

**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**

Washington, D.C. 20549

**FORM 10-Q**

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

For the Quarterly Period Ended June 30, 2022

OR

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

For the Transition Period from \_\_\_\_\_ to \_\_\_\_\_

Commission File Number 001-36189

**Tandem Diabetes Care, Inc.**

(Exact name of registrant as specified in its charter)

**Delaware**

(State or other jurisdiction of  
incorporation or organization)

**11075 Roselle Street**

**San Diego, California**

(Address of principal executive offices)

**20-4327508**

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

**92121**

(Zip Code)

**(858) 366-6900**

(Registrant's telephone number, including area code)

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

<u>Title of Each Class</u>	<u>Trading Symbol(s)</u>	<u>Name of Exchange on Which Registered</u>
Common Stock, par value \$0.001 per share	TNDM	Nasdaq Global Market

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

Indicate by check mark whether the registrant has submitted electronically every Interactive Data File required to be submitted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit such files). Yes  No

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, a smaller reporting company or an emerging growth company. See definitions of "large accelerated filer," "accelerated filer," "smaller reporting company," and "emerging growth company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer

Accelerated filer

Non-accelerated filer

Smaller reporting company

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.

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

As of July 29, 2022, there were 64,221,212 shares of the registrant's Common Stock outstanding.

## TABLE OF CONTENTS

<b>Part I</b>	Financial Information	<a href="#">1</a>
Item 1	Financial Statements	<a href="#">1</a>
	Condensed Consolidated Balance Sheets at June 30, 2022 (Unaudited) and December 31, 2021	<a href="#">1</a>
	Condensed Consolidated Statements of Operations and Comprehensive Income (Loss) for the Three and Six Months Ended June 30, 2022 and 2021 (Unaudited)	<a href="#">2</a>
	Condensed Consolidated Statements of Stockholders' Equity for the Three and Six Months Ended June 30, 2022 and 2021 (Unaudited)	<a href="#">3</a>
	Condensed Consolidated Statements of Cash Flows for the Six Months Ended June 30, 2022 and 2021 (Unaudited)	<a href="#">5</a>
	Notes to Unaudited Condensed Consolidated Financial Statements	<a href="#">6</a>
Item 2	Management's Discussion and Analysis of Financial Condition and Results of Operations	<a href="#">24</a>
Item 3	Quantitative and Qualitative Disclosures About Market Risk	<a href="#">41</a>
Item 4	Controls and Procedures	<a href="#">41</a>
<b>Part II</b>	Other Information	<a href="#">43</a>
Item 1	Legal Proceedings	<a href="#">43</a>
Item 1A	Risk Factors	<a href="#">43</a>
Item 6	Exhibits	<a href="#">80</a>

---

PART I. FINANCIAL INFORMATION

Item 1. Financial Statements

TANDEM DIABETES CARE, INC.  
CONDENSED CONSOLIDATED BALANCE SHEETS  
(In thousands, except par value)

	June 30, 2022	December 31, 2021
	(Unaudited)	(Note 1)
<b>Assets</b>		
Current assets:		
Cash and cash equivalents	\$ 114,966	\$ 71,181
Short-term investments	520,365	552,630
Accounts receivable, net	103,763	110,725
Inventories	88,098	68,551
Prepaid and other current assets	7,852	8,433
Total current assets	835,044	811,520
Property and equipment, net	58,901	50,386
Operating lease right-of-use assets	126,672	27,503
Other long-term assets	15,958	15,728
Total assets	<u>\$ 1,036,575</u>	<u>\$ 905,137</u>
<b>Liabilities and Stockholders' Equity</b>		
Current liabilities:		
Accounts payable	\$ 50,661	\$ 28,032
Accrued expenses	7,610	9,419
Employee-related liabilities	35,429	51,556
Operating lease liabilities	9,925	9,279
Deferred revenue	11,713	10,182
Other current liabilities	23,921	23,388
Total current liabilities	139,259	131,856
Convertible senior notes, net - long-term	282,345	281,467
Operating lease liabilities - long-term	129,802	23,922
Deferred revenue - long-term	18,343	16,940
Other long-term liabilities	17,242	17,840
Total liabilities	586,991	472,025
Commitments and contingencies (Note 12)	—	—
Stockholders' equity:		
Common stock, \$0.001 par value; 200,000 shares authorized, 64,210 and 63,833 shares issued and outstanding at June 30, 2022 and December 31, 2021, respectively.	64	64
Additional paid-in capital	1,118,168	1,068,259
Accumulated other comprehensive loss	(4,282)	(616)
Accumulated deficit	(664,366)	(634,595)
Total stockholders' equity	449,584	433,112
Total liabilities and stockholders' equity	<u>\$ 1,036,575</u>	<u>\$ 905,137</u>

See accompanying notes to unaudited condensed consolidated financial statements.

**TANDEM DIABETES CARE, INC.**  
**CONDENSED CONSOLIDATED STATEMENTS OF OPERATIONS AND COMPREHENSIVE INCOME (LOSS)**  
(Unaudited)  
(In thousands, except per share data)

	Three Months Ended June 30,		Six Months Ended June 30,	
	2022	2021	2022	2021
Sales	\$ 200,262	\$ 172,139	\$ 376,169	\$ 313,176
Cost of sales	98,316	79,685	183,130	147,435
Gross profit	101,946	92,454	193,039	165,741
Operating expenses:				
Selling, general and administrative	80,614	66,523	153,885	125,086
Research and development	33,571	20,499	66,731	38,460
Total operating expenses	114,185	87,022	220,616	163,546
Operating income (loss)	(12,239)	5,432	(27,577)	2,195
Other income (expense), net:				
Interest income and other, net	769	418	1,150	690
Interest expense	(1,537)	(1,509)	(3,053)	(3,015)
Change in fair value of common stock warrants	57	(272)	91	(962)
Total other expense, net	(711)	(1,363)	(1,812)	(3,287)
Income (loss) before income taxes	(12,950)	4,069	(29,389)	(1,092)
Income tax expense (benefit)	2,106	61	382	(56)
Net income (loss)	\$ (15,056)	\$ 4,008	\$ (29,771)	\$ (1,036)
Other comprehensive income (loss):				
Unrealized loss on short-term investments	\$ (1,124)	\$ (51)	\$ (3,641)	\$ (89)
Foreign currency translation loss	(97)	(26)	(25)	(102)
Comprehensive income (loss)	\$ (16,277)	\$ 3,931	\$ (33,437)	\$ (1,227)
Net income (loss) per share, basic	\$ (0.23)	\$ 0.06	\$ (0.47)	\$ (0.02)
Net income (loss) per share, diluted	\$ (0.24)	\$ 0.06	\$ (0.47)	\$ (0.02)
Weighted average shares used to compute basic net income (loss) per share	64,077	62,717	63,979	62,583
Weighted average shares used to compute diluted net income (loss) per share	64,078	65,663	63,980	62,583

*See accompanying notes to unaudited condensed consolidated financial statements.*

**TANDEM DIABETES CARE, INC.**  
**CONDENSED CONSOLIDATED STATEMENTS OF STOCKHOLDERS' EQUITY**  
**(Unaudited)**  
**(In thousands)**

**Three Months Ended June 30, 2022**

	Common Stock		Additional Paid-in Capital	Accumulated Other Comprehensive Loss	Accumulated Deficit	Total Stockholders' Equity
	Shares	Amount				
Balance at March 31, 2022	63,941	\$ 64	\$ 1,089,689	\$ (3,061)	\$ (649,310)	\$ 437,382
Exercise of stock options	70	—	2,615	—	—	2,615
Vesting of restricted stock units, net of shares withheld for taxes	66	—	(2,276)	—	—	(2,276)
Issuance of common stock for Employee Stock Purchase Plan	129	—	7,915	—	—	7,915
Exercise of common stock warrants	4	—	68	—	—	68
Stock-based compensation expense	—	—	20,157	—	—	20,157
Unrealized loss on short-term investments	—	—	—	(1,124)	—	(1,124)
Foreign currency translation adjustments	—	—	—	(97)	—	(97)
Net loss	—	—	—	—	(15,056)	(15,056)
Balance at June 30, 2022	64,210	\$ 64	\$ 1,118,168	\$ (4,282)	\$ (664,366)	\$ 449,584

**Six Months Ended June 30, 2022**

	Common Stock		Additional Paid-in Capital	Accumulated Other Comprehensive Loss	Accumulated Deficit	Total Stockholders' Equity
	Shares	Amount				
Balance at December 31, 2021	63,833	\$ 64	\$ 1,068,259	\$ (616)	\$ (634,595)	\$ 433,112
Exercise of stock options	172	—	6,398	—	—	6,398
Vesting of restricted stock units, net of shares withheld for taxes	70	—	(2,575)	—	—	(2,575)
Issuance of common stock for Employee Stock Purchase Plan	129	—	7,915	—	—	7,915
Exercise of common stock warrants	6	—	83	—	—	83
Stock-based compensation expense	—	—	38,088	—	—	38,088
Unrealized loss on short-term investments	—	—	—	(3,641)	—	(3,641)
Foreign currency translation adjustments	—	—	—	(25)	—	(25)
Net loss	—	—	—	—	(29,771)	(29,771)
Balance at June 30, 2022	64,210	\$ 64	\$ 1,118,168	\$ (4,282)	\$ (664,366)	\$ 449,584

*See accompanying notes to unaudited condensed consolidated financial statements.*

**Three Months Ended June 30, 2021**

	Common Stock		Additional Paid-in Capital	Accumulated Other Comprehensive Income (Loss)	Accumulated Deficit	Total Stockholders' Equity
	Shares	Amount				
Balance at March 31, 2021	62,571	\$ 63	\$ 968,450	\$ 106	\$ (655,205)	\$ 313,414
Exercise of stock options	252	—	8,172	—	—	8,172
Vesting of restricted stock units, net of shares withheld for taxes	29	—	(867)	—	—	(867)
Issuance of common stock for Employee Stock Purchase Plan	100	—	6,317	—	—	6,317
Stock-based compensation expense	—	—	15,118	—	—	15,118
Unrealized loss on short-term investments	—	—	—	(51)	—	(51)
Foreign currency translation adjustments	—	—	—	(26)	—	(26)
Net income	—	—	—	—	4,008	4,008
Balance at June 30, 2021	62,952	\$ 63	\$ 997,190	\$ 29	\$ (651,197)	\$ 346,085

**Six Months Ended June 30, 2021**

	Common Stock		Additional Paid-in Capital	Accumulated Other Comprehensive Income (Loss)	Accumulated Deficit	Total Stockholders' Equity
	Shares	Amount				
Balance at December 31, 2020	62,335	\$ 62	\$ 1,025,233	\$ 220	\$ (659,210)	\$ 366,305
Effect of change in accounting for convertible senior notes (1)	—	—	(85,803)	—	9,049	(76,754)
Exercise of stock options	363	1	11,307	—	—	11,308
Vesting of restricted stock units, net of shares withheld for taxes	29	—	(867)	—	—	(867)
Issuance of common stock for Employee Stock Purchase Plan	100	—	6,317	—	—	6,317
Exercise of common stock warrants	125	—	437	—	—	437
Fair value of common stock warrants at time of exercise	—	—	12,434	—	—	12,434
Stock-based compensation expense	—	—	28,132	—	—	28,132
Unrealized loss on short-term investments	—	—	—	(89)	—	(89)
Foreign currency translation adjustments	—	—	—	(102)	—	(102)
Net loss	—	—	—	—	(1,036)	(1,036)
Balance at June 30, 2021	62,952	\$ 63	\$ 997,190	\$ 29	\$ (651,197)	\$ 346,085

(1) The Company adopted ASU No. 2020-06, *Accounting for Convertible Instruments and Contracts in an Entity's Own Equity*, effective January 1, 2021 (see Note 2, "Summary of Significant Accounting Policies").

See accompanying notes to unaudited condensed consolidated financial statements.

**TANDEM DIABETES CARE, INC.**  
**CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS**  
**(Unaudited)**  
**(In thousands)**

	Six Months Ended June 30,	
	2022	2021
<b>Operating Activities</b>		
Net loss	\$ (29,771)	\$ (1,036)
Adjustments to reconcile net loss to net cash provided by operating activities:		
Depreciation and amortization expense	7,181	6,925
Amortization of debt issuance costs	896	859
Provision for expected credit losses	1,990	874
Provision for inventory obsolescence	641	211
Change in fair value of common stock warrants	(91)	962
Amortization of premium (discount) on short-term investments	1,799	(306)
Stock-based compensation expense	38,241	27,924
Other	262	(106)
Changes in operating assets and liabilities:		
Accounts receivable, net	4,922	1,046
Inventories	(20,352)	(2,965)
Prepaid and other current assets	1,524	411
Other long-term assets	(901)	(159)
Accounts payable & Accrued expenses	20,193	11,957
Employee-related liabilities	(16,126)	2,318
Deferred revenue	2,934	5,288
Operating leases & Other current liabilities	7,443	1,170
Other long-term liabilities	(84)	2,207
Net cash provided by operating activities	20,701	57,580
<b>Investing Activities</b>		
Purchases of short-term investments	(229,719)	(385,580)
Proceeds from maturities of short-term investments	238,862	308,607
Proceeds from sales of short-term investments	17,686	20,788
Purchases of property and equipment	(14,760)	(5,339)
Acquisition of intangible assets and equity investments	(515)	(9,331)
Net cash provided by (used in) investing activities	11,554	(70,855)
<b>Financing Activities</b>		
Proceeds from issuance of common stock under Company stock plans, net	11,738	16,758
Proceeds from exercise of common stock warrants	83	438
Other financing activities	(270)	—
Net cash provided by financing activities	11,551	17,196
Effect of foreign exchange rate changes on cash	(21)	44
Net increase in cash and cash equivalents	43,785	3,965
Cash and cash equivalents at beginning of period	71,181	94,613
Cash and cash equivalents at end of period	\$ 114,966	\$ 98,578
<b>Supplemental disclosures of cash flow information</b>		
Income taxes paid	\$ 162	\$ 197
<b>Supplemental schedule of non-cash investing and financing activities</b>		
Operating lease right-of-use assets obtained in exchange for operating lease obligations	\$ 110,515	\$ 15,087
Purchase of property and equipment included in accounts payable	\$ 1,255	\$ 452
Intangible costs in accounts payable and other long-term liabilities	\$ 515	\$ 1,029

*See accompanying notes to unaudited condensed consolidated financial statements.*

TANDEM DIABETES CARE, INC.

NOTES TO UNAUDITED CONDENSED CONSOLIDATED FINANCIAL STATEMENTS

**1. Organization and Basis of Presentation**

***The Company***

Tandem Diabetes Care, Inc. is a medical device company focused on the design, development and commercialization of technology solutions for people living with diabetes. Tandem Diabetes Care, Inc. is incorporated in the state of Delaware. Unless the context requires otherwise, the terms the “Company” or “Tandem” refer to Tandem Diabetes Care, Inc., together with its wholly-owned subsidiaries in the United States, Canada and the Netherlands.

The Company manufactures, sells and supports insulin pump products that are designed to address the evolving needs and preferences of differentiated segments of the insulin-dependent diabetes market. The Company’s manufacturing, sales and support activities principally focus on the t:slim X2 Insulin Delivery System (t:slim X2), the Company’s flagship pump platform which has an advanced algorithm for managing insulin delivery, and is designed to display continuous glucose monitoring (CGM) sensor information directly on the pump home screen. The Company’s insulin pump products are compatible with other complementary digital health offerings, such as the t:connect mobile app and cloud-based diabetes management application (t:connect), and the Tandem Device Updater, a Mac and PC-compatible tool which offers and supports remote updates of the Company’s insulin pump software from a personal computer. The Company’s insulin pump products are generally considered durable medical equipment and have an expected lifespan of at least four years. In addition to insulin pumps, the Company sells disposable products that are used together with the pumps and are replaced every few days, including cartridges for storing and delivering insulin, and infusion sets that connect the insulin pump to a user’s body, as well as other accessories for enhanced usability.

***Basis of Presentation and Principles of Consolidation***

The Company has prepared the accompanying unaudited condensed consolidated financial statements in accordance with accounting principles generally accepted in the United States of America (U.S. GAAP) for interim financial information and pursuant to the instructions to Form 10-Q and Article 10 of Regulation S-X. Accordingly, they do not include all of the information and disclosures required by U.S. GAAP for complete financial statements. In the opinion of management, all adjustments which are of a normal and recurring nature, considered necessary for a fair presentation of the financial information contained herein, have been included.

Interim financial results are not necessarily indicative of results anticipated for the full year or any other period(s). These unaudited condensed consolidated financial statements should be read in conjunction with the Company’s audited consolidated financial statements and accompanying notes included in the Company’s Annual Report on Form 10-K for the year ended December 31, 2021 (Annual Report), from which the balance sheet information herein was derived. The condensed consolidated financial statements include the accounts of Tandem Diabetes Care, Inc. and its wholly-owned subsidiaries. All significant intercompany balances and transactions have been eliminated in consolidation.

The functional currency of the Company’s foreign subsidiaries is their respective local currency. The Company translates the financial statements of its foreign subsidiaries into U.S. dollars using period-end exchange rates for assets and liabilities and average exchange rates for each period for revenue, costs and expenses. Translation related adjustments are included in other comprehensive income (loss), and in accumulated other comprehensive income (loss) in the stockholders’ equity section of the Company’s condensed consolidated balance sheets. Foreign exchange gains or losses resulting from balances denominated in a currency other than the functional currency are recognized in interest income and other, net in the Company’s condensed consolidated statements of operations.

***Reclassifications***

Starting with the first quarter of 2022, the Company included the liability related to common stock warrants (see Note 5, “Fair Value Measurements”) as a component of other current liabilities on the Company’s condensed consolidated balance sheet. In addition, deferred revenue long-term, which was previously reported as a component of other long-term liabilities, is now separately reported on the condensed consolidated balance sheet. The corresponding balances at December 31, 2021, have been reclassified to conform to the current year presentation.



## 2. Summary of Significant Accounting Policies

There have been no material changes to the Company's significant accounting policies during the six months ended June 30, 2022, as compared to those disclosed in the Company's 2021 Annual Report.

### *Use of Estimates*

The preparation of the consolidated financial statements in conformity with U.S. GAAP requires management to make estimates and judgments that affect the reported amounts of assets, liabilities, revenues and expenses and the disclosure of contingent assets and liabilities in the Company's consolidated financial statements and accompanying notes as of the date of the consolidated financial statements. Some of those judgments can be subjective and complex, and therefore, actual results could differ materially from those estimates under different assumptions or conditions.

### *Accounts Receivable*

The Company grants credit to various customers in the ordinary course of business and is paid directly by customers who use its products, distributors and third-party insurance payors. The Company maintains an allowance for its current estimate of expected credit losses. Provisions for expected credit losses are estimated based on historical experience, assessment of specific risk, review of outstanding invoices, forecasts about the future, and various assumptions and estimates that are believed to be reasonable under the circumstances, including credit risks as a result of the coronavirus pandemic (COVID-19 global pandemic). Uncollectible accounts are written off against the allowance after appropriate collection efforts have been exhausted and when it is deemed that a balance is uncollectible.

### *Fair Value of Financial Instruments*

The carrying amounts of cash and cash equivalents, accounts receivable, accounts payable, accrued expenses, and employee-related liabilities are reasonable estimates of their fair values because of the short-term nature of these assets and liabilities. Short-term investments are carried at fair value. The carrying value and estimated fair value of certain of the Company's common stock warrants was determined using the Black-Scholes pricing model as of June 30, 2022 and December 31, 2021 (see Note 5, "Fair Value Measurements").

The Company's convertible senior notes are carried at amortized cost on the condensed consolidated balance sheets (see Note 7, "Debt"). The Company measures the fair value of its convertible senior notes for disclosure purposes. The Company estimated the fair value of its convertible senior notes to be \$269.5 million and \$430.0 million at June 30, 2022 and December 31, 2021, respectively, based on Level 2 quoted market prices as of those dates.

### *Operating Lease Right-of-Use Assets and Liabilities*

Operating lease right-of-use assets represent the Company's right to use an underlying asset for the lease term and lease liabilities represent its obligation to make lease payments arising from the lease. Operating lease right-of-use assets and liabilities are recognized when the Company takes possession of the leased property (the Commencement Date) based on the present value of lease payments over the lease term. For lease agreements entered into or reassessed after the adoption of ASC 842 *Leases*, the Company combines lease and non-lease components. Rent expense on noncancelable leases containing known future scheduled rent increases is recorded on a straight-line basis over the term of the respective leases beginning on the Commencement Date. The difference between rent expense and rent paid is accounted for as a component of operating lease right-of-use assets on the Company's consolidated balance sheets. Landlord improvement allowances and other similar lease incentives are recorded as a reduction of the right-of-use leased assets, and are amortized on a straight-line basis as a reduction to operating lease costs.

### *Cost Basis Equity Investment*

The Company made an \$8.1 million equity investment in a private company in the second quarter of 2021, which represented less than 5% of the outstanding equity of that company as of the date of investment. The investment is recorded using the cost minus impairment, if any, adjusted for changes in observable prices and is included as a component of other long-term assets on the consolidated balance sheets. The Company monitors this investment to evaluate whether any increase or decline in its value has occurred, based on the implied value of recent company financings, public market prices of comparable companies and general market conditions.

### **Intangible Assets Subject to Amortization**

Finite-lived intangible assets are recorded at cost, net of accumulated amortization and, if applicable, impairment charges. Amortization of finite-lived intangible assets is recognized over their estimated useful lives on a straight-line basis. The Company reviews its finite-lived intangible assets for impairment whenever events or changes in circumstances indicate that the carrying amount of an asset may not be recoverable. The Company did not recognize any impairment losses during the six months ended June 30, 2022 and 2021.

### **Revenue Recognition**

Revenue is generated primarily from sales of insulin pumps, disposable insulin cartridges and infusion sets to individual customers with third-party insurance coverage and through a network of distributors that resell the products to insulin-dependent diabetes customers. The Company recognizes revenue when it transfers control of the promised goods or services to customers in an amount that reflects the consideration to which the Company expects to be entitled in exchange for those goods or services, net of estimated returns.

#### *Revenue Recognition for Arrangements with Multiple Performance Obligations*

The Company considers the individual deliverables in its product offering as separate performance obligations. The transaction price is determined based on the consideration expected to be received, based either on the stated value in contractual arrangements or the estimated cash to be collected in non-contracted arrangements. The Company allocates the consideration to the individual performance obligations and recognizes the consideration based on when the performance obligation is satisfied, considering whether or not this occurs at a point in time or over time. Generally, insulin pumps, cartridges, infusion sets and accessories are deemed performance obligations that are satisfied at a point in time when the customer obtains control of the promised good, which typically is upon shipment for our distributor arrangements and upon receipt for sales directly to individual customers. Complementary products, such as t:connect and the Tandem Device Updater, are considered distinct performance obligations that are satisfied over time, as access and support for these products is provided throughout the typical four-year warranty period of the insulin pumps. Accordingly, revenue related to the complementary products is deferred and recognized over a four-year period. Where there is no standalone value for the complementary product, the Company determines its value by applying the expected cost plus a margin approach and then allocates the residual to the insulin pumps.

### **Warranty Reserve**

The Company generally provides a four-year warranty on its insulin pumps to end user customers and may replace any pumps that do not function as intended in accordance with the product specifications within the warranty period. Additionally, the Company offers a six-month warranty on disposable insulin cartridges and infusion sets. Estimated warranty costs are recorded at the time of shipment, and the Company reevaluates the estimate of the warranty reserve obligation at each reporting period. Warranty costs are estimated primarily based on the current expected product replacement cost and expected replacement rates utilizing historical experience. Insulin pumps returned to the Company may be refurbished and redeployed. Experience has shown that initial data for any given pump version may be insufficient; therefore, the Company's process relies on long-term historical averages until sufficient data are available. As actual experience becomes available, the Company uses the data to update the historical averages. The Company may make further adjustments to the warranty reserve when deemed appropriate, giving additional consideration to the length of time each pump version has been in the field and revised future expectations of performance based on new features and capabilities that may become available through Tandem Device Updater.

The following table provides a reconciliation of the changes in product warranty liabilities for the three and six months ended June 30, 2022 and 2021 (in thousands):

	<b>Three Months Ended June 30,</b>		<b>Six Months Ended June 30,</b>	
	<b>2022</b>	<b>2021</b>	<b>2022</b>	<b>2021</b>
Balance at beginning of the period	\$ 30,444	\$ 23,169	\$ 30,401	\$ 22,075
Provision for warranties issued during the period	7,279	8,020	14,480	13,916
Settlements made during the period	(5,687)	(4,751)	(11,708)	(9,007)
Decrease in warranty estimates	(132)	(770)	(1,269)	(1,316)
Balance at end of the period	\$ 31,904	\$ 25,668	\$ 31,904	\$ 25,668

As of June 30, 2022 and December 31, 2021, total product warranty reserves were included in the following consolidated balance sheet accounts (in thousands):

	June 30, 2022	December 31, 2021
Other current liabilities	\$ 14,663	\$ 13,076
Other long-term liabilities	17,241	17,325
Total warranty reserve	<u>\$ 31,904</u>	<u>\$ 30,401</u>

#### **Stock-Based Compensation**

Stock-based compensation cost is measured at the grant date based on the estimated fair value of the award, and the portion that is ultimately expected to vest is recognized as compensation expense over the requisite service period on a straight-line basis. The Company estimates the fair value of stock options issued under the Company's Amended and Restated 2013 Stock Incentive Plan (2013 Plan) and the fair value of the employees' purchase rights under the Company's 2013 Employee Stock Purchase Plan (ESPP) using the Black-Scholes option-pricing model on the date of grant. The Black-Scholes option-pricing model requires the use of assumptions about a number of variables, including stock price volatility, expected term, dividend yield and risk-free interest rate (see Note 8, "Stockholders' Equity"). The fair value of restricted stock unit (RSU) awards issued under the 2013 Plan that vest solely based on service is estimated based on the fair market value of the underlying stock on the date of grant. The fair value of RSU awards issued under the 2013 Plan that vest based upon the Company's actual performance relative to predefined performance metrics, and the awardee's continuing service through the measurement date, is estimated based on the fair market value of the underlying stock on the date of grant and the probability that the specified performance criteria will be met. At each reporting period, the Company reassesses the probability of the achievement of such performance metrics. Any expense change resulting from an adjustment in the estimated shares to be released is recorded in the period of adjustment.

