the Company by the Trustee, or to the Company and the Trustee by Holders of at least twenty five percent (25%) of the aggregate principal amount of Notes then outstanding, which notice must specify such default, demand that it be remedied and state that such notice is a "Notice of Default";

(vii) a default by the Company or any of its Subsidiaries with respect to any one or more mortgages, agreements or other instruments under which there is outstanding, or by which there is secured or evidenced, any indebtedness for money borrowed of at least five million dollars (\$5,000,000) (or its foreign currency equivalent) in the aggregate of the Company or any of its Subsidiaries, whether such indebtedness exists as of the Issue Date or is thereafter created, where such default:

(1) constitutes a failure to pay the principal of, or premium or interest on, any of such indebtedness when due and payable at its stated maturity, upon required repurchase, upon declaration of acceleration or otherwise; or

(2) results in such indebtedness becoming or being declared due and payable before its stated maturity;

(viii) one or more final judgments being rendered against the Company or any of its Subsidiaries for the payment of at least five million dollars (\$5,000,000) (or its foreign currency equivalent) in the aggregate (excluding any amounts covered by insurance), where such judgment is not discharged or stayed within sixty (60) days after (i) the date on which the right to appeal the same has expired, if no such appeal has commenced; or (ii) the date on which all rights to appeal have been extinguished;

(ix) the Company or any of its Significant Subsidiaries, pursuant to or within the meaning of any Bankruptcy Law, either:

- (1) commences a voluntary case or proceeding;
- (2) consents to the entry of an order for relief against it in an involuntary case or proceeding;
- (3) consents to the appointment of a custodian of it or for any substantial part of its property;
- (4) makes a general assignment for the benefit of its creditors;
- (5) takes any comparable action under any foreign Bankruptcy Law; or
- (6) generally is not paying its debts as they become due;

(x) a court of competent jurisdiction enters an order or decree under any Bankruptcy Law that either:

- (1) is for relief against Company or any of its Significant Subsidiaries in an involuntary case or proceeding;
- (2) appoints a custodian of the Company or any of its Significant Subsidiaries, or for any substantial part of the property of the Company or any of its Significant Subsidiaries;
- (3) orders the winding up or liquidation of the Company or any of its Significant Subsidiaries; or
- (4) grants any similar relief under any foreign Bankruptcy Law,

and, in each case under this **Section 7.01(A)(x)**, such order or decree remains unstayed and in effect for at least sixty (60) consecutive days, or

(xi) except as permitted by this Indenture, with respect to any assets or property having a fair market value of at least five million dollars (\$5,000,000) (or its foreign currency equivalent), individually or in the aggregate, that constitutes, or under this Indenture is required to constitute, Collateral, (a) this Indenture will for any reason cease to be in full force and effect in all material respects, or the Company will so assert, or (b) any security interest created, or purported to be created, by this Indenture will cease to be enforceable and of the same effect and priority purported to be created thereby, if such default does not result from any unauthorized action by the Collateral Agent in express violation of any provision of this Indenture.

(B) *Cause Irrelevant.* Each of the events set forth in **Section 7.01(A)** will constitute an Event of Default regardless of the cause thereof or whether voluntary or involuntary or effected by operation of law or pursuant to any judgment, decree or order of any court or any order, rule or

regulation of any administrative or governmental body.

Section 7.02. Acceleration.

(A) *Automatic Acceleration in Certain Circumstances.* If an Event of Default set forth in **Section 7.01(A)(ix)** or **7.01(A)(x)** occurs with respect to the Company (and not solely with respect to a Significant Subsidiary of the Company), then the principal amount of, and all accrued and unpaid interest on, all of the Notes then outstanding will immediately become due and payable without any further action or notice by any Person.

(B) *Optional Acceleration.* Subject to **Section 7.03**, if an Event of Default (other than an Event of Default set forth in **Section 7.01(A)(ix)** or **7.01(A)(x)**) with respect to the Company and not solely with respect to a Significant Subsidiary of the Company) occurs and is continuing, then the Trustee, by notice to the Company, or Holders of at least twenty five percent (25%) of the aggregate principal amount of Notes then outstanding, by notice to the Company and the Trustee, may declare the principal amount of, and all accrued and unpaid interest on, all of the Notes then outstanding to become due and payable immediately.

(C) *Rescission of Acceleration.* Notwithstanding anything to the contrary in this Indenture or the Notes, the Holders of a majority in aggregate principal amount of the Notes then outstanding, by notice to the Company and the Trustee, may, on behalf of all Holders, rescind any acceleration of the Notes and its consequences if (i) such rescission would not conflict with any judgment or decree of a court of competent jurisdiction; and (ii) all existing Events of Default (except the non-payment of principal of, or interest on, the Notes that has become due solely because of such acceleration) have been cured or waived. No such rescission will affect any subsequent Default or impair any right consequent thereto.

Section 7.03. Sole Remedy for a Failure to Report.

(A) *Generally.* Notwithstanding anything to the contrary in this Indenture or the Notes, the Company may elect that the sole remedy for any Event of Default (a “**Reporting Event of Default**”) pursuant to **Section 7.01(A)(vi)** arising from the Company’s failure to comply with **Section 3.02** will, for each of the first one hundred and eighty (180) calendar days on which a Reporting Event of Default has occurred and is continuing, consist exclusively of the accrual of Special Interest on the Notes. If the Company has made such an election, then (i) the Notes will be subject to acceleration pursuant to **Section 7.02** on account of the relevant Reporting Event of Default from, and including, the one hundred and eighty first (181st) calendar day on which a Reporting Event of Default has occurred and is continuing or if the Company fails to pay any accrued and unpaid Special Interest when due; and (ii) Special Interest will cease to accrue on any Notes from, and including, such one hundred and eighty first (181st) calendar day (it being understood that interest on any defaulted Special Interest will nonetheless accrue pursuant to **Section 2.04(B)**).

(B) *Amount and Payment of Special Interest.* Any Special Interest that accrues on a Note pursuant to **Section 7.03(A)** will be payable on the same dates and in the same manner as the Stated Interest on such Note and will accrue at a rate per annum equal to one quarter of one percent (0.25%) of the principal amount thereof for the first ninety (90) days beginning on, and including,

the date on which such Reporting Event of Default first occurs and, thereafter, at a rate per annum equal to one half of one percent (0.50%) of the principal amount thereof. For the avoidance of doubt, any Special Interest that accrues on a Note will be in addition to the Stated Interest that accrues on such Note.

(C) *Notice of Election.* To make the election set forth in **Section 7.03(A)**, the Company must send to the Holders, the Trustee and the Paying Agent, before the date on which each Reporting Event of Default first occurs, a notice that (i) briefly describes the report(s) that the Company failed to file with or furnish to the SEC; (ii) states that the Company is electing that the sole remedy for such Reporting Event of Default consist of the accrual of Special Interest; and (iii) briefly describes the periods during which and rate at which Special Interest will accrue and the circumstances under which the Notes will be subject to acceleration on account of such Reporting Event of Default.

(D) *Notice to Trustee and Paying Agent; Trustee's Disclaimer.* If Special Interest accrues on any Note, then, no later than five (5) Business Days before each date on which such Special Interest is to be paid, the Company will deliver an Officer's Certificate to the Trustee and the Paying Agent stating (i) that the Company is obligated to pay Special Interest on such Note on such date of payment; and (ii) the amount of such Special Interest that is payable on such date of payment. The Trustee will have no duty to determine whether any Special Interest is payable or the amount thereof.

(E) *No Effect on Other Events of Default.* No election pursuant to this **Section 7.03** with respect to a Reporting Event of Default will affect the rights of any Holder with respect to any other Event of Default, including with respect to any other Reporting Event of Default.

Section 7.04. Other Remedies.

(A) *Trustee or the Collateral Agent May Pursue All Remedies.* If an Event of Default occurs and is continuing, then the Trustee or the Collateral Agent may pursue any available remedy to collect the payment of any amounts due with respect to the Notes or to enforce the performance of any provision of this Indenture or the Notes.

(B) *Procedural Matters.* The Trustee or the Collateral Agent may maintain a proceeding even if it does not possess any of the Notes or does not produce any of them in such proceeding. A delay or omission by the Trustee, the Collateral Agent or any Holder in exercising any right or remedy following an Event of Default will not impair the right or remedy or constitute a waiver of, or acquiescence in, such Event of Default. All remedies will be cumulative to the extent permitted by law.

Section 7.05. Waiver of Past Defaults.

An Event of Default pursuant to **clause (i), (ii), (iv) or (vi) of Section 7.01(A)** (that, in the case of **clause (vi)** only, results from a Default under any covenant that cannot be amended without the consent of each affected Holder), and a Default that could lead to such an Event of Default, can be waived only with the consent of each affected Holder. Each other Default or Event of Default may be waived, on behalf of all Holders, by the Holders of a majority in aggregate principal amount of the Notes then outstanding. If an Event of Default is so waived, then it will

cease to exist. If a Default is so waived, then it will be deemed to be cured and any Event of Default arising therefrom will be deemed not to occur. However, no such waiver will extend to any subsequent or other Default or Event of Default or impair any right arising therefrom.

Section 7.06. Control by Majority.

Holders of a majority in aggregate principal amount of the Notes then outstanding may direct the time, method and place of conducting any proceeding for exercising any remedy available to the Trustee or the Collateral Agent or exercising any trust or power conferred on it. However, the Trustee and Collateral Agent, as the case may be, may refuse to follow any direction that conflicts with law, this Indenture or the Notes, or that, subject to **Section 8.01**, the Trustee determines may be unduly prejudicial to the rights of other Holders or may involve the Trustee or Collateral Agent in liability, unless the Trustee and Collateral Agent, as applicable, are offered, and if requested, provided security and indemnity satisfactory to each of the Trustee and Collateral Agent against any loss, liability or expense to the Trustee and Collateral Agent that may result from the Trustee's and Collateral Agent's following such direction.

Section 7.07. Limitation on Suits.

No Holder may pursue any remedy with respect to this Indenture or the Notes (except to enforce (x) its rights to receive the principal of, or the Redemption Price, Fundamental Change Repurchase Price or Optional Repurchase Price for, or interest on, any Notes; or (y) the Company's obligations to convert any Notes pursuant to **Article 5**), unless:

(A) such Holder has previously delivered to the Trustee notice that an Event of Default is continuing;

(B) Holders of at least twenty five percent (25%) in aggregate principal amount of the Notes then outstanding have delivered a request to the Trustee to pursue such remedy;

(C) such Holder or Holders have offered and, if requested, provided to the Trustee security and indemnity satisfactory to the Trustee against any loss, liability or expense to the Trustee that may result from the Trustee's following such request;

(D) the Trustee has not complied with such request within sixty (60) calendar days after its receipt of such request and such offer of security or indemnity; and

(E) during such sixty (60) calendar day period, Holders of a majority in aggregate principal amount of the Notes then outstanding have not delivered to the Trustee a direction that is inconsistent with such request.

A Holder of a Note may not use this Indenture to prejudice the rights of another Holder or to obtain a preference or priority over another Holder. The Trustee will have no duty to determine whether any Holder's use of this Indenture complies with the preceding sentence.

Section 7.08. Absolute Right of Holders to Receive Payment and Conversion Consideration.

Notwithstanding anything to the contrary in this Indenture or the Notes, the right of each Holder of a Note to receive payment or delivery, as applicable, of the principal of, or the Redemption Price, Fundamental Change Repurchase Price or Optional Repurchase Price for, or any interest on, or the Conversion Consideration due pursuant to **Article 5** upon conversion of, such Note on or after the respective due dates therefor provided in this Indenture and the Notes, or to bring suit for the enforcement of any such payment or delivery on or after such respective due dates, will not be impaired or affected without the consent of such Holder.

Section 7.09. Collection Suit by Trustee.

The Trustee will have the right, upon the occurrence and continuance of an Event of Default pursuant to **clause (i), (ii) or (iv) of Section 7.01(A)**, to recover judgment in its own name and as trustee of an express trust against the Company for the total unpaid or undelivered principal of, or Redemption Price, Fundamental Change Repurchase Price or Optional Repurchase Price for, or interest on, or Conversion Consideration due pursuant to **Article 5** upon conversion of, the Notes, as applicable, and, to the extent lawful, any Default Interest on any Defaulted Amounts, and such further amounts sufficient to cover the costs and expenses of collection, including compensation provided for in Section 8.07.

Section 7.10. Trustee May File Proofs of Claim.