#### **Net Income (Loss) Per Share**

Basic net income (loss) per share is calculated by dividing the net income or loss by the weighted average number of common shares outstanding for the period, without consideration for common stock equivalents. Diluted net income (loss) per share reflects the potential dilution that would occur if securities exercisable for or convertible into common stock were exercised for or converted into common stock. Dilutive common share equivalents are comprised of stock options and unvested RSUs outstanding under the Company's stock plans, potential awards to be granted pursuant to the ESPP, and common stock warrants, each calculated using the treasury stock method; and shares issuable upon conversion of the convertible senior notes calculated using the if-converted method. For common stock warrants that are recorded as a liability in the accompanying condensed consolidated balance sheets, the calculation of diluted loss per share requires that, to the extent the average market price of the underlying shares for the reporting period exceeds the exercise price of the warrants and the presumed exercise of the warrants is dilutive to loss per share for the period, an adjustment is made to net loss used in the calculation to remove the change in fair value of the warrants from the numerator for the period. Likewise, an adjustment to the denominator is required to reflect the related dilutive shares, if any, under the treasury stock method. For the three and six months ended June 30, 2022, the net loss used in the calculation of diluted net loss per share was increased by \$0.1 million and \$0.1 million, respectively, to remove the gain recognized from the change in fair value of certain common stock warrants based on the dilutive effect of assumed exercise, and the denominator was increased by 958 shares and 965 shares, respectively, calculated under the treasury stock method.

For the six months ended June 30, 2021, there was no difference in the weighted average number of shares used to calculate basic and diluted net loss per share due to the Company's net loss position. For the three months ended June 30, 2021, the numerator and denominator of the diluted net income per share computation were calculated as follows (in thousands):

	<b>Three Months Ended June 30, 2021</b>
Net income - basic and diluted	<u>\$ 4,008</u>
Weighted average shares outstanding - basic	62,717
Dilutive common share equivalents:	
Options to purchase common stock	2,550
Unvested restricted stock units	246
Warrants to purchase common stock	148
Awards to be granted under the ESPP	2
Weighted average shares outstanding - diluted	<u>65,663</u>

Potentially dilutive securities outstanding and not included in the calculation of diluted net loss per share (because inclusion would be anti-dilutive) are as follows (in thousands, in common stock equivalent shares):

	<b>Three Months Ended June 30,</b>		<b>Six Months Ended June 30,</b>	
	2022	2021	2022	2021
Options to purchase common stock	1,235	—	1,327	5,136
Unvested restricted stock units	980	—	765	170
Warrants to purchase common stock	195	30	195	251
Awards granted under the ESPP	11	—	6	4
Convertible senior notes (if-converted)	2,554	2,554	2,554	2,554
	<u>4,975</u>	<u>2,584</u>	<u>4,847</u>	<u>8,115</u>

#### **Recent Accounting Pronouncements**

In June 2020, the FASB issued ASU No. 2020-06, *Accounting for Convertible Instruments and Contracts in an Entity's Own Equity*, which is intended to simplify the accounting for convertible instruments. This new guidance eliminated certain models that require separate accounting for embedded conversion features, and eliminated certain of the conditions for equity classification for contracts in an entity's own equity. Accordingly, a convertible debt instrument will be accounted for as a single liability measured at its amortized cost, as long as no other features require bifurcation and recognition as derivatives. The new guidance could be adopted through either a modified retrospective method of transition or a fully retrospective method of transition. ASU 2020-06 is effective for public business entities for fiscal years beginning after December 15, 2021, including interim periods within those fiscal years. Early adoption is permitted for fiscal years beginning after December 15, 2020, including interim periods within those fiscal years. The Company elected to early adopt the new standard on January 1, 2021 using the modified retrospective method and, accordingly, recorded a net reduction to accumulated deficit of \$9.0 million, a decrease to additional paid-in capital of \$85.8 million, and an increase to convertible senior notes, net - long-term of \$76.8 million to reflect the impact of the accounting change (see Note 7, "Debt").

### 3. Short-Term Investments

The Company invests in marketable securities primarily consisting of debt instruments of the U.S. Government, U.S. Government-sponsored enterprises, and financial institutions and corporations with strong credit ratings. The following represents a summary of the estimated fair value of short-term investments at June 30, 2022 and December 31, 2021 (in thousands):

<u>At June 30, 2022</u>	Amortized Cost	Gross Unrealized Gain	Gross Unrealized Loss	Estimated Fair Value
<b>Available-for-sale securities:</b>				
U.S. Treasury securities	\$ 281,783	\$ 4	\$ (3,364)	\$ 278,423
Commercial paper	147,872	4	(225)	147,651
Corporate debt securities	49,515	—	(215)	49,300
U.S. Government-sponsored enterprises	42,948	1	(458)	42,491
Supranational bonds	2,512	—	(12)	2,500
<b>Total</b>	<b>\$ 524,630</b>	<b>\$ 9</b>	<b>\$ (4,274)</b>	<b>\$ 520,365</b>

<u>At December 31, 2021</u>	Amortized Cost	Gross Unrealized Gain	Gross Unrealized Loss	Estimated Fair Value
<b>Available-for-sale securities:</b>				
U.S. Treasury securities	\$ 222,206	\$ —	\$ (482)	\$ 221,724
Commercial paper	218,391	14	(24)	218,381
Corporate debt securities	58,881	—	(45)	58,836
U.S. Government-sponsored enterprises	50,773	1	(88)	50,686
Supranational bonds	3,003	—	—	3,003
<b>Total</b>	<b>\$ 553,254</b>	<b>\$ 15</b>	<b>\$ (639)</b>	<b>\$ 552,630</b>

The contractual maturities of available-for-sale debt securities as of June 30, 2022, were as follows (in thousands):

<u>At June 30, 2022</u>	Years to Maturity		Estimated Fair Value
	Within One Year	One to Two Years	
U.S. Treasury securities	\$ 256,417	\$ 22,006	\$ 278,423
Commercial paper	147,651	—	147,651
Corporate debt securities	38,538	10,762	49,300
U.S. Government-sponsored enterprises	40,495	1,996	42,491
Supranational bonds	2,500	—	2,500
<b>Total</b>	<b>\$ 485,601</b>	<b>\$ 34,764</b>	<b>\$ 520,365</b>

The Company has classified all marketable securities, regardless of maturity, as short-term investments based upon the Company's ability and intent to use any of those marketable securities to satisfy the Company's liquidity requirements.

The Company reviews the portfolio of available-for-sale debt securities quarterly to determine if any investment is impaired due to changes in credit risk or other potential valuation concerns. Unrealized losses on available-for-sale debt securities at June 30, 2022 were primarily due to the recent increase in market interest rates. The Company does not intend to sell the available-for-sale debt securities that are in an unrealized loss position, and it is not more likely than not that the Company will be required to sell these debt securities before recovery of their amortized cost bases, which may be at maturity. Based on the credit quality of the available-for-sale debt securities in an unrealized loss position, and the Company's estimates of future cash flows to be collected from those securities, the Company believes the unrealized losses are not credit losses. Accordingly, the Company did not recognize any impairment losses related to its available-for-sale debt securities at June 30, 2022.

#### 4. Composition of Certain Financial Statement Items

##### Accounts Receivable

Accounts receivable, net consisted of the following at June 30, 2022 and December 31, 2021 (in thousands):

	June 30, 2022		December 31, 2021	
Accounts receivable	\$	108,363	\$	114,974
Less: allowance for credit losses		(4,600)		(4,249)
Accounts receivable, net	\$	103,763	\$	110,725

##### Allowance for Credit Losses

The following table provides a reconciliation of the changes in the allowance for estimated accounts receivable credit losses for the three and six months ended June 30, 2022 and 2021 (in thousands):

	Three Months Ended June 30,				Six Months Ended June 30,			
	2022		2021		2022		2021	
Balance at beginning of the period	\$	4,344	\$	3,559	\$	4,249	\$	3,857
Provision for expected credit losses		1,144		731		1,990		874
Write-offs and adjustments, net of recoveries		(888)		(617)		(1,639)		(1,058)
Balance at end of the period	\$	4,600	\$	3,673	\$	4,600	\$	3,673

##### Inventories

Inventories consisted of the following at June 30, 2022 and December 31, 2021 (in thousands):

	June 30, 2022		December 31, 2021	
Raw materials	\$	34,786	\$	26,911
Work-in-process		15,616		16,612
Finished goods		37,696		25,028
Total inventories	\$	88,098	\$	68,551

#### 5. Fair Value Measurements

Authoritative guidance on fair value measurements defines fair value, and provides a consistent framework for measuring fair value and for disclosures of each major asset and liability category measured at fair value on either a recurring or a nonrecurring basis. Fair value is intended to reflect an assumed exit price, representing the amount that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants. As such, fair value is a market-based measurement that should be determined based on assumptions that market participants would use in pricing an asset or liability. As a basis for considering such assumptions, the authoritative guidance establishes a three-tier fair value hierarchy, which prioritizes the inputs used in measuring fair value as follows:

- Level 1: Observable inputs such as unadjusted quoted prices in active markets that are accessible at the measurement date for identical, unrestricted assets or liabilities.
- Level 2: Inputs, other than quoted prices in active markets, that are observable either directly or indirectly for substantially the full term of the asset or liability.
- Level 3: Unobservable inputs in which there is little or no market data and that are significant to the fair value of the assets or liabilities, which require the reporting entity to develop its own valuation techniques that require input assumptions.

The following table presents information about the Company's financial assets and liabilities measured at fair value on a recurring basis as of June 30, 2022 and December 31, 2021, and indicates the fair value hierarchy of the valuation techniques utilized by the Company to determine such fair value (in thousands):

	Fair Value Measurements at June 30, 2022			
	Total	Level 1	Level 2	Level 3
<b>Assets</b>				
Cash equivalents <sup>(1)</sup>	\$ 57,720	\$ 57,720	\$ —	\$ —
U.S. Treasury securities	278,423	278,423	—	—
Commercial paper	147,651	—	147,651	—
Corporate debt securities	49,300	—	49,300	—
U.S. Government-sponsored enterprises	42,491	—	42,491	—
Supranational bonds	2,500	—	2,500	—
Total assets	\$ 578,085	\$ 336,143	\$ 241,942	\$ —
<b>Liabilities</b>				
Common stock warrants <sup>(2)</sup>	\$ 56	\$ —	\$ —	\$ 56
Total liabilities	\$ 56	\$ —	\$ —	\$ 56

	Fair Value Measurements at December 31, 2021			
	Total	Level 1	Level 2	Level 3
<b>Assets</b>				
Cash equivalents <sup>(1)</sup>	\$ 48,286	\$ 48,286	\$ —	\$ —
U.S. Treasury securities	221,724	221,724	—	—
Commercial paper	218,381	—	218,381	—
Corporate debt securities	58,836	—	58,836	—
U.S. Government-sponsored enterprises	50,686	—	50,686	—
Supranational bonds	3,003	—	3,003	—
Total assets	\$ 600,916	\$ 270,010	\$ 330,906	\$ —
<b>Liabilities</b>				
Common stock warrants <sup>(2)</sup>	\$ 147	\$ —	\$ —	\$ 147
Total liabilities	\$ 147	\$ —	\$ —	\$ 147

(1) Generally, cash equivalents include money market funds and investments with a maturity of three months or less from the date of purchase.

(2) Included in other current liabilities on the Company's condensed consolidated balance sheets.

The Company's Level 2 financial instruments are valued using market prices on less active markets with observable valuation inputs such as interest rates and yield curves. The Company obtains the fair value of Level 2 financial instruments from quoted market prices, calculated prices or quotes from third-party pricing services. The Company validates these prices through independent valuation testing and review of portfolio valuations provided by the Company's investment managers.

The Company's Level 3 liabilities at June 30, 2022 and December 31, 2021 included the remaining Series A warrants issued by the Company in connection with the public offering of common stock in October 2017. The Series A warrants, which expire in October 2022, provide holders the right to purchase shares of the Company's common stock at an exercise price of \$3.50 per share. As of June 30, 2022 and December 31, 2021, there were Series A warrants outstanding to purchase 1,000 shares of the Company's common stock (see Note 8, "Stockholders' Equity").

The Company reassesses the fair value of the outstanding Series A warrants at each reporting date utilizing a Black-Scholes pricing model. Variables used in the pricing model include the closing market price of the Company's common stock at the balance sheet date, as well as estimated stock price volatility, dividend yield, remaining warrant term and risk-free interest rate. A significant increase (decrease) in any of these inputs in isolation, particularly the market price of the Company's common stock, would have resulted in a significantly higher (lower) fair value measurement. The assumptions used to estimate the fair values of the outstanding Series A warrants at June 30, 2022 and December 31, 2021 are presented below:

	Series A Warrants	
	June 30, 2022	December 31, 2021
Risk-free interest rate	1.9 %	0.3 %
Dividend yield	0.0%	0.0%
Expected volatility	63.3 %	39.1 %
Expected term (in years)	0.3	0.8

The following table presents a summary of changes in the fair value of the Company's Level 3 financial liabilities for the six months ended June 30, 2022 and 2021 (in thousands):

	Six Months Ended June 30,	
	2022	2021
Balance at beginning of period	\$ 147	\$ 14,261
(Gain) loss recognized from the change in fair value of common stock warrants	(91)	962
Common stock warrants exercised during the period	—	(12,434)
Balance at end of period	\$ 56	\$ 2,789

## 6. Leases

The Company's leases consist of operating leases for general office space, research and development, manufacturing and warehouse facilities, and equipment. These noncancellable operating leases have initial lease terms from two years to thirteen years. Leases with an initial term of 12 months or less (Short-term Lease) are expensed as incurred and are not recorded as right-of-use leased assets on the Company's condensed consolidated balance sheets. The Company is required to recognize operating lease right-of-use assets and liabilities, and begin recording lease expense when the Company takes possession of the leased property (the Commencement Date). The Company recognizes lease expense for these leases on a straight-line basis over the lease term. Because the Company's leases do not provide an implicit interest rate, the Company uses its incremental borrowing rate based on the information available at the lease Commencement Date to determine the operating lease right-of-use assets and liabilities based on the present value of future lease payments over the lease term. The Company used the incremental borrowing rate on January 1, 2019 for operating leases that commenced prior to that date.

Certain leases include an option to renew, with renewal terms that can extend the lease term for additional periods. The exercise of lease renewal options is at the Company's sole discretion. For renewal options that are reasonably certain at the lease Commencement Date of being exercised, the Company includes the renewal option period in the lease term.

### Vista Sorrento Lease

In March 2021, the Company entered into a second amendment (Second Amendment) to its lease agreement for office space located on Vista Sorrento Parkway in San Diego, California (Vista Sorrento Lease) covering 59,013 square feet of general administrative office space (Existing Premises). The Second Amendment expanded the Existing Premises by adding 14,916 square feet of general administrative office space (Expansion Space), and extended the lease term for the Existing Premises through January 2028. The Expansion Space lease Commencement Date occurred in March 2021, and the lease term expires in January 2028. The Company has two options to extend the term of the Vista Sorrento Lease, covering both the Existing Premises and the Expansion Space, with each option providing for an additional period of five years. The Vista Sorrento Lease term was determined assuming the renewal options would not be exercised. The Company recognized operating lease right-of-use assets and corresponding operating lease liabilities of \$15.1 million on the condensed consolidated balance sheet in the first quarter of 2021 related to the Second Amendment.



### **Tech Center Lease**

In September 2021, the Company entered into a lease agreement for 181,949 square feet of additional general administrative, laboratory, and research and development office space (the Premises) located on High Bluff Drive in San Diego, California (Tech Center Lease). Possession of the Premises is expected to be tendered to the Company by the landlord in two phases, with Phase I consisting of 143,850 rentable square feet, and Phase II consisting of 38,099 rentable square feet. The Company intends to use Phase I of the Tech Center Lease for operations currently occupying 77,458 square feet of leased space, located on Roselle Street in San Diego, California, that is scheduled to expire in May 2023.

The initial lease term Phase I Commencement Date occurred in March 2022 when the Company was tendered possession of the Phase I portion of the Premises, and rent payments commence in September 2022 (the Phase I Rent Commencement Date). The Phase II Commencement Date is expected to occur upon the earlier of (i) the date upon which the Company first commences business in the Phase II portion of the Premises, and (ii) May 1, 2025 (the Phase II Rent Commencement Date). The Tech Center Lease term expires in April 2035. The Company has two options to extend the term of the lease, with each option providing for an additional period of five years. The Tech Center Lease term was determined assuming the renewal options would not be exercised.

The Tech Center Lease also includes a first right of offer with respect to an additional 34,569 rentable square feet of general office space should the space become available. The lease term and associated base rent for the additional space will not be known until the Company is notified that the additional space has become available, and the Company elects to lease the space on terms mutually satisfactory to the Company and the landlord.

The initial base rent for the Tech Center Lease is approximately \$906,000 per month beginning on the Phase I Rent Commencement Date, and the base rent increases by approximately \$255,000 per month on the Phase II Rent Commencement Date. The monthly base rent will increase by 3.0% on each annual anniversary of the respective Rent Commencement Date. In addition to the monthly base rent, the Company is required to pay its proportionate share of certain ongoing operating expenses throughout the duration of the lease. No base rent, other than the proportionate share of operating expenses, will be due for the Phase I portion of the Premises for months two through nine following the Phase I Rent Commencement Date, and for the Phase II portion of the Premises for months two through five following the Phase II Rent Commencement Date. The Company recognized operating lease right-of-use assets and corresponding operating lease liabilities of \$107.5 million on the condensed consolidated balance sheet on the Phase I Commencement Date in the first quarter of 2022.

### **High Bluff Lease**

In May 2021, the Company entered into a lease agreement for approximately 31,372 square feet of general office space located on High Bluff Drive, in San Diego, California (High Bluff Lease). The High Bluff Lease is a direct lease agreement for property the Company previously occupied subject to a sublease agreement. The lease term began in April 2022 following the termination of the High Bluff sublease in March 2022, and is scheduled to expire in March 2024. The Company recognized operating lease right-of-use assets and corresponding operating lease liabilities of \$3.0 million on the condensed consolidated balance sheet on the Commencement Date in the second quarter of 2022.

### **Supplemental Lease Disclosure Information**

The Company's lease costs recorded in the condensed consolidated statements of operations were as follows (in thousands):

	<b>Three Months Ended June 30,</b>		<b>Six Months Ended June 30,</b>	
	<b>2022</b>	<b>2021</b>	<b>2022</b>	<b>2021</b>
Operating lease cost	\$ 5,061	\$ 2,197	\$ 8,189	\$ 4,203
Short-term lease cost	37	22	71	44
Total lease cost	\$ 5,098	\$ 2,219	\$ 8,260	\$ 4,247

Maturities of operating lease liabilities at June 30, 2022 were as follows (in thousands):

Years Ending December 31,		
2022 (remaining)	\$	5,086
2023		14,399
2024		17,460
2025		17,475
2026		17,528
Thereafter		120,235
Total undiscounted lease payments		192,183
Less: amount representing interest		(52,456)
Present value of operating lease liabilities		139,727
Less: current portion of operating lease liabilities		(9,925)
Operating lease liabilities - long-term	\$	129,802

The weighted-average remaining lease term and weighted-average discount rate for operating leases were as follows:

	June 30, 2022	December 31, 2021
Weighted-average remaining lease term (in years)	11.0	5.0
Weighted-average discount rate used to determine operating lease liabilities	5.3 %	5.6 %

Cash paid for amounts included in the measurement of lease liabilities, representing operating cash flows from operating leases, was \$5.9 million and \$4.7 million for the six months ended June 30, 2022 and 2021, respectively.

#### **Leases For Which Accounting Has Not Yet Commenced**

##### *Tech Center Lease - Phase II*

As of June 30, 2022, the Commencement Date for Phase II of the Tech Center Lease had not yet occurred. Accordingly, the condensed consolidated balance sheet at June 30, 2022 does not include operating lease right-of-use assets and operating lease liabilities, and the condensed consolidated statements of operations for the three and six months ended June 30, 2022 do not include any lease costs, related to Phase II of the Tech Center Lease. In addition, the above disclosures of the Company's lease costs, maturities of operating lease liabilities, and the weighted-average remaining lease term and weighted-average discount rate, do not include any amounts related to Phase II of the Tech Center Lease.

The Company currently estimates that Phase II Commencement Date will occur in the first quarter of 2025, at which time the Phase II operating lease right-of-use assets and liabilities will be recorded. Future minimum payments for monthly base rent due under Phase II of the Tech Center Lease, are currently estimated to total \$34.7 million from 2025 through 2035, subject to a number of factors, including the actual Commencement Date of Phase II. Because the incremental borrowing rate will not be available until the Phase II Commencement Date, we are not yet able to determine the Phase II operating lease right-of-use assets and liabilities.

## **7. Debt**

#### **Convertible Senior Notes**

In May 2020, the Company entered into a purchase agreement with certain counterparties for the sale of an aggregate of \$287.5 million principal amount of 1.50% Convertible Senior Notes due 2025 (Notes) in a private offering to qualified institutional buyers pursuant to Rule 144A under the Securities Act of 1933, as amended. The proceeds from the issuance of the Notes were \$244.6 million, net of debt issuance costs and cash used to pay the cost of the capped call transactions (Capped Call Transactions) discussed below.

The Notes are the Company's senior unsecured obligations. Interest is payable in cash semi-annually in arrears beginning on November 1, 2020 at a rate of 1.50% per year. The Notes mature on May 1, 2025 unless repurchased, redeemed, or converted in accordance with their terms prior to the maturity date.

The Notes are convertible into cash, shares of the Company's common stock, or a combination of cash and shares of the Company's common stock, at the Company's election, at an initial conversion rate of 8.8836 shares of common stock per \$1,000 principal amount of the Notes, which is equivalent to an initial conversion price of \$112.57 (Conversion Price) per share of the Company's common stock. The conversion rate is subject to customary adjustments for certain events as described in the Indenture governing the Notes. The Company expects to settle conversions through a combination settlement, which involves payment in cash equal to the principal portion and delivery of shares of common stock for the excess of the conversion value over the principal portion.

The Company may not redeem the Notes prior to May 6, 2023. The Company has the option to redeem for cash all or any portion of the Notes on or after May 6, 2023 if the last reported sale price of the Company's common stock has been at least 130% of the Conversion Price then in effect for at least 20 trading days (whether or not consecutive), including the trading day immediately preceding the date on which the Company provides notice of redemption, during any 30 consecutive trading day period, at a redemption price equal to 100% of the principal amount of the Notes to be redeemed, plus accrued and unpaid interest. No sinking fund is provided for the Notes.

Holders of the Notes may convert all or a portion of their Notes at their option prior to November 1, 2024, in multiples of \$1,000 principal amounts, only under the following circumstances:

- if the last reported sale price of the Company's common stock for at least 20 trading days (whether or not consecutive) during the period of 30 consecutive trading days ending on the last trading day of the immediately preceding calendar quarter is greater than or equal to 130% of the applicable conversion price of the Notes on each such trading day;
- during the five business day period after any five consecutive trading day period in which the trading price per \$1,000 principal amount of the Notes for each day of that five consecutive trading day period was less than 98% of the product of the last reported sale price of the Company's common stock and the applicable conversion rate of the Notes on such trading day;
- if the Company calls any or all of the Notes for redemption, at any time prior to the close of business on the scheduled trading day immediately preceding the redemption date; or
- on the occurrence of specified corporate events.

On or after November 1, 2024, until the close of business on the second scheduled trading day immediately preceding the maturity date, holders may convert their Notes at any time, regardless of the foregoing circumstances.

Holders of the Notes who convert in connection with a make-whole fundamental change or in connection with a redemption are entitled to an increase in the conversion rate. Additionally, in the event of a fundamental change, holders of the Notes may require us to repurchase all or a portion of the Notes at a price equal to 100% of the principal amount of the Notes, plus any accrued and unpaid interest.

The net carrying amount of the Notes on the condensed consolidated balance sheets consisted of the following (in thousands):

	<b>June 30, 2022</b>	<b>December 31, 2021</b>
Principal amount	\$ 287,500	\$ 287,500
Unamortized debt issuance costs	(5,155)	(6,033)
Net carrying amount	<u>\$ 282,345</u>	<u>\$ 281,467</u>

As of June 30, 2022, the unamortized debt issuance costs of \$5.2 million associated with the Notes will be amortized to interest expense, at an effective interest rate of 2.2% over the remaining period of approximately three years.

The following table details interest expense related to the Notes recognized for the three and six months ended June 30, 2022 and 2021 (in thousands):

	Three Months Ended June 30,				Six Months Ended June 30,			
	2022		2021		2022		2021	
Contractual interest expense	\$	1,078	\$	1,078	\$	2,156	\$	2,156
Amortization of debt issuance costs		458		431		896		859
Total interest expense	\$	1,536	\$	1,509	\$	3,052	\$	3,015

The Notes will have a dilutive effect to the extent the average market price per share of common stock for a given reporting period exceeds the conversion price of \$112.57. As of June 30, 2022, the if-converted value of the Notes did not exceed the principal amount. As of December 31, 2021, the if-converted value of the Notes exceeded the principal amount by \$96.9 million.

#### **Capped Call Transactions**

In connection with the issuance of the Notes, the Company entered into Capped Call Transactions in May 2020 with certain counterparties at a net cost of \$34.1 million. The Capped Call Transactions are intended to reduce potential dilution to holders of the Company's common stock beyond the conversion price of \$112.57, up to a conversion price of \$173.18 on any conversion of the Notes, or to offset any cash payments the Company is required to make in excess of the principal amount of such converted Notes, as the case may be, with such reduction or offset subject to a cap. The cap price of the Capped Call Transactions is initially \$173.18 per share of the Company's common stock, representing a premium of 100% above the last reported sale price of \$86.59 per share of the Company's common stock on May 12, 2020, and is subject to certain adjustments under the terms of the Capped Call Transactions. Conditions that cause adjustments to the initial strike price of the Capped Call Transactions mirror conditions that result in corresponding adjustments for the Notes.

For accounting purposes, the Capped Call Transactions are separate transactions, and not part of the terms of the Notes, while they are integrated for federal tax purposes. As these transactions met certain criteria under the applicable accounting guidance, the Capped Call Transactions were recorded in stockholders' equity and were not accounted for as derivatives. The cost of the Capped Call Transactions was recorded as a reduction of the Company's additional paid-in capital in the Company's condensed consolidated balance sheet and will not be remeasured.

#### **Line of Credit**

On May 18, 2022, the Company entered into a three-year Revolving Line of Credit Agreement, that provides the Company with an available principal borrowing amount of \$100.0 million (the Line of Credit). The Line of Credit allows the Company to request advances thereunder, and to use the proceeds of such advances for general corporate purposes, including working capital and capital expenditures. The Line of Credit matures on the earlier of (i) May 18, 2025 or (ii) the Springing Maturity Date, unless renewed at maturity upon approval by the Company's board of directors and the lender. The Springing Maturity Date is any date during the 91 days prior to the May 1, 2025 maturity date of the Company's Convertible Senior Notes, that the Company does not satisfy a predefined liquidity threshold. During the term of the Line of Credit, the Company is required to maintain compliance with two financial maintenance covenants: a minimum consolidated interest coverage ratio and a maximum consolidated net leverage ratio. The Company was in compliance with these financial maintenance covenants as of June 30, 2022. The Line of Credit is secured by a first priority security interest in substantially all of the assets of the Company and its subsidiaries.

Advances drawn under the Line of Credit bear interest at an annual rate of (1) the SOFR Rate (as defined in the Line of Credit); plus (2) an applicable credit spread adjustment ranging from 0.10% to 0.25%; plus (3) an applicable margin ranging from 1.25% to 2.00%, and each advance will be payable on the Maturity Date with the interest on outstanding advances payable quarterly. The Credit Agreement also includes a commitment fee ranging from 0.20% to 0.35% per annum on the average daily unused amount of the Line of Credit, payable quarterly. The Company may, at its option, prepay any borrowings under the Line of Credit, in whole or in part at any time prior to the maturity date, without premium or penalty. As of June 30, 2022, the Company had no outstanding borrowings under the Line of Credit.