The Trustee has the right to (A) file such proofs of claim and other papers or documents as may be necessary or advisable in order to have the claims of the Trustee, the Collateral Agent and the Holders allowed in any judicial proceedings relative to the Company (or any other obligor upon the Notes) or its creditors or property and (B) collect, receive and distribute any money or other property payable or deliverable on any such claims. Each Holder authorizes any custodian in such proceeding to make such payments to the Trustee, and, if the Trustee consents to the making of such payments directly to the Holders, to pay to the Trustee any amount due to the Trustee for the reasonable compensation, expenses, disbursements and advances of the Trustee, the Collateral Agent and their agents and counsel, and any other amounts payable to the Trustee and the Collateral Agent pursuant to Section 8.07. To the extent that the payment of any such compensation, expenses, disbursements, advances and other amounts out of the estate in such proceeding, is denied for any reason, payment of the same will be secured by a lien on, and will be paid out of, any and all distributions, dividends, money, securities and other properties that the Holders may be entitled to receive in such proceeding (whether in liquidation or under any plan of reorganization or arrangement or otherwise). Nothing in this Indenture will be deemed to authorize the Trustee or the Collateral Agent to authorize, consent to, accept or adopt on behalf of any Holder any plan of reorganization, arrangement, adjustment or composition affecting the Notes or the rights of any Holder, or to authorize the Trustee or the Collateral Agent to vote in respect of the claim of any Holder in any such proceeding.

Section 7.11. Priorities.

The Trustee will pay or deliver in the following order any money or other property that it collects pursuant to this **Article 7**:

First: to the Trustee, the Collateral Agent or any Agent and their agents and attorneys for amounts due under Section 8.07, including payment of all fees, compensation, expenses and liabilities incurred, and all advances made, by the Trustee, the Collateral Agent or such Agent and the costs and expenses of collection;

Second: to Holders for unpaid amounts or other property due on the Notes, including the principal of, or the Redemption Price, Fundamental Change Repurchase Price or Optional Repurchase Price for, or any interest on, or any Conversion Consideration due upon conversion of, the Notes, ratably, and without preference or priority of any kind, according to such amounts or other property due and payable on all of the Notes; and

Third: to the Company or such other Person as a court of competent jurisdiction directs.

The Trustee may fix a record date and payment date for any payment or delivery to the Holders pursuant to this **Section 7.11**, in which case the Trustee will instruct the Company to, and the Company will, deliver, at least fifteen (15) calendar days before such record date, to each Holder and the Trustee a notice stating such record date, such payment date and the amount of such payment or nature of such delivery, as applicable.

Section 7.12. Undertaking for Costs.

In any suit for the enforcement of any right or remedy under this Indenture or the Notes or in any suit against the Trustee for any action taken or omitted by it as Trustee, a court, in its discretion, may (A) require the filing by any litigant party in such suit of an undertaking to pay the costs of such suit, and (B) assess reasonable costs (including reasonable attorneys' fees) against any litigant party in such suit, having due regard to the merits and good faith of the claims or defenses made by such litigant party; *provided, however*, that this **Section 7.12** does not apply to any suit by the Trustee, any suit by a Holder pursuant to **Section 7.08** or any suit by one or more Holders of more than ten percent (10%) in aggregate principal amount of the Notes then outstanding.

Article 8. Trustee

Section 8.01. Duties of Trustee.

(A) If an Event of Default has occurred and is continuing, the Trustee will exercise such of the rights and powers vested in it by this Indenture and use the same degree of care and skill in their exercise as a prudent Person would exercise or use under the same circumstances in the conduct of his own affairs.

(B) Except during the continuance of an Event of Default:

(i) The Trustee need perform only those duties that are specifically set forth in this Indenture, and no covenants or obligations will be implied in this Indenture against the Trustee.

(ii) In the absence of bad faith on its part, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon certificates or opinions furnished to the Trustee and conforming to the requirements of this Indenture, but, in the case of any such certificates or opinions which by any provision hereof are specifically required to be furnished to the Trustee, the Trustee will be under a duty to examine the same to determine whether or not they conform to the requirements of this Indenture.

(C) The Trustee may not be relieved from liability for its own negligent action, its own negligent failure to act or its own willful misconduct, except that:

(i) This paragraph does not limit the effect of paragraph (B) of this Section 8.01.

(ii) The Trustee will not be liable for any error of judgment made in good faith by a Responsible Officer, unless it is proved that the Trustee was negligent in ascertaining the pertinent facts.

(iii) The Trustee will not be liable with respect to any action it takes or omits to take in good faith in accordance with a direction received by it pursuant to Sections 7.02, 7.05 and 7.06.

(D) No provision of this Indenture will require the Trustee or Collateral Agent to expend or risk its own funds, or otherwise incur any financial liability, in the performance of any of its rights or powers if it will have reasonable grounds for believing that repayment of such funds or adequate indemnity satisfactory to it against such risk or liability is not reasonably assured to it.

(E) Whether or not therein expressly so provided, paragraphs (A), (B), (C) and (D) of this Section 8.01 will govern every provision of this Indenture that in any way relates to the Trustee.

(F) The Trustee, Paying Agent and Collateral Agent will not be liable for interest on any money received by either of them, except as the Trustee, Paying Agent and Collateral Agent may agree in writing from time to time with the Company. Money held in trust by the Trustee need not be segregated from other funds except to the extent required by the law.

(G) The Collateral Agent, the Paying Agent, the Registrar, the Conversion Agent and any authenticating agent will be entitled to the protections and immunities afforded the Trustee set forth in paragraphs (D) and (F) of this Section 8.01 and in Section 8.02.

Section 8.02. Rights of Trustee.

(A) Subject to Section 8.01:

(i) The Trustee may rely on, and will be protected in acting or refraining from acting upon, any document reasonably believed by it to be genuine and to have been signed or presented by the proper Person. The Trustee need not investigate any fact or matter stated in the document.

(ii) Before the Trustee acts or refrains from acting, it may require an Officer's Certificate or an Opinion of Counsel, or both, which will conform to the provisions of **Section 12.06**. The Trustee will be protected and will not be liable for any action it takes or omits to take in good faith in reliance on such certificate or opinion.

(iii) The Trustee may act through agents and attorneys, and will not be responsible for the misconduct or negligence of any agent appointed by it with due care.

(iv) The Trustee will not be liable for any action it takes or omits to take in good faith which it reasonably believes to be authorized or within its rights or powers.

(v) The Trustee may consult with counsel acceptable to the Trustee, which may be counsel to the Company, and the advice or opinion of such counsel as to matters of law will be full and complete authorization and protection from liability in respect of any action taken, omitted or suffered by it hereunder in good faith and in accordance with the advice or opinion of such counsel.

(vi) The Trustee will be under no obligation to exercise any of the rights or powers vested in it by this Indenture at the request, order or direction of any of the Holders pursuant to the provisions of this Indenture, unless such Holders will have offered, and if requested, provided to the Trustee security or indemnity satisfactory to the Trustee against the losses, costs, expenses and liabilities which may be incurred therein or thereby.

(vii) The Trustee will not be deemed to have knowledge of any fact or matter (including, without limitation, a Default or Event of Default) unless such fact or matter is actually known to a Responsible Officer of the Trustee.

(viii) The Trustee will not have any responsibility with respect to reports, notices, certificates or other documents delivered to it hereunder, it being understood that delivery of such reports, information and documents to the Trustee is for informational purposes only and the Trustee's receipt of such will not constitute constructive notice of any information contained therein or determinable from information contained therein, including the Company's compliance with any of its covenants hereunder (as to which the Trustee will be entitled to conclusively rely on Officer's Certificates).

(ix) The permissive right of the Trustee to act hereunder will not be construed as a duty.

(x) The rights, privileges, protections, immunities and benefits given to the Trustee, including, without limitation, its right to be indemnified, are extended to the Trustee in each of its capacities hereunder (including, without limitation, the Paying Agent, the Registrar, the Conversion Agent and the Collateral Agent).

(xi) In no event will the Trustee be responsible or liable for special, indirect, punitive or consequential loss or damage of any kind whatsoever (including, but not limited to, loss of profit) irrespective of whether the Trustee has been advised of the likelihood of such loss or damage and regardless of the form of action.

Section 8.03. Individual Rights of Trustee.

The Trustee and the Collateral Agent, as applicable, in its individual or any other capacity may become the owner or pledgee of Notes, and may make loans to, accept deposits from, perform services for or otherwise deal with the Company, or any Affiliate thereof, with the same rights it would have if it were not Trustee or the Collateral Agent, as applicable. Any Agent may do the same with like rights. The Trustee, however, will be subject to Sections 8.10 and 8.11.

Section 8.04. Trustee's Disclaimer.

The Trustee makes no representation as to the validity or adequacy of this Indenture or the Notes (except that the Trustee represents that it is duly authorized to execute and deliver this Indenture and authenticate the Notes and perform its obligations hereunder), and the Trustee will not be accountable for the Company's use of the proceeds from the sale of Notes or any money paid to the Company pursuant to the terms of this Indenture, and the Trustee will not be responsible for any statement in the Notes other than its certificates of authentication.

Section 8.05. Notice of Default.

If a Default or an Event of Default occurs and is continuing, and if it is actually known to the Trustee, the Trustee will send to each Holder notice of the Default or the Event of Default, as the case may be, within 90 days after it occurs or, if later, as soon as practicable after a Responsible Officer of the Trustee has actual knowledge of such Default or Event of Default (except if such Default or Event of Default has been validly cured or waived before the giving of such notice). Except in the case of a Default or an Event of Default in payment of the principal of, or interest or premium, if any, on, any Note, or an Event of Default arising from the failure to deliver the consideration due upon conversion of any Note, the Trustee may withhold the notice if and so long as the Trustee in good faith determines that withholding the notice is in the interests of the Holders.

Section 8.06. Reserved.

Section 8.07. Compensation and Indemnity.

(A) The Company will pay to each of the Trustee and the Collateral Agent from time to time compensation for its services as agreed to from time to time in writing between the Company, the Trustee and the Collateral Agent. The Trustee's and the Collateral Agent's compensation will not be limited by any provision of law on compensation of a trustee of an express trust. The Company will reimburse the Trustee and the Collateral Agent within 45 days after receipt of request for all reasonable out-of-pocket disbursements and expenses incurred or made by it in connection with its duties under this Indenture, including the reasonable compensation, disbursements and expenses of the Trustee's and the Collateral Agent's agents and

counsel.

(B) The Company will indemnify the Trustee, the Collateral Agent, their respective officers, directors, employees and agents for, and hold the Trustee and the Collateral Agent harmless against, any and all loss or liability incurred by them in connection with the acceptance or performance of their respective duties under this Indenture and the Intercreditor Agreement, including the reasonable fees, costs and out-of-pocket expenses of defending itself against any claim or liability in connection with the exercise or performance of any of its powers or duties hereunder. The Trustee or the Collateral Agent, as applicable, will notify the Company promptly of any claim asserted against the Trustee or the Collateral Agent, as applicable, for which it may seek indemnity.

(C) The failure by the Trustee or the Collateral Agent to so notify the Company will not however relieve the Company of its obligations. Notwithstanding the foregoing, the Company need not reimburse the Trustee or the Collateral Agent for any expense or indemnify them against any loss or liability incurred by the Trustee or the Collateral Agent through its negligence or willful misconduct. To secure the payment obligations of the Company in this Section 8.07, the Trustee and the Collateral Agent will have a lien prior to the Notes on all money or property held or collected by the Trustee and the Collateral Agent, except such money or property held in trust to pay the principal of, interest and premium, if any, on particular Notes. Such Lien will survive the satisfaction and discharge of this Indenture.

(D) When the Trustee or the Collateral Agent incurs expenses or renders services after an Event of Default specified in **Section 7.01(A)(ix)** or **(x)** occurs, the expenses and the compensation for the services are intended to constitute expenses of administration under any Bankruptcy Law.

(E) For purposes of this Section 8.07, the term "Trustee" will include any trustee appointed pursuant to this **Article 8** and the term "Collateral Agent" will include any collateral agent appointed pursuant to **Article 11**.

(F) The provisions of this Section 8.07 will survive satisfaction and discharge of this Indenture, repayment of any Notes and the resignation or removal of the Trustee or the Collateral Agent, as applicable.

Section 8.08. Replacement of Trustee.

(A) The Trustee may resign by so notifying the Company in writing at least 30 days in advance of such resignation.

(B) The Holders of a majority in principal amount of the outstanding Notes may remove the Trustee by notifying the Trustee in writing and may appoint a successor Trustee with the consent of the Company, which consent will not be unreasonably withheld. The Company may remove the Trustee at its election if:

- (i) the Trustee fails to comply with Section 8.10;
- (ii) the Trustee is adjudged a bankrupt or an insolvent, or an order for relief is

entered with respect to the Trustee, under any Bankruptcy Law;

(iii) a Custodian or other public officer takes charge of the Trustee or its property; or

(iv) the Trustee otherwise becomes incapable of acting.

(C) If the Trustee resigns or is removed, or if a vacancy exists in the office of Trustee for any reason, the Company will promptly appoint a successor Trustee.