## 8. Stockholders' Equity

### Shares Reserved for Future Issuance

The following shares of the Company's common stock were reserved for future issuance at June 30, 2022 (in thousands):

Shares reserved for issuance upon conversion of Convertible Senior Notes	2,554
Shares underlying outstanding warrants	196
Shares underlying outstanding stock options	4,655
Shares underlying unvested restricted stock units	1,474
Shares authorized for issuance pursuant to awards granted under the ESPP	1,087
Shares authorized for future equity award grants	436
<b>Total</b>	<b>10,402</b>

### Common Stock Warrants

Warrants outstanding to purchase shares of the Company's common stock as of June 30, 2022 were as follows:

<u>Issue Date</u>	<u>Exercise Price Per Share</u>	<u>Warrants Outstanding</u>	<u>Expiration Date of Warrants Outstanding</u>
October 2017	\$3.50	1,000	October 2022
March 2017	\$23.50	193,788	March 2027
July 2012 - August 2012	\$73.73	1,359	July 2022 - August 2022
		<u>196,147</u>	

Each warrant allows the holder to purchase one share of the Company's common stock at the exercise price per share of the respective warrant. The Company issued 3,843 and 5,678 shares of its common stock, respectively, upon the exercise of warrants during the three and six months ended June 30, 2022, and 522 and 125,522 shares of its common stock, respectively, upon the exercise of warrants during the three and six months ended June 30, 2021.

### Stock Plans

The Company's Amended and Restated 2013 Stock Incentive Plan (2013 Plan) was originally approved by the Company's board of directors in October 2013. Under the 2013 Plan, the Company may grant stock options, stock appreciation rights, restricted stock and restricted stock units to individuals who are then employees, officers, directors or consultants of the Company.

The ESPP enables eligible employees to purchase shares of the Company's common stock using their after-tax payroll deductions, subject to certain conditions. Generally, offerings under the ESPP consist of a two-year offering period with four six-month purchase periods which begin in May and November of each year.

### Stock-Based Compensation

#### Common Stock Options

Common stock options have an exercise price equal to the closing price of the Company's common stock on the applicable grant date, and have a maximum term of ten years. Stock options granted prior to the second quarter of 2022, generally vest over a four-year period as to 25% of the underlying shares on the first anniversary of the grant date, with the balance of the options vesting monthly over the following three years. Stock options granted during the second quarter of 2022 and thereafter vest over a three-year period as to 33% of the underlying shares on the first anniversary of the grant date, with the balance of the options vesting monthly over the following two years.

The Company estimates the fair value of stock options using the Black-Scholes option-pricing model on the grant date. The total number of common stock options granted and the respective assumptions used in the Black-Scholes option-pricing model were as follows:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2022	2021	2022	2021
Stock options granted	83,008	239,608	83,008	355,008
Weighted average grant date fair value (per share)	\$ 42.16	\$ 54.92	\$ 42.16	\$ 56.89
Risk-free interest rate	2.7 %	1.1 %	2.7 %	1.0 %
Dividend yield	0.0 %	0.0 %	0.0 %	0.0 %
Expected volatility	72.0 %	74.9 %	72.0 %	75.1 %
Expected term (in years)	5.8	6.1	5.8	6.1

#### Restricted Stock Units

Restricted stock units (RSUs) have a grant value equal to the closing price of the Company's common stock on the award date. RSUs granted prior to March 2022, generally vest over a four-year period based on continued service to the Company as to 25% of the underlying shares on the first anniversary of the award, with the balance of the RSUs vesting quarterly over the following three years. RSUs granted in March 2022 and thereafter vest over a three-year period based on continued service to the Company as to 33% of the underlying shares on the first anniversary of the award, with the balance of the RSUs vesting quarterly over the following two years. In addition, the Company granted 53,662 performance-based RSUs, during the three and six month periods ended June 30, 2022 and 25,674 performance-based RSUs, during the three and six month periods ended June 30, 2021. The performance-based RSUs have a grant value equal to the closing price of the Company's common stock on the award date, and vest upon the Company's actual performance relative to predefined performance metrics and subject to the awardee's continuing service through the December 31, 2024 measurement date.

The total number of RSUs granted, which includes performance-based RSUs, and the respective weighted average grant date fair value were as follows:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2022	2021	2022	2021
RSUs granted	820,173	339,386	1,007,249	342,594
Weighted average grant date fair value (per share)	\$ 66.88	\$ 82.31	\$ 74.88	\$ 82.41

#### Employee Stock Purchase Plan

The Company records stock-based compensation expense associated with the ESPP using the Black-Scholes option-pricing model. Valuations are performed on the grant date at the beginning of the purchase period, which generally occurs in May and November of each year. The assumptions used in the Black-Scholes option-pricing model for the ESPP were as follows:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2022	2021	2022	2021
Weighted average grant date fair value (per share)	\$ 26.57	\$ 29.24	\$ 26.57	\$ 29.24
Risk-free interest rate	2.2 %	0.1 %	2.2 %	0.1 %
Dividend yield	0.0 %	0.0 %	0.0 %	0.0 %
Expected volatility	47.1 %	47.5 %	47.1 %	47.5 %
Expected term (in years)	1.3	1.3	1.3	1.3

The following table summarizes the allocation of stock-based compensation expense included in the condensed consolidated statements of operations for all stock-based compensation arrangements (in thousands):

	Three Months Ended June 30,		Six Months Ended June 30,	
	2022	2021	2022	2021
Cost of sales	\$ 1,900	\$ 1,591	\$ 3,747	\$ 3,067
Selling, general and administrative	13,732	10,881	25,586	20,292
Research and development	4,498	2,505	8,908	4,565
Total stock-based compensation expense	\$ 20,130	\$ 14,977	\$ 38,241	\$ 27,924

The total stock-based compensation expense capitalized as part of the cost of the Company's inventories was \$0.8 million at June 30, 2022, and \$1.0 million at December 31, 2021.

## 9. Employee Benefits

### Employee 401(k) Plan

The Company has a defined contribution 401(k) plan for employees in the United States who are at least 18 years of age. Employees are eligible to participate in the plan beginning on the first day of the calendar month following their date of hire. Unless they affirmatively elect otherwise, employees are automatically enrolled in the plan following 30 days from date of rehire or entry date. Under the terms of the plan, employees may make voluntary contributions as a percent of compensation, and the Company may elect to match a discretionary percentage of employee contributions. The Company did not provide a matching contribution prior to 2022, but began making a discretionary match in the first quarter of 2022.

## 10. Income Taxes

For the three and six months ended June 30, 2022, the Company recognized income tax expense of \$2.1 million and \$0.4 million, respectively, on a pre-tax loss of \$13.0 million and \$29.4 million, respectively. The Company calculated the provision for income taxes for the three and six months ended June 30, 2022, using the discrete effective tax rate method as the annual effective tax rate method would not provide a reliable estimate. Income tax expense for the three months ended June 30, 2022 was primarily attributable to the change from the annual effective tax rate method used in the first quarter of 2022 to the discrete effective tax rate method, and state and foreign income tax expense as a result of current taxable income in certain jurisdictions. Income tax expense for the six months ended June 30, 2022 was primarily attributable to state and foreign income tax expense as a result of current taxable income in certain jurisdictions.

For the three and six months ended June 30, 2021, the Company recognized income tax expense of \$0.1 million on a pre-tax income of \$4.1 million, and an income tax benefit of \$0.1 million on a pre-tax loss of \$1.1 million respectively. The Company calculated the provision (benefit) for income taxes for the three and six months ended June 30, 2021, by applying an estimate of the annual effective tax rate for the full year to ordinary income (loss) adjusted by the tax impact of discrete items. The income tax benefit for the six months ended June 30, 2021 was primarily attributable to the pre-tax loss position, partially offset by state and foreign income tax expense as a result of current taxable income in certain jurisdictions.

The Company continues to maintain a full valuation allowance against its net deferred tax assets as of June 30, 2022, based on the current assessment that it is not more likely than not these future benefits will be realized before expiration.

## 11. Business Segment and Geographic Information

### Segment Reporting

Operating segments are identified as components of an enterprise about which discrete financial information is available for evaluation by the chief operating decision-maker (CODM) in making decisions regarding resource allocation and assessing performance. The Company is organized based on its current product portfolio, which consists primarily of insulin pumps, disposable insulin cartridges and infusion sets for the storage and delivery of insulin. The Company views its operations and manages its business as one segment and a single reporting unit because key operating decisions and resource allocations are made by the CODM using consolidated financial data.

## Disaggregation of Revenue

The Company primarily sells its products through national and regional distributors in the United States on a non-exclusive basis, and through distribution partners outside the United States, including in select European countries, Canada, Australia, New Zealand, Saudi Arabia and South Africa. In the United States and Canada, the Company utilizes a direct sales force. The Company disaggregates its revenue by geography and by major sales channel as management believes these categories best depict how the nature, amount and timing of revenues and cash flows are affected by economic factors.

### Revenues by Geographic Region and Customer Sales Channel

During the three and six months ended June 30, 2022 and 2021, no individual country outside the United States generated revenue that represented more than 10% of total revenue. The table below sets forth revenues for the Company's two primary geographical markets, based on the geographic location to which its products are shipped (in thousands).

	Three Months Ended June 30,		Six Months Ended June 30,	
	2022	2021	2022	2021
United States	\$ 145,667	\$ 127,580	\$ 276,950	\$ 230,919
Outside the United States	54,595	44,559	99,219	82,257
Total Sales	\$ 200,262	\$ 172,139	\$ 376,169	\$ 313,176

Sales to distributors accounted for 65% and 68% of the Company's total United States sales for the three months ended June 30, 2022 and 2021, respectively, and 65% and 68% of the Company's total United States sales for the six months ended June 30, 2022 and 2021, respectively. Sales to distributors accounted for 96% and 95% of the Company's total sales outside the United States for the three months ended June 30, 2022 and 2021, respectively, and 96% and 95% of the Company's total sales outside the United States for the six months ended June 30, 2022 and 2021, respectively.

## 12. Commitments and Contingencies

### Legal and Regulatory Matters

In May 2020, the Company was named as a defendant in three California state court class action lawsuits arising from the same data breach. Collectively, these lawsuits seek statutory, compensatory, actual, and punitive damages; equitable relief, including restitution; pre- and post-judgment interest; injunctive relief; and attorney fees, costs, and expenses from the Company. On July 24, 2020, these three pending lawsuits were consolidated into a single case in the Superior Court of the State of California in the County of San Bernardino entitled *Joseph Deluna et al v. Tandem Diabetes Care, Inc.* The consolidated case alleges violations of the Confidentiality of Medical Information Act (CMIA), California Consumer Privacy Act (CCPA), California's Unfair Competition Law (UCL), and breach of contract. The Company filed a demurrer seeking dismissal of all claims, which was heard by the Court on October 27, 2020, and which resulted in the following outcome: (i) the demurrer to the CMIA claim was denied; (ii) the demurrer to the CCPA claim was sustained; and (iii) the demurrer to the UCL and contract claims were sustained with leave to amend the pending complaint. A second demurrer was heard by the Court on March 29, 2021 with the following outcome: (i) the demurrer to the CMIA claim was denied; and (ii) the demurrer to the UCL and contract claims was sustained without leave to amend as to three of the named plaintiffs. The plaintiffs filed a motion for class certification on January 7, 2021 and the Company filed a motion for summary adjudication on plaintiffs' CMIA claim on April 7, 2022. Both motions are fully briefed, and the Court's order on each motion is pending. The Company anticipates the Court will hear argument on both motions in the third quarter of 2022, though not yet scheduled. Although the Company continues to vigorously defend against these claims, there is no guarantee that the Company will prevail. The Company presently is unable to determine the ultimate outcome of these lawsuits or determine the amount (or range) of possible losses associated with the lawsuits.



In September 2020, the Company was named as a defendant in a lawsuit entitled Buck Walsh, individually and on behalf of others similarly situated v. Tandem Diabetes Care, Inc., which was filed in the Superior Court of the State of California in the County of San Diego. The alleged violations include business and professions code and labor code violations for failure to compensate wages, unpaid meal and rest periods, and failure to reimburse for necessary business-related expenses. The case was brought as a class action and was later amended to also include a representative action under the California Private Attorney General Act, or PAGA. The class of plaintiffs includes hourly paid or non-exempt employees of the Company who were employed from April 6, 2016 through the date of adjudication. The parties recently agreed to resolve all claims in the lawsuit. The settlement of claims covered by the PAGA matter were approved by the Superior Court of the State of California in the County of San Diego on September 21, 2021 and settlement amounts were disbursed in 2021. In October 2021, a settlement of the class action related claims was preliminarily approved by an independent arbitrator mutually acceptable to both parties. The class action is intended to resolve the claims of the individual plaintiff, as well as the remaining members of the class, unless an individual class member submits a timely request for exclusion. The material terms of the settlement are set forth in a binding Memorandum of Agreement dated as of July 1, 2021, which was approved by the independent arbitrator on April 18, 2022. This lawsuit was resolved and closed upon disbursement of the settlement amount in May 2022.

From time to time, the Company is involved in various other legal proceedings, regulatory matters, and other disputes or claims arising from or related to the normal course of its business activities, including actions with respect to intellectual property, data privacy, employment, regulatory, product liability and contractual matters. Although the results of legal proceedings, disputes and other claims cannot be predicted with certainty, the Company believes it is not currently a party to any other legal proceeding(s) which, if determined adversely to the Company, would, individually or taken together, have a material adverse effect on the Company's business, operating results, financial condition or cash flows. However, regardless of the merit of the claims raised or the outcome, legal proceedings may have an adverse impact on the Company as a result of defense and settlement costs, diversion of management time and resources, and other factors.

Except as set forth above, as of June 30, 2022, there were no legal proceedings, regulatory matters, or other disputes or claims for which a material loss was considered probable or for which the amount (or range) of loss was reasonably estimable. However, regardless of the merits of the claims raised or the outcome, legal proceedings, regulatory matters, and other disputes and claims may have an adverse impact on the Company because of as a result of defense and settlement costs, diversion of management time and resources, and other factors.

#### ***Letters of Credit***

The Company leases general office space, research and development, manufacturing and warehouse facilities, and equipment under noncancelable operating leases for use in its operations (see Note 6, "Leases"). In connection with one of the operating leases, the Company has a \$4.9 million unsecured irrevocable standby letter of credit arrangement with a bank, under which the landlord of the building is the beneficiary. The Company is required to maintain the standby letter of credit throughout the term of the lease, which expires in April 2035.

**Item 2. Management’s Discussion and Analysis of Financial Condition and Results of Operations.**

*You should read the following discussion and analysis together with our financial statements and related notes in Part I, Item 1 of this Quarterly Report on Form 10-Q for the quarter ended June 30, 2022 (Quarterly Report).*

*This Quarterly Report contains forward-looking statements within the meaning of the federal securities laws, which statements are subject to considerable risks and uncertainties. These forward-looking statements are intended to qualify for the safe harbor from liability established by the Private Securities Litigation Reform Act of 1995. All statements included or incorporated by reference in this Quarterly Report, other than statements of historical fact, are forward-looking statements. You can identify forward-looking statements by the use of words such as “may,” “will,” “could,” “anticipate,” “expect,” “intend,” “believe,” “continue” or the negative of such terms, or other comparable terminology. Forward-looking statements also include the assumptions underlying or relating to such statements. In particular, forward-looking statements contained in this Quarterly Report may relate to, among other things, our future or assumed financial condition, results of operations, liquidity, trends impacting our financial results, business forecasts and plans, research and product development plans, manufacturing plans, strategic plans and objectives, capital needs and financing plans, product launches, geographic expansion, distribution plans, production capacity, clinical trials, regulatory approvals, competitive position and the impact of changes in the competitive environment, the impact of the COVID-19 global pandemic on our business, supply chain, and the businesses of our contract manufacturers and suppliers, integration of acquisitions and partner technologies, and the application of accounting guidance. We caution you that the foregoing list may not include all of the forward-looking statements made in this Quarterly Report.*

*Our forward-looking statements are based on our management’s current assumptions and expectations about future events and trends, which affect or may affect our business, strategy, operations or financial performance. Although we believe that these forward-looking statements are based upon reasonable assumptions, they are subject to numerous known and unknown risks and uncertainties and are made in light of information currently available to us. Our actual financial condition and results could differ materially from those anticipated in these forward-looking statements as a result of various factors, including those set forth below in the section entitled “Risk Factors” in Part II, Item 1A, and elsewhere in this Quarterly Report, as well as the other public filings we make with the Securities and Exchange Commission. You should read this Quarterly Report with the understanding that our actual future financial condition and results may be materially different from and worse than what we expect.*

*Moreover, we operate in an evolving environment. New risk factors and uncertainties emerge from time to time and it is not possible for our management to predict all risk factors and uncertainties, nor can we assess the impact of all factors on our business or the extent to which any factor, or combination of factors, may cause actual results to differ materially from those contained in any forward-looking statements.*

*Forward-looking statements speak only as of the date they were made and, except to the extent required by law or the rules of the Nasdaq Global Market, we undertake no obligation to update or review any forward-looking statement because of new information, future events or other factors.*

*We qualify all of our forward-looking statements by these cautionary statements.*

**Overview**

We are a medical device company focused on the design, development and commercialization of technology solutions for people living with diabetes. Diabetes management can vary greatly from person-to-person, creating multiple market segments based on clinical needs and personal preferences. Our goal is to lead in insulin therapy management across multiple of these market segments by providing a portfolio of delivery devices, software, and data insight solutions to people living with diabetes, as well as their caregivers and healthcare providers.

Since our initial commercial launch, we have rapidly innovated and brought more products to market than our competitors. We have commercially launched seven insulin pump configurations in the United States since 2012 and three insulin pump configurations outside the United States since 2018. Today, our software-updatable t:slim X2 Insulin Delivery System (t:slim X2) hardware platform represents 100% of our new pump shipments. In the four-year period ended June 30, 2022, we shipped more than 375,000 insulin pumps, which is representative of our estimated global installed customer base, assuming the typical four-year reimbursement cycle. More than 265,000 of these pumps were shipped to customers in the United States and nearly 110,000 were shipped to more than 20 countries in which we operate outside the United States.

Our manufacturing, sales and support activities principally focus on our flagship pump platform, the t:slim X2 and our complementary product offerings. Our simple-to-use t:slim X2 is based on our proprietary technology platform and is the smallest durable insulin pump available in the United States. We have commercially offered two different automated insulin dosing (AID) algorithms on t:slim X2, including our Control-IQ technology, which is an advanced hybrid-closed loop feature, designed to help increase a user's time in their targeted glycemic range. It was the first system cleared by the U.S. Food and Drug Administration (FDA) to deliver automatic correction boluses in addition to adjusting insulin to help prevent high and low blood sugar based on continuous glucose monitoring (CGM) readings. Our Control-IQ technology launched in the United States in the first quarter of 2020, and is now available in all of the countries in which we operate. Our Control-IQ technology uses information from Dexcom Inc.'s (Dexcom) G6 sensor, which is the third generation of Dexcom CGM that we have integrated and commercially launched with our pump technology.

The t:slim X2 is unique in that it is the only pump on which remote software updates have been made commercially available in the United States. Now available in the countries we serve worldwide, our Tandem Device Updater (TDU), is a revolutionary tool that allows people to update their t:slim X2 software from a personal computer. This offering is a competitive advantage as it allows us to bring new features, such as our AID technology and CGM integration, to our customers faster than the industry has been able to do historically.

In February 2022, the FDA provided clearance for our t:slim X2 pump users to bolus insulin from a compatible smartphone. This is the first-ever FDA-cleared smartphone app capable of initiating insulin delivery on both iOS and Android operating systems. We launched our mobile bolus feature to all t:slim X2 users in the United States in July 2022, along with the pump software update to use this new feature, at no cost.

Our insulin pump products are generally considered durable medical equipment and have an expected lifespan of at least four years. In addition to insulin pumps, we sell disposable products that are used together with our pumps and are replaced every few days, including cartridges for storing and delivering insulin, and infusion sets that connect the insulin pump to a user's body. Additionally, we sell accessories such as belt clips and cases for use with pumps which are designed to enhance usability. In the United States, we also offer t:connect, our data management web application that provides users, their caregivers and their healthcare providers with a fast, easy and visual way to display diabetes therapy management data from our pumps, integrated CGMs and supported blood glucose meters.

#### ***COVID-19 Global Pandemic Impact and Considerations***

Our business has been impacted in a variety of ways since the onset of the COVID-19 global pandemic in early 2020, and will likely continue to be impacted for the remainder of 2022. Specific factors that have influenced our financial results and the way in which we operate include fluctuations in shelter-in-place restrictions, supply chain constraints, generalized labor shortages impacting global markets, the timing and extent of vaccine availability and surges in infection and hospitalization rates as new COVID variants have emerged. Most notably, our sales results reflected a high degree of variability across the quarters during this time, unlike historical seasonal trends. Our raw material costs and inventory levels have also fluctuated as we respond to supply chain constraints due to the timing of availability of components from the various suppliers we use to build our products. In addition, we experienced extended regulatory review timelines for new product submissions in the United States. Throughout this time, we have responded to each of these unique challenges, while prioritizing the health and safety of our employees and customers and working diligently to maintain a continuous supply of products, training and customer support.

Overall, we anticipate that our sales and operating results will continue to be impacted and subject to unpredictable variability. The full extent of the impact of the pandemic on our future business and operations is difficult to estimate and will depend on a number of factors including the scope and duration of the COVID-19 global pandemic, and the relative impact of COVID-19 on the business operations of our contract manufacturers, suppliers and competitors and any resulting changes to general economic conditions in the countries in which we operate and sell our products.

#### ***Products Under Development***

Our products under development support our strategy of developing insulin delivery systems as part of a therapy management portfolio that is designed to improve patient experience and outcomes. Our product development efforts fall into three pillars of innovation: delivery devices, device software including algorithms, and data and insights.

## ***Delivery Devices***

We are developing a family of delivery device solutions to meet the varying needs of people living with type 1 and type 2 diabetes by providing choice within our own portfolio. Preferences in the size, shape, and mode of operation that comprise an insulin pump's hardware often impact a person's pump purchasing decision and overall user experience.

### ***Mobi***

Formerly referred to by its development name, t:sport, Tandem Mobi is approximately half the size of our t:slim X2 pump, and is being designed for people who seek even greater discretion and flexibility with the use of their insulin pump. In addition to being waterproof, Mobi's features include a 200-unit cartridge, an on-pump bolus button, inductive charging, and an AID algorithm. We anticipate that Mobi will be our first insulin pump to support full pump-control from our mobile application.

### ***t:slim X3***

Advancing our flagship t:slim platform, the t:slim X3 is being designed to provide a modernized user interface and even greater usability for our planned feature updates. It is also being designed to include enhanced technology, such as greater processing power and capacity to support our advanced algorithms, as well as increased battery life, improved durability, and wireless software update capabilities.

### ***Mobi: Tubeless***

This offering is being developed to provide an alternative tubeless infusion site option for Mobi pump users. A goal of this design is to allow people living with diabetes to customize the way they wear their pump with each cartridge change to best suit their personal preferences and lifestyle.

### ***Patch***

Our patch pump design is in its early stages and is being developed for people living with diabetes who want a disposable tubeless solution.

### ***Infusion Sets***

Infusion sets provide additional choice and flexibility to people living with diabetes. Our goals for infusion set innovation focus on solutions that extend wear time and enhance user experience, while reducing occlusions, body burden and waste.

### ***Device Software***

Our device software is used to control our pumps either directly through the pump's interface or through our mobile application. It also includes our AID technology and the software used to support remote pump updatability.

### ***Control-IQ Advancements***

We are driving innovation in our algorithms, emphasizing automation, personalization and simplification, all intended to continue to improve therapeutic outcomes and provide a positive patient experience characterized by simplicity and ease of use. Additionally, we have initiated clinical studies to expand the indications of our Control-IQ technology to include people with type 1 diabetes ages 2 to 5 years old, as well as people living with type 2 diabetes. We are also researching the use of different insulins with our Control-IQ technology.

### ***Mobile Control***

We are working to expand our mobile control capability. In the future, our t:connect mobile app is planned to include additional pump control features, such as full operation of our Mobi pump.

### ***Integration***

Building a robust ecosystem and portfolio around our flagship insulin pumps requires product development efforts to integrate, add and enhance complementary system components.

*Dexcom CGM:* In November 2020, we entered into an agreement with Dexcom to extend our current collaboration to include integration with their future G7 CGM technology. Following integrated product development work, and required regulatory clearances or approvals, this will be the fourth generation of Dexcom CGM that we intend to integrate with our devices.

*Abbott CGM:* In June 2020, we announced an agreement with Abbott Laboratories (Abbott), to develop and commercialize integrated diabetes solutions that combine Abbott's CGM technology with our insulin delivery systems. Following the completion of our integrated product development work, and after obtaining required regulatory clearances or approvals, we intend to focus our initial commercial activities on integrated products in the U.S. and Canada, with additional geographies considered in the future.

#### ***Data and Insights***

Our goal is to innovate across our digital health platforms by using the vast amount of data that we collect, in combination with technology such as artificial intelligence or machine learning, to provide information and insights to people living with diabetes, their caregivers and healthcare providers and insurance payors. Key areas of development include making these insights easy to understand, provided in a flexible format with mobile or web apps, and available real time. In addition, we are working to integrate health-related information from third-party sources and use our data to support current and future products under development.

#### ***Tandem Source***

Expanding the capabilities of our t:connect data management application available for customers in the United States, Tandem Source is our second-generation web-based data management application that is being designed to become our single, global platform. This application enhances clinical data visualization, provides added interface customization for users to personalize how they engage with their data and for healthcare providers to better manage their care. In the second quarter of 2021, we began limited testing of an initial version of Tandem Source in the United Kingdom.

#### ***Settings Automation***

Our automation research and development activities center around opportunities for enhanced user and healthcare provider experience, and improved clinical outcomes. In support of this effort, we are working to automate our pump settings adjustments to further enhance ease of use and expand adoption of our insulin pump products.

#### ***Pump Shipments***

From inception in 2012 through June 2018, we derived nearly all of our sales from the shipment of insulin pumps and associated supplies to customers in the United States. Starting in the third quarter of 2018, we commenced sales of our t:slim X2 insulin pump in select geographies outside the United States and now offer our technology solutions in more than 20 countries worldwide. We consider the number of insulin pump units shipped to be an important metric for managing our business.

Insulin pumps in the markets we serve worldwide are generally subject to a four-year reimbursement cycle, imposed by the third-party insurance carrier, government plan or healthcare system that serves as the primary payor. In the past four years, we have shipped more than 375,000 insulin pumps worldwide, which is representative of our estimated global in-warranty installed customer base. Our estimated worldwide installed base has increased approximately 40% compared to the second quarter of 2021.

At the end of the typical four-year reimbursement cycle, customers may be eligible for the purchase of a new insulin pump, subject to the rules and requirements of their primary insurance payor. While warranties generally expire four years from the original pump shipment date, our typical renewal cycle, or time from original pump purchase to a subsequent pump purchase by the same customer, averages five years. The majority of our insulin pump sales through the current period have been generated by new customers, but the opportunity for existing customers to purchase a renewal insulin pump increases each period as additional customer warranties expire. With programs dedicated to customer retention efforts, we expect such renewal purchases to represent a more significant portion of our shipments in the long-term.

More than 265,000 of pumps were shipped to customers in the United States in the past four years, which aligns with the standard four-year warranty period. Pump shipments to customers in the United States by fiscal quarter for the last five years, which aligns more closely with our typical renewal cycle, were as follows:

	United States Pump Unit Shipments for Each of the Three Months Ended in Respective Years					Total
	March 31	June 30	September 30	December 31		
2017	2,816	3,427	3,868	6,950		17,061
2018	4,444	5,447	7,379	12,935		30,205
2019	9,669	12,799	13,814	17,453		53,735
2020	13,158	14,735	18,380	24,552		70,825
2021	16,644	20,665	20,296	25,712		83,317
2022	18,658	20,818	N/A	N/A		39,476

Since commencing sales outside the United States in the third quarter of 2018, we have shipped nearly 110,000 pumps to customers in more than 20 countries, and have yet to complete a full four-year reimbursement cycle. Pump shipments to customers outside the United States by fiscal quarter were as follows:

	Outside the United States Pump Unit Shipments for Each of the Three Months Ended in Respective Years					Total
	March 31	June 30	September 30	December 31		
2018	N/A	N/A	1,055	3,233		4,288
2019	5,063	8,459	4,025	2,149		19,696
2020	4,220	3,952	3,641	8,133		19,946
2021	8,708	13,152	11,262	11,873		44,995
2022	9,437	11,296	N/A	N/A		20,733

### **Trends Impacting Financial Results**

Overall, we have experienced considerable sales growth each year since the commercial launch of our first product in the third quarter of 2012, only recognizing an operating profit on a full year basis for the first time in 2021. Our operating results have historically fluctuated on a quarterly or annual basis, particularly in periods surrounding anticipated regulatory approvals, the commercial launch of new products by us and our competitors, the commercial launch of our products in geographies outside of the United States and due to general seasonality in the United States. We expect these periodic fluctuations in our operating results to continue.

We believe that our financial condition and operating results, as well as the decision-making process of our current and potential customers, has been and will continue to be impacted by a number of general trends, including the following:

- market acceptance of our products and competitive products by people with insulin-dependent diabetes, their caregivers and healthcare providers;
- the introduction of new products, treatment techniques or technologies for the treatment of diabetes, including the timing of the commercialization of new products by us and our competitors;
- seasonality in the United States associated with annual insurance deductibles and coinsurance requirements associated with the medical insurance plans utilized by our customers and the customers of our distributors;
- incidence of disease or illness, including the COVID-19 global pandemic, that may impact customer purchasing patterns or disrupt our supply chain, or create uncertainty or delay with respect to regulatory approvals;
- timing of holidays and summer vacations, which may vary by geography and may be further influenced by the lifting or relaxation of COVID-19 related restrictions and broader availability of vaccines;
- the buying patterns of our distributors and other customers;

- changes in the competitive landscape, including as a result of companies entering or exiting the diabetes therapy market;
- access to adequate coverage and reimbursement for our current and future products by third-party payors, and reimbursement decisions by third-party payors;
- the magnitude and timing of any changes to our facilities, manufacturing operations and other infrastructure, and factors impacting our ability to access our facilities;
- the impact of any potential claims, investigations, information requests, or legal, regulatory or administrative proceedings with respect to potential or asserted violations of law, including: sales and marketing practices, anti-corruption and the Foreign Corrupt Practices Act, antitrust, securities, employment, product liability, environmental, data privacy breaches and patent infringement, which may subject us to fines, penalties, expenses, or reputational harm;
- anticipated and actual regulatory approvals of our products and competitive products; and
- product recalls impacting, or the suspension or withdrawal of regulatory clearance or approval relating to, our products or the products of our competitors.

In addition to these general trends, we believe the following specific factors have materially impacted, and could continue to materially impact, our business going forward:

- changes in customer purchasing behavior due to the economic environment such as inflation or threat of recession;
- anticipated new product launches and the timing of their commercial availability;
- the disruptions caused by the COVID-19 global pandemic on suppliers, third-party manufacturers, healthcare providers, distributors and our existing or potential customers;
- continued increase in demand following the commercial launch of t:slim X2 with Control-IQ technology in additional geographies, and the ability to access new pump software using our Tandem Device Updater;
- increased opportunity to achieve customer renewals as customers become eligible for insurance reimbursement to purchase a new insulin pump at the end of the typical four-year reimbursement cycle;
- ability to enter into, maintain agreements, and accomplish continued success in current and future product integrations with CGM partners;
- expansion and new product launches in select geographies outside the United States, including initial orders to stock inventories; and
- ability to effectively scale our operations to support rapid growth, including expanding our facilities, advancing our research and development efforts, increasing manufacturing capacity through third-party manufacturers, and hiring and retaining employees in customer service and support functions.

In addition to working to achieve our sales growth expectations, in the long-term we intend to continue to leverage our infrastructure investments to realize additional manufacturing, sales, marketing and administrative cost efficiencies with the goal of improving our operating margins and ultimately achieving sustained profitability. While we have achieved profitability in each fourth quarter since 2018, we were profitable for the first time on a full-year basis in 2021. We believe we can ultimately achieve sustained profitability by driving incremental sales growth in markets worldwide, meeting our pump renewal sales objectives, maximizing manufacturing efficiencies on increased production volumes, and leveraging the investments made in our sales, clinical, marketing and customer support organizations.

## Components of Results of Operations

### Sales

We offer products for people with insulin-dependent diabetes. We commenced commercial sales of our original t:slim insulin pump platform in the United States in the third quarter of 2012 and continued to launch various iterations of that platform during the following years. In October 2016, we began shipping our flagship pump platform, the t:slim X2 insulin pump. The t:slim X2 insulin pump platform with remote software update capabilities, now represents 100% of our new pump shipments and is used by nearly all of our in-warranty customers. Our products also include disposable insulin cartridges and infusion sets, as well as our complementary t:connect, TDU and mobile application products. We also offer additional accessories including protective cases, belt clips, and power adapters, although sales of these products are not significant.

In the United States, we primarily sell our products through national and regional distributors on a non-exclusive basis. These distributors are generally providers of medical equipment and supplies to individuals with diabetes. Our primary end customers are people with insulin-dependent diabetes. Similar to other durable medical equipment, the primary payor is generally a third-party insurance carrier and the customer is usually responsible for any medical insurance plan copay or coinsurance requirements. We believe we can continue to increase sales by promoting our products to a greater number of potential customers, caregivers and healthcare providers, although pressures related to the broader economic environment and the COVID-19 global pandemic have had, and may continue to have, an adverse impact on our sales.

In the third quarter of 2018, we began the launch of our t:slim X2 hardware platform through distribution partners outside the United States. Our products are now sold in more than 20 countries, including in Canada, France and Germany. Today, distributor orders are fulfilled in the United States. In the first half of 2022, we laid the commercial and operational groundwork, as well as the IT infrastructure, to begin working with a third-party logistics service provider in the Netherlands to support our distributors in Europe with the intent to scale utilization in the next twelve months. Our independent distributor partners outside the United States and Canada perform all sales, customer support and training in their respective markets. In Canada, we market with a direct sales force and, similar to the United States, use a distributor partner for certain billing and fulfillment activities. Historically, we have experienced consistent levels of reimbursement for our products in the United States, but we expect the average sales price will vary in markets outside the United States based on a number of factors, such as the geographical mix, nature of the reimbursement environment, government regulations and the extent to which we rely on distributor relationships to provide sales, clinical and marketing support.

In general, in the United States we have experienced pump shipments being weighted heavily towards the second half of the year, with the highest percentage of pump shipments expected in the fourth quarter due to the nature of the reimbursement environment. Consistent with these historical seasonality trends, our pump shipments in the United States have typically decreased significantly from the fourth quarter to the following first quarter. Outside the United States, we do not expect this same impact from seasonality associated with reimbursement, although the quarterly sales trends may be impacted by a number of other factors, including summer vacations, the timing of product launches into new geographies and variability in the ordering patterns of our distributor partners.

Since early 2020, the COVID-19 global pandemic had a major impact on businesses around the world, as well as our own quarterly trends. Initially, the impact on our business was relatively consistent worldwide but we have since seen varying degrees of impact in individual markets based on local conditions. We anticipate that our sales may not follow historical trends and may be subject to unpredictable variability in the coming months based on varying levels of impact of the global pandemic across the markets in which we operate. The full extent of the impact of the COVID-19 global pandemic on our business and operations will depend on a number of factors, including the scope and duration of the pandemic, varying government responses to the pandemic and potential delays to product development timelines.

Separate from any impacts of the COVID-19 global pandemic, our quarterly sales have historically fluctuated, and may continue to fluctuate substantially in the periods surrounding anticipated and actual regulatory approvals and commercial launches of new products by us or our competitors. We believe customers may defer purchasing decisions if they believe a new product may be launched in the future. Additionally, upon the announcement of FDA approval or commercial launch of a new product, either by us or one of our competitors, potential new customers may reconsider their purchasing decisions or take additional time to consider such FDA approval or product launch before making their purchasing decisions. For example, we believe certain customers paused their decision-making during the second half of 2019 in anticipation of the commercial availability of the t:slim X2 with Control-IQ technology, and similar occurrences may occur in future periods. However, it is difficult to quantify the extent of the impact of these or similar events on future purchasing decisions.



## **Cost of Sales**

Historically, we have manufactured our pumps and disposable insulin cartridges at our manufacturing facility in San Diego, California. In early 2020, our third-party cartridge manufacturer completed validation and commenced commercial-scale manufacturing to supplement our existing cartridge manufacturing capacity. By the end of 2021, the majority of our t:slim cartridge manufacturing capacity transitioned to our partner in order to create capacity for Tandem Mobi cartridge manufacturing in the future. Infusion sets and pump accessories are manufactured by third-party suppliers. Cost of sales includes raw materials, labor costs, manufacturing overhead expenses, product training costs, royalties, freight, reserves for expected warranty costs, costs of supporting our digital health platforms, scrap and charges for excess and obsolete inventories. Manufacturing overhead expenses include expenses relating to quality assurance, manufacturing engineering, material procurement, inventory control, facilities, equipment, information technology and operations supervision and management.

Over the long term, we expect our overall gross margin percentage, which for any given period is calculated as sales less cost of sales divided by sales, to improve, as our sales increase and our overhead costs are spread over larger production volumes. We expect we will be able to leverage our manufacturing cost structure across our products that utilize the same technology platform and manufacturing infrastructure and will be able to further reduce per unit costs with increased automation, process improvements and raw materials cost reductions. We also expect our warranty cost per unit to decrease as we release additional product features and functionality utilizing the Tandem Device Updater. Pumps have, and are expected to continue to have, a higher gross margin percentage than our pump-related supplies. Therefore, the percentage of pump sales relative to total sales could have a significant impact on our overall gross margin percentage. In the event that customers delay their pump purchasing decisions or physicians pause in prescribing new pumps, it is possible that we may experience a higher percentage of pump-related supply sales than anticipated, which in turn could adversely impact our overall gross margin percentage. However, our overall gross margin percentage may fluctuate in future quarterly periods as a result of numerous factors aside from those associated with production volumes and product mix. For instance, as a result of the COVID-19 global pandemic we implemented temporary operational changes that introduced variability to our cost of sales, such as supplemental staffing, incremental expenses to protect the health, safety and welfare of our employees working on-site and to enable other employees to work remotely. We are also experiencing higher costs as we manage global supply challenges and anticipate that this will continue for the remainder of 2022. In addition, as demand for our products increases, we may continue to make additional investments in manufacturing capacity or increase our reliance on third parties for manufacturing-related services, either of which could have a negative impact on our gross margins. Specifically, we have and will continue to evaluate investing in additional manufacturing equipment to substantially increase our existing capacity in order to meet anticipated long-term demand for our cartridges, which may initially place downward pressure on the gross margin percentage associated with our pump-related supplies.

Other factors impacting our overall gross margin percentage may include the changing percentage of products sold to distributors versus directly to individual customers, varying levels of reimbursement among third-party payors in individual markets worldwide, the timing and success of new regulatory approvals and product launches, the impact of the valuation and amortization of employee stock awards on non-cash stock-based compensation expense allocated to cost of sales, changes in warranty estimates, training costs, licensing and royalty costs, cost to support our digital health platforms, cost associated with excess and obsolete inventories, and changes in our manufacturing processes, capacity, costs or output.

## **Selling, General and Administrative**

Our selling, general and administrative (SG&A) expenses primarily consist of salary, cash-based incentive compensation, fringe benefits and non-cash stock-based compensation for our sales, marketing and administrative functions, which also includes our clinical, customer support, technical services, insurance verification and regulatory affairs personnel. We had approximately 110 sales territories in the United States in the first quarter of 2022, up from approximately 95 in 2021. Our existing territories are generally maintained by sales representatives and field clinical specialists, and supported by managed care liaisons, additional sales management and other customer support personnel, which have also been rapidly expanding to support our growing installed base. Our operations in Canada are comprised of approximately ten sales territories.

Other significant SG&A expenses typically include those incurred for product demonstration samples, commercialization activities associated with new product launches, travel, trade shows, outside legal fees, independent auditor fees, outside consultant fees, insurance premiums, facilities costs and information technology costs. While we experienced reduced spending in areas such as travel and trade shows in 2021 due to the COVID-19 global pandemic, we may experience additional costs as our employees return to work at our offices and as we adapt to alternative hybrid work models, or as needed to respond to general labor shortages and heightened competition for employees with specialized skills. Overall, we expect our SG&A expenses, including the cost of our customer support infrastructure, to continue to increase as our customer base grows worldwide. In addition, we will continue to evaluate, and may further increase, the number of our field sales and clinical personnel in order to optimize the coverage of our existing territories. In the longer term, SG&A expenses may also increase due to anticipated costs associated with additional compliance and regulatory reporting requirements.

#### ***Research and Development***

Our research and development (R&D) activities primarily consist of engineering and research programs associated with our hardware, software and digital health products under development, as well as activities associated with our core technologies and processes. R&D expenses are primarily related to employee compensation, including salary, cash-based incentive compensation, fringe benefits and non-cash stock-based compensation. We also incur R&D expenses for supplies, development prototypes, outside design and testing services, depreciation, allocated facilities and information services, clinical trial costs, payments under our licensing, development and commercialization agreements and other indirect costs. We expect our R&D expenses to increase as we advance our products under development, develop new products and technologies and support more clinical trials.

#### ***Other Income and Expense***

Other income and expense primarily consists of interest expense which includes the amortization of debt issuance costs related to our 1.50% Convertible Senior Notes due 2025, changes in the fair value of certain warrants issued in connection with our public offering of common stock in October 2017, and interest earned on our cash equivalents and short-term investments. We expect interest expense in future quarters to be comparable with the amount expensed in 2021, through the date of conversion or redemption of the Notes. We expect the revaluation of the outstanding Series A warrants will not have a significant impact on our other income and expense through their expiration in the fourth quarter of 2022.

#### ***Income Tax Expense (Benefit)***

Because the Company maintains a full valuation allowance against its net deferred tax assets, income tax expense is expected to primarily consist of current state and foreign cash tax expense as a result of taxable income anticipated or incurred in those jurisdictions. Income tax expense (benefit) may fluctuate in future quarters due to adjustments related to non-recurring transactions and changes in certain tax assessments.

## Results of Operations

(in thousands, except percentages)	Three Months Ended June 30,		Six Months Ended June 30,	
	2022	2021	2022	2021
<b>Sales:</b>				
United States	\$ 145,667	\$ 127,580	\$ 276,950	\$ 230,919
Outside the United States	54,595	44,559	99,219	82,257
Total sales	200,262	172,139	376,169	313,176
Cost of sales	98,316	79,685	183,130	147,435
Gross profit	101,946	92,454	193,039	165,741
Gross margin	51 %	54 %	51 %	53 %
<b>Operating expenses:</b>				
Selling, general and administrative	80,614	66,523	153,885	125,086
Research and development	33,571	20,499	66,731	38,460
Total operating expenses	114,185	87,022	220,616	163,546
Operating loss	(12,239)	5,432	(27,577)	2,195
<b>Other income (expense), net:</b>				
Interest income and other, net	769	418	1,150	690
Interest expense	(1,537)	(1,509)	(3,053)	(3,015)
Change in fair value of common stock warrants	57	(272)	91	(962)
Total other expense, net	(711)	(1,363)	(1,812)	(3,287)
Income (loss) before income taxes	(12,950)	4,069	(29,389)	(1,092)
Income tax expense (benefit)	2,106	61	382	(56)
Net income (loss)	\$ (15,056)	\$ 4,008	\$ (29,771)	\$ (1,036)

### Comparison of the Three Months Ended June 30, 2022 and 2021

*Sales.* For the three months ended June 30, 2022, sales were \$200.3 million, which included \$54.6 million of sales outside the United States. Sales were \$172.1 million for the same period in 2021, which included \$44.6 million of sales outside the United States.

The increase in worldwide sales of \$28.1 million in the second quarter of 2022, compared to the second quarter of 2021, was driven by a 44% increase in pump-related supply sales, with pump sales consistent period over period. Sales of pump-related supplies increased primarily due to the 40% growth in our estimated worldwide installed base of customers.

Sales by product in the United States were as follows (in thousands):

	Three Months Ended June 30,	
	2022	2021
Pump	\$ 81,656	\$ 80,041
Infusion sets	43,910	32,134
Cartridges	19,703	15,082
Other	398	323
Total Sales in the United States	\$ 145,667	\$ 127,580

Pump sales in the United States were \$81.7 million for the second quarter of 2022, compared to \$80.0 million in the second quarter of 2021 as pump shipments increased 1% and pump average selling prices improved compared to the same period in 2021. Pump shipments in the United States were 20,818 in the second quarter of 2022, compared to 20,665 in the second quarter of 2021. Pump shipments were driven by continued demand for our t:slim X2 insulin pump with Control-IQ technology even with the presence of new competitive product launches during the quarter. We also faced challenging marketplace dynamics and economic conditions brought on by the global pandemic and a deteriorating macroeconomic environment, with inflation and the threat of recession beginning to impact pump purchasing decisions. Sales of pump-related supplies increased primarily due to a 32% increase year over year in our estimated installed base of customers in the United States. Sales to distributors accounted for 65% and 68% of our total sales in the United States for the three months ended June 30, 2022 and 2021, respectively, which contributed to modest improvement in average selling prices across all products. Our percentage of sales to distributors versus individual customers is principally determined by the mix of customers ordering our products within the period and whether or not we have a contractual arrangement with their underlying third-party insurance payor.

Sales by product outside the United States were as follows (in thousands):

	Three Months Ended June 30,	
	2022	2021
Pump	\$ 25,798	\$ 27,630
Infusion sets	20,295	12,165
Cartridges	8,366	4,660
Other	136	104
<b>Total Sales Outside the United States</b>	<b>\$ 54,595</b>	<b>\$ 44,559</b>

Pump sales outside the United States were \$25.8 million for the second quarter of 2022, compared to \$27.6 million in the second quarter of 2021. Pump shipments decreased 14% compared to the same period in the prior year primarily due to variable pump ordering and stocking patterns, offset by improvements in average selling price. Sales of pump-related supplies benefited from a 67% increase in our estimated installed base of customers outside the United States. The ordering patterns of our distributors outside the United States for pumps and supplies is highly variable from period to period as distributors continue to gain familiarity with the markets in which they operate and the acceptance of our products in those markets. This variability was compounded during the period by the differing levels of impact from the global pandemic with regard to both access to physicians and customers, as well as shipping logistics. Sales to distributors accounted for 96% and 95% of our total sales outside the United States for both of the three-month periods ended June 30, 2022 and 2021, respectively.

*Cost of Sales and Gross Profit.* Our cost of sales for the three months ended June 30, 2022 was \$98.3 million, resulting in gross profit of \$101.9 million, compared to cost of sales of \$79.7 million and gross profit of \$92.5 million for the same period in 2021. The gross margin for the three months ended June 30, 2022 and 2021 was 51% and 54%, respectively.

The increase in our gross profit for the three months ended June 30, 2022 was primarily the result of the \$28.1 million increase in total sales, driven by increased supply sales. Gross profit benefited from an increase in average selling prices as well as improvement in per unit labor and overhead costs from manufacturing efficiencies, leverage of fixed overhead and increased volumes from our third-party cartridge manufacturer. Gross margin was pressured by approximately 2 percentage points from increased pump material costs due to the use of alternative sourcing for certain raw materials to reduce the risk of component shortages in the near-term. On an aggregate basis, non-manufacturing costs, which primarily consist of warranty, training, royalty and freight, also negatively impacted gross margin as a result of increased supply chain costs due to the global pandemic. We anticipate continued pressure from increased supply chain and material costs through the end of this year as we continue to navigate the challenges of the global pandemic and the challenging economic environment. Other factors that have and may continue to impact the gross margin percentage are changes in product and geographical mix and the level of non-cash stock-based compensation allocated to cost of sales. Pump sales, which have the highest gross margin, were 54% of total worldwide sales in the second quarter of 2022 versus 63% in the second quarter of 2021.

**Selling, General and Administrative Expenses.** SG&A expenses increased 21% to \$80.6 million for the three months ended June 30, 2022, from \$66.5 million for the same period in 2021. Employee-related expenses for our SG&A functions comprise the majority of SG&A expenses. The increase compared to 2021 was primarily the result of a \$10.0 million increase in salaries, incentive compensation, non-cash stock-based compensation, and other employee benefits due to an increase in personnel to support additional sales territories, higher sales and other services in support of our growing installed customer base. Non-cash stock-based compensation expense allocated to SG&A was \$13.7 million for the three months ended June 30, 2022, compared to \$10.9 million in the same period in 2021. We also experienced an \$4.1 million increase in facilities and other non-employee discretionary spending, including travel, outside services, equipment and supplies costs.

**Research and Development Expenses.** R&D expenses increased 64% to \$33.6 million for the three months ended June 30, 2022 from \$20.5 million for the same period in 2021. The increase in R&D expenses was primarily the result of an increase of \$7.3 million in salaries, incentive compensation, non-cash stock-based compensation, and other employee benefits due to an increase in personnel to support our product development efforts. Non-cash stock-based compensation expense allocated to R&D was \$4.5 million for the three months ended June 30, 2022, compared to \$2.5 million in the same period in 2021. We also experienced a \$5.8 million increase in other non-employee discretionary spending, including outside consulting and services, clinical trial expenses, information technology and equipment costs attributable to R&D.

**Other Income (Expense), Net.** Total other expense, net for the three months ended June 30, 2022 was \$0.7 million compared to \$1.4 million in the same period in 2021. Total other expense, net for both periods primarily consisted of \$1.5 million of interest expense which included the amortization of debt issuance costs related to our Notes, partially offset by interest income earned on our cash equivalents and short-term investments. Total other expense, net for the three months ended June 30, 2021 also included a \$0.3 million loss on revaluation from the change in fair value of certain warrants.

**Income Tax Expense (Benefit).** We recognized income tax expense of \$2.1 million on a pre-tax loss of \$13.0 million for the three months ended June 30, 2022, compared to income tax expense of \$0.1 million on pre-tax income of \$4.1 million for the three months ended June 30, 2021. The provision for income taxes for the three months ended June 30, 2022 was calculated using the discrete effective tax rate method as the annual effective tax rate method would not provide a reliable estimate. Income tax expense for the three months ended June 30, 2022 was primarily attributable to the change from the annual effective tax rate method used in the first quarter of 2022 to the discrete effective tax rate method, and state and foreign income tax expense as a result of current taxable income in certain jurisdictions.

The provision for income taxes for the three months ended June 30, 2021 was calculated by applying an estimate of the annual effective tax rate for the full year to ordinary income (loss) adjusted by the tax impact of discrete items. The income tax expense for the three months ended June 30, 2021 was primarily attributable to state and foreign income tax expense as a result of current taxable income in certain jurisdictions.

### Comparison of the Six Months Ended June 30, 2022 and 2021

**Sales.** For the six months ended June 30, 2022, sales were \$376.2 million, which included \$99.2 million of sales outside the United States. For the six months ended June 30, 2021, sales were \$313.2 million, which included \$82.3 million of sales outside the United States.

The increase in worldwide sales of \$63.0 million in the first six months of 2022 compared to the first six months of 2021, was driven by a 40% increase in pump-related supply sales, primarily due to 40% growth in our estimated worldwide installed base of customers. We also had a 7% increase in worldwide pump sales in the first six months of 2022, compared to the same period in 2021.

Sales by product in the United States were as follows (in thousands):

	Six Months Ended June 30,	
	2022	2021
Pump	\$ 155,153	\$ 142,953
Infusion sets	83,651	59,526
Cartridges	37,380	27,847
Other	766	593
Total Sales in the United States	\$ 276,950	\$ 230,919

Pump sales in the United States were \$155.2 million for the first six months of 2022, compared to \$143.0 million in the first six months of 2021, as pump shipments increased 6% compared to the same period in the prior year, and pump average selling prices improved. Domestic pump shipments were 39,476 in the first six months of 2022 compared to 37,309 in the first six months of 2021. Sales of pump-related supplies increased primarily due to a 32% increase in our estimated domestic installed base of customers. Sales to distributors accounted for 65% and 68% of our total domestic sales for the six months ended June 30, 2022 and 2021, respectively, which contributed to modest improvement in average selling prices across all products. Our percentage of sales to distributors versus individual customers is principally determined by the mix of customers ordering our products within the period and whether or not we have a contractual arrangement with their underlying third-party insurance payor.

Sales outside the United States by product were as follows (in thousands):

	Six Months Ended June 30,	
	2022	2021
Pump	\$ 48,130	\$ 46,538
Infusion sets	35,294	24,899
Cartridges	15,543	10,609
Other	252	211
<b>Total Sales Outside the United States</b>	<b>\$ 99,219</b>	<b>\$ 82,257</b>

Pump sales outside the United States were \$48.1 million for the first six months of 2022, compared to \$46.5 million in the first six months of 2021, as the 5% decrease in pump shipments was more than offset by an increase in average selling prices compared to the same period in the prior year. Sales of pump-related supplies increased 43% primarily due to a 67% increase in our estimated installed base of customers outside the United States. The ordering patterns of our distributors outside the United States for pumps and supplies is highly variable from period to period, as distributors continue to gain familiarity with the markets in which they operate and the acceptance of our products in those markets. This variability was compounded during the period by the differing levels of impact from the global pandemic with regard to both access to physicians and customers, as well as shipping logistics across the more than 20 markets in which we operate outside the United States. Sales to distributors accounted for 96% of our total sales outside the United States for the six month period ended June 30, 2022, and 95% for the same period in 2021.