(D) If a successor Trustee does not take office within 60 days after the retiring Trustee resigns or is removed, the retiring Trustee, the Company or the Holders of at least 10% in principal amount of the outstanding Notes may petition any court of competent jurisdiction for the appointment of a successor Trustee.

(E) If the Trustee, after written request by any Holder who has been a Holder for at least six months, fails to comply with Section 8.10, such Holder may petition any court of competent jurisdiction for the removal of the Trustee and the appointment of a successor Trustee.

(F) A successor Trustee will deliver a written acceptance of its appointment to the retiring Trustee and to the Company. Immediately following such delivery, (i) the retiring Trustee will, subject to its rights under Section 8.07, transfer all property held by it as Trustee to the successor Trustee, (ii) the resignation or removal of the retiring Trustee will become effective and (iii) the successor Trustee will have all the rights, powers and duties of the Trustee under this Indenture.

Section 8.09. Successor Trustee by Consolidation, Merger or Conversion.

If the Trustee, Collateral Agent or any Note Agent, consolidates with, merges or converts into, or transfers all or substantially all of its corporate trust assets to, another corporation, subject to Section 8.10, the successor corporation without any further act will be the successor Trustee, Collateral Agent or Note Agent, as the case may be.

Section 8.10. Eligibility; Disqualification.

This Indenture will always have a Trustee who is an entity organized and doing business under the laws of the United States of America or of any state thereof that is authorized under such laws to exercise corporate trustee power, who is subject to supervision or examination by federal or state authorities and who will have a combined capital and surplus of at least \$100,000,000 as set forth in its most recent published annual report of condition.

Section 8.11. Reserved.

Section 8.12. Paying Agents.

(A) The Company will cause each Paying Agent other than the Trustee to execute and deliver to it and the Trustee an instrument in which such agent will agree with the Trustee, subject to the provisions of this Section 8.12:

(i) that it will hold all sums held by it as agent for the payment of the principal of, or interest or premium, if any, on, the Notes (whether such sums have been paid to it by the Company or by any obligor on the Notes) in trust for the benefit of Holders of the Notes or the Trustee;

(ii) that it will at any time during the continuance of any Event of Default, upon written request from the Trustee, deliver to the Trustee all sums so held in trust by it together with a full accounting thereof; and

(iii) that it will give the Trustee written notice within three Business Days after any failure of the Company (or by any obligor on the Notes) in the payment of any installment of the principal of, or interest or premium, if any, on, the Notes when the same will be due and payable.

Section 8.13. Trustee in Other Capacities.

References to the Trustee in Sections 7.10, 8.02, 8.03, 8.04, 8.07, 8.08 and 8.09 and the protections but not duties of 8.01 will be understood to include the Trustee when acting in other capacities under this Indenture and the Notes, including, without limitation, as Collateral Agent, Paying Agent, Registrar and Conversion Agent. Without limiting the foregoing, and for the avoidance of doubt, such Sections will be read to apply to the Collateral Agent, and any other document to which the Collateral Agent is party, *mutatis mutandis*, in addition to this Indenture, and the Collateral Agent will be entitled to the same rights, benefits, privileges, powers, protections, indemnities and exculpations (but not duties) afforded to the Trustee by such Sections. The privileges, protections, rights, indemnities and exculpatory provisions contained in this Indenture and the Notes will apply to the Trustee, acting in any capacity under this Indenture and the Notes (and without limiting the foregoing, the Trustee will be entitled to the same privileges, protections, rights, indemnities and exculpations afforded to the Collateral Agent under this Indenture, the Intercreditor Agreement and any other document to which the Collateral Agent is party), which will survive satisfaction and discharge or the termination for any reason of this Indenture or the Notes and the resignation or removal of the Trustee.

Article 9. Amendments, Supplements and Waivers

Section 9.01. Without the Consent of Holders.

Notwithstanding anything to the contrary in **Section 9.02**, the Company, the Trustee and the Collateral Agent may amend or supplement this Indenture, the Notes or the Intercreditor Agreement without the consent of any Holder to:

(A) cure any ambiguity or correct any omission, defect or inconsistency in this Indenture, the Notes or the Intercreditor Agreement (as determined in good faith by the Company);

(B) add guarantees with respect to the Company's obligations under this Indenture or the Notes;

(C) add additional assets as Collateral, release Collateral from the Lien pursuant to this Indenture and the Intercreditor Agreement when permitted or required by this Indenture or the

Intercreditor Agreement and to modify this Indenture and/or the Intercreditor Agreement to secure additional indebtedness and other obligations and add additional secured creditors;

(D) make, complete or confirm any grant of Collateral permitted or required by this Indenture;

(E) add to the Company's covenants or Events of Default for the benefit of the Holders or surrender any right or power conferred on the Company;

(F) provide for the assumption of the Company's obligations under this Indenture or the Notes pursuant to, and in compliance with, **Article 6**;

(G) enter into supplemental indentures pursuant to, and in accordance with, **Section 5.09** in connection with a Common Stock Change Event;

(H) evidence or provide for the acceptance of the appointment, under this Indenture, of a successor Trustee or Collateral Agent;

(I) provide for or confirm the issuance of additional Notes pursuant to **Section 2.02**;

(J) to appropriately include in the Intercreditor Agreement any refinancing indebtedness in respect of the Senior Credit Agreement (including, without limitation, the holders and agents or trustees thereof and the Liens securing the indebtedness evidenced thereby); or

(K) make any other change to this Indenture, the Notes or the Intercreditor Agreement that does not, individually or in the aggregate with all other such changes, adversely affect the rights of the Holders, as such, in any material respect (as determined by the Company in good faith).

Section 9.02. With the Consent of Holders.

(A) *Generally.* Subject to **Sections 9.01, 7.05 and 7.08** and the immediately following sentence, the Company, the Trustee and the Collateral Agent may, with the consent of the Holders of a majority in aggregate principal amount of the Notes then outstanding, amend or supplement this Indenture, the Notes or the Intercreditor Agreement or waive compliance with any provision of this Indenture, the Notes or the Intercreditor Agreement. Notwithstanding anything to the contrary in the foregoing sentence, without the consent of each affected Holder, no amendment or supplement to this Indenture or the Notes, or waiver of any provision of this Indenture or the Notes, may:

(i) reduce the principal, or extend the stated maturity, of any Note;

(ii) reduce the Redemption Price, Fundamental Change Repurchase Price or Optional Repurchase Price for any Note or change the times at which, or the circumstances under which, the Notes may or will be redeemed or repurchased by the Company;

(iii) reduce the rate, or extend the time for the payment, of interest on any Note;

- (iv) make any change that adversely affects the conversion rights of any Note;
- (v) impair the rights of any Holder set forth in **Section 7.08** (as such Section is in effect on the Issue Date);
- (vi) change the ranking of the Notes;
- (vii) make any note payable in money, or at a place of payment, other than that stated in this Indenture or the Note;
- (viii) reduce the amount of Notes whose Holders must consent to any amendment, supplement, waiver or other modification; or
- (ix) make any direct or indirect change to any amendment, supplement, waiver or modification provision of this Indenture or the Notes that requires the consent of each affected Holder.

For the avoidance of doubt, pursuant to **clauses (i), (ii), (iii) and (iv)** of this **Section 9.02(A)**, no amendment or supplement to this Indenture or the Notes, or waiver of any provision of this Indenture or the Notes, may change the amount or type of consideration due on any Note (whether on an Interest Payment Date, Redemption Date, Fundamental Change Repurchase Date, Optional Repurchase Date or the Maturity Date or upon conversion, or otherwise), or the date(s) or time(s) such consideration is payable or deliverable, as applicable, without the consent of each affected Holder.

In addition, any amendment to, or waiver of, the provisions of this Indenture relating to the Collateral that has the effect of releasing all or substantially all of the Collateral from the Liens securing the Notes will require the consent of the Holders of at least 66-2/3% in aggregate principal amount of the Notes then outstanding.

(B) *Holders Need Not Approve the Particular Form of any Amendment.* A consent of any Holder pursuant to this **Section 9.02** need approve only the substance, and not necessarily the particular form, of the proposed amendment, supplement or waiver.

Section 9.03. Notice of Amendments, Supplements and Waivers.

As soon as reasonably practicable after any amendment, supplement or waiver pursuant to **Section 9.01** or **9.02** becomes effective, the Company will send to the Holders notice that (A) describes the substance of such amendment, supplement or waiver in reasonable detail and (B) states the effective date thereof. The failure to send, or the existence of any defect in, such notice will not impair or affect the validity of such amendment, supplement or waiver.

Section 9.04. Revocation, Effect and Solicitation of Consents; Special Record Dates; Etc.

(A) *Revocation and Effect of Consents.* The consent of a Holder of a Note to an amendment, supplement or waiver will bind (and constitute the consent of) each subsequent Holder of any Note to the extent the same evidences any portion of the same indebtedness as the

consenting Holder's Note, subject to the right of any Holder of a Note to revoke (if not prohibited pursuant to **Section 9.04(B)**) any such consent with respect to such Note by delivering notice of revocation to the Trustee before the time such amendment, supplement or waiver becomes effective.

(B) *Special Record Dates.* The Company may, but is not required to, fix a record date for the purpose of determining the Holders entitled to consent or take any other action in connection with any amendment, supplement or waiver pursuant to this **Article 9**. If a record date is fixed, then, notwithstanding anything to the contrary in **Section 9.04(A)**, only Persons who are Holders as of such record date (or their duly designated proxies) will be entitled to give such consent, to revoke any consent previously given or to take any such action, regardless of whether such Persons continue to be Holders after such record date; *provided, however*, that no such consent will be valid or effective for more than one hundred and twenty (120) calendar days after such record date.

(C) *Solicitation of Consents.* For the avoidance of doubt, each reference in this Indenture or the Notes to the consent of a Holder will be deemed to include any such consent obtained in connection with a repurchase of, or tender or exchange offer for, any Notes.

(D) *Effectiveness and Binding Effect.* Each amendment, supplement or waiver pursuant to this **Article 9** will become effective in accordance with its terms and, when it becomes effective with respect to any Note (or any portion thereof), will thereafter bind every Holder of such Note (or such portion).

Section 9.05. Notations and Exchanges.

If any amendment, supplement or waiver changes the terms of a Note, then the Trustee or the Company may, in its discretion, require the Holder of such Note to deliver such Note to the Trustee so that the Trustee may place an appropriate notation prepared by the Company on such Note and return such Note to such Holder. Alternatively, at its discretion, the Company may, in exchange for such Note, issue, execute and deliver, and the Trustee will authenticate, in each case in accordance with **Section 2.02**, a new Note that reflects the changed terms. The failure to make any appropriate notation or issue a new Note pursuant to this **Section 9.05** will not impair or affect the validity of such amendment, supplement or waiver.

Section 9.06. Trustee and the Collateral Agent to Execute Supplemental Indentures.

The Trustee and the Collateral Agent will execute and deliver any amendment or supplemental indenture to this Indenture, the Notes or the Intercreditor Agreement authorized pursuant to this **Article 9**; *provided, however*, that the Trustee and the Collateral Agent need not (but may, in its sole and absolute discretion) execute or deliver any such amendment or supplemental indenture that adversely affects the Trustee's or the Collateral Agent's rights, duties, liabilities or immunities. In executing any amendment or supplemental indenture, the Trustee and the Collateral Agent will be entitled to receive, and (subject to **Sections 8.01** and **8.02**) will be fully protected in relying on, an Officer's Certificate and an Opinion of Counsel stating that (A) the execution and delivery of such amendment or supplemental indenture is authorized or

permitted by this Indenture; and (B) in the case of the Opinion of Counsel, such amendment or supplemental indenture is valid, binding and enforceable against the Company in accordance with its terms.

Article 10. Satisfaction and Discharge; Defeasance of Certain Covenants

Section 10.01. Termination of Company's Obligations.

This Indenture will be discharged with respect to the Notes, and will cease to be of further effect as to all Notes issued under this Indenture, when:

(A) all Notes then outstanding (other than Notes replaced pursuant to **Section 2.16**) have (i) been delivered to the Trustee for cancellation; or (ii) become due and payable (whether on a Redemption Date, a Fundamental Change Repurchase Date, an Optional Repurchase Date, the Maturity Date, upon conversion or otherwise) for an amount of cash or Conversion Consideration, as applicable, that has been fixed;

(B) the Company has caused there to be irrevocably deposited with the Trustee, or with the Paying Agent (or, with respect to Conversion Consideration, the Conversion Agent or its designee), in each case for the benefit of the Holders, or has otherwise caused there to be delivered to the Holders, cash (or, with respect to Notes to be converted, Conversion Consideration) sufficient to satisfy all amounts or other property due on all Notes then outstanding (other than Notes replaced pursuant to **Section 2.16**);

(C) the Company has paid all other amounts payable by it under this Indenture; and

(D) the Company has delivered to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that the conditions precedent to the discharge of this Indenture have been satisfied;

provided, however, that **Section 8.07**, **Section 11.11(H)** and **Section 12.01** will survive such discharge and, until no Notes remain outstanding, **Section 2.15** and the obligations of the Trustee, the Paying Agent and the Conversion Agent with respect to money or other property deposited with them will survive such discharge.