*Cost of Sales and Gross Profit.* Our cost of sales for the six months ended June 30, 2022 was \$183.1 million resulting in gross profit of \$193.0 million, compared to cost of sales of \$147.4 million and gross profit of \$165.7 million for the same period in 2021. The gross margin for the six months ended June 30, 2022 was 51% compared to 53% in the same period in 2021.

The increase in our gross profit for the six months ended June 30, 2022 was primarily the result of the \$63.0 million increase in total sales. Gross profit benefited from an increase in average selling prices as well as improvement in per unit labor and overhead costs from manufacturing efficiencies, leverage of fixed overhead and increased volumes from our third-party cartridge manufacturer. Gross margin was pressured by increased pump material costs due to the use of alternative sourcing for raw materials to reduce the risk of component shortages in the near-term. On an aggregate basis, non-manufacturing costs, which primarily consist of warranty, royalty, freight, training and digital health product support costs, were negatively impacted by increased supply chain costs due to the global pandemic. We anticipate continued pressure from increased supply chain and material costs through the end of this year as we continue to navigate the challenges of the global pandemic and the economic environment. Other factors that have and may continue to impact the gross margin percentage are changes in product and geographical mix and the level of non-cash stock-based compensation allocated to cost of sales. Pump sales, which have the highest gross margin, were 54% of total worldwide sales in the first six months of 2022 compared to 61% in the same period in 2021.

*Selling, General and Administrative Expenses.* SG&A expenses increased 23% to \$153.9 million for the six months ended June 30, 2022, from \$125.1 million for the same period in 2021. Employee-related expenses for our SG&A functions comprise the majority of SG&A expenses. The increase compared to 2021 was primarily the result of a \$22.8 million increase in salaries, incentive compensation, non-cash stock-based compensation, and other employee benefits due to an increase in personnel to support additional sales territories, higher sales and other services in support of our growing installed customer base. Non-cash stock-based compensation expense allocated to SG&A was \$25.6 million for the six months ended June 30, 2022, compared to \$20.3 million in the same period in 2021. We also experienced a \$6.0 million increase in facilities and non-employee discretionary spending, including outside services, travel, and software maintenance and supplies costs.

*Research and Development Expenses.* R&D expenses increased 74% to \$66.7 million for the six months ended June 30, 2022, from \$38.5 million for the same period in 2021. The increase in R&D expenses was primarily the result of an increase of \$16.3 million in salaries, incentive compensation, non-cash stock-based compensation, and other employee benefits due to an increase in personnel to support our product development efforts. Non-cash stock-based compensation expense allocated to R&D was \$8.9 million for the six months ended June 30, 2022, compared to \$4.6 million in the same period in 2021. We also experienced a \$11.9 million increase in other non-employee discretionary spending, including outside consulting and services, clinical trial expenses, information technology and equipment costs attributable to R&D.

*Other Income (Expense), Net.* Total other expense, net for the six months ended June 30, 2022 and 2021 was \$1.8 million and \$3.3 million, respectively. Other expense, net for the six months ended June 30, 2022 primarily consisted of \$3.0 million of interest expense which included the amortization of debt issuance costs related to our Convertible Senior Notes, partially offset by \$1.1 million of interest income earned on our cash equivalents and short-term investments. Other expense, net for the six months ended June 30, 2021 primarily consisted of \$3.0 million of interest expense which included the amortization of debt issuance costs related to our Notes, and a \$1.0 million revaluation loss from the change in the fair value of certain common stock warrants, offset by \$0.7 million of interest income earned on our cash equivalents and short-term investments.

*Income Tax Expense (Benefit).* We recognized income tax expense of \$0.4 million on pre-tax loss of \$29.4 million for the six months ended June 30, 2022, compared to an income tax benefit of \$0.1 million on a pre-tax loss of \$1.1 million for the six months ended June 30, 2021. The income tax expense for the six months ended June 30, 2022 was primarily attributable to state and foreign income tax expense as a result of current taxable income in certain jurisdictions. The provision for income taxes for the six months ended June 30, 2022 was calculated using the discrete effective tax rate method as the annual effective tax rate method would not provide a reliable estimate.

The income tax benefit for the six months ended June 30, 2021 was primarily due to our pre-tax loss position, partially offset by state and foreign income tax expense as a result of current taxable income in certain jurisdictions. The provision (benefit) for income taxes for the six months ended June 30, 2021 was calculated by applying an estimate of the annual effective tax rate for the full year to ordinary income (loss) adjusted by the tax impact of discrete items.

#### **Liquidity and Capital Resources**

At June 30, 2022, we had \$635.3 million in cash and cash equivalents and short-term investments. In addition, we have a \$100 million Revolving Line of Credit (the Line of Credit), which expires in May 2025 (see Note 7, "Debt"). At June 30, 2022, no amount was outstanding under the Line of Credit. We believe that our cash and cash equivalents, short-term investments, borrowing availability under the Line of Credit, and future cash flows from operations will be sufficient to fund our ongoing core business activities.

Historically, our principal sources of cash have included cash collected from product sales, private and public offerings of equity securities, exercises of employee stock awards, and debt financing.

Our historical cash outflows have primarily been associated with cash used for operating activities such as the development and commercialization of our products, the expansion and support of our sales, marketing, clinical and customer support organizations, the expansion of our R&D activities, the expansion of our commercial activities to select geographies outside the United States, the acquisition of intellectual property and equity investments, expenditures related to increases in our manufacturing capacity and improvements to our manufacturing efficiency, overall expansion of our facilities and operations, and other working capital needs. Additionally, we have used cash to pay the interest expense associated with our convertible senior notes.

The following table shows a summary of our cash flows for the six months ended June 30, 2022 and 2021 (in thousands):

	Six Months Ended June 30,	
	2022	2021
Net cash provided by (used in):		
Operating activities	\$ 20,701	\$ 57,580
Investing activities	11,554	(70,855)
Financing activities	11,551	17,196
Effect of foreign exchange rate changes on cash	(21)	44
Net increase in cash and cash equivalents	<u>\$ 43,785</u>	<u>\$ 3,965</u>

*Operating Activities.* Net cash provided by operating activities was \$20.7 million for the six months ended June 30, 2022, compared to \$57.6 million in the same period in 2021. The reduction in net cash provided by operating activities for 2022 compared to 2021 was primarily a result of a 28.7 million increase in net loss as well as working capital changes. Working capital changes during the six months of 2022, primarily consisted of increases in inventories and accounts payable and accrued expenses, and a decrease in employee-related liabilities. Accounts receivable decreased to \$103.8 million at June 30, 2022, from \$110.7 million at December 31, 2021. Inventories increased to \$88.1 million at June 30, 2022 from \$68.6 million at December 31, 2021.

*Investing Activities.* Net cash provided by investing activities was \$11.6 million for the six months ended June 30, 2022, which was primarily related to \$256.5 million in proceeds from maturities and sales of short-term investments, offset by \$229.7 million of purchases of short-term investments, and \$14.8 million in purchases of property and equipment. Net cash used by investing activities was \$70.9 million for the six months ended June 30, 2021, which was primarily related to \$385.6 million of purchases of short-term investments, \$9.3 million cash paid for the acquisition of intangible assets and equity investments, and \$5.3 million in purchases of property and equipment, offset by \$329.4 million in proceeds from maturities and sales of short-term investments.

*Financing Activities.* Net cash provided by financing activities was \$11.6 million for the six months ended June 30, 2022, which primarily consisted of proceeds from the issuance of common stock under our stock plans. Net cash provided by financing activities was \$17.2 million for the six months ended June 30, 2021, which primarily consisted of proceeds from the issuance of common stock under our stock plans.

Our liquidity position and capital requirements are subject to fluctuation based on a number of factors. In particular, our cash inflows and outflows are principally impacted by the following:

- our ability to generate sales, the timing of those sales, the mix of products sold and the collection of receivables from period to period;
- the timing of any additional financings, and the net proceeds raised from such financings;
- the timing and amount of the exercise of outstanding warrants, and proceeds from the issuance of equity awards pursuant to employee stock plans;
- fluctuations in gross margins and operating margins;
- fluctuations in working capital, including changes in accounts receivable, inventories, accounts payable, employee-related liabilities, and operating lease liabilities; and
- the impacts and disruptions caused by the COVID-19 global pandemic.



Both our primary short-term and long-term capital needs are expected to include expenditures related to:

- support of our commercialization efforts related to our current and future products;
- expansion of our customer support resources for our growing installed customer base;
- research and product development efforts, including clinical trial costs;
- acquisitions, leasing or licensing of equipment, technology, intellectual property and other assets;
- additional facilities leases and related tenant improvements;
- investments for the development, improvement and acquisition of manufacturing, testing and packaging equipment to support business growth and increase capacity; and
- payments under licensing, development and commercialization agreements.
- acquisition and subsequent integration of businesses, products and technologies.

Although we believe the foregoing items reflect our most likely uses of cash in the short-term, we cannot predict with certainty all of our particular cash uses or the timing or amount of cash used. In addition, from time to time we may consider opportunities to acquire or license other products or technologies that may enhance our product platform or technology, expand the breadth of our markets or customer base, or advance our business strategies. Any such transaction may require short-term expenditures that may impact our capital needs. If for any reason our cash and cash equivalents balances, or cash generated from operations is insufficient to satisfy our working capital requirements, we may in the future be required to seek additional capital from public or private offerings of our equity or debt securities, or we may elect to borrow capital under the Line of Credit, new credit arrangements or from other sources. We may also seek to raise additional capital from such offerings or borrowings on an opportunistic basis when we believe there are suitable opportunities for doing so. If we issue equity or debt securities to raise additional funds, our existing stockholders may experience dilution, we may incur significant financing or debt service costs, and the new equity or debt securities may have rights, preferences and privileges senior to those of our existing stockholders. There can be no assurance that financing will be available on acceptable terms, or at all. Our ability to raise additional financing may be negatively impacted by a number of factors, including our recent and projected financial results, recent changes in and volatility of our stock price, perceptions about the dilutive impact of financing transactions, the competitive environment in our industry, uncertainties regarding the regulatory environment in which we operate and conditions impacting the capital markets more generally, including economic weakness, inflation, political instability, war and terrorism, natural disasters, incidence of illness or disease, or other events beyond our control.

#### Indebtedness

In May 2020, the Company entered into a purchase agreement with certain counterparties for the sale of an aggregate of \$287.5 million principal amount of 1.50% Convertible Senior Notes due 2025 in a private offering to qualified institutional buyers (the Notes). The proceeds from the issuance of the Notes were \$244.6 million, net of debt issuance costs and cash used to pay the cost of the Capped Call Transactions (see Note 7, "Debt"). The Notes are the Company's senior unsecured obligations. Interest is payable in cash semi-annually in arrears beginning on November 1, 2020 at a rate of 1.50% per year. The Notes mature on May 1, 2025 unless repurchased, redeemed, or converted in accordance with their terms prior to the maturity date.

Cash payments due by calendar year for our Convertible Senior Notes at June 30, 2022 are as follows (in thousands):

	Total	Remaining in 2022	2023	2024	2025
Contractual interest	\$ 12,200	\$ 2,156	\$ 4,313	\$ 4,313	\$ 1,418
Principal amount of convertible senior notes <sup>(1)</sup>	287,500	—	—	—	287,500
<b>Total</b>	<b>\$ 299,700</b>	<b>\$ 2,156</b>	<b>\$ 4,313</b>	<b>\$ 4,313</b>	<b>\$ 288,918</b>

(1) The Convertible Senior Notes may be settled in cash, shares of our common stock, or a combination of cash and shares of our common stock, at our election.

**Critical Accounting Policies**

Our discussion and analysis of our financial condition and results of operations are based on our consolidated financial statements, which have been prepared in accordance with accounting principles generally accepted in the United States of America (U.S. GAAP). The preparation of these consolidated financial statements requires management to make estimates and judgments that affect the reported amounts of assets, liabilities, revenues and expenses and the disclosure of contingent assets and liabilities in our consolidated financial statements and accompanying notes as of the date of the consolidated financial statements. We evaluate our estimates and judgments on an ongoing basis. We base our estimates on historical experience and on various other factors that we believe are reasonable under the circumstances, the results of which form the basis for making judgments about our financial condition and results of operations that are not readily apparent from other sources. Actual results may differ from these estimates.

There have been no material changes to our critical accounting policies and estimates from the information provided in Part II, Item 7, “Management’s Discussion and Analysis of Financial Condition and Results of Operations – Critical Accounting Policies Involving Management Estimates and Assumptions,” included in our Annual Report on Form 10-K for the year ended December 31, 2021.

**Off-Balance Sheet Arrangements**

As of June 30, 2022, we are a party to certain standby letter of credit arrangements in support of our operating lease obligations. For a description of the arrangements we consider significant, see Note 12 “Commitments and Contingencies” to the condensed consolidated financial statements in Part I, Item 1 of this Quarterly Report.

### **Item 3. Quantitative and Qualitative Disclosures about Market Risk.**

#### ***Credit and Interest Rate Risks***

We invest our excess cash in marketable securities consisting primarily of commercial paper, corporate debt securities, U.S. Treasury securities and U.S. Government-sponsored enterprise securities. Some of the financial instruments in which we invest subject us to market risk, in that a change in prevailing interest rates may cause the principal amount of the instrument to fluctuate. Other financial instruments in which we invest subject us to credit risk, in that the value of the instrument may fluctuate based on the issuer's ability to pay. As a result of the COVID-19 global pandemic and the perceived increased credit risks associated with certain securities, credit rating agencies have, from time to time, issued downgrades or revised outlooks to negative for certain issuers of the debt securities held in our short-term investments portfolio. Unrealized losses on available-for-sale debt securities at June 30, 2022 were primarily due to the recent increase in market interest rates. Based on the credit quality of the available-for-sale debt securities that are in an unrealized loss position, and our current estimates of future cash flows to be collected from those securities, we believe the unrealized losses were not credit losses (see Note 3, "Short-Term Investments").

The primary objectives of our investment activities are to maintain liquidity and preserve principal while maximizing the income we receive from our financial instruments without significantly increasing risk. We have established guidelines regarding approved investments and maturities of investments, which are primarily designed to maintain liquidity and preserve principal.

Because of the short-term maturities of our financial instruments, we do not believe that an increase or decrease in market interest rates would have any significant impact on the realized value of our investment portfolio. If a 10% change in interest rates were to have occurred on June 30, 2022, it would not have had a material effect on the fair value of our investment portfolio as of that date.

In May 2020, we issued \$287.5 million principal amount of Convertible Senior Notes, which bear interest at a fixed rate of 1.50% per year. Accordingly, we are not subject to interest rate risk as a result of the Convertible Senior Notes (see Note 7, "Debt").

#### ***Foreign Currency Exchange Rate Risk***

Our operations are primarily located in the United States, and nearly all of our sales since inception have been made in U.S. dollars. With the exception of a portion of our sales in Canada, our sales outside of the United States are currently made to independent distributors under agreements denominated in U.S. dollars. As we expand our operations in markets outside the United States, particularly in Europe, we will be exposed to further foreign currency exchange rate risk. We believe our exposure to foreign currency rate fluctuations is currently limited to our operations in Canada, where fluctuations in the rate of exchange between the U.S. dollar and the Canadian dollar could adversely affect our financial results. In addition, from time to time, we may have foreign currency exchange risk related to existing assets and liabilities, committed transactions and forecasted future cash flows. In certain circumstances, we may seek to manage such foreign currency exchange risk by using derivative instruments such as foreign currency exchange forward contracts to hedge our risk. In general, we may hedge foreign currency exchange exposures up to 12 months in advance. However, we may choose not to hedge some exposures for a variety of reasons, including prohibitive economic costs.

### **Item 4. Controls and Procedures.**

#### **Evaluation of Disclosure Controls and Procedures**

We maintain disclosure controls and procedures, as defined in Rules 13a-15(e) and 15d-15(e) under the Exchange Act, that are designed to ensure that information required to be disclosed in the reports we file with the SEC under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms, and that such information is accumulated and communicated to our management, including our principal executive officer and principal financial officer, as appropriate, to allow timely decisions regarding required disclosure.

As of June 30, 2022, we carried out an evaluation, under the supervision and with the participation of our management, including our principal executive officer and principal financial officer, of the effectiveness of the design and operation of our disclosure controls and procedures. Based on this evaluation, our principal executive officer and principal financial officer concluded that our disclosure controls and procedures were effective at a reasonable assurance level as of June 30, 2022.

Our disclosure controls and procedures are designed to provide reasonable assurance of achieving their objectives as specified above. Management does not expect, however, that our disclosure controls and procedures will prevent or detect all error and fraud. Any control system, no matter how well designed and operated, is based upon certain assumptions and can provide only reasonable, not absolute, assurance that its objectives will be met. Further, no evaluation of controls can provide absolute assurance that misstatements due to error or fraud will not occur or that all control issues and instances of fraud, if any, within the Company have been detected.

**Changes in Internal Control over Financial Reporting**

There were no changes in our internal control over financial reporting (as defined in Rules 13a-15(f) and 15d-15(f) of the Exchange Act) during the quarter ended June 30, 2022 that materially affected, or are reasonably likely to materially affect, our internal control over financial reporting.

## PART II. OTHER INFORMATION

### Item 1. Legal Proceedings.

In May 2020, we were named as a defendant in three California state court class action lawsuits arising from a data breach that we experienced in January 2020. Collectively, these lawsuits seek statutory, compensatory, actual, and punitive damages; equitable relief, including restitution; pre- and post-judgment interest; injunctive relief; and attorney fees, costs, and expenses from us. On July 24, 2020, these three pending lawsuits were consolidated into a single case in the Superior Court of the State of California in the County of San Bernardino entitled *Joseph Deluna et al v. Tandem Diabetes Care, Inc.* The consolidated case alleges violations of the Confidentiality of Medical Information Act (CMIA), CCPA, California's Unfair Competition Law (UCL), and breach of contract. We filed a demurrer seeking dismissal of all claims, which was heard by the Court on October 27, 2020, and which resulted in the following outcome: (i) the demurrer to the CMIA claim was denied; (ii) the demurrer to the CCPA claim was sustained; and (iii) the demurrer to the UCL and contract claims were sustained with leave to amend the pending complaint. A second demurrer was heard by the Court on March 29, 2021 with the following outcome: (i) the demurrer to the CMIA claim was denied; and (ii) the demurrer to the UCL and contract claims was sustained without leave to amend as to three of the named plaintiffs. The plaintiffs filed a motion for class certification on January 7, 2021 to which the Company filed its opposition on April 11, 2022. The Company filed a motion for summary adjudication on the CMIA claim on April 7, 2022. Both motions are fully briefed, and the Court's order on each motion is pending. The Company anticipates the Court will hear argument on both motions in the third quarter of 2022, though not yet scheduled.

In September 2020, we were named as a defendant in a lawsuit entitled *Buck Walsh, individually and on behalf of others similarly situated v. Tandem Diabetes Care, Inc.*, which was filed in the Superior Court of the State of California in San Diego County. The alleged violations include business and professions code and labor code violations for failure to compensate wages, unpaid meal and rest periods, and failure to reimburse for necessary business-related expenses. The proposed class of plaintiffs includes hourly paid or non-exempt employees of the Company who were employed from April 6, 2016 through the date of adjudication. The material terms of the settlement are set forth in a binding Memorandum of Agreement dated as of July 1, 2021, which was approved by the independent arbitrator on April 18, 2022. This lawsuit was resolved and closed upon disbursement of the settlement amount in May 2022.

Although we intend to vigorously defend against these claims, there is no guarantee that we will prevail. Accordingly, we are unable to determine the ultimate outcome of these lawsuits or determine the amount or range of potential losses associated with the lawsuits.

From time to time, we are involved in various other legal proceedings arising from or related to claims incident to the normal course of our business activities, including actions with respect to intellectual property, employment, regulatory, product liability and contractual matters. Although the results of such legal proceedings and claims cannot be predicted with certainty, we believe we are not currently a party to any legal proceeding(s) which, if determined adversely to us, would, individually or taken together, have a material adverse effect on our business, operating results, financial condition or cash flows. However, regardless of the merit of the claims raised or the outcome, legal proceedings may have an adverse impact on us as a result of defense and settlement costs, diversion of management time and resources, and other factors.

### Item 1A. Risk Factors.

*An investment in our common stock, or in securities convertible into or exchangeable for our common stock, involves a high degree of risk. You should carefully consider the risks described below, together with all of the other information included in this Quarterly Report, as well as in our other filings with the SEC, in evaluating our business. If any of the following risks actually occur, our business, financial condition, operating results and future prospects could be materially and adversely affected. In that case, the trading price of our common stock may decline and you might lose all or part of your investment. The risks described below are not the only ones we face. Additional risks that we currently do not know about or that we currently believe to be immaterial may also impair our business, financial condition, operating results, liquidity, and future prospects. Certain statements below are forward-looking statements. For additional information, see Item 2, Management's Discussion and Analysis of Financial Condition and Results of Operations of this Quarterly Report.*

*The risk factors set forth below marked with an asterisk (\*) next to the title contain changes to the description of the risk factors previously disclosed in Part I, Item 1A of our Annual Report.*

## Summary of Risk Factors

*An investment in our common stock, or in securities convertible into or exchangeable for our common stock, involves a high degree of risk. Below is a summary of material factors that make an investment in our securities speculative or risky. Importantly, this summary does not address all of the risks that we face. Additional discussion of the risks summarized in this risk factor summary, as well as other risks that we face, can be found below, after this summary.*

### Risks Related to Our Business and Our Industry

- We have incurred significant operating losses since inception and may not achieve sustained profitability.
- We currently rely on sales of insulin pump products to generate a significant portion of our revenue, and any factors that negatively impact sales of these products may adversely affect us.
- Uncertainty in current global economic and political conditions could adversely affect our ability to predict product demand and impact our financial results.
- Our ability to maintain and grow our revenue depends on retaining a high percentage of our customer base.
- Failure to secure or retain adequate coverage or reimbursement for our products by third-party payors could adversely affect our business.
- We may fail to meet our sales forecasts if we are unable to maintain our existing sales, marketing, clinical and customer service infrastructure.
- If we are unable to maintain or expand our network of independent distributors, our sales may be negatively affected.
- Our failure to successfully complete clinical trials and development-stage testing could prevent us from obtaining regulatory approvals for or commercializing our products.
- We depend on a limited number of third-party suppliers for certain components and products.
- Any disruption at one of our facilities could adversely affect our business and operating results.
- Global economic and market uncertainty may adversely impact our business, financial condition and operating results.

### Risks Related to Our Future Financings and Financial Results

- We may need to raise additional funds in the future and funds may not be available on commercially reasonable terms.
- Our operating results may fluctuate significantly from quarter to quarter.

### Risks Related to Our Intellectual Property and Potential Litigation

- Our ability to comprehensively protect our intellectual property and proprietary technology is uncertain.
- Patent litigation is not uncommon in the medical device industry, and we may be subject to such litigation.
- We may be subject to damages resulting from claims that we have wrongfully used or disclosed patient health information or trade secrets, or are in breach of non-competition or non-solicitation agreements.

### Risks Related to Our Legal and Regulatory Environment

- Our products and operations are subject to extensive governmental regulation, and regulatory approvals could be denied or delayed.
- New products or modifications to our existing products may require new regulatory approvals, or require us to cease marketing or recall modified products.
- If we or our third-party suppliers, contract manufacturers or service providers fail to comply with manufacturing regulations, it could impair our ability to market our products.

### Risks Related to Our Common Stock

- The price of our common stock may continue to fluctuate significantly.
- Our ability to use our net operating loss carryforwards and certain other tax attributes may be limited.
- We may fail to maintain an effective system of internal control over financial reporting.

### Risks Related to Our Convertible Senior Notes

- The Notes could adversely affect our financial condition.
- We may not have sufficient cash flow from our business to service the Notes.
- We may take actions which could limit our ability to make payments on the Notes.

## Risks Related to Our Business and Our Industry

### ***We have incurred significant operating losses since inception and cannot assure you that we will achieve sustained profitability.\****

Since our inception in January 2006, we have incurred a significant net loss. As of June 30, 2022, we had an accumulated deficit of \$664.4 million. To date, we have funded our operations primarily through cash collected from product sales, private and public offerings of our equity securities, and debt financing. We have devoted substantially all of our resources to the design, development and commercialization of our products, the scaling of our manufacturing and business operations, and the research and development of our current products and products under development.

We began commercial sales of our first product, t:slim, in August 2012 and our current flagship pump platform, t:slim X2, in October 2016. The t:slim X2 insulin pump now represents 100% of new pump shipments. Until the third quarter of 2018 we were selling our products only in the United States and have since launched our products in select international geographies.

Since the first quarter of 2013, we have been able to manufacture and sell our insulin pump products at a cost and in volumes sufficient to allow us to achieve a positive overall gross margin. For the years ended December 31, 2021 and 2020, our gross profit was \$376.2 million and \$260.5 million, respectively. Although we have achieved a positive overall gross margin and generated net income on an annual basis for the first time for the year ended December 31, 2021, we may still operate at a net loss from time to time due to fluctuations in our business.

To implement our business strategy and achieve consistent profitability, we need to, among other things, increase sales of our products and the gross profit associated with those sales, maintain an appropriate customer service, training and support infrastructure, fund ongoing R&D activities, create additional efficiencies in our manufacturing processes while adding to our capacity, and obtain regulatory clearance or approval to commercialize our products currently under development both in the United States and the more than 20 countries in which we operate outside the United States. We expect our expenses will continue to increase as we pursue these objectives and make investments in our business. Additional increases in our expenses without commensurate increases in sales could significantly increase our operating losses.

The extent of our future operating losses and the timing of our profitability are highly uncertain in light of a number of factors, including the timing of the launch of new products and product features by us and our competitors, market acceptance of our products and competitive products by people with insulin-dependent diabetes, their caregivers and healthcare providers, the timing of regulatory approval of our products and the products of our competitors, the actual efficiencies gained in our manufacturing processes, general economic conditions, and the scope and duration of the impacts caused by the COVID-19 global pandemic. Any additional operating losses will have an adverse effect on our stockholders' equity, and we cannot assure you that we will be able to sustain profitability.

### ***We currently rely on sales of insulin pump products to generate a significant portion of our revenue, and any factors that negatively impact sales of these products may adversely affect our business, financial condition and operating results.\****

We generate nearly all of our revenue from the sale of t:slim X2 insulin pumps and the related insulin cartridges and infusion sets. Sales of these products may be negatively impacted by many factors, including:

- market acceptance of the insulin pumps and related products manufactured and sold by our key competitors, including Medtronic;
- the potential that breakthroughs for the monitoring, treatment or prevention of diabetes may render our insulin pumps obsolete or less desirable;
- adverse regulatory or legal actions relating to our products, or similar products or technologies of our competitors;
- failure of our Tandem Device Updater to accurately and timely provide customers with remote access to new product features and functionality as anticipated, or our failure to obtain regulatory approval for any such updates;
- changes in reimbursement rates or policies relating to insulin pumps or similar products or technologies by third-party payors;

- our inability to enter into contracts with third-party payors on a timely basis and on acceptable terms;
- problems arising from the expansion of our manufacturing capabilities and commercial operations, or destruction, loss, or temporary shutdown of our manufacturing facilities;
- concerns regarding the perceived safety, reliability or cybersecurity of any of our products, or any component thereof, particularly in connection with the launch of additional mobile app features and functionality and other software products; and
- claims that any of our products, or any component thereof, infringes on patent rights or other intellectual property rights of third parties.