At the Company's request, the Trustee will acknowledge the satisfaction and discharge of this Indenture.

Section 10.02. Repayment to Company.

Subject to applicable unclaimed property law, the Trustee, the Paying Agent and the Conversion Agent will promptly notify the Company if there exists (and, at the Company's request, promptly deliver to the Company) any cash, Conversion Consideration or other property held by any of them for payment or delivery on the Notes that remain unclaimed two (2) years after the date on which such payment or delivery was due. After such delivery to the Company, the Trustee, the Paying Agent and the Conversion Agent will have no further liability to any Holder with respect to such cash, Conversion Consideration or other property, and Holders entitled to the

payment or delivery of such cash, Conversion Consideration or other property must look to the Company for payment as a general creditor of the Company.

Section 10.03. Reinstatement.

If the Trustee, the Paying Agent or the Conversion Agent is unable to apply any cash or other property deposited with it pursuant to **Section 10.01** or **10.04** hereof because of any legal proceeding or any order or judgment of any court or other governmental authority that enjoins, restrains or otherwise prohibits such application, then the Company's obligations under this Indenture and the Notes will be revived and reinstated as though no deposit had occurred pursuant to **Section 10.01** or **10.04** hereof; *provided, however*, that if the Company thereafter pays or delivers any cash or other property due on the Notes to the Holders thereof, then the Company will be subrogated to the rights of such Holders to receive such cash or other property from the cash or other property, if any, held by the Trustee, the Paying Agent or the Conversion Agent, as applicable.

Section 10.04. Defeasance of Restrictive Covenants.

If:

(A) the Company has caused there to be irrevocably deposited, with the Trustee or the Paying Agent for the benefit of the Holders, cash in an aggregate amount equal to the sum of (i) the remaining scheduled interest payments on each Note outstanding as of the time of such deposit (assuming, for these purposes, that Special Interest would accrue on such Note at its maximum rate per annum provided in **Section 7.03**); and (ii) 100% of the principal amount of each Note outstanding as of the time of such deposit (excluding, in the case of each of **sub-clause (i)** and **(ii)** above, any Notes referred to in **clause (B)** below as to which the deposit referred to in such **clause** is made);

(B) with respect to each Note, if any, for which a Conversion Date has occurred, but the Conversion Consideration due in respect of such Note has not been fully paid or delivered, as of the time of the deposit referred to in **clause (A)** above, the Company has caused there to be irrevocably deposited, with the Trustee or the Conversion Agent or the Company's stock transfer agent for the benefit of the Holders, the maximum kind and amount of Conversion Consideration due in respect of such Note (together, if applicable, with cash in the amount of any interest due on such Note pursuant to **Section 5.03(A)(i)(1)**);

(C) the Company has instructed the Trustee, the Paying Agent or the Conversion Agent, as applicable, to pay or deliver cash or other property due on the Notes from the cash or other property deposited pursuant to **clauses (A)** and **(B)** above as the same becomes due;

(D) as of the time of the deposits referred to in **clauses (A)** and **(B)** above, no Default in the payment or delivery of any amount or property (including Conversion Consideration) on any Note has occurred and is continuing;

(E) the Company has delivered to the Trustee an Opinion of Counsel confirming that the Holders of the Notes will not recognize any income, gain or loss for federal income tax

purposes as a result of the Covenant Defeasance and will be subject to federal income tax on the same amounts, in the same manner and at the same times, as would have been the case if the Covenant Defeasance had not occurred;

(F) the Covenant Defeasance will not result in a breach or violation of, or constitute a default under, any material agreement or instrument (other than this Indenture, but solely in connection with the incurrence of any indebtedness for borrowed money to finance the Covenant Defeasance) to which the Company is a party or by which the Company is bound;

(G) the Company has delivered to the Trustee an Officer's Certificate stating that the deposits referred to in **clauses (A) and (B)** above were not made by the Company with the intent of preferring the Holders over the other creditors of the Company with the intent of defeating, hindering, delaying or defrauding any creditors of the Company or others; and

(H) the Company has delivered to the Trustee an Officer's Certificate and an Opinion of Counsel, each stating that all conditions precedent relating to the Covenant Defeasance have been complied with,

then, notwithstanding anything to the contrary in the Indenture or the Notes:

(i) the Company shall be released from its obligations under the covenant contained in **Section 3.07** hereof and **Article 11** hereof with respect to the outstanding Notes and, for the avoidance of doubt, any omission to comply with any of such Sections or Articles (whether directly or indirectly, by reason of any reference elsewhere in this Indenture to any of such Sections or Articles or by reason of any reference in any such Section or Article to any other provision of this Indenture or in any other document) will not in itself constitute a Default or Event of Default.

For the avoidance of doubt, the remainder of this Indenture and the Notes will be unaffected by any Covenant Defeasance and will continue to be in full force and effect.

Each of the Trustee, the Paying Agent and the Conversion Agent will return to the Company any cash or other property deposited with it pursuant to **clause (A) or (B)** above that remains on deposit after (x) all Notes have been paid in full and none remain outstanding; and (y) the Company has paid all other amounts payable by it under this Indenture.

Article 11. Collateral and Security

Section 11.01. Grant of Security Interest

(A) As security for the prompt and complete payment when due (whether on the payment dates or otherwise) of all the Obligations, the Company grants to the Collateral Agent a security interest in all of the Company's right, title, and interest in and to the following personal property whether now owned or hereafter acquired (collectively, the "**Collateral**"): (a) Receivables; (b) Equipment; (c) Fixtures; (d) General Intangibles (other than Intellectual Property); (e) Inventory; (f) Investment Property; (g) Deposit Accounts; (h) Cash; (i) Goods; and all other tangible and intangible personal property of the Company (other than Intellectual

Property) whether now or hereafter owned or existing, leased, consigned by or to, or acquired by, the Company and wherever located, and any of the Company's property in the possession or under the control of the Collateral Agent; and, to the extent not otherwise included, all Proceeds of each of the foregoing and all accessions to, substitutions and replacements for, and rents, profits and products of each of the foregoing; provided, however, that the Collateral will include all Accounts and General Intangibles that consist of rights to payment and proceeds from the sale, licensing or disposition of all or any part, or rights in, the Intellectual Property (the "**Rights to Payment**"). Notwithstanding the foregoing, the Company is not granting to the Collateral Agent, and the Collateral Agent is not receiving from the Company, any grant of security interest in (a) any Excluded Account, (b) any of the outstanding capital stock or other equity interests of any owned (x) Foreign Subsidiary (other than an Eligible Foreign Subsidiary) or (y) Foreign Subsidiary HoldCo of the Company in excess of sixty-five percent (65%) of the equity interests (as determined for U.S. federal income tax purposes) of such Subsidiary, (c) any of the outstanding capital stock or other equity interests of a Subsidiary owned by a Foreign Subsidiary HoldCo, (d) equipment financed by capital leases or purchase money financing, products, proceeds and insurance proceeds of the foregoing, but only to the extent and for so long as the agreements under which the equipment is financed prohibit granting a security interest therein to the Notes Secured Parties, (e) any particular asset if the pledge thereof or the security interest therein is prohibited or restricted by applicable law, rule or regulation (including any requirement to obtain the consent of any governmental authority, regulatory authority or third party), provided that the foregoing exclusion of this clause (e) will in no way be construed (1) to apply to the extent that any described prohibition or restriction is unenforceable under Section 9-406, 9-407, 9-408, or 9-409 of the UCC or other applicable law or (2) to apply to the extent that any consent or waiver has been obtained, or is hereafter obtained, that would permit the Collateral Agent's security interest or Lien notwithstanding the prohibition or restriction on the pledge of such asset or (f) to the extent any obligations remain outstanding under the Senior Credit Agreement, any particular asset that does not constitute collateral securing the obligations under the Senior Credit Agreement.

(B) Each Holder, by its acceptance of a Note, consents and agrees to the terms of this Indenture, as the same may be in effect or may be amended from time to time in accordance with its respective terms, and authorizes and directs the Collateral Agent, on behalf of the Notes Secured Parties, to enter into this Indenture, the Intercreditor Agreement and the other documents to which the Collateral Agent is party and to perform its obligations and exercise its rights thereunder in accordance therewith. The Company will do, at its sole cost and expense, all such actions and things as may be required by the provisions of this Indenture and the Intercreditor Agreement to assure and confirm to the Collateral Agent the security interests in the Collateral contemplated by this Indenture and the Intercreditor Agreement, as from time to time constituted, so as to render the same available for the security and benefit of this Indenture and of the Notes secured hereby, according to the intent and purpose herein and therein expressed and subject to the Intercreditor Agreement, if any, including taking all commercially reasonable actions required to cause this Indenture to create and maintain, as security for the Obligations contained in this Indenture valid and enforceable, perfected (to the extent required herein) security interests in and on all the Collateral, in favor of the Collateral Agent, superior to and prior to the rights of all third Persons other than as set forth in the Intercreditor Agreement, if any, and subject to no other Liens, in each case, except as expressly provided herein or therein. If required for the purpose of meeting the legal requirements of any jurisdiction in which any of the Collateral may at the time be located, the Company, the Trustee and the Collateral Agent will have the power to appoint, and will take

all reasonable action to appoint, one or more Persons approved by the Trustee and reasonably acceptable to the Company to act as co-Collateral Agent with respect to any such Collateral, with such rights and powers limited to those deemed necessary for the Company, the Trustee or the Collateral Agent to comply with any such legal requirements with respect to such Collateral, and which rights and powers will not be inconsistent with the provisions of this Indenture or the Intercreditor Agreement. The Company will from time to time promptly file or cause the filing of all appropriate UCC financing statements (including any necessary amendments and continuation statements) and pay all reasonable financing and continuation statement recording and/or filing fees, charges and taxes relating to this Indenture and any amendments hereto and any other instruments of further assurance required pursuant hereto

(C) The Company will not change its corporate name or legal form or jurisdiction of formation without executing, delivering and filing any necessary financing statements, amendments or continuation statements in connection with any such change in corporate name, legal form or jurisdiction of formation.

Section 11.02. Release of Collateral.

(A) The Liens on the Collateral will be automatically and unconditionally released with respect to the Notes:

(i) in whole, upon payment in full of the principal of, together with accrued and unpaid interest and premium, if any, on, the Notes and all other Obligations under this Indenture and the Notes that are non-contingent and due and payable at or prior to the time such principal, together with accrued and unpaid interest and premium, if any, is paid;

(ii) in whole, upon satisfaction and discharge of this Indenture as set forth in **Article 10** hereof;

(iii) in whole, upon a Covenant Defeasance as set forth in **Article 10** hereof;

(iv) as to any property or assets constituting Collateral (a) that is sold or otherwise disposed of by the Company in a transaction not prohibited by this Indenture, to the extent of the interest sold or disposed of; or (b) that at any time no longer constitutes Collateral;

(v) that is released under the Senior Credit Agreement (including after giving effect to any amendment, waiver or consent, but excluding payment under or the termination or repayment in full of the Senior Credit Agreement (it being understood that, in each case, a release subject to a contingent reinstatement is still a release, and if any such Collateral under the Senior Credit Agreement is so reinstated, such Collateral will also be reinstated with respect to the Notes));

(vi) to the extent required by the terms of the Intercreditor Agreement; and

(vii) as described in **Article 9** hereof.

provided, that, in the case of any release in whole pursuant to clauses (i) and (ii) above, all amounts owing to the Trustee and the Collateral Agent under this Indenture, the Notes, and the Intercreditor Agreement have been paid.

(B) To the extent applicable, the Company will furnish to the Trustee and the Collateral Agent, prior to each proposed release of Collateral pursuant to the Intercreditor Agreement and this Indenture:

(i) an Officer's Certificate requesting such release, including a statement to the effect that such release is permitted or required by this Indenture and that any requirements for such release have been satisfied;

(ii) a form of such release (which release will be in form reasonably satisfactory to the Trustee and will provide that the requested release is without recourse or warranty to the Trustee or the Collateral Agent); and

(iii) all documents required by this Indenture and the Intercreditor Agreement.

Notwithstanding anything to the contrary, an Opinion of Counsel will not be required in connection with the release of any Collateral permitted by this Indenture. Neither the Trustee nor the Collateral Agent will have any liability to any person for releases granted in accordance with the Officer's Certificate delivered under this Section.

Upon compliance by the Company with the conditions precedent set forth above, the Collateral Agent will promptly execute and deliver, without recourse or warranty and at the Company's sole cost and expense, such documents reasonably requested by the Company to evidence the release of the Collateral Agent's security interest in the released Collateral.