In addition, sales of any of our current or future insulin pump products with CGM integration are subject to the continuation of our applicable agreements with Dexcom, Abbott, or other third parties which, under some circumstances, may be subject to termination, with or without cause, on relatively short notice. Sales of our current or future products may also be negatively impacted in the event of any regulatory or legal actions relating to CGM products that are compatible with our pumps, or in the event of any disruption to the availability of the applicable CGM-related supplies, such as sensors or transmitters, in a given market in which our products are sold. Sales of our products may also be adversely impacted if the CGM products that are compatible with our pumps are not viewed as superior to competing CGM products in markets where our products are sold, or if the price of these products is not competitive with similar products available in the market.

Because we currently rely on sales of our t:slim X2 insulin pump and related products to generate a significant majority of our revenue, any factors that negatively impact sales of these products (or negatively impact the products or components integrated with these products), or result in sales of these products increasing at a lower rate than expected, could adversely affect our business, financial condition and operating results. We believe the COVID-19 global pandemic has had, and that it may continue to have, an adverse impact on sales of our products. Furthermore, any disruption in our supply chain could negatively impact our ability to manufacture or otherwise supply sufficient product quantities to meet current customer demand, or any unexpected increase in demand, which could also have the effect of magnifying the negative impact of any of the factors described above.

***Uncertainty in current global economic and political conditions could adversely affect our ability to predict product demand and impact our financial results.***

Our operations and performance depend in part on worldwide economic and political conditions. Many of the jurisdictions in which our products are sold have experienced and could continue to experience unfavorable general economic conditions, such as a recession or economic slowdown, which could negatively affect the affordability of, and consumer demand for, our products. Under difficult economic conditions, consumers may seek to modify spending priorities and reduce discretionary spending by delaying purchases of our products, which could reduce our profitability and could negatively affect our overall financial performance. Other financial uncertainties in our major markets and unstable political conditions in certain markets, including civil unrest and governmental changes, could undermine global consumer confidence and reduce consumers' purchasing power, thereby reducing demand for our products. We cannot predict the reoccurrence of any economic slowdown or the strength or sustainability of the economic recovery, worldwide, in the United States, or in our industry. These and other economic factors could have a material adverse effect on our business, financial condition, and results of operations.

***Public health threats, such as the COVID-19 global pandemic, have had and could continue to have a material adverse effect on our operations, the operations of our business partners, and the global economy as a whole.\****

Public health threats and other highly communicable diseases and outbreaks could adversely impact our operations, the operations of our customers, suppliers, distributors and other business partners, as well as the healthcare system in general. The overall scope of the COVID-19 global pandemic and its impacts continue to fluctuate, and in some instances worsen, in various regions worldwide. Although the overall negative impact from the COVID-19 global pandemic on our business is difficult to estimate, our sales and operating results have been adversely impacted, and we anticipate that they will continue to be impacted and subject to unpredictable variability in future periods. Further, certain development activities, such as human factors studies associated with our product development efforts, activities to support the manufacturing scale-up for new products and the recruitment of participants in ongoing clinical studies, were modified or delayed due to impacts of the COVID-19 global pandemic, which has and continues to impact our development timelines and regulatory strategies and also could have a negative impact on our product commercialization efforts and the future demand for our products.



The COVID-19 global pandemic, or other similar outbreaks or epidemics, may have an adverse effect on the overall productivity of our workforce, and we expect to continue to take appropriate measures to protect the health and safety of our employees and our business partners and reduce the risk of disruptions to our operations. We temporarily increased our staffing in certain operations in order to mitigate potential risks associated with increases in unplanned employee absences or illness. Our adoption of these preventive measures has resulted in incremental costs that have negatively impacted our gross margin, and could impact future periods. In addition, for the duration of the COVID-19 global pandemic, some of our employees may be required to continue to operate within a remote work environment for extended periods of time due to illness, travel restrictions, government-imposed orders, school closures or for other reasons, any of which could result in reduced productivity of our workforce. As the COVID-19 global pandemic improves, we anticipate adapting to a hybrid work model, and we may experience additional costs as our employees return to work, or as we respond to general labor shortages and heightened competition for employees with specialized skills.

In addition to the foregoing impacts, disruptions from the COVID-19 global pandemic, or other similar outbreaks or epidemics, could result in delays in or the suspension of our manufacturing operations, research and product development activities, regulatory work streams, clinical development programs and other important commercial functions. In particular, if we or our third-party manufacturers are required to delay or suspend our manufacturing operations, we may encounter severe product shortages, which would adversely affect our results of operations and harm our reputation. We are also dependent upon our third-party suppliers for many of our product components and for our manufacturing-related equipment, and the COVID-19 global pandemic has and could continue to have a material adverse impact on the operations of one or more of our suppliers. These adverse impacts on our suppliers could prevent them from delivering products to us or supporting our requirements for manufacturing-related equipment on a timely basis, or at all. Additionally, we have been and may continue to be negatively impacted by global shortages of semiconductors and copper, which could limit our insulin pump manufacturing capacity. If we continue to experience these or similar manufacturing challenges, or if these challenges worsen in the future, it could increase our manufacturing costs, disrupt our manufacturing operations, negatively impact our product sales and harm our reputation.

The full extent of the impact of the COVID-19 global pandemic on our business and operations is highly uncertain and subject to change, and will continue to depend on a number of factors, including the scope and duration of the pandemic and any resulting changes to general economic conditions in the countries in which we operate and sell our products. Further spread or escalation of the COVID-19 global pandemic, a resurgence of the pandemic in the United States, or even the threat or perception that this could occur, or any protracted duration of decreased economic activity or increase in inflation, could have a material adverse impact on our business, operations and financial results and could negatively impact or disrupt our plans to have employees return to our facilities.

***Our ability to maintain and grow our revenue depends in part on retaining a high percentage of our customer base.\****

A key to maintaining and growing our revenue is the retention of a high percentage of our customers due to the potentially significant revenue generated from ongoing purchases of disposable infusion sets, insulin cartridges and other supplies. In addition, our pumps are designed and tested to remain effective for at least four years and a customer may consider purchasing another product from us when the time comes to replace the pump. We have developed retention programs aimed at our customers, their caregivers and healthcare providers, which include training specific to our products, ongoing support by our sales and clinical employees, and technical support and customer service. Demand for our products from our existing customers could decline or could fail to increase as anticipated or projected as a result of a number of factors, including the introduction of competitive products, breakthroughs for the monitoring, treatment or prevention of diabetes, changes in reimbursement rates or policies, manufacturing problems, perceived safety or reliability issues with our products or components or the products of our competitors, the failure to secure regulatory clearance or approvals for products or product features in a timely manner or at all, product development or commercialization delays, the impacts and disruptions caused by the COVID-19 global pandemic, or for other reasons.

Further, the COVID-19 global pandemic has resulted in substantial restrictions on our engagement efforts with customers and healthcare providers, including the cancellation or postponement of company-sponsored educational events, as well as third-party conferences, trade shows and similar events. The impact continues even as some third-party conferences, trade shows and events are being held remotely from time to time, which restricts our engagement with customers and healthcare providers. In addition, varying COVID-19 case rates can limit our in-person access to healthcare provider offices and also result in staffing shortages in the practices we serve. Collectively, these restrictions have negatively impacted, and are likely to continue negatively impacting, our ability to promote our new products and features to customers and healthcare providers, which could adversely impact our product sales and customer retention rates, as well as the strength of our brand.

The failure to retain a high percentage of our customers and increase sales to these customers consistent with our forecasts would have a material adverse effect on our business, financial condition and operating results.

*We operate in a very competitive industry and if we fail to compete successfully against our existing or potential competitors, or if the competitive environment harms our business partners, our financial condition and operating results may be negatively affected.\**

The medical device industry is intensely competitive, subject to rapid change and highly sensitive to the introduction of new products, treatment techniques or technologies, as well as other activities of industry participants. We believe our products compete, and will continue to compete, directly with a number of traditional insulin pumps, as well as other methods for the treatment of diabetes, including multiple daily injection (MDI) therapy.

Our primary competitors are major medical device companies that are publicly traded companies or divisions or subsidiaries of publicly traded companies, including Insulet and Medtronic. In addition, Eli Lilly has announced a collaboration to commercialize an existing third-party insulin pump as part of a to-be-developed system and Becton Dickinson and Company recently completed the spin off its diabetes care business as a separate publicly-traded company, Embecka. There are also a number of other companies developing and marketing their own insulin delivery systems and/or related software applications, including insulin pumps and Bluetooth-enabled insulin pens to support MDI therapy. While these industry changes are significant, it is difficult to know how they will impact our business or the competitive landscape in which we operate. Our key competitors, most notably Medtronic, enjoy several competitive advantages over us, including:

- greater financial and human resources for sales and marketing, product development, customer service and clinical resources;
- greater ability to respond to competitive pressures, regulatory uncertainty, or challenges within the financial markets;
- established relationships with healthcare providers, third-party payors and regulatory agencies;
- established reputation and name recognition among healthcare providers and other key opinion leaders in the medical industry generally and the diabetes industry in particular;
- larger and more established distribution networks;
- greater ability to cross-sell products or provide incentives to healthcare providers to use their products; and
- more experience in conducting R&D, manufacturing, clinical trials, and obtaining regulatory approval or clearance.

In some instances, our competitors offer products that include features that we do not currently offer. For instance, Insulet offers an insulin pump with a tubeless delivery system that does not utilize an infusion set and Medtronic is selling a connected insulin pen delivery device. Additionally, Medtronic recently announced the launch in select European countries of an infusion set that can be worn for up to seven days.

In addition, the competitive environment in which we operate has resulted and may continue to result in competitive pressures on our manufacturers, suppliers, distributors, collaboration partners and other business constituents. For example, we have entered into development agreements with Dexcom, which provide us non-exclusive licenses to integrate various generations of Dexcom CGM technology with our insulin pump products. Abbott also offers glucose sensors which compete with Dexcom CGMs. Further, we have entered into an agreement with Abbott to develop and commercialize integrated diabetes solutions using Abbott's glucose sensor. There can be no assurance that our collaborations with Dexcom and Abbott will be successful or that we will not experience delays, business disputes, or other unanticipated challenges. Competitive pressures within our industry, as well as the impacts and disruptions associated with the COVID-19 global pandemic, could negatively impact the financial condition of our business partners and impact their ability to fulfill contractual obligations to us, which could negatively impact our product sales, result in delays in obtaining regulatory approvals for new products, harm our reputation, and result in harm to our financial condition and operating results.

For these and other reasons, we may not be able to compete successfully against our current or potential future competitors, which could have a material adverse impact on our financial condition and operating results.

***Competitive products or other technological developments and breakthroughs for the monitoring, treatment or prevention of diabetes may render our products obsolete or less desirable.***

Our ability to grow our business and achieve our strategic objectives will depend, among other things, on our ability to develop and commercialize products for the treatment of diabetes that offer distinct features and functionality, are easy-to-use, provide superior treatment outcomes, receive adequate coverage and reimbursement from third-party payors, and are otherwise more appealing than available alternatives. Our primary competitors, as well as a number of other companies and medical researchers are pursuing new delivery devices, delivery technologies, sensing technologies, treatment techniques, procedures, drugs and other therapies for the monitoring, treatment and prevention of diabetes. Any breakthroughs in diabetes monitoring, treatment or prevention could reduce the potential market for our products or render our products obsolete altogether, which would significantly reduce our sales or cause our sales to grow at a slower rate than we currently expect. In addition, even the perception that new products may be introduced, or that technological or treatment advancements could occur, could cause consumers to delay the purchase of our products.

Because the insulin-dependent diabetes market is large and growing, we anticipate companies will continue to dedicate significant resources to developing competitive products and technologies. The introduction by competitors of products that are or claim to be superior to our products may create market confusion that may make it difficult to differentiate the benefits of our products over competitive products. In addition, some of our competitors employ aggressive pricing strategies, including the use of discounts, rebates, low-cost product upgrades or other financial incentives that could adversely affect sales of our products. If a competitor develops a product that competes with or is perceived to be superior to our products, or if competitors continue to utilize strategies that place downward pressure on pricing within our industry, our sales may decline, our operating margins could be reduced and we may fail to meet our financial projections, which would materially and adversely affect our business, financial condition and operating results.

Moreover, we have designed our hardware products to resemble modern consumer electronic devices to address certain embarrassment and functionality concerns consumers have raised with respect to traditional pumps. Similarly, our newer mobile software applications are being designed to incorporate features and functions that are common to other consumer-oriented applications. These consumer industries are themselves highly competitive, and characterized by continuous new product introductions, rapid developments in technology, and subjective and changing consumer preferences. If, in the future, consumers cease to view our products as contemporary or convenient as compared to then-existing consumer technology, our products may become less desirable.

***The failure of our insulin pump and related products to achieve and maintain market acceptance could result in us achieving sales below our expectations, which would cause our business, financial condition and operating results to be materially and adversely affected.\****

Our current business and growth strategy is highly dependent on our insulin pump and related products achieving and maintaining market acceptance. In order for us to sell our products to people with insulin-dependent diabetes, we must convince them, their caregivers and healthcare providers that our products are an attractive alternative to competitive products for the treatment of diabetes, including traditional insulin pump products and MDI therapies, as well as alternative diabetes monitoring, treatment or prevention methodologies. Market acceptance and adoption of our products depends on educating people with diabetes, as well as their caregivers and healthcare providers, about the distinct features, ease-of-use, beneficial treatment outcomes, and other perceived benefits of our products as compared to competitive products. If we are not successful in convincing existing and potential customers of the benefits of our products, or if we are not able to achieve the support of caregivers and healthcare providers for our products, our sales may decline or we may achieve sales below our expectations.

Market acceptance of our products could be negatively impacted by many factors, including:

- the failure of our products to achieve and maintain wide acceptance among people with insulin-dependent diabetes, their caregivers, healthcare providers, third-party payors and key opinion leaders in the diabetes treatment community;
- lack of evidence supporting the safety, ease-of-use or other perceived benefits of our products over competitive products or other currently available insulin treatment methodologies;
- perceived risks or uncertainties associated with the use of our products, or components thereof, or of similar products or technologies of our competitors;

- adverse regulatory or legal actions relating to our insulin pump products or similar products or technologies; and
- results of clinical studies relating to our existing products or products under development or similar competitive products.

In addition, the rapid evolution of technology and treatment options within our industry may cause consumers to delay the purchase of our products in anticipation of advancements or breakthroughs, or the perception that advancements or breakthroughs could occur, in our products or the products offered by our competitors. It is also possible that consumers interested in purchasing any of our future products currently under development may delay the purchase of one of our current products. We anticipate that customers may continue to delay their purchasing decisions, or physicians may continue to pause prescriptions of our products, as a result of the COVID-19 global pandemic or unfavorable changes in general economic conditions.

If our insulin pump products do not achieve and maintain widespread market acceptance, we may fail to achieve sales consistent with our projections, in which case our business, financial condition and operating results could be materially and adversely affected.

***Failure to secure or retain adequate coverage or reimbursement for our current products and our potential future products by third-party payors could adversely affect our business, financial condition and operating results.\****

A substantial portion of the purchase price of an insulin pump is typically paid for by third-party payors, including private insurance companies, preferred provider organizations and other managed care providers. Future sales of our current and future products will be limited unless our customers can rely on third-party payors to pay for all or part of the associated purchase cost. Access to adequate coverage and reimbursement for our current and future products by third-party payors is essential to the acceptance of our products by customers.

As guidelines in setting their coverage and reimbursement policies, many third-party payors in the United States use coverage decisions and payment amounts determined by the Centers for Medicare and Medicaid Services (CMS), which administers the U.S. Medicare program. Medicare periodically reviews its reimbursement practices for diabetes-related products, and there is uncertainty as to the future Medicare reimbursement rate for our products. It is also possible that CMS may continue to review and modify the current coverage and reimbursement of diabetes-related products in connection with anticipated changes to the regulatory approval process for insulin pumps and related products, software applications and services. In addition, third-party payors that do not follow the CMS guidelines may adopt different coverage and reimbursement policies for our current and future products. Further, it is possible that some third-party payors will not offer any coverage for our current or future products. For instance, it is possible that third-party payors may adopt policies in the future that designate one or more of our competitors as their preferred, in-network durable medical equipment provider of insulin pumps and that such policies would discourage or prohibit the payors' members from purchasing our products, which would adversely impact our ability to sell our products.

We currently have contracts establishing reimbursement for our insulin pump products with a number of national and regional third-party payors in the United States. While we may enter into additional contracts both in the United States and the more than 20 countries in which we operate outside the United States with third-party payors and add coverage for future products under our current agreements, we cannot guarantee that we will succeed in doing so or that the reimbursement contracts that we are able to negotiate will enable us to sell our products on a profitable basis. In particular, we have limited experience securing reimbursement in international markets other than Canada, as that process is managed by local distributors. Government involvement in funding healthcare may limit access to or reimbursement for the Company's products. In addition, existing contracts with third-party payors generally include numerous quality and compliance related requirements, including audit rights, and can be modified or terminated by the third-party payor without cause and with little or no notice to us. Our compliance with the administrative procedures or requirements may result in increased costs for us and delays in processing approvals by those third-party payors for customers to obtain coverage for our products, and any payor audits of our compliance obligations may result in requests for refunds or other costs. Failure to secure or retain adequate coverage or reimbursement for our current and future products by third-party payors, or delays in processing approvals by those payors, could result in the loss of sales, which could have a material adverse effect on our business, financial condition and operating results.

Further, the healthcare industry in the United States is increasingly focused on cost containment as government and private insurers seek to control healthcare costs by imposing lower payment rates and negotiating reduced contract rates with third-party payors. If third-party payors deny coverage or reduce their current levels of payment, or if our production costs increase faster than increases in reimbursement levels, we may be unable to sell our products on a profitable basis.

***We may face unexpected challenges in marketing and selling our products, and training new customers on the use of our products, which could harm our ability to achieve our sales forecasts.***

We have limited experience marketing and selling our newer products as well as training new customers on their use, particularly in international markets. In addition, the vast majority of our existing customers are individuals with type 1 diabetes, and we have limited experience marketing and selling our products to customers with type 2 diabetes.

In addition, due to the current COVID-19 global pandemic, starting in the first quarter of 2020 we temporarily discontinued in-person activities for our field-based sales and clinical employees and are utilizing technology to remotely engage healthcare providers and customers. While we have authorized limited in-person activities to resume, many restrictions persist that have been imposed by state and local governmental authorities or expert agencies, as well as by the health systems and professional organizations with which we interact. The scope and duration of these restrictions on our field-based employees remains highly uncertain, and it is difficult to predict the extent of any adverse impacts on the demand for our products resulting from these restrictions.

Our financial condition and operating results are and will continue to be highly dependent on our ability to adequately promote, market and sell our insulin pump and related products, and the ability of our diabetes educators to train new customers on the use of our products. If our sales and marketing representatives or diabetes educators continue to be restricted in their ability to interact with healthcare providers and customers, our sales could decrease or may not increase at levels that are in line with our forecasts.

***If we are unable to maintain our existing sales, marketing, clinical and customer service infrastructure, we may fail to increase our sales to meet our forecasts.***

A key element of our business strategy involves our sales, marketing, clinical and customer service personnel driving adoption of our products. We have significantly increased the number of sales, marketing, clinical and customer service personnel employed by us since we commenced commercial sales. However, we have faced considerable challenges in growing and managing these resources, including with respect to recruiting, training and assimilation of sales territories and new clinical training staff. We expect to continue to face significant challenges as we seek to further increase the number of our sales, clinical and customer service personnel in order to optimize the coverage of our existing sales territories, as well as expand the number and scope of our existing sales territories. These challenges may be even greater in connection with our commercial expansion outside of the United States, where we have limited experience. Unexpected turnover among our sales, marketing, clinical and customer service personnel, or unanticipated challenges in recruiting additional personnel, would have a negative impact on our ability to achieve our sales projections. Further, if a sales, marketing or clinical representative was to depart and be retained by one of our competitors, we may fail to prevent him or her from helping competitors solicit business from our existing customers, which could adversely affect our sales. Similarly, if we are not able to recruit and retain a network of diabetes educators and customer service personnel, we may not be able to successfully train and service new customers, which could delay new sales and harm our reputation. These risks may be greater now than in the past due to current general labor shortages in the United States, and in particular in our office locations in San Diego, California and Boise, Idaho.

We expect the oversight of our sales, marketing, clinical and customer service personnel will continue to place significant burdens on our management team, which may be compounded as we manage remote employees during the COVID-19 global pandemic and as we work towards returning personnel to our facilities. If we are unable to retain our personnel in line with our strategic plans, we may not be able to effectively commercialize our existing products or products under development, or enhance the strength of our brand, either of which could result in the failure of our sales to increase in line with our projections or cause sales to decline.

***Our sales and marketing efforts are dependent on independent distributors who are free to market products that compete with our products. If we are unable to maintain or expand our network of independent distributors, our sales may be negatively affected.\****

We believe a majority of our sales will continue to be to independent distributors for the foreseeable future, and it is possible that the percentage of our sales to independent distributors could increase, particularly in light of our reliance on independent distributors outside of the United States. For example, our dependence upon independent distributors in the United States could increase if third-party payors decide to contract with independent distributors directly in lieu of contracting with us to supply our products to their members directly. Our dependence upon independent distributors could also increase if customers prefer to purchase all of their diabetes supplies through a single source, instead of purchasing pump-related products through us and other diabetes supplies through other suppliers. None of our independent distributors in the United States have been required to sell our products exclusively and each of them may freely sell the products of our competitors. If we are unable to maintain or expand our network of independent distributors, our sales may be negatively affected.

For the year ended December 31, 2021, our two largest independent distributors in the United States collectively comprised approximately 21% of our worldwide sales, and our three largest independent international distributors collectively comprised approximately 55% of our international sales. If any of our key independent distributors were to cease to distribute our products or reduce their promotion of our products as compared to the products of our competitors, our sales could be adversely affected. In that case, we may need to seek alternative independent distributors or increase our reliance on our other independent distributors or our direct sales representatives, which may not prevent our sales from being adversely affected. Additionally, to the extent we enter into additional arrangements with independent distributors to perform sales, marketing or distribution services, the terms of the arrangements could result in our product margins being lower than if we directly marketed and sold our products.

***If the third parties on which we increasingly rely to assist us with our current and anticipated pre-clinical development or clinical trials do not perform as expected, we may not be able to obtain regulatory clearance or approval or commercialize our products.***

As our clinical infrastructure expands, we expect to increasingly rely on third parties, such as contract research organizations, medical institutions, clinical investigators and contract laboratories to conduct some of our current and anticipated pre-clinical investigations and clinical trials. If we are not able to reach mutually acceptable agreements with these third parties on a timely basis, these third parties do not successfully carry out their commitments or regulatory obligations or meet expected deadlines, or the quality or accuracy of the data they obtain is compromised due to the failure to adhere to agreed-upon clinical protocols or regulatory requirements or for other reasons, our pre-clinical development activities or clinical trials may be extended, delayed, suspended or terminated, and we may not be able to obtain regulatory clearance or approval for, or successfully commercialize, our products on a timely basis, if at all, and our business, operating results and prospects may be adversely affected.

***We are increasingly dependent on clinical investigators and clinical sites to enroll participants in our current and anticipated clinical trials and human factors studies, and the failure to successfully complete those trials and studies could prevent us from obtaining regulatory approvals for or commercializing our products.***

As part of our product development efforts, we expect to increasingly rely on clinical investigators and clinical sites to enroll participants in our clinical trials or users in our human factors testing and other third parties to manage such trials and testing and to perform related data collection and analysis. However, we may not be able to control the amount and timing of resources that clinical sites may devote to our clinical trials or other studies. If these clinical investigators and clinical sites fail to enroll a sufficient number of patients, fail to ensure compliance by patients with clinical protocols, or fail to comply with regulatory requirements, we may be unable to successfully complete our clinical trials or other studies, which could prevent us from obtaining regulatory approvals for our products and commercializing our products, which would have an adverse impact on our business.

***If important assumptions about the potential market for our products are inaccurate, or if we have failed to understand what people with insulin-dependent diabetes are seeking in an insulin pump, our business and operating results may be adversely affected.***

Our business strategy was developed based on a number of important assumptions about the diabetes industry in general, and the insulin-dependent diabetes market in particular, any one or more of which may prove to be inaccurate or may change over time. For example, we believe that the benefits of insulin pump therapy as compared to other common insulin treatment alternatives will continue to drive growth in the market for insulin pump therapy. In addition, we believe the incidence of diabetes in the United States and worldwide is increasing. Further, our view is that diabetes management can vary greatly from person to person, creating multiple market segments based on clinical needs and personal preferences. However, each of these assumptions may prove to be inaccurate and limited sources exist to compare treatment alternatives and obtain reliable market data. The actual incidence of diabetes, and the actual demand for our products or competitive products, could differ materially from our projections if our assumptions are incorrect. In addition, our strategy of focusing exclusively on the insulin-dependent diabetes market may limit our ability to increase sales or achieve profitability.

Another key element of our business strategy is utilizing market research to understand what people with diabetes are seeking to improve in their diabetes therapy management. This strategy underlies our entire product design, marketing and customer support approach and is the basis on which we developed our current products and are pursuing the development of new products. However, our market research is based on interviews, focus groups and online surveys involving people with insulin-dependent diabetes, their caregivers and healthcare providers, which represent only a small percentage of the overall insulin-dependent diabetes market. As a result, the responses we receive may not be reflective of the broader market and may not provide us accurate insight into the desires of people with insulin-dependent diabetes. In addition, understanding the meaning and significance of such market research responses necessarily requires that analysis be conducted and conclusions be drawn. We may not be able to perform an analysis that yields meaningful results, or the conclusions we draw from the analysis could be misleading or incorrect. Moreover, even if our market research has allowed us to better understand the features and functionality consumers are seeking in an insulin pump to improve management of their diabetes therapy, there can be no assurance that consumers will actually purchase our products or that our competitors will not develop products with similar features.

***We expect to face complexities frequently encountered by companies in competitive and rapidly evolving markets, which may make it difficult to evaluate our business and forecast our future sales and operating results.***

We operate in a competitive and rapidly evolving market. Important industry changes, such as the FDA approval and launch of new products by our competitors, as well as changes specific to our business, such as the timing of our launch of new products currently in development, increasing reliance on digital health products and connected devices, and our potential expansion of commercial sales in international markets, combine to make it more difficult for us to predict our future sales and operating results, as well as our expected timeframe to achieve profitability. The significant uncertainty resulting from the COVID-19 global pandemic has made, and may continue to make, it more difficult for us to accurately forecast our financial results and achieve sustained profitability. In assessing our business prospects, you should consider these factors as well as the various risks and difficulties frequently encountered by companies in competitive and rapidly evolving markets, particularly those companies that manufacture and sell medical devices.