(C) The release of any Collateral in accordance with the terms of this Indenture will not be deemed to impair the collateral security remaining under this Indenture in contravention of the provisions hereof.

Section 11.03. [Reserved].

Section 11.04. [Reserved].

Section 11.05. [Reserved].

Section 11.06. Purchaser Protected.

No purchaser or grantee of any property or rights purporting to be released herefrom will be bound to ascertain the authority of the Trustee or the Collateral Agent to execute the release or to inquire as to the existence of any conditions herein prescribed for the exercise of such authority; nor will any purchaser or grantee of any property or rights permitted by this Indenture to be sold or otherwise disposed of by the Company be under any obligation to ascertain or inquire into the authority of the Company to make such sale or other disposition.

Section 11.07. Authorization of Actions to Be Taken by the Collateral Agent Hereunder.

Wilmington Trust, National Association is hereby appointed Collateral Agent and hereby accepts such appointment. Subject to the provisions of this Indenture, each Holder, by acceptance of its Note(s) agrees that (a) the Collateral Agent will execute and deliver this Indenture and act in accordance with the terms hereof, (b) the Collateral Agent may (but will not be obligated to), in its sole discretion and without the consent of the Trustee or the Holders, take all actions it deems necessary or appropriate in order to (i) enforce any of the terms of this Indenture relating to the Collateral and (ii) collect and receive any and all amounts payable in respect of the Obligations of the Company hereunder and (c) to the extent permitted by this Indenture, the Collateral Agent will have power to institute and to maintain such suits and proceedings as it may deem expedient to prevent any impairment of the Collateral by any act that may be unlawful or in violation of this Indenture, and suits and proceedings as the Collateral Agent may deem expedient to preserve or protect its interests and the interests of the Trustee and the Holders in the Collateral (including the power to institute and maintain suits or proceedings to restrain the enforcement of or compliance with any legislative or other governmental enactment, rule or order that may be unconstitutional or otherwise invalid if the enforcement of, or compliance with, such enactment, rule or order would impair the security interest thereunder or be prejudicial to the interests of the Collateral Agent, the Holders or the Trustee). Notwithstanding the foregoing, the Collateral Agent may, at the sole expense of the Company, request the direction of the Holders or the Trustee with respect to any such actions and, upon receipt of the written consent of the Holders of at least a majority in aggregate principal amount of the outstanding Notes accompanied by, if requested, indemnity satisfactory to the Collateral Agent, will take such actions; *provided* that all actions so taken will, at all times, be in conformity with the requirements of the Intercreditor Agreement. Notwithstanding any provision to the contrary in this Indenture, the Collateral Agent will not have any duties or responsibilities except those expressly set forth herein, or any fiduciary relationship with any Holder, and no implied covenants, functions, responsibilities, duties, obligations or liabilities will be read into this Indenture or otherwise exist against the Collateral Agent.

Section 11.08. Authorization of Receipt of Funds by the Trustee Hereunder.

The Collateral Agent is authorized to receive any funds for the benefit of itself, the Trustee and the Holders distributed hereunder and to the extent not prohibited under the Intercreditor Agreement for turnover to the Trustee to make further distributions of such funds in accordance with the provisions of **Section 7.11** and the other provisions of this Indenture.

Section 11.09. Intercreditor Agreement.

(A) By their acceptance of the Notes, the Holders hereby (i) authorize and direct the Trustee and the Collateral Agent, as the case may be, to execute and deliver the Intercreditor Agreement (on behalf of the Collateral Agent, the Trustee and the Holders), including such changes from the form, if any attached to this Indenture or any other agreement, as may be necessary or desirable in connection with the execution thereof, and including any amendments contemplated by the terms thereof, and (ii) authorize and appoint the Collateral Agent to act as the Notes Collateral Agent (as defined in the Intercreditor Agreement) under the Intercreditor Agreement, and agree that as such it will be deemed to be a party to the Intercreditor Agreement

as agent for the Holders, (iii) accept and acknowledge the terms of the Intercreditor Agreement, (iv) appoint and authorize the Collateral Agent, as Collateral Agent for itself, the Trustee and the Holders under the Intercreditor Agreement, to take such action as agent on their behalf and to exercise such powers under the Intercreditor Agreement as are delegated to the Collateral Agent by the terms thereof, and (v) accept and acknowledge the terms of the Intercreditor Agreement applicable to them and agree to be bound by the terms thereof applicable to holders of the Notes with all the rights and obligations of a Notes Secured Party thereunder and bound by all the provisions thereof.

(B) It is hereby expressly acknowledged and agreed that, in taking the foregoing actions, the Trustee and the Collateral Agent are not responsible for the terms or contents of such agreements, or for the validity or enforceability thereof, or the sufficiency thereof for any purpose. Whether or not so expressly stated therein, in entering into, or taking (or forbearing from) any action under pursuant to, the Intercreditor Agreement, the Trustee and the Collateral Agent each will have all of the rights, immunities, indemnities and other protections granted to them under this Indenture (in addition to those that may be granted to them under the terms of such other agreement or agreements).

Section 11.10. Further Assurances.

The Company will from time to time execute, deliver and file any UCC financing statements, continuation statements and amendments thereto necessary to perfect the Collateral Agent's Lien on the Collateral. The Company will from time to time procure any instruments or documents as may be reasonably requested by the Collateral Agent, and take all further action that may be necessary, or that the Collateral Agent may reasonably request, to perfect and protect the Liens granted hereby and thereby. In addition, and for such purposes only, the Company hereby authorizes the Collateral Agent to execute and deliver on behalf of the Company and to file such UCC financing statements (including an indication that the financing statement covers "all assets or all personal property" of the Company in accordance with Section 9-504 of the UCC), continuation statements and amendments thereto without the signature of the Company either in the Collateral Agent's name or in the name of the Collateral Agent as agent and attorney-in-fact for the Company. Notwithstanding the grant of authority under this **Section 11.10**, neither the Trustee nor the Collateral Agent will have any duty to file or record any financing statement, continuation statement, collateral assignment, notice, control agreement, security agreement or any other document.

Section 11.11. Concerning the Collateral Agent.

(A) The Collateral Agent will act pursuant to the instructions of the Holders and the Trustee with respect to the Collateral. For the avoidance of doubt, the Collateral Agent will have no discretion under this Indenture or the Intercreditor Agreement and will not be required to make or give any determination, consent, approval, request or direction without the written direction of the Holders of a majority in aggregate principal amount of the then outstanding Notes or the Trustee, as applicable. After the occurrence of an Event of Default, subject to the provisions of the Intercreditor Agreement, the Trustee may (but will not be obligated to) direct the Collateral Agent in connection with any action required or permitted by this Indenture.

(B) None of the Collateral Agent or any of its Affiliates will be liable for any action taken or omitted to be taken by any of them under or in connection with this Indenture or the transactions contemplated hereby (except for its own gross negligence or willful misconduct).

(C) Other than in connection with a release of Collateral permitted under **Section 11.02** or as may be required by **Section 9.02**, in each case that the Collateral Agent may or is required hereunder to take any action (an “**Action**”), including without limitation to make any determination, to give consents, to exercise rights, powers or remedies, to release or sell Collateral or otherwise to act hereunder, the Collateral Agent may seek direction from the Holders of a majority in aggregate principal amount of the then outstanding Notes. The Collateral Agent will not be liable with respect to any Action taken or omitted to be taken by it in accordance with the direction from the Holders of a majority in aggregate principal amount of the then outstanding Notes. If the Collateral Agent will request direction from the Holders of a majority in aggregate principal amount of the then outstanding Notes with respect to any Action, the Collateral Agent will be entitled to refrain from such Action until the Collateral Agent will have received direction from the Holders of a majority in aggregate principal amount of the then outstanding Notes, and the Collateral Agent will not incur liability to any Person by reason of so refraining.

(D) Beyond the exercise of reasonable care in the custody of the collateral in its possession, the Collateral Agent will have no duty as to any Collateral in its possession or control or in the possession or control of any agent or bailee or any income thereon or as to preservation of rights against prior parties or any other rights pertaining thereto. The Collateral Agent will be deemed to have exercised reasonable care in the custody of the Collateral in its possession if the Collateral is accorded treatment substantially equal to that which it accords its own property, and the Collateral Agent will not be liable or responsible for any loss or diminution in the value of any of the Collateral by reason of the act or omission of any carrier, forwarding agency or other agent or bailee selected by the Collateral Agent in good faith.

(E) Neither the Trustee nor the Collateral Agent will be responsible for the existence, genuineness or value of any of the Collateral or for the validity, perfection, priority or enforceability of the Liens in any of the Collateral, whether impaired by operation of law or by reason of any action or omission to act on its part hereunder, except to the extent such action or omission constitutes gross negligence or willful misconduct on the part of the Collateral Agent, as determined by a court of competent jurisdiction in a final, nonappealable order, for the validity or sufficiency of the Collateral or any agreement or assignment contained therein, for the validity of the title of any grantor to the Collateral, for insuring the Collateral or for the payment of taxes, charges, assessments or Liens upon the Collateral or otherwise as to the maintenance of the Collateral. The Trustee and Collateral Agent hereby disclaim any representation or warranty to the present and future Holders of Notes concerning the perfection of the liens granted hereunder or in the value of any of the Collateral.

(F) In the event that the Collateral Agent is required to acquire title to an asset for any reason, or take any managerial action of any kind in regard thereto, in order to carry out any fiduciary or trust obligation for the benefit of another, which in the Collateral Agent’s sole discretion may cause the Collateral Agent, as applicable, to be considered an “owner or operator” under any environmental laws or otherwise cause the Collateral Agent to incur, or be exposed to,

any environmental liability or any liability under any other federal, state or local law, the Collateral Agent reserves the right, instead of taking such action, either to resign as Collateral Agent or to arrange for the transfer of the title or control of the asset to a court appointed receiver. The Collateral Agent will not be liable to any Person for any environmental claims or any environmental liabilities or contribution actions under any federal, state or local law, rule or regulation by reason of the Collateral Agent's actions and conduct as authorized, empowered and directed hereunder or relating to any kind of discharge or release or threatened discharge or release of any hazardous materials into the environment.

(G) The Collateral Agent will be entitled to all of the protections, immunities, indemnities, rights and privileges of the Trustee set forth in this Indenture.

(H) The Collateral Agent will be entitled to compensation, reimbursement and indemnity as set forth in **Section 8.07**.

(I) The Collateral Agent will not be deemed to have knowledge of any fact or matter (including, without limitation, a Default or Event of Default) unless such fact or matter is actually known to a Responsible Officer of the Collateral Agent.

Section 11.12. Remedies.

(A) *General.* Upon and during the continuance of any one or more Events of Default, (i) Collateral Agent may (but will not be obligated to) sign and file in the Company's name any and all collateral assignments, notices, control agreements, security agreements and other documents with respect to the Collateral that it deems necessary or appropriate to perfect or protect the repayment of the Obligations, and in furtherance thereof, the Company hereby grants Collateral Agent an irrevocable power of attorney coupled with an interest, and (ii) Collateral Agent may (but will not be obligated to) notify any of the Company's account debtors to make payment directly to Collateral Agent, compromise the amount of any such account on the Company's behalf and endorse Collateral Agent's name without recourse on any such payment for deposit directly to Collateral Agent's account. Upon and during the continuance of any one or more Events of Default, Collateral Agent may (but will not be obligated to), and at the direction of the Trustee acting upon the written direction of the Holders of a majority in aggregate principal amount of the Notes then outstanding, as provided in **Section 7.06**, will, exercise all rights and remedies with respect to the Collateral under this Indenture or the Intercreditor Agreement, or otherwise available to it under the UCC and other applicable law, including the right to release, hold, sell, lease, liquidate, collect, realize upon, or otherwise dispose of all or any part of the Collateral and the right to occupy, utilize, process and commingle the Collateral. The Collateral Agent will exercise rights and remedies and sell the Collateral in accordance with this Indenture and the Intercreditor Agreement only at the direction of the Trustee acting upon the written direction of the Holders of a majority in aggregate principal amount of the Notes then outstanding, as provided in **Section 7.06**. All Collateral Agent's rights and remedies will be cumulative and not exclusive.

(B) *Collection; Foreclosure.* Upon the occurrence and during the continuance of any Event of Default, Collateral Agent may (but will not be obligated to), and at the direction of the Trustee acting upon the written direction of the Holders of a majority in aggregate principal

amount of the Notes then outstanding, as provided in **Section 7.06**, will, at any time or from time to time, apply, collect, liquidate, sell in one or more sales, lease or otherwise dispose of, any or all of the Collateral, in its then condition or following any commercially reasonable preparation or processing. Any such sale may be made either at public or private sale at its place of business or elsewhere. The Company agrees that any such public or private sale may occur upon ten (10) calendar days' prior written notice to the Company. Upon the occurrence and during the continuance of any Event of Default, Collateral Agent may (but will not be obligated to) require the Company to assemble the Collateral and make it available to Collateral Agent at a place designated by Collateral Agent that is reasonably convenient to Collateral Agent and the Company. The proceeds of any sale, disposition or other realization upon all or any part of the Collateral will be transferred by the Collateral Agent to the Trustee for application in accordance with **Section 7.11**.

(C) *No Waiver.* Collateral Agent will be under no obligation to marshal any of the Collateral for the benefit of the Company or any other Person, and the Company expressly waives all rights, if any, to require Collateral Agent to marshal any Collateral.

(D) *Cumulative Remedies.* The rights, powers and remedies of Collateral Agent hereunder will be in addition to all rights, powers and remedies given by statute or rule of law and are cumulative. The exercise of any one or more of the rights, powers and remedies provided herein will not be construed as a waiver of or election of remedies with respect to any other rights, powers and remedies of Collateral Agent.

Article 12. Miscellaneous

Section 12.01. Notices.

Any notice or communication by the Company, the Trustee or the Collateral Agent to any other will be deemed to have been duly given if in writing and delivered in person or by first class mail (registered or certified, return receipt requested), facsimile transmission, electronic transmission or other similar means of unsecured electronic communication or overnight air courier guaranteeing next day delivery, or to the other's address, which initially is as follows:

If to the Company:

Verastem, Inc.
117 Kendrick Street
Suite 500
Needham, MA 02494
Attention: General Counsel

with a copy (which will not constitute notice) to:

Ropes & Gray LLP
Prudential Tower
800 Boylston Street

Boston, MA 02199-3600
Attention: Marko S. Zatylny, Esq.

If to the Trustee or the Collateral Agent:

Wilmington Trust, National Association
1100 North Market Street
Wilmington, DE 19890
Facsimile: (302) 636-4145
Attention: Verastem, Inc. Administrator

The Company, the Trustee or the Collateral Agent, by notice to the other, may designate additional or different addresses (including facsimile numbers and electronic addresses) for subsequent notices or communications.

All notices and communications (other than those sent to Holders) will be deemed to have been duly given: (A) at the time delivered by hand, if personally delivered; (B) five (5) Business Days after being deposited in the mail, postage prepaid, if mailed; (C) when receipt acknowledged, if transmitted by facsimile, electronic transmission or other similar means of unsecured electronic communication; and (D) the next Business Day after timely delivery to the courier, if sent by overnight air courier guaranteeing next day delivery.

All notices or communications required to be made to a Holder pursuant to this Indenture must be made in writing and will be deemed to be duly sent or given in writing if mailed by first class mail, certified or registered, return receipt requested, or by overnight air courier guaranteeing next day delivery, to its address shown on the Register; *provided, however*, that a notice or communication to a Holder of a Global Note may, but need not, instead be sent pursuant to the Depositary Procedures (in which case, such notice will be deemed to be duly sent or given in writing). The failure to send a notice or communication to a Holder, or any defect in such notice or communication, will not affect its sufficiency with respect to any other Holder.

If a notice or communication is mailed or sent in the manner provided above within the time prescribed, it will be deemed to have been duly given, whether or not the addressee receives it.

Section 12.02. No Personal Liability of Directors, Officers, Employees and Stockholders.

No past, present or future director, officer, employee, incorporator or stockholder of the Company, as such, will have any liability for any obligations of the Company under this Indenture or the Notes or for any claim based on, in respect of, or by reason of, such obligations or their creation. By accepting any Note, each Holder waives and releases all such liability. Such waiver and release are part of the consideration for the issuance of the Notes.

Section 12.03. Governing Law; Waiver of Jury Trial.

THIS INDENTURE AND THE NOTES, AND ANY CLAIM, CONTROVERSY OR

DISPUTE ARISING UNDER OR RELATED TO THIS INDENTURE OR THE NOTES, WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK. EACH OF THE COMPANY, THE TRUSTEE AND THE COLLATERAL AGENT IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS INDENTURE, THE NOTES OR THE TRANSACTIONS CONTEMPLATED BY THIS INDENTURE OR THE NOTES.

Section 12.04. Submission to Jurisdiction.

Any legal suit, action or proceeding arising out of or based upon this Indenture or the transactions contemplated by this Indenture may be instituted in the federal courts of the United States of America located in the City of New York or the courts of the State of New York, in each case located in the City of New York (collectively, the “**Specified Courts**”), and each party irrevocably submits to the non-exclusive jurisdiction of such courts in any such suit, action or proceeding. Service of any process, summons, notice or document by mail (to the extent allowed under any applicable statute or rule of court) to such party’s address set forth in **Section 12.01** will be effective service of process for any such suit, action or proceeding brought in any such court. Each of the Company, the Trustee, the Collateral Agent and each Holder (by its acceptance of any Note) irrevocably and unconditionally waives any objection to the laying of venue of any suit, action or other proceeding in the Specified Courts and irrevocably and unconditionally waives and agrees not to plead or claim any such suit, action or other proceeding has been brought in an inconvenient forum.

Section 12.05. Certificate and Opinion as To Conditions Precedent.

Upon any request or application by the Company to the Trustee or the Collateral Agent to take any action under this Indenture, the Company will furnish to the Trustee or the Collateral Agent, as applicable:

(A) an Officer’s Certificate (which will include the statements set forth in Section 12.06 below) stating that, in the opinion of the signers, all conditions precedent and covenants, if any, provided for in this Indenture relating to the proposed action have been complied with; and

(B) an Opinion of Counsel (which will include the statements set forth in Section 12.06 below, but will not be required in connection with any action expressly authorized under this Indenture upon delivery of an Officer’s Certificate only) stating that, in the opinion of such counsel, all such conditions precedent and covenants, if any, have been complied with.

Section 12.06. Statement Required in Certificate and Opinion.

Each certificate and opinion with respect to compliance with a condition or covenant provided for in this Indenture will include:

(A) a statement that the Person making such certificate or opinion has read such

covenant or condition;

(B) a brief statement as to the nature and scope of the examination or investigation upon which the statements or opinions contained in such certificate or opinion are based;

(C) a statement that, in the opinion of such Person, it or he has made such examination or investigation as is necessary to enable it or him to express an informed opinion as to whether or not such covenant or condition has been complied with; and

(D) a statement as to whether or not, in the opinion of such Person, such covenant or condition has been complied with.

Section 12.07. No Adverse Interpretation of Other Agreements.

Neither this Indenture nor the Notes may be used to interpret any other indenture, note, loan or debt agreement of the Company or its Subsidiaries or of any other Person, and no such indenture, note, loan or debt agreement may be used to interpret this Indenture or the Notes.

Section 12.08. Successors.

All agreements of the Company in this Indenture and the Notes will bind its successors. All agreements of the Trustee and the Collateral Agent in this Indenture will bind their respective successors.

Section 12.09. Force Majeure.

The Trustee, the Collateral Agent and each Note Agent will not incur any liability for not performing any act or fulfilling any duty, obligation or responsibility under this Indenture or the Notes by reason of any occurrence beyond its control (including any act or provision of any present or future law or regulation or governmental authority, act of God or war, civil unrest, local or national disturbance or disaster, act of terrorism or unavailability of the Federal Reserve Bank wire or facsimile or other wire or communication facility).

Section 12.10. U.S.A. Patriot Act.

The Company acknowledges that, in accordance with Section 326 of the U.S.A. Patriot Act, the Trustee, like all financial institutions, in order to help fight the funding of terrorism and money laundering, is required to obtain, verify and record information that identifies each person or legal entity that establishes a relationship or opens an account with the Trustee. The Company agrees to provide the Trustee with such information as it may request to enable the Trustee to comply with the U.S.A. Patriot Act.

Section 12.11. Calculations.

Except as otherwise provided in this Indenture, the Company will be responsible for making all calculations called for under this Indenture or the Notes, including determinations of the Last Reported Sale Price, Daily VWAP, accrued interest (including any Special Interest) on

the Notes and the Conversion Rate.

The Company will make all calculations in good faith, and, absent manifest error, its calculations will be final and binding on all Holders. The Company will provide a schedule of its calculations to the Trustee and the Conversion Agent, and each of the Trustee and the Conversion Agent may rely conclusively on the accuracy of the Company's calculations without independent verification. The Trustee will promptly forward a copy of each such schedule to a Holder upon its written request therefor.

Section 12.12. Severability.

If any provision of this Indenture or the Notes is invalid, illegal or unenforceable, then the validity, legality and enforceability of the remaining provisions of this Indenture or the Notes will not in any way be affected or impaired thereby.

Section 12.13. Counterparts.

The parties may sign any number of copies of this Indenture. Each signed copy will be an original, and all of them together represent the same agreement. Delivery of an executed counterpart of this Indenture by facsimile, electronically in portable document format or in any other format will be effective as delivery of a manually executed counterpart.

Section 12.14. Table of Contents, Headings, Etc.

The table of contents and the headings of the Articles and Sections of this Indenture have been inserted for convenience of reference only, are not to be considered a part of this Indenture and will in no way modify or restrict any of the terms or provisions of this Indenture.

Section 12.15. Withholding Taxes.

Each Holder of a Note agrees that, in the event that it is deemed to have received a distribution that is subject to U.S. federal income tax as a result of an adjustment or the non-occurrence of an adjustment to the Conversion Rate, any resulting withholding taxes (including backup withholding) may be withheld from interest and payments upon conversion, repurchase, redemption, or maturity of the Notes. In addition, each Holder of a Note agrees that if any withholding taxes (including backup withholding) are paid on behalf of such Holder, then those withholding taxes may be set off against payments of cash or the delivery of other Conversion Consideration, if any, in respect of the Notes (or, in some circumstances, any payments on the Common Stock) or sales proceeds received by, or other funds or assets of, such Holder.

Section 12.16. Intercreditor Agreement.

This Indenture is subject to the terms, limitations and conditions set forth in the Intercreditor Agreement. Notwithstanding anything herein to the contrary, the Lien and security interest granted to the Collateral Agent pursuant to this Indenture and the exercise of any right or remedy by the Collateral Agent hereunder and thereunder are subject to the provisions of the

Intercreditor Agreement. In the event of any conflict between the terms of the Intercreditor Agreement and this Indenture with respect to lien priority or rights and remedies in connection with any Collateral that also secures the Senior Credit Agreement, the terms of the Intercreditor Agreement will govern.

Section 12.17. Rules by Trustee.

The Trustee and Collateral Agent may make reasonable rules for action by Holders. The Registrar and Paying Agent and any other Note Agent may make reasonable rules for their functions.

[The Remainder of This Page Intentionally Left Blank; Signature Page Follows]

IN WITNESS WHEREOF, the parties hereto have caused this Indenture to be duly executed as of the date first written above.

Verastem, Inc.

By: /s/ Robert Gagnon

Name: Robert Gagnon
Title: Chief Business and Financial Officer

Wilmington Trust, National Association, as Trustee and
as Collateral Agent

By: /s/ W.
Thomas Morris II

Name: W. Thomas Morris II
Title: Vice President

[Signature Page to Indenture]

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HOLDER BENEFICIAL OWNERSHIP LIMIT

Citadel Equity Fund Ltd elects that any Notes issued to it be subject to a Holder Beneficial Ownership Limit equal to 9.8%.

D. E. Shaw Valence Portfolios, L.L.C. elects that any Notes issued to it be subject to a Holder Beneficial Ownership Limit equal to 4.9%.

Highbridge Tactical Credit Master Fund, L.P. elects that any Notes issued to it be subject to a Holder Beneficial Ownership Limit equal to 9.9%.

FORM OF NOTE

[Insert Global Note Legend, if applicable]

VERASTEM, INC.**5.00% Convertible Senior Second Lien Note due 2048**

CUSIP No.:92337C AB0

Certificate No. 2048-

B1

ISIN No.: US92337CAB00

Verastem, Inc., a Delaware corporation, for value received, promises to pay to Cede & Co., or its registered assigns, the principal sum of SIXTY-TWO MILLION EIGHT HUNDRED SEVENTY-TWO THOUSAND dollars (\$62,872,000.00) [(as revised by the attached Schedule of Exchanges of Interests in the Global Note)]* on November 1, 2048 and to pay interest thereon, as provided in the Indenture referred to below, until the principal and all accrued and unpaid interest are paid or duly provided for.

Interest Payment Dates: May 1 and November 1 of each year, commencing on May 1, 2020.

Regular Record Dates: April 15 and October 15.

Additional provisions of this Note are set forth on the other side of this Note.

[The Remainder of This Page Intentionally Left Blank; Signature Page Follows]

* Insert bracketed language for Global Notes only.

IN WITNESS WHEREOF, Verastem, Inc. has caused this instrument to be duly executed as of the date set forth below.

Verastem, Inc.