These risks include our ability to:

- implement and execute our business strategy;
- manage and improve the productivity of our sales, marketing, clinical and customer service infrastructure to grow sales of our existing and proposed products, and enhance our ability to provide service and support to our customers;
- achieve and maintain market acceptance of our products and increase awareness of our brand among people with insulin-dependent diabetes, their caregivers and healthcare providers;
- comply with a broad range of regulatory requirements within a highly regulated industry;
- enhance our manufacturing capabilities, increase production of products efficiently while maintaining quality standards, and adapt our manufacturing facilities to the production of new products;

- respond effectively to competitive pressures and developments;
- enhance our existing products and develop proposed products;
- manage cybersecurity and other technological risks associated with our expanding portfolio of digital health products, and align these products to a dynamic threat landscape.
- obtain and maintain regulatory clearance or approval to enhance our existing products and commercialize proposed products;
- perform clinical trials and other studies with respect to our existing products and proposed products; and
- attract, retain and motivate qualified personnel in various areas of our business.

As a result of these or other risks, we may not be able to execute key components of our business strategy, and our business, financial condition and operating results may suffer.

***Our ability to achieve profitability will depend, in part, on our ability to reduce the per-unit cost of our products while also increasing production volume.***

We believe our ability to reduce the per-unit cost of our insulin pumps and related products will have a significant impact on our ability to achieve profitability. Our cost of sales includes raw materials and component parts, labor costs, product training expenses, freight, reserves for expected warranty costs, royalties, scrap and charges for excess and obsolete inventories. It also includes manufacturing overhead costs, including expenses relating to quality assurance, manufacturing engineering, material procurement and inventory control, facilities, equipment, information technology and operations supervision and management. Our warranty reserve requires a significant amount of judgment and is primarily estimated based on historical experience. Recently released versions of our pump may not incur warranty costs in a manner similar to previously released pumps and the launch of our mobile app also may result in unanticipated changes in historical trends.

In response to the COVID-19 global pandemic, we have taken steps to prioritize the health and safety of our employees and customers, while working to maintain a continuous supply of products, training and customer support. For example, we have implemented preventative safety measures for our employees involved in production and fulfillment operations as well as for any field-based employees. For employees in other functions, we have adopted measures designed to help employees remain effective in a work-from-home environment and we are implementing safety measures and protocols as employees transition back into our facilities. We also temporarily increased our staffing in certain operations in order to mitigate potential risks associated with increases in unplanned employee absences or illness. In addition, due to shortages of specific components, we have had to qualify alternative components or source components from alternative distributors. Each of these measures has resulted in unanticipated expenses that will negatively impact our gross margin and may adversely impact our ability to achieve profitability. We may also incur additional incremental expenses to help us support our ongoing operations during a period of unpredictable variability in the demand for our products, including throughout the duration of the COVID-19 pandemic.

If we are unable to increase our production volumes while sustaining or reducing our overall cost of sales, including through arrangements such as volume purchase discounts, negotiation of pricing and cost reductions with our suppliers, more efficient training programs for customers, improved warranty performance or fluctuations in warranty estimates, it will be difficult to reduce our per-unit costs and our ability to achieve profitability will be constrained.

In addition, the per-unit cost of our products is significantly impacted by our overall production volumes, and any factors that prevent our products from achieving market acceptance, cause our production volumes to decline, alter our product mix, result in our sales growing at a slower rate than we expect, or result in the closure of our manufacturing facilities, would significantly impact our expected per-unit costs, which would adversely impact our gross margins. Further, we may not achieve anticipated improvements in manufacturing efficiency as we undertake actions to expand our manufacturing capacity. We are also subject to other general market and economic conditions that may increase our expenses, including unpredictable variability in commodity prices, wage increases and inflation. If we are unable to effectively manage our overall costs while increasing our production volumes and lowering our per-unit costs, we may not be able to achieve or sustain profitability, which would have an adverse impact on our business, financial condition and operating results.



***Manufacturing risks may adversely affect our ability to manufacture products, which could negatively impact our sales and operating margins.***

Our business strategy depends on our ability to manufacture our current and proposed products in sufficient quantities and on a timely basis to meet consumer demand, while adhering to product quality standards, complying with regulatory requirements and managing manufacturing costs. We are subject to numerous risks related to our manufacturing capabilities, including:

- quality or reliability defects in product components that we source from third-party suppliers;
- our inability to secure product components in a timely manner due to shipping delays at ports of entry or exit, the impact of the COVID-19 global pandemic, or other issues, in sufficient quantities and on commercially reasonable terms;
- difficulty identifying and qualifying alternative suppliers for components in a timely manner;
- implementing and maintaining acceptable quality systems while experiencing rapid growth;
- our failure to increase production of products to meet demand;
- our inability to modify production lines and expand manufacturing facilities to enable us to efficiently produce future products or implement changes in current products in response to consumer demand or regulatory requirements;
- our inability to manufacture multiple products simultaneously while utilizing common manufacturing equipment;
- government-mandated or voluntary closures of, or operational limitations impacting, our manufacturing facilities; and
- potential damage to or destruction of our manufacturing equipment or manufacturing facilities.

As demand for our products increases, and as the number of our commercial products expands, we will have to invest additional resources to purchase components, hire and train employees, and enhance our manufacturing processes and quality systems. We may also increase our utilization of third parties to perform contracted manufacturing services for us, and we may need to acquire additional custom designed equipment to support the expansion of our manufacturing capacity. In addition, although we expect some of our products under development to share product features and components with our current products, manufacturing of these products may require modification of our production lines, hiring of specialized employees, identification of new suppliers for specific components, qualifying and implementing additional equipment and procedures, obtaining new regulatory approvals, or developing new manufacturing technologies. Ultimately, it may not be possible for us to manufacture these products at a cost or in quantities sufficient to make these products commercially viable.

In response to the COVID-19 global pandemic, in early 2020 we initiated discussions with our key suppliers regarding their abilities to fulfill existing orders and we have continued to regularly assess their capacity. At various times, our primary infusion set manufacturer experienced certain inventory constraints which resulted in us requesting some customers to accept substitutions of similar products to prevent delays in order fulfillment. Additionally, at various times our cartridge inventory was below our targeted stocking levels and our inventory of certain pump and cartridge components are currently below our targeted stocking levels. We continue to monitor factors that could negatively impact our supply chain, such as shortages of semiconductors and copper that are needed to manufacture our insulin pumps and accessories and custom components for our insulin pumps and cartridges where we rely on a limited number of qualified suppliers. If we continue to experience these or similar manufacturing challenges, or if these challenges worsen in the future, it could have a negative impact on product sales and harm our reputation.

If we and our suppliers fail to increase our production capacity to meet consumer demand while also maintaining product quality standards, obtaining and maintaining regulatory approvals, and efficiently managing costs, our sales and operating margins could be negatively impacted, which would have an adverse impact on our financial condition and operating results.

***We depend on a limited number of third-party suppliers for certain components and products, and the loss of any of these suppliers, their inability to provide us with an adequate supply of components or products, or our ability to adequately forecast customer demand, could harm our business.***

We currently rely, and expect to continue to rely, on third-party suppliers to supply components of our current products and our potential future products, including our disposable insulin cartridges. For example, we rely on plastic injection molding companies to provide plastic molded components, electronic manufacturing suppliers to provide electronic assemblies, and machining companies to provide machined mechanical components. We also purchase all of our infusion sets and pump accessories from third-party suppliers. For our business strategy to be successful, our suppliers must be able to provide us with components and products in sufficient quantities, in compliance with regulatory requirements and quality control standards, in accordance with agreed-upon specifications, at acceptable costs and on a timely basis.

Although we have long-term supply agreements with many of our suppliers, these agreements do not include long-term capacity commitments. Under most of our supply agreements, we make purchases on a purchase order basis and have no obligation to buy any given quantity of components or products until we place written orders, and our suppliers have no obligation to manufacture for us or sell to us any given quantity of components or products until they accept an order. In addition, our suppliers may encounter problems that limit their ability to manufacture components or products for us, including financial difficulties, damage to their manufacturing equipment or facilities, inability to obtain raw materials or other components, or problems with their own suppliers. For instance, we are currently subject to allocation limits for certain semiconductor components. As a result, our ability to purchase adequate quantities of our components or products may be limited. If we fail to obtain sufficient quantities of high-quality components to meet demand on a timely basis, we could lose customer orders, our reputation may be harmed, and our business could suffer.

We generally use a small number of suppliers for our components and products, some of which are located outside the United States, including in China, Mexico and Costa Rica. Depending on a limited number of suppliers exposes us to risks, including limited control over costs, including tariffs, availability, quality and delivery schedules. Moreover, in some cases we do not have long-standing relationships with our manufacturers and may not be able to convince suppliers to continue to make components available to us unless there is demand for such components from their other customers. As a result, there is a risk that certain components could be discontinued and no longer available to us at acceptable prices, or at all. We have in the past been, and we may in the future be, required to make significant "last time" purchases of component inventories that are being discontinued by the manufacturer to ensure supply continuity. If any one or more of our suppliers cease to provide us with sufficient quantities of components in a timely manner or on terms acceptable to us, we would have to seek alternative sources of supply. We are actively pursuing alternative suppliers of several existing components and qualifying new alternatives to existing select components, but there is no assurance that we will be able to identify alternative sources that meet our requirements and at comparable prices, or at all. Because of factors such as the proprietary nature of our products, our quality control standards and applicable regulatory requirements, we cannot quickly engage additional or replacement suppliers for some of our critical components. These risks associated with the procurement of critical components from a limited number of suppliers may be increased as a result of the COVID-19 global pandemic. Failure of any of our suppliers to deliver products at the level our business requires could harm our reputation and limit our ability to meet our sales projections, which could have a material adverse effect on our business, financial condition and operating results.

We place orders with our suppliers using our forecasts of customer demand, which are based on a number of assumptions and estimates, in advance of purchase commitments from our customers. As a result, we incur inventory and manufacturing costs in advance of anticipated sales, which sales ultimately may not materialize or may be lower than expected. If we overestimate customer demand, we may experience higher inventory carrying costs and increased excess or obsolete inventory, which would negatively impact our results of operations. By the same token, if we underestimate future demand we may be unable to meet future production requirements or our inventory of critical materials may be below our targeted stocking levels. We expect it will be particularly difficult to accurately forecast demand during the global pandemic and even for some time while travel and social-distancing restrictions are lifted.

We may also have difficulty obtaining components from other suppliers that are acceptable to the FDA or other regulatory agencies, and the failure of our suppliers to comply with regulatory requirements could expose us to regulatory action including warning letters, product recalls, termination of distribution, product seizures or civil penalties. Such a failure by our suppliers could also require us to cease using the components, seek alternative components or technologies, and modify our products to incorporate alternative components or technologies, which could necessitate additional regulatory approvals. Any disruption of this nature, or any increased expenses associated with any such disruption, could negatively impact our ability to manufacture our products on a timely basis, in sufficient quantities, or at all, which could harm our commercialization efforts and have a material adverse impact on our operating results.

***Any disruption at one of our facilities could adversely affect our business and operating results.\****

Although we operate in multiple locations, most of our current operations are still conducted in San Diego, California, including our final pump assembly, some manufacturing processes, and the majority of our research and development, management and administrative functions. In addition, the majority of our inventories of component supplies and finished goods is stored at two facilities in San Diego. Over the past two years we substantially expanded various quality and customer and technical support activities in Boise, Idaho. We take precautions to safeguard our facilities and data infrastructure, including by acquiring insurance, employing back-up generators, adopting health and safety protocols, implementing cybersecurity protections, and utilizing off-site storage of computer data. However, vandalism, terrorism, unplanned power outages, cyberattacks or a natural disaster, such as an earthquake, fire or flood, or other catastrophic event, could damage or destroy our manufacturing equipment or our inventories of component supplies and finished goods, cause substantial delays in our operations, result in the loss of key information, result in reduced sales, and cause us to incur additional expenses. Our insurance coverage may not be sufficient to provide coverage with respect to the damages incurred in any particular case, and our insurance carrier may deny coverage with respect to all or a portion of our claims. Regardless of the level of insurance coverage or other precautions taken, damage to our facilities may have a material adverse effect on our business, financial condition and operating results.

***We may not experience the anticipated operating efficiencies from the transition of our manufacturing and warehousing operations.***

At the beginning of 2018 we completed the transition of our manufacturing operations to a facility located on Barnes Canyon Road in San Diego, and during the fourth quarter of 2019 we commenced operations at a logistics warehouse in San Diego. We expect that both of these actions will allow for future capacity for product manufacturing and warehousing expansion. However, we may not experience the anticipated operating efficiencies at either facility as we continue to scale our business operations and add manufacturing requirements for products currently under development. In addition, beginning in 2020 we outsourced a portion of our cartridge manufacturing demand to an experienced third-party contract manufacturer and we expect to increase our reliance on this third-party cartridge manufacturer over the next 24 months while reducing our own internal slim cartridge manufacturing capacity in our existing facility. We may consider outsourcing other aspects of our operations in the future. If we fail to achieve the operating efficiencies that we anticipate, our manufacturing and operating costs may be greater than expected, which would have a material adverse impact on our operating results. In addition, we or our third-party contract manufacturers may encounter problems during manufacturing for a variety of reasons, including failure to follow specific protocols and procedures, failure to comply with applicable regulations, equipment malfunction, component part supply constraints and environmental factors, any of which could delay or impede our ability to meet customer demand and have a material adverse impact on our business, financial condition and operating results. Further, because of the custom nature of our cartridge manufacturing process and product components, and the highly regulated nature of our products overall, in the event of any problems with a contract manufacturer, we may not be able to quickly establish additional or alternative arrangements.

We expect that the management and support of our facilities, increasing reliance on third-party contract manufacturers and the increase of our manufacturing volumes will place significant burdens on our management team, particularly in areas relating to operations, quality, regulatory, facilities and information technology. We may not be able to effectively manage our ongoing manufacturing operations and we may not achieve the operating efficiencies that we anticipate, either from our own facilities or from our use of contract manufacturing. Further, additional increases in demand for our products may require that we further expand our business operations, which may require that we obtain additional facilities, make additional investments in capital equipment or increase our utilization of third-party contract manufacturing.

***If we do not enhance our product portfolio to meet the demands of our market, we may fail to effectively compete, which may impede our ability to become profitable.***

In order to increase our sales and market share in the insulin-dependent diabetes market, we must enhance and broaden our product portfolio in response to the evolving demands of people with insulin-dependent diabetes, their caregivers and healthcare providers, as well as competitive pressures and technologies. We may not be successful in developing, obtaining regulatory approval for, or marketing our proposed products when anticipated, or at all. In addition, notwithstanding our market research efforts, our future products may not be accepted by people with insulin-dependent diabetes, their caregivers, healthcare providers or third-party payors. The success of any proposed product offerings will depend on numerous factors, including our ability to:

- identify the product features and functionality that people with insulin-dependent diabetes, their caregivers and healthcare providers are seeking in an insulin pump, and successfully incorporate those features into our products;
- develop and introduce products in sufficient quantities and in a timely manner;
- offer products at a price that is competitive with other products then available;
- work with third-party payors to obtain reimbursement for our products;
- adequately protect our intellectual property and avoid infringing upon the intellectual property rights of third parties;
- demonstrate the safety and efficacy of proposed products; and
- obtain the necessary regulatory approvals for proposed products on a timely basis.

If we fail to generate demand by continuing to develop products that incorporate features and functionality requested by people with insulin-dependent diabetes, their caregivers or healthcare providers, or if we do not obtain regulatory clearance or approval for proposed products in time to meet market demand, we may be unable to compete and may fail to generate sales sufficient to achieve or maintain profitability. We have in the past experienced, and may in the future experience, delays in various phases of product development and commercialization, including during research and development, manufacturing, limited release testing, marketing and customer education efforts. We have also recently experienced delays in the regulatory review and approval process, including due to the impacts of the current global pandemic. Any delays in our anticipated regulatory submissions or approvals, or subsequent product launches, may significantly impede our ability to successfully compete in our markets. In particular, such delays could cause customers to delay or forego purchases of our products, or to purchase our competitors' products. Even if we are able to successfully develop proposed products when anticipated, these products may not produce sales in excess of the costs of development, and they may be quickly rendered obsolete by changing consumer preferences or the introduction by our competitors of products embodying new technologies or features, or alternative methods for the treatment of diabetes.

***Any concerns regarding the safety and efficacy of our products could limit sales and cause unforeseen negative effects to our business prospects and financial results.***

Studies to evaluate the safety or effectiveness of our latest products in a controlled setting are only available over the past few years. As a result, people with insulin-dependent diabetes and healthcare providers may not be familiar with our studies and may be slower to adopt or recommend our products. Further, even with data from controlled studies third-party payors may not be willing to provide coverage or reimbursement for our products. We remain subject to regulatory and product liability risks, and these and other factors could slow the adoption of our products and result in our sales being lower than anticipated. In addition, future studies or clinical experience may indicate that treatment with our products is not superior to treatment with competitive products. Such results could slow the adoption of our products and significantly reduce our sales, which could prevent us from achieving our forecasted sales targets or achieving or sustaining profitability.

If the results of clinical studies or other experience, such as our monitoring or investigation of customer complaints, indicate that our products may cause or create an unacceptable risk of unexpected or serious complications or other unforeseen negative effects, we could be required to inform our customers of these risks or complications or, in more serious circumstances, we could be subject to mandatory product recalls, suspension or withdrawal of FDA clearance or approval, which could result in significant legal liability, harm to our reputation, and a decline in our product sales.

Any alleged illness or injury associated with any of our products or product recalls may negatively impact our financial results and business prospects depending on a number of factors, including the scope and seriousness of the problem, degree of publicity, reaction of our customers and healthcare professionals, competitive response, and consumer perceptions generally. Even if such an allegation or product liability claim lacks merit, cannot be substantiated, is unsuccessful or is not fully pursued, the negative publicity surrounding any assertion that our products have caused or carry a risk of causing illness, injury or death could adversely affect our reputation with customers, healthcare professionals, third-party payors, and existing and potential collaborators, and could adversely affect our operating results and cause a decline in our stock price. Furthermore, general concerns regarding the perceived safety or reliability of any of our products, or any component thereof, may have a similar adverse effect on us.

***We may enter into collaborations, licensing arrangements, joint ventures, strategic alliances or partnerships with third parties that may not result in the development of commercially viable products or the generation of significant future revenues.***

In the ordinary course of our business, we may enter into collaborations, licensing arrangements, joint ventures, strategic alliances or partnerships to develop proposed products or technologies, pursue new markets, or protect our intellectual property assets. We may also elect to amend or modify similar agreements that we already have in place. Proposing, negotiating and implementing collaborations, licensing arrangements, joint ventures, strategic alliances or partnerships may be a lengthy and complex process, and may subject us to business risks. For example, other companies, including those with substantially greater financial, marketing, sales, technology or other business resources, may compete with us for these opportunities, or may be the counterparty in any such arrangements. We may not be able to identify or complete any such collaboration in a timely manner, on a cost-effective basis, on acceptable terms or at all. In addition, we may not realize the anticipated benefits of any such collaborations that we do identify and complete. In particular, these collaborations may not result in the development of products or technologies that achieve commercial success or result in positive financial results, or may otherwise fail to have the intended impact on our business.

Additionally, we may not be in a position to exercise sole decision-making authority regarding a collaboration, licensing or other similar arrangement, which could create the potential risk of creating impasses on decisions. Further, our collaborators and business partners may have economic or business interests or goals that are, or that may become, inconsistent with our business interests or goals. It is possible that conflicts may arise with our collaborators and other business partners, such as conflicts concerning the achievement of performance milestones, or the interpretation of significant terms under any agreement, such as those related to financial obligations, termination rights or the ownership or control or other licenses of intellectual property rights. If any conflicts arise with our current or future collaborators, they may act in their self-interest, which may be adverse to our best interest, and they may breach their obligations to us. In addition, we have limited control over the amount and timing of resources that our current collaborators, such as Dexcom and Abbott, or any future collaborators devote to our arrangement with them or our future products. Disputes between us and our current, future or potential collaborators may result in litigation or arbitration which would increase our expenses and divert the attention of our management. Further, these transactions and arrangements are contractual in nature and may be terminated or dissolved under the terms of the applicable agreements and, in such event, we may not continue to have rights to the products relating to such transaction or arrangement or may need to purchase such rights at a premium.

For example, we have entered into multiple development and commercialization agreements with Dexcom, which provide us non-exclusive licenses to integrate various currently available and future generations of Dexcom's CGM technology with our insulin pump products. Under certain circumstances, these agreements may be terminated by either party without cause or on short notice. Our current agreements with Dexcom do not grant us rights to integrate future generations of Dexcom CGM technology, other than G7 CGM devices, with any of our current or future products. Termination of any of our agreements with Dexcom would require us to redesign certain current products and products under development, and attempt to integrate an alternative CGM system into our insulin pump systems, which would require significant development and regulatory activities that could result in an interruption or substantial delay in the availability of the product to our customers. The termination of our existing commercial agreements with Dexcom would disrupt our ability to commercialize our existing products and our development of future products, which could have a material adverse impact on our financial condition and results of operations, negatively impact our ability to compete and cause our stock price to decline.

*A security breach or other significant disruption to our information technology systems, or failures of our pumps' software to perform as we anticipate, could materially disrupt our operations or result in the loss, theft, misuse, unauthorized disclosure, or unauthorized access to sensitive information relating to our customers, suppliers, employees or other individuals, which could damage our relationships, expose us to litigation or regulatory proceedings, or harm our reputation, any of which could have an adverse and material effect on our business, financial condition and operating results.\**

The efficient operation of our business depends on our information technology and communication systems, as well as those of our suppliers, contract manufacturers, distributors and other third-party business partners. We rely on such systems to effectively store, process and transit proprietary sales and marketing data, accounting and financial functions, manufacturing and quality records, inventory management, product development tasks, research and development data, customer service and technical support functions. Our information technology systems, including those that support our t:connect uploader software and cloud-based web application, our current and future mobile applications, our Tandem Source data management platform, as well as those involved in the operation of our Tandem Device Updater, are vulnerable to damage or interruption from a number of causes, including earthquakes, fires, floods and other natural disasters, terrorist attacks, attacks by computer viruses or hackers, malware, ransomware or other destructive software, cyber-attacks, power losses, and computer system or data network failures. Should any of those risks occur, it could adversely impact the availability, confidentiality and integrity of information assets contained in those systems.

Our business also involves the storage and transmission of a substantial amount of confidential, personal, or other sensitive information, including health information and other personal information relating to our customers, the personal information of our employees and other individuals, and our proprietary, financial, operational or strategic information. Should any of the foregoing risks occur, it could also result in the loss, theft, misuse, unauthorized disclosure, or unauthorized access of such sensitive information, which could lead to significant reputational or competitive harm, litigation involving us or our business partners, regulatory proceedings, or substantial liabilities, fines, penalties or expenses. As a result, we strive to maintain and regularly update reasonable security measures, and to respond quickly and effectively if and when data security incidents do occur. Like many businesses, we are subject to numerous data privacy and security risks, including threats arising from computer viruses or hackers, cyber-attacks and ransomware attacks, as well as the risk that one or more of our employees may fail to comply, whether knowingly or accidentally, with established security measures, or with internal policies relating to the use, storage or transmission of confidential or sensitive information. We are unable to predict the direct or indirect impact of any such incidents to our business. Further, many of our third-party service providers are subject to similar risks. Whether or not our security measures and those of our third-party service providers are ultimately successful, our expenditures on those measures could have an adverse impact on our financial condition and results of operations, and divert management's attention from pursuing our strategic objectives.

In addition to the risks regarding information technology systems and processing of sensitive information, our insulin pumps and other products rely on software, some of which is developed by third-party service providers, that could contain unanticipated vulnerabilities, which could make our products subject to computer viruses, cyber-attacks, or failures. These risks significantly increased when we commenced use of our Tandem Device Updater, which enables customers to remotely update software on their insulin pumps and may be higher following the launch of our new mobile application in the second half of 2020. These risks may increase further when we enable users to control insulin boluses through the mobile app. We may also face new risks relating to our information technology systems as we continue to commercialize our products outside of the United States and are subject to additional regulations relating to the use and protection of personal information and as we launch new mobile applications or new features to our existing applications. As this is a rapidly evolving area, compliance with any future requirements, regulations, and evolving threat models may require the investment of additional resources in the form of capital, personnel or technology.

The failure of our or our service providers' information technology systems or our pumps' software or other mobile applications to perform as we anticipate, or our failure to effectively identify, investigate and mitigate potential threats through ongoing maintenance and enhancement of software applications, information technology systems and privacy policies and controls, could disrupt our entire operation or adversely affect our software products. For example, we market our Tandem Device Updater as having the unique capability to deploy software updates to our pumps, which may allow customers remote access to new and enhanced features. The failure of our Tandem Device Updater to provide software updates as we anticipate, including as a result of our inability to secure and maintain necessary regulatory approvals, the inability of our pumps to properly receive software updates, errors or viruses embedded within the software being transmitted, or the failure of our customers to properly utilize the system to complete the update, could result in decreased sales, increased warranty costs, and harm to our reputation, any of which could have a material adverse effect on our business, financial condition and operating results.

***We experienced a breach of our information technology systems in January 2020.***

On January 17, 2020, we learned that an unauthorized person gained access to an employee's email account through a cyber-attack commonly known as "phishing." We investigated the incident, and learned that a limited number of our employee email accounts may have been accessed by an unauthorized user in a similar manner between January 17, 2020 and January 20, 2020. Our investigation indicated that customer information, as well as proprietary Company information, may have been contained in one or more of the employee email accounts affected by the incident. Our investigation has not determined whether an unauthorized person viewed any such information. As a result of this incident, we are presently defending a class action lawsuit entitled *Joseph Deluna et al. v. Tandem Diabetes Care, Inc.*, which is pending in the Superior Court of the State of California in the County of San Bernardino.

The risks posed by this lawsuit and any future related matters include civil monetary damages, attorney fees and costs, other legal penalties, reputational damage, loss of goodwill, and competitive harm. It is possible that our legal expenses and defense costs, alone or together with any monetary damages, may exceed the limits of any applicable insurance coverage that we carry.

***If we are found to have violated laws concerning the privacy and security of patient health information or other personal information, we could be subject to civil or criminal penalties, which could increase our liabilities and harm our reputation or our business.\****

There are a number of laws in the United States and outside the United States protecting the privacy and security of personal information. These laws include the U.S. Health Insurance Portability and Accountability Act of 1996 (HIPAA) and related regulations, U.S. state laws (such as the California Consumer Privacy Act (CCPA)), Canada's Personal Information and Electronic Documents Act (PIPEDA) or the applicable provincial alternatives, the EU's General Data Protection Regulation (GDPR), EU member states directives, or similar applicable laws. These laws place limits on how we may collect, use, share and store medical information and other personal information, and they impose obligations to protect that information against unauthorized access, use, loss, and disclosure. The putative class action lawsuit described above alleges violations of some of these laws.