Date:

By:

Name:
Title:

Date:

By:

Name:
Title:

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TRUSTEE'S CERTIFICATE OF AUTHENTICATION

Wilmington Trust, National Association, as Trustee, certifies that this is one of the Notes referred to in the within-mentioned Indenture.

Date:

By:

Authorized Signatory

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5.00% Convertible Senior Second Lien Note due 2048

This Note is one of a duly authorized issue of notes of Verastem, Inc., a Delaware corporation (the “**Company**”), designated as its 5.00% Convertible Senior Second Lien Notes due 2048 (the “**Notes**”), all issued or to be issued pursuant to an indenture (as may be amended, supplemented or modified from time to time, the “**Indenture**”), dated as of November 14, 2019, and between the Company and Wilmington Trust, National Association, as trustee and as collateral agent. Capitalized terms used in this Note without definition have the respective meanings ascribed to them in the Indenture.

The Indenture sets forth the rights and obligations of the Company, the Trustee, the Collateral Agent and the Holders and the terms of the Notes. Notwithstanding anything to the contrary in this Note, to the extent that any provision of this Note conflicts with the provisions of the Indenture, the provisions of the Indenture will control.

1. **Interest.** This Note will accrue interest at a rate and in the manner set forth in Section 2.04 of the Indenture. Stated Interest on this Note will begin to accrue from, and including, November 14, 2019.

2. **Maturity.** This Note will mature on November 1, 2048, unless earlier repurchased, redeemed or converted.

3. **Method of Payment.** Cash amounts due on this Note will be paid in the manner set forth in Section 2.03 of the Indenture.

4. **Persons Deemed Owners.** The Holder of this Note will be treated as the owner of this Note for all purposes.

5. **Denominations; Transfers and Exchanges.** All Notes will be in registered form, without coupons, in principal amounts equal to any Authorized Denominations. Subject to the terms of the Indenture, the Holder of this Note may transfer or exchange this Note by presenting it to the Registrar and delivering any required documentation or other materials.

6. **Right of Holders to Require the Company to Repurchase Notes upon a Fundamental Change.** If a Fundamental Change occurs, then each Holder will have the right to require the Company to repurchase such Holder’s Notes (or any portion thereof in an Authorized Denomination) for cash in the manner, and subject to the terms, set forth in Section 4.02 of the Indenture.

7. **Right of Holders to Require the Company to Repurchase Notes on the Optional Repurchase Dates.** Each Holder will have the right to require the Company to repurchase such Holder’s Notes (or any portion thereof in an Authorized Denomination) on each Optional Repurchase Date for cash in the manner, and subject to the terms, set forth in Section 4.03 of the Indenture.

8. **Right of the Company to Redeem the Notes.** The Company will have the right to redeem the Notes for cash in the manner, and subject to the terms, set forth in Section 4.04 of the Indenture.

9. **Conversion.** The Holder of this Note may convert this Note into Conversion Consideration in the manner, and subject to the terms, set forth in Article 5 of the Indenture. The Company will have the right to cause the automatic conversion of all Notes then outstanding in the manner, and subject to the terms, set forth in Section 5.04 of the Indenture.

10. **When the Company May Merge, Etc.** Article 6 of the Indenture places limited restrictions on the Company's ability to be a party to a certain transaction.

11. **Defaults and Remedies.** If an Event of Default occurs, then the principal amount of, and all accrued and unpaid interest on, all of the Notes then outstanding may (and, in certain circumstances, will automatically) become due and payable in the manner, and subject to the terms, set forth in Article 7 of the Indenture.

12. **Amendments, Supplements and Waivers.** The Company, the Trustee and the Collateral Agent may amend or supplement the Indenture, the Notes or the Intercreditor Agreement or waive compliance with any provision of the Indenture, the Notes or the Intercreditor Agreement in the manner, and subject to the terms, set forth in Article 9 of the Indenture.

13. **No Personal Liability of Directors, Officers, Employees and Stockholders.** No past, present or future director, officer, employee, incorporator or stockholder of the Company, as such, will have any liability for any obligations of the Company under the Indenture or the Notes or for any claim based on, in respect of, or by reason of, such obligations or their creation. By accepting any Note, each Holder waives and releases all such liability. Such waiver and release are part of the consideration for the issuance of the Notes.

14. **Authentication.** No Note will be valid until it is authenticated by the Trustee. A Note will be deemed to be duly authenticated only when an authorized signatory of the Trustee (or a duly appointed authenticating agent) manually signs the certificate of authentication of such Note.

15. **Abbreviations.** Customary abbreviations may be used in the name of a Holder or its assignee, such as TEN COM (tenants in common), TEN ENT (tenants by the entireties), JT TEN (joint tenants with right of survivorship and not as tenants in common), CUST (custodian), and U/G/M/A (Uniform Gift to Minors Act).

16. **Governing Law.** THIS NOTE, AND ANY CLAIM, CONTROVERSY OR DISPUTE ARISING UNDER OR RELATED TO THIS NOTE, WILL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK.

* * *

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To request a copy of the Indenture, which the Company will provide to any Holder at no charge, please send a written request to the following address:

Verastem, Inc.
117 Kendrick Street
Suite 500
Needham, MA 02494
Attention: Chief Financial Officer

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SCHEDULE OF EXCHANGES OF INTERESTS IN THE GLOBAL NOTE*

INITIAL PRINCIPAL AMOUNT OF THIS GLOBAL NOTE: \$62,872,000.00

The following exchanges, transfers or cancellations of this Global Note have been made:

Date	Amount of Increase (Decrease) in Principal Amount of this Global Note	Principal Amount of this Global Note After Such Increase (Decrease)	Signature of Authorized Signatory of Trustee

* Insert for Global Notes only.



CONVERSION NOTICE

VERASTEM, INC.

5.00% Convertible Senior Second Lien Notes due 2048

Subject to the terms of the Indenture, by executing and delivering this Conversion Notice, the undersigned Holder of the Note identified below directs the Company to convert (check one):

- the entire principal amount of
- \$ _____ * aggregate principal amount of

the Note identified by CUSIP No. _____ and Certificate No. _____.

The undersigned acknowledges that if the Conversion Date of a Note to be converted is after a Regular Record Date and before the next Interest Payment Date, then such Note, when surrendered for conversion, must, in certain circumstances, be accompanied with an amount of cash equal to the interest that would have accrued on such Note to, but excluding, such Interest Payment Date.

Date:

(Legal Name of Holder)

By:

Name:

Title:

Signature Guaranteed:

Participant in a Recognized Signature
Guarantee Medallion Program

By:

Authorized Signatory

* Must be an Authorized Denomination.

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FUNDAMENTAL CHANGE REPURCHASE NOTICE

VERASTEM, INC.

5.00% Convertible Senior Second Lien Notes due 2048

Subject to the terms of the Indenture, by executing and delivering this Fundamental Change Repurchase Notice, the undersigned Holder of the Note identified below is exercising its Fundamental Change Repurchase Right with respect to (check one):

- the entire principal amount of
- \$ _____ * aggregate principal amount of

the Note identified by CUSIP No. _____ and Certificate No. _____.

The undersigned acknowledges that this Note, duly endorsed for transfer, must be delivered to the Paying Agent before the Fundamental Change Repurchase Price will be paid.

Date:

(Legal Name of Holder)

By:

Name:

Title:

Signature Guaranteed:

Participant in a Recognized Signature
Guarantee Medallion Program

By:

Authorized Signatory

* Must be an Authorized Denomination.

OPTIONAL REPURCHASE NOTICE

VERASTEM, INC.

5.00% Convertible Senior Second Lien Notes due 2048

Subject to the terms of the Indenture, by executing and delivering this Optional Repurchase Notice, the undersigned Holder of the Note identified below is exercising its Optional Repurchase Right with respect to (check one):

- the entire principal amount of
- \$ _____ * aggregate principal amount of

the Note identified by CUSIP No. _____ and Certificate No. _____.

The undersigned directs the Company to purchase the above-referenced principal amount on (check one):

- November 1, 2028 November 1, 2033
- November 1, 2038 November 1, 2043

The undersigned acknowledges that this Note, duly endorsed for transfer, must be delivered to the Paying Agent before the Optional Repurchase Price will be paid.

Date: _____ (Legal Name of Holder)

By: _____
Name:
Title:

Signature Guaranteed:

Participant in a Recognized Signature
Guarantee Medallion Program

By: _____
Authorized Signatory

* Must be an Authorized Denomination.



ASSIGNMENT FORM

VERASTEM, INC.

5.00% Convertible Senior Second Lien Notes due 2048

Subject to the terms of the Indenture, the undersigned Holder of the within Note assigns to:

Name:

Address:

Social security or
tax identification
number:

the within Note and all rights thereunder irrevocably appoints:

as agent to transfer the within Note on the books of the Company. The agent may substitute another to act for him/her.

Date:

(Legal Name of Holder)

By:

Name:

Title:

Signature Guaranteed:

Participant in a Recognized Signature
Guarantee Medallion Program

By:

Authorized Signatory

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FORM OF GLOBAL NOTE LEGEND

THIS IS A GLOBAL NOTE WITHIN THE MEANING OF THE INDENTURE HEREINAFTER REFERRED TO AND IS REGISTERED IN THE NAME OF THE DEPOSITARY OR A NOMINEE OF THE DEPOSITARY, WHICH MAY BE TREATED BY THE COMPANY, THE TRUSTEE AND ANY AGENT THEREOF AS THE OWNER AND HOLDER OF THIS NOTE FOR ALL PURPOSES.

UNLESS THIS CERTIFICATE IS PRESENTED BY AN AUTHORIZED REPRESENTATIVE OF THE DEPOSITARY TRUST COMPANY (“DTC”) TO THE COMPANY OR ITS AGENT FOR REGISTRATION OF TRANSFER, EXCHANGE OR PAYMENT, AND ANY CERTIFICATE ISSUED IS REGISTERED IN THE NAME OF CEDE & CO. OR IN SUCH OTHER NAME AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF DTC (AND ANY PAYMENT HEREON IS MADE TO CEDE & CO. OR TO SUCH OTHER ENTITY AS IS REQUESTED BY AN AUTHORIZED REPRESENTATIVE OF THE DTC), ANY TRANSFER, PLEDGE OR OTHER USE HEREOF FOR VALUE OR OTHERWISE BY OR TO ANY PERSON IS WRONGFUL SINCE THE REGISTERED OWNER HEREOF, CEDE & CO., HAS AN INTEREST HEREIN.

TRANSFERS OF THIS GLOBAL NOTE WILL BE LIMITED TO TRANSFERS IN WHOLE, BUT NOT IN PART, TO NOMINEES OF DTC, OR TO A SUCCESSOR THEREOF OR SUCH SUCCESSOR’S NOMINEE, AND TRANSFERS OF PORTIONS OF THIS GLOBAL NOTE WILL BE LIMITED TO TRANSFERS MADE IN ACCORDANCE WITH THE RESTRICTIONS SET FORTH IN ARTICLE 2 OF THE INDENTURE HEREINAFTER REFERRED TO.

**FIFTH AMENDMENT
TO
LOAN AND SECURITY AGREEMENT**

This **Fifth Amendment to Loan and Security Agreement** (this “**Amendment**”) is dated as of November 14, 2019 and is entered into by and among (a) VERASTEM, INC., a Delaware corporation (“**Borrower**”), (b) the several banks and other financial institutions or entities from time to time parties to the Loan Agreement (collectively, referred to as “**Lender**”) and (c) HERCULES CAPITAL, INC., a Maryland corporation, in its capacity as administrative agent for itself and the Lender (in such capacity, the “**Agent**”). Capitalized terms used herein without definition shall have the same meanings given them in the Loan Agreement (as defined below).

Recitals

A. Borrower, Agent and Lender have entered into that certain Loan and Security Agreement dated as of March 21, 2017, among Borrower, Agent and Lender, as amended by that certain First Amendment to Loan and Security Agreement dated as of January 4, 2018 among Borrower, Agent and Lender, that certain Second Amendment to Loan and Security Agreement dated as of March 6, 2018, among Borrower, Agent and Lender, as amended by that certain Third Amendment to Loan and Security Agreement dated as of October 11, 2018, among Borrower, Agent and Lender, and as amended by that certain Fourth Amendment to Loan and Security Agreement dated as of April 23, 2019, among Borrower, Agent and Lender (as amended, and as may be further amended, restated, amended and restated, supplemented or otherwise modified from time to time, the “**Loan Agreement**”), pursuant to which Lender has agreed to extend and make available to Borrower certain advances of money.

B. In accordance with Section 11.3 of the Loan Agreement, Borrower and Lender have agreed to amend the Loan Agreement upon the terms and conditions more fully set forth herein.

Agreement

NOW, THEREFORE, in consideration of the foregoing Recitals and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, and intending to be legally bound, the parties hereto agree as follows:

1. Consent to Use of Cash to Prepay Permitted Indebtedness. Subject to the satisfaction of the conditions precedent set forth below, Agent consents to Borrower using Borrower’s Cash to prepay Permitted Convertible Debt Financing, provided that the amount of Cash used for such purpose does not exceed \$11,700,000.00.

2. Amendments.

2.1 The Loan Agreement shall be amended by inserting the following new definitions to appear in proper alphabetical order in Section 1.1 thereof:

“**2019 Convertible Debt Indenture**” means that certain Indenture dated as of the Fifth Amendment Closing Date by and between Borrower and Wilmington Trust National Association, as trustee and collateral agent.

“**Fifth Amendment Closing Date**” means November 14, 2019.

“Initial Net Product Revenue Threshold” means Borrower’s receipt of Net Product Revenues of at least Twenty Million Dollars (\$20,000,000.00) after the Fifth Amendment Closing Date and on or before December 31, 2020, measured on a trailing six (6) month basis.

2.2 The Loan Agreement shall be amended by deleting the following defined terms and their corresponding definitions in Section 1.1 thereof and inserting the following in their place:

“Liquidity Threshold” means as of any date of determination, that Borrower maintains, in accounts in the name of Borrower that are subject to an Account Control Agreement, unrestricted and unencumbered (other than as a result of this Agreement or the 2019 Convertible Debt Indenture) Cash in an aggregate amount greater than or equal to one hundred percent (100%) of the outstanding Secured Obligations on such date, as reasonably determined by Agent (based upon supporting documentation reasonably requested by Agent).

“Net Product Revenue Threshold” means Net Product Revenues of at least eighty percent (80%) of the amounts shown on Borrower’s most recent Board approved financial and business projections reasonably approved by Agent and the Lender, measured on a trailing six (6) month basis and tested as of the end of each calendar month.

“Permitted Convertible Debt Financing” means convertible notes issued by the Borrower after the Closing Date but prior to the Fifth Amendment Closing Date in an aggregate principal amount of not more than \$35,700,000, and convertible notes issued by the Borrower pursuant to the 2019 Convertible Debt Indenture on the Fifth Amendment Closing Date in an aggregate principal amount of not more than \$62,900,000; provided that for so long as any portion of the Secured Obligations remain outstanding such convertible notes shall (a) have a scheduled maturity date no earlier than 180 days after the 2019 Term Loan Maturity Date, (b) with respect to convertible notes issued prior to the Fifth Amendment Closing Date, be unsecured, and with respect to convertible notes issues on the Fifth Amendment Closing Date, be unsecured or secured by a Permitted Lien, (c) not be guaranteed by any Subsidiary of Verastem that is not a Qualified Subsidiary and (d) not provide for any prepayments, repurchases or redemptions of principal (other than customary fundamental change obligations and, for the avoidance of doubt, Permitted Conversion Payments) at the option of the holder thereof earlier than 180 days after the 2019 Term Loan Maturity Date.

2.3 The definition of “Permitted Liens” in Section 1.1 of the Loan Agreement shall be amended by (a) deleting “and” at the end of subsection (xv), and (b) inserting the following as subsections (xvi) and (xvii):

“(xvi) Liens securing Permitted Convertible Debt Financing incurred on the Fifth Amendment Closing Date which are subordinated to the Liens in favor of Agent securing the Secured Obligations and subject to a valid subordination agreement in a form and substance acceptable to Agent in all respects, and (xvii) Liens incurred in connection with the extension, renewal or refinancing of the Indebtedness secured by Liens of the type described in clauses (i) through (xvi) above; provided, that any extension, renewal or replacement Lien shall be limited to the property encumbered by the existing Lien and the principal amount of the Indebtedness being extended, renewed or refinanced, modified,

amended, restated or amended and restated (as may have been reduced by any payment thereon) does not increase.”

2.4 The Loan Agreement shall be amended by amending and replacing clause (a) in Section 7.4 as follows:

“(a) the conversion of Indebtedness into equity securities and the payment of cash (i) in lieu of (A) fractional shares in connection with such conversion and (B) shares to the extent that the number of shares of the Verastem’s common stock due upon such conversion would exceed the aggregate number of shares of Verastem’s common stock authorized but not issued and shares of Verastem’s common stock held in treasury and reserved for issuance in connection with a Permitted Convertible Debt Financing, and (ii) for payment of accrued and unpaid interest and the applicable Interest Make-Whole (as defined in the 2019 Convertible Debt Indenture in effect as of the Fifth Amendment Closing Date) in accordance with the 2019 Convertible Debt Indenture owed by Borrower to the holders of any Permitted Convertible Debt Financing issued pursuant to the 2019 Convertible Debt Indenture, which cash payments shall not exceed \$5,000,000.00 in the aggregate (any such cash payments in this subsection (a), “Permitted Conversion Payments”),”

2.5 The Loan Agreement shall be amended by deleting Section 7.15 in its entirety and inserting the following in its place:

“7.15 Financial Covenants.

(a) Borrower shall at all times satisfy the Liquidity Threshold. Notwithstanding the foregoing, in the event that Borrower satisfies the Initial Net Product Revenue Threshold on or before December 31, 2020, Borrower shall not be required to satisfy the covenant contained in this clause (a) at any time from and after the date such Initial Net Product Revenue Threshold is satisfied.

(b) In the event that Borrower satisfies the Initial Net Product Revenue Threshold on or before December 31, 2020, Borrower shall satisfy the Net Product Revenue Threshold as of the last date of each following month. Notwithstanding the foregoing, Borrower shall not be required to satisfy the Net Product Revenue Threshold for any month under this Section 7.15(b) if Borrower maintained at all times during such month, and continues to maintain at all times thereafter until Borrower satisfies the Net Product Revenue Threshold, in accounts in the name of Borrower that are subject to an Account Control Agreement, unrestricted and unencumbered (other than as a result of this Agreement and the 2019 Convertible Debt Indenture) Cash in an aggregate amount greater than or equal to fifty percent (50%) of the outstanding Secured Obligations, as reasonably determined by Agent (based upon supporting documentation reasonably requested by Agent).”

2.6 The Loan Agreement shall be amended by deleting clause (c) in Section 11.2 in its entirety and inserting the following in its place:

“(c) If to Borrower:
VERASTEM, INC.
Attention: Rob Gagnon
117 Kendrick Street, Suite 500
Needham, MA 02494
Email: rgagnon@verastem.com
Telephone: 781-292-4200

VERASTEM, INC.
Attention: Maddy Zeylikman
117 Kendrick Street, Suite 500
Needham, MA 02494
Email: mzeylikman@verastem.com
Telephone: 781-292-4201”

3. Borrower’s Representations And Warranties. Borrower represents and warrants that:

3.1 Immediately upon giving effect to this Amendment (i) the representations and warranties contained in the Loan Documents are true, accurate and complete except to the extent such representations and warranties relate to an earlier date, in which case they are true and correct as of such date, after giving effect in all cases to any standard(s) of materiality contained in the Loan Agreement as to such representations and warranties and (ii) no Event of Default has occurred and is continuing with respect to which Borrower has not been notified in writing by Agent or Lender.

3.2 Borrower has the corporate power and authority to execute and deliver this Amendment and to perform its obligations under the Loan Agreement, as amended by this Amendment.

3.3 The certificate of incorporation, bylaws and other organizational documents of Borrower delivered to Agent and/or Lender on the Fourth Amendment Closing Date remain true, accurate and complete and have not been amended, supplemented or restated and are and continue to be in full force and effect.

3.4 The execution and delivery by Borrower of this Amendment and the performance by Borrower of its obligations under the Loan Agreement, as amended by this Amendment, have been duly authorized by all necessary corporate action on the part of Borrower.

3.5 This Amendment has been duly executed and delivered by Borrower and is the binding obligation of Borrower, enforceable against it in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, liquidation, moratorium or other similar laws of general application and equitable principles relating to or affecting creditors’ rights.

3.6 As of the date hereof, it has no defenses against the obligations to pay any amounts under the Obligations. Borrower acknowledges that each of Agent and Lender has acted in good faith and has conducted in a commercially reasonable manner its relationships with Borrower in connection with this Amendment and in connection with the Loan Documents.

Borrower understands and acknowledges that each of Agent and Lender is entering into this Amendment in reliance upon, and in partial consideration for, the above representations and warranties, and agrees that such reliance is reasonable and appropriate.

4. Limitation. The amendments set forth in this Amendment shall be limited precisely as written and shall not be deemed (a) to be a waiver or modification of any other term or condition of the Loan Agreement or of any other instrument or agreement referred to therein or to prejudice any right or remedy which Agent and/or Lender may now have or may have in the future under or in connection with the Loan Agreement (as amended hereby) or any instrument or agreement referred to therein; or (b) to be a consent to any future amendment or modification or waiver to any instrument or agreement the execution and delivery of which is consented to hereby, or to any waiver of any of the provisions thereof. Except as expressly amended hereby, the Loan Agreement shall continue in full force and effect.

5. Effectiveness. This Amendment shall become effective upon the satisfaction of all the following conditions precedent:

5.1 Amendment. Borrower, Agent and Lender shall have duly executed and delivered this Amendment to Lender and such other documents as Agent may reasonably request.

5.2 Final Draft. Borrower shall deliver to Agent at least three (3) Business Days prior to the consummation of any Permitted Convertible Debt Financing, the offering memorandum, indenture and all other material documents related thereto to Agent in substantially final form.

5.3 Subordination Agreement. Borrower shall deliver to Agent a subordination agreement in a form and substance acceptable to Agent in all respects and duly executed by the collateral agent for all holders of Permitted Convertible Debt Financing that will be secured by a Lien.

5.4 Payment of Lender Expenses. Borrower shall have paid all reasonable and invoiced Lender expenses (including all reasonable attorneys' fees and reasonable expenses) incurred through the date of this Amendment for the documentation and negotiation of this Amendment.

6. Release. In consideration of the agreements of Agent and each Lender contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Borrower, on behalf of itself and its successors, assigns, and other legal representatives, hereby fully, absolutely, unconditionally and irrevocably releases, remises and forever discharges Agent and each Lender, and its successors and assigns, and its present and former shareholders, affiliates, subsidiaries, divisions, predecessors, directors, officers, attorneys, employees, agents and other representatives (Agent, Lender and all such other persons being hereinafter referred to collectively as the "**Releasees**" and individually as a "**Releasee**"), of and from all demands, actions, causes of action, suits, covenants, contracts, controversies, agreements, promises, sums of money, accounts, bills, reckonings, damages and any and all other claims, counterclaims, defenses, rights of set-off, demands and liabilities whatsoever of every name and nature, known or unknown, suspected or unsuspected, both at law and in equity, which Borrower, or any of its successors, assigns, or other legal representatives may now or hereafter own, hold, have or claim to have against the Releasees or any of them for, upon, or by reason of any circumstance, action, cause or thing whatsoever which arises at any time on or prior to the day and date of this Amendment, for or on account of, or in relation to, or in any way in connection with the Loan Agreement, or any of the other Loan Documents or transactions thereunder or related thereto. Borrower understands, acknowledges and agrees that the release set forth above may be pleaded as a full and complete

defense and may be used as a basis for an injunction against any action, suit or other proceeding which may be instituted, prosecuted or attempted in breach of the provisions of such release. Borrower agrees that no fact, event, circumstance, evidence or transaction which could now be asserted or which may hereafter be discovered shall affect in any manner the final, absolute and unconditional nature of the release set forth above.

7. **Counterparts.** This Amendment may be signed in any number of counterparts, and by different parties hereto in separate counterparts, with the same effect as if the signatures to each such counterpart were upon a single instrument. All counterparts shall be deemed an original of this Amendment. This Amendment may be executed by facsimile, portable document format (.pdf) or similar technology signature, and such signature shall constitute an original for all purposes.

8. **Incorporation By Reference.** The provisions of Section 11 of the Loan Agreement shall be deemed incorporated herein by reference, *mutatis mutandis*.

[remainder of page intentionally left blank]

In Witness Whereof, the parties have duly authorized and caused this Amendment to be executed as of the date first written above.

BORROWER:

VERASTEM, INC.

Signature: /s/ Daniel Paterson
Print Name: Daniel Paterson
Title: President and Chief Operating Officer

AGENT:

HERCULES CAPITAL, INC.

Signature: /s/ Jennifer Choe
Print Name: Jennifer Choe
Title: Assistant General Counsel

LENDER:

HERCULES CAPITAL, INC.

Signature: /s/ Jennifer Choe
Print Name: Jennifer Choe
Title: Assistant General Counsel

HERCULES CAPITAL FUNDING TRUST 2018-1

Signature: /s/ Jennifer Choe
Print Name: Jennifer Choe
Title: Assistant General Counsel

HERCULES CAPITAL FUNDING TRUST 2019-1

Signature: /s/ Jennifer Choe
Print Name: Jennifer Choe
Title: Assistant General Counsel