If we, or any of our service providers who have access to the personal data for which we are responsible, are found to be in violation of the privacy or security requirements of HIPAA, PIPEDA, GDPR, or applicable foreign, U.S. state and Canadian provincial laws, we could be subject to civil or criminal penalties, which could increase our liabilities, harm our reputation and have a material adverse effect on our business, financial condition and operating results. In addition, entities operating in the healthcare industry have increasingly become targets for hackers. Although we utilize a variety of measures to secure the data that we control, even compliant entities can experience security breaches or have inadvertent failures despite employing reasonable practices and safeguards.

We may also face new risks relating to data privacy and security as the United States, individual U.S. states or Canadian provinces, E.U. member states, and other international jurisdictions adopt or implement new data privacy and security laws and regulations as we continue to commercialize our products worldwide. For example, amendments to privacy and security laws (such as the CCPA) may impose additional requirements on us and increase our regulatory and litigation risk. As we continue to expand, our business will need to adapt to meet these and other similar legal requirements.

***We depend on the knowledge and skills of our senior management and other key employees, and if we are unable to retain and motivate them or recruit additional qualified personnel, our business may suffer.\****

We have benefited substantially from the leadership and performance of our senior management, as well as certain key employees. For example, key members of our management have experience successfully scaling an early-stage medical device company to achieve profitability. Our success will depend on our ability to retain our current management and key employees, and to attract and retain qualified personnel in the future. Competition for senior management and key employees in our industry is intense and over the past year we have also experienced general labor shortages in various areas of our business. We cannot guarantee that we will be able to retain our personnel or attract new, qualified personnel. In addition, adoption of new work models and requirements about when or how often employees work on site or remotely may present new challenges. As certain jobs and employers increasingly operate remotely, competition for talent may change in ways that cannot be fully predicted at this time. Moreover, we may need to increase employee wages and benefits in order to attract and retain our personnel, which would increase our expenses. The loss of the services of certain members of our senior management or key employees could prevent or delay the implementation and completion of our strategic objectives, or divert management's attention to seeking qualified replacements, and any general labor shortages could also negatively impact our ability to expand and scale functions that are needed to support the ongoing development of our products and the future growth of our business. Each member of senior management, as well as the vast majority of our employees may terminate employment without notice and without cause or good reason. The members of our senior management are not subject to non-competition agreements. Accordingly, the adverse effect resulting from the loss of certain members of senior management could be compounded by our inability to prevent them from competing with us.

***We depend upon key employees in a competitive market, and if we are unable to provide meaningful equity incentives to retain key personnel, it could adversely affect our ability to execute our business strategy.***

We are highly dependent upon the members of our management team, as well as other key employees. In our industry, it is common to attract and retain executive talent and other employees with compensation packages that include a significant equity component. We have issued, and may continue to issue, additional equity incentives that we believe will enhance our ability to retain our current key employees and attract the necessary additional executive talent. It may be more difficult to continue to incentivize employees during a period of rapid growth in our overall headcount while limiting the utilization of the share reserve under our current stock incentive plans. However, even if we issue significant additional equity incentives, there can be no assurance that we will be able to attract and retain key executive talent. A loss of any of our key personnel, or our inability to hire new personnel, may have a material adverse effect on our ability to execute our business strategy.

***We began commercialization of our products outside of the United States, which may result in a variety of risks associated with international operations that could materially adversely affect our business.***

During 2018, we began commercialization of the t:slim X2 insulin pump in select geographies outside of the United States. We have limited experience commercializing our products outside of the United States and expect that we will be subject to additional risks related to international business markets, including:

- different regulatory requirements for product approvals in foreign countries;
- differing U.S. and foreign medical device import and export rules;
- more restrictive privacy laws relating to personal information of end-users and employees, including GDPR and other EU member state directives;
- reduced protection for our intellectual property rights in foreign countries;
- unexpected changes in tariffs, trade barriers and regulatory requirements;
- different reimbursement systems;
- economic weakness, including inflation, or political instability in particular foreign economies and markets;



- compliance with tax, employment, immigration and labor laws for employees living or traveling abroad or with U.S. regulations that would apply to activities in such foreign jurisdictions, such as the Foreign Corrupt Practices Act;
- foreign taxes, including withholding of payroll taxes;
- foreign currency fluctuations, which could result in increased operating expenses and reduced revenues, and other obligations incident to doing business in another country; and
- business interruptions resulting from geopolitical actions, including war and terrorism, natural disasters, or incidence of disease, including as a result of the COVID-19 global pandemic.

In addition, entry into international markets may require significant financial resources, impose additional demands on our manufacturing, quality, regulatory, customer support and other general and administrative personnel, and could divert management's attention from managing our core business. We have limited experience with regulatory environments and market practices internationally, and we may not be able to penetrate or successfully operate in new markets. If we are unable to expand internationally, manage the complexity of our global operations successfully or if we incur unanticipated expenses, we may not achieve the expected benefits of this expansion and our financial condition and results of operations could be materially and adversely impacted.

***We may seek to grow our business through acquisitions of products or technologies, or investments in businesses, and the failure to successfully manage these acquisitions or investments, or the failure to integrate them with our existing business, could have a material adverse effect on our business, financial condition and operating results.***

From time to time, we may consider opportunities to acquire or invest in other companies, products or technologies that may enhance our product platform or technology, expand the breadth of our markets or customer base, or otherwise advance our business strategies. Potential and completed acquisitions and investments involve numerous risks, including:

- problems assimilating, maintaining or operating the acquired products or technologies;
- issues maintaining uniform standards, procedures, controls and policies;
- unanticipated costs, impairment charges or write-offs associated with acquisitions or investments;
- diversion of management's attention from our existing business;
- risks associated with entering new markets in which we have limited or no experience; and
- increased legal and accounting costs relating to the acquisitions or to comply with regulatory requirements or other compliance matters.

We have experienced and may continue to experience one or more of these risks in connection with our acquisition of Sugarmate, which was completed in 2020. For example, as a result of an update to Dexcom's data systems in October 2021, Sugarmate users in all geographies were unable to receive Dexcom CGM data in the Sugarmate app. Connections for users in the United States were restored in December 2021 and in June 2022 for users in all geographies except Australia and New Zealand, though we continue to work towards restoring service for users in those geographies. These service disruptions, or other problems utilizing the mobile app or other assets acquired from Sugarmate, could adversely affect our ability to realize the expected benefits from the Sugarmate acquisition. Further, it is possible that we could experience a loss of Sugarmate customers or reputational harm arising from this service outage or similar events, which could adversely affect our business, results of operations, and financial condition.

We do not know if we will be able to identify future acquisitions or investments we deem suitable, whether we will be able to successfully complete any such acquisitions or investments on favorable terms or at all, or whether we will be able to successfully integrate any acquired products or technologies into our business. Our potential inability to integrate any acquired products or technologies effectively may adversely affect our business, operating results and financial condition.

## Risks Related to Our Future Financings and Financial Results

*We may need or otherwise determine to raise additional funds in the future and if we are unable to raise additional funds when necessary or desirable, we may not be able to achieve our strategic objectives.\**

As of June 30, 2022, we had \$635.3 million in cash, cash equivalents and short-term investments. Our management expects the continued growth of our business, including the expansion of our customer service infrastructure to support our growing base of customers, our plans to expand commercial sales of our products outside of the United States, the growth of our manufacturing and warehousing operations, increasing the size of our facility footprint due to increases in headcount and additional R&D activities, will continue to increase our expenses. In addition, the amount of our future product sales is difficult to predict and actual sales may not be in line with our forecasts. Accordingly, our future capital requirements will depend on many factors, including:

- the revenue generated by sales of our insulin pump products, and the related insulin cartridges and infusion sets, and any other future products that we may develop and commercialize;
- the gross profits and gross margin we realize from the sales we generate;
- the costs associated with maintaining and expanding an appropriate sales, marketing, clinical and customer service infrastructure;
- the expenses we incur or other capital expenditures we make to maintain or enhance our manufacturing operations and distribution capabilities, including leasing additional property, hiring additional personnel, and purchasing additional equipment;
- the expenses associated with developing and commercializing our proposed products or technologies;
- the cost of obtaining and maintaining regulatory clearance or approval for our products and our manufacturing facilities;
- the cost of ongoing compliance with legal and regulatory requirements
- the expenses we incur in connection with current or future litigation or governmental investigations;
- expenses we may incur or other financial commitments we may make in connection with current and potential new acquisitions, investments, business or commercial collaborations, development agreements or licensing arrangements;
- anticipated or unanticipated capital expenditures;
- unanticipated general and administrative expenses; and
- impacts and disruptions resulting from geopolitical actions, including war and terrorism, natural disasters, or incidence of disease, including as a result of the impacts from the COVID-19 global pandemic.

As a result of these and other factors we may in the future seek additional capital from public or private offerings of our equity or debt securities, or from other sources. If we issue equity or debt securities to raise additional funds, our existing stockholders may experience dilution, we may incur significant financing or debt service costs, and the new equity or debt securities may have rights, preferences and privileges senior to those of our existing stockholders. In addition, if we raise additional funds through collaborations, licensing, joint ventures, strategic alliances, partnership arrangements or other similar arrangements, it may be necessary to relinquish valuable rights to our potential future products or proprietary technologies, or grant licenses on terms that are not favorable to us.

If we are unable to raise additional capital when necessary, we may not be able to maintain our existing sales, marketing, clinical and customer service infrastructure, enhance our current products or develop new products, take advantage of future opportunities, respond to competitive pressures, changes in supplier relationships, or unanticipated changes in customer demand. Any of these events could adversely affect our ability to achieve our strategic objectives, which could have a material adverse effect on our business, financial condition and operating results.

***Our operating results may fluctuate significantly from quarter to quarter.***

There has been and may continue to be meaningful variability in our operating results from quarter to quarter, as well as within each quarter, especially around the time of anticipated new product launches or regulatory approvals by us or our competitors, and as a result of the commercial launch of our products in geographies outside of the United States. Our operating results, and the variability of these operating results, will be affected by numerous factors, including:

- our ability to commercialize and sell our current and future products and our ability to increase sales and gross profit from our products, including insulin pumps and the related insulin cartridges and infusion sets;
- the number and mix of our products sold in each quarter;
- acceptance of our products by people with insulin-dependent diabetes, their caregivers, healthcare providers and third-party payors;
- the pricing of our products and competitive products, including the use of discounts, rebates or other financial incentives by us or our competitors;
- the effect of third-party coverage and reimbursement policies;
- our ability to maintain our existing infrastructure;
- the amount of, and the timing of the payment for, insurance deductibles required to be paid by our customers and potential customers under their existing insurance plans;
- interruption in the manufacturing or distribution of our products;
- our ability to simultaneously manufacture multiple products that meet quality, reliability and regulatory requirements;
- seasonality and other factors affecting the timing of purchases of our products;
- timing of new product offerings, acquisitions, licenses or other significant events by us or our competitors;
- results of clinical research and trials on our existing and future products;
- the ability of our suppliers to timely provide us with an adequate supply of components that meet our requirements for product quality and reliability;
- regulatory clearance or approvals, or adverse regulatory or legal actions, affecting our products or those of our competitors; and
- the timing of revenue and expense recognition associated with our product sales pursuant to applicable accounting standards.

In addition, we expect our operating expenses will continue to increase as we expand our business, which may exacerbate the quarterly fluctuations in our operating results. If our quarterly or annual operating results fall below the expectation of investors or securities analysts, the price of our common stock could decline substantially. Further, any quarterly or annual fluctuations in our operating results may, in turn, cause the price of our common stock to fluctuate substantially, and these price fluctuations could result in further pressure on our stock price. We believe quarterly comparisons of our financial results are not necessarily meaningful and should not be relied upon as an indication of our future performance.

## **Risks Related to Our Intellectual Property and Potential Litigation**

### ***Our ability to comprehensively protect our intellectual property and proprietary technology is uncertain.\****

We rely primarily on patent, trademark and trade secret laws, as well as confidentiality and non-disclosure agreements, to protect our proprietary technologies. As of June 30, 2022, our patent portfolio consisted of approximately 125 issued U.S. patents and 87 pending U.S. patent applications. Of these, our issued U.S. patents expire between approximately 2024 and 2041. Our foreign patent portfolio consisted of approximately 41 issued patents and 17 pending patent applications in other countries throughout the world. Of these, our issued foreign patents expire between approximately 2025 and 2036. In addition, we also have 117 trademark registrations, including 21 U.S. trademark registrations and 96 foreign trademark registrations.

We have applied for patent protection relating to certain existing and proposed products and processes. If we fail to file a patent application timely in any jurisdiction, it could result in us forfeiting certain patent rights in that jurisdiction. Further, we cannot assure you that any of our patent applications will be granted in a timely manner or at all. The rights granted to us under our patents, and the rights we are seeking to have granted in our pending patent applications, may not provide us with any commercial advantage. In addition, those rights could be opposed, contested or circumvented by our competitors, or be declared invalid or unenforceable in judicial or administrative proceedings. The failure of our patents to adequately protect our technology might make it easier for our competitors to offer the same or similar products or technologies. Even if we are successful in receiving patent protection for certain products and processes, our competitors may be able to design around our patents or develop products that provide outcomes which are comparable to ours without infringing on our intellectual property rights. Due to differences between foreign and U.S. patent laws, our patented intellectual property rights may not receive the same degree of protection in foreign countries as they would in the United States. Even if patents are granted outside of the United States, effective enforcement in those countries may not be available.

We rely on our trademarks and trade names to distinguish our products from the products of our competitors, and have registered or applied to register many of these trademarks. We cannot assure you that our current or future trademark applications will be approved in a timely manner or at all. From time to time, third parties oppose our trademark applications, or otherwise challenge our use of trademarks. In the event that our trademarks are successfully challenged, we could be forced to rebrand our products, which could result in loss of brand recognition, and could require us to devote additional resources to marketing new brands. Further, we cannot assure you that competitors will not infringe upon our trademarks, or that we will have adequate resources to enforce our trademarks.

We have entered into confidentiality agreements and intellectual property assignment agreements with our officers, employees, temporary employees and consultants regarding our intellectual property and proprietary technology. We also enter into confidentiality agreements with potential collaborators and other counterparties, and the terms of our collaboration agreements typically contain provisions governing the ownership and control of intellectual property. In the event of unauthorized use or disclosure or other breaches of those agreements, we may not be provided with meaningful protection for our trade secrets or other proprietary information.

If a competitor infringes one of our patents, trademarks or other intellectual property rights, enforcing those patents, trademarks and other intellectual property rights may be difficult, expensive and time consuming. Patent law relating to the scope of claims in the industry in which we operate is subject to rapid change and constant evolution and, consequently, patent protection in our industry can be uncertain. Even if successful, litigation to defend our patents and trademarks against challenges or to enforce our intellectual property rights could divert management's attention from managing our business. Moreover, we may not have sufficient resources or incentive to defend our patents or trademarks against challenges or to enforce our intellectual property rights. Litigation also puts our patents at risk of being invalidated or narrowly interpreted and our patent applications at risk of not issuing. Additionally, pursuing litigation may provoke third parties to assert counterclaims against us. We may not prevail in any lawsuits that we initiate and the damages or other remedies awarded, if any, may not be commercially valuable. The occurrence of any of these events may have a material adverse effect on our business, financial condition and operating results.

***Patent litigation in the medical device industry is not uncommon, and from time to time, we may be subject to litigation that could be costly, result in the diversion of management's time and efforts, or require us to pay damages.***

Our success will depend in part on not infringing the patents or violating the other proprietary rights of third parties. Significant litigation regarding patent rights exists in our industry. Our competitors in both the United States and abroad, many of which have substantially greater resources and have made considerable investments in competing technologies, may have applied for or obtained or may in the future apply for and obtain, patents that will prevent, limit or otherwise interfere with our ability to make and sell our products. The large number of patents, the rapid rate of new patent issuances, and the complexities of the technology involved increase the risk of patent litigation.

From time to time, we may receive communications from third parties alleging our infringement of their intellectual property rights or offering a license to their intellectual property relating to products that we are currently developing. Any intellectual property-related discussions, disputes or litigation could force us to do one or more of the following:

- stop selling our products or using technology that allegedly infringes third-party intellectual property;
- prevent or limit our ability to sell a product that we are currently developing;
- incur significant legal expenses;
- pay substantial damages to the party whose intellectual property rights we are allegedly infringing;
- redesign those products that allegedly infringe third-party intellectual property; or
- attempt to obtain a license to the relevant intellectual property from third parties, which may not be available on reasonable terms or at all.

We do not currently maintain insurance to cover the expense or any liability that may arise from an intellectual property dispute with a third party. Any litigation or claim against us, even those without merit, or even preparing for a potential dispute or litigation before it arises, may cause us to incur substantial costs, and could place a significant strain on our financial resources and divert the attention of management from our core business. Any litigation or claim against us may also harm our reputation. Further, as we launch new products and increase our sales, and the number of participants in the diabetes market increases, we believe the possibility of our involvement in intellectual property disputes will increase.

***We may be subject to damages resulting from claims that we, or our employees, have wrongfully used or disclosed alleged trade secrets of our competitors or are in breach of non-competition or non-solicitation agreements with our competitors.***

Many of our employees were previously employed at other medical device companies, including those that are our direct competitors or could potentially become our direct competitors. In some cases, those employees joined our company recently. We may be subject to claims that we, or our employees, have inadvertently or otherwise used or disclosed trade secrets or other proprietary information of these former employers or competitors. In addition, we have been and may in the future be subject to allegations that we caused an employee to breach the terms of his or her non-competition or non-solicitation agreement. Litigation may be necessary to defend against these claims. Even if we successfully defend against these claims, litigation could cause us to incur substantial costs, and could place a significant strain on our financial resources, divert the attention of management from our core business and harm our reputation. If our defense to those claims fails, in addition to paying monetary damages, we may lose valuable intellectual property rights or personnel. We cannot guarantee that this type of litigation will not continue, and any future litigation or the threat thereof may adversely affect our ability to hire additional direct sales representatives. A loss of key personnel or their work product could hamper or prevent our ability to commercialize proposed products, which could have an adverse effect on our business, financial condition and operating results.

***We may incur product liability losses, and insurance coverage may be inadequate or unavailable to cover these losses.***

Our business exposes us to potential product liability claims that are inherent in the design, manufacture, testing, inspection, and sale of medical devices. We are subject to product liability lawsuits alleging that component failures, manufacturing flaws, manufacturing defects, negligence in manufacturing, design defects, negligence in design, or inadequate disclosure of product-related risks, warnings, or product-related information resulted in an unsafe condition, injury or death to customers. The risk of one or more product liability claims or lawsuits may be even greater after we launch new products with new features or enter new markets where we have no prior experience selling our products and rely on newly-hired staff or new independent distributors or contractors to provide new customer training and customer support. In addition, the misuse of our products or the failure of customers to adhere to operating guidelines could cause significant harm to customers, including death, which could result in product liability claims. We may also identify deficiencies in our products that we determine are immaterial and do not pose safety risks, and therefore decide not to initiate a voluntary recall. However, any such deficiency may be more significant than we expect and lead to product liability claims. Product liability lawsuits and claims, safety alerts or product recalls, with or without merit, could cause us to incur substantial costs, and could place a significant strain on our financial resources, divert the attention of management from our core business, harm our reputation and adversely affect our ability to attract and retain customers, any of which could have a material adverse effect on our business, financial condition and operating results.

Although we maintain third-party product liability insurance coverage, it is possible that claims against us may exceed the coverage limits of our insurance policies. Even if any product liability loss is covered by an insurance policy, these policies typically have substantial deductibles for which we are responsible. In addition, we expect the cost of our product liability insurance will increase as our product sales increase and we may also increase the amount of our deductibles over time. Product liability claims in excess of applicable insurance coverage could have a material adverse effect on our business, financial condition and operating results. In addition, any product liability claim brought against us, with or without merit, could result in further increases of our product liability insurance premiums. Insurance coverage varies in cost and can be difficult to obtain, and we cannot guarantee that we will be able to obtain insurance coverage in the future on terms acceptable to us or at all. Our inability to obtain sufficient insurance coverage to protect against potential product liability claims could prevent or limit our commercialization of current products or products currently under development.

#### **Risks Related to Our Legal and Regulatory Environment**

***Our products and operations are subject to extensive governmental regulation, and failure to comply with applicable requirements could cause our business to suffer.***

The medical device industry is regulated extensively in the United States by governmental authorities, principally the FDA and corresponding state regulatory agencies. The regulations are very complex and are subject to rapid change and varying interpretations. Regulatory restrictions or changes could limit our ability to carry on or expand our operations or result in higher than anticipated costs or lower than anticipated sales. The FDA and other U.S. governmental agencies and international regulatory authorities regulate numerous elements of our business, including:

- product design and development;
- pre-clinical and clinical testing and trials;
- product safety;
- establishment registration and product listing;
- labeling and storage;
- marketing, manufacturing, sales and distribution;
- pre-market clearance or approval;
- servicing and post-market surveillance;
- advertising and promotion; and

- recalls and field safety corrective actions.

Before we can market or sell a new regulated product or a significant modification to an existing product in the United States, we must obtain either clearance under Section 510(k) of the Food, Drug and Cosmetic Act or approval of a pre-market approval (PMA) application from the FDA, unless an exemption from pre-market review applies. In the 510(k) clearance process, the FDA must determine that a proposed device is “substantially equivalent” to a device legally on the market, known as a “predicate” device, with respect to intended use, technology and safety and effectiveness, in order to clear the proposed device for marketing. Clinical data is sometimes required to support substantial equivalence. The PMA pathway requires an applicant to demonstrate the safety and effectiveness of the device based on extensive data. The PMA process is typically required for devices that are deemed to pose the greatest risk, such as life-sustaining, life-supporting or implantable devices. Products that are approved through a PMA application generally need FDA approval before they can be modified. Similarly, some modifications made to products cleared through the 510(k) clearance process may require a new 510(k) submission. The process of obtaining regulatory clearances or approvals to market a medical device can be costly and time-consuming, and we may not be able to obtain these clearances or approvals on a timely basis or at all for our proposed products.

If the FDA or other regulatory authority requires a more rigorous examination for our future products or modifications to existing products than we had expected, our product introductions or modifications could be delayed or canceled, which could cause our sales to decline or to not increase in line with our forecasts.

The FDA or other regulatory authority can delay, limit or deny clearance or approval of one of our devices for many reasons, including:

- our inability to demonstrate that our products are safe and effective for their intended users;
- the data from our pre-clinical studies or clinical trials may be insufficient to support clearance or approval; and
- failure of the manufacturing process or facilities we use to meet applicable requirements.

In addition, the FDA or other regulatory authority may change its clearance and approval policies, adopt additional regulations or revise existing regulations, or take other actions which may prevent or delay approval or clearance of our products under development or impact our ability to modify our currently cleared or approved products on a timely basis. More recently, the FDA has stated that the review process for new submissions may take longer than normal due to the impact of the COVID-19 global pandemic.

Any delay in, or failure to receive or maintain, clearance or approval for our products under development could prevent us from generating revenue from these products or achieving profitability. Moreover, customers may defer purchasing our existing products in anticipation of a new product launch. Additionally, the FDA and other regulatory authorities have broad enforcement powers and regulatory enforcement or inquiries, or other increased scrutiny on us, could dissuade some customers from using our products and adversely affect our reputation and the perceived safety and efficacy of our products.

Since our inception we have been audited or inspected by various regulatory authorities on numerous occasions. We also regularly respond to routine inquiries from regulatory authorities. In some instances these audits, inspections and inquiries result in findings that require us to take corrective actions, which could include changes to our internal policies, procedures or operations, revisions to our product labeling, issuances of customer notifications or the initiation of product recalls, any of which could result in product liability claims and lawsuits. Since mid-2021 we have completed several audits and inspections, some of which include findings that require us to take one or more corrective actions. Our failure to appropriately respond to these findings and take corrective actions, or our failure to comply with applicable regulations for any other reason, could jeopardize our ability to sell our products and result in enforcement actions such as fines, civil penalties, injunctions, warning letters, recalls of products, delays in the introduction of products into the market, refusal of the FDA or other regulators to grant future clearances or approvals, delays by the FDA or other regulators in granting clearances or approvals, and the suspension or withdrawal of existing approvals by the FDA or other regulators. Any of these sanctions could result in higher than anticipated costs, lower than anticipated sales, and diversion of management time and resources, any of which could have a material adverse effect on our reputation, business, financial condition and operating results.

Further, we commenced commercial sales of our products in select international markets during the third quarter of 2018. As we expand our operations outside of the United States and launch new products, we will become subject to various additional regulatory and legal requirements in the international markets we enter. These additional legal and regulatory requirements may result in our incurring significant costs and expenditures. We have limited experience complying with applicable laws and regulations in international markets generally, and in particular when we enter new markets, and if we are not able to comply with any such requirements, our international expansion and business could be significantly harmed.

***New products or modifications to our existing products may require new 510(k) clearances or PMAs, or may require us to cease marketing or recall the modified products until clearances are obtained.***

Any modification to a 510(k)-cleared device that could significantly affect its safety or effectiveness, or that would constitute a major change in its intended use, design, or manufacture, requires a new 510(k) clearance or, possibly, a PMA. The FDA requires every manufacturer to make this determination in the first instance, but the FDA may review any manufacturer's decision. The FDA may not agree with our decisions regarding whether new clearances or approvals are necessary for changes that we have made to our products. If the FDA disagrees with our determination and requires us to submit new 510(k) notifications or PMAs for modifications to our previously cleared or approved products, for which we concluded that new clearances or approvals were not necessary, we may be required to cease marketing or to recall the modified product until we obtain clearance or approval, and we may be subject to significant regulatory fines or penalties.

Further, the FDA's ongoing review of and potential changes to the 510(k) program may make it more difficult for us to modify our previously cleared products, either by imposing stricter requirements on when a new 510(k) for a modification to a previously cleared product must be submitted, or by applying more onerous review criteria to such submissions.

***If we or our third-party suppliers, contract manufacturers and service providers fail to comply with good manufacturing practice regulations, this could impair our ability to market our products in a cost-effective and timely manner.***

We and our third-party suppliers, contract manufacturers and service providers are required to comply with the FDA's Quality System Regulation (QSR), which covers the methods and documentation of the design, testing, production, control, quality assurance, labeling, packaging, sterilization, storage and shipping of our products. We also are subject to similar requirements by regulatory authorities in other geographies. The FDA and other regulatory bodies routinely audit our compliance with the QSR and equivalent international requirements through periodic announced and unannounced inspections of manufacturing and other facilities which may occur at any time. We cannot assure you that our facilities or our contract manufacturer or third-party suppliers' facilities would pass any quality system inspection or audit. If we or our suppliers, contract manufacturers and service providers have significant non-compliance issues or if any corrective action plan that we or our suppliers, contract manufacturers or service providers propose in response to observed deficiencies is not sufficient, the FDA could take enforcement action against us and the manufacturing or distribution of our devices could be interrupted and our operations disrupted.

If we, or our third-party suppliers, contract manufacturers and service providers, fail to adhere to QSR requirements, this could delay production of our products and lead to fines, difficulties in obtaining regulatory clearances, recalls, enforcement actions, including injunctive relief or consent decrees, or other consequences, which could, in turn, have a material adverse effect on our financial condition or results of operations.

***A recall or suspension of our products, or the discovery of serious safety issues with our products, could have a significant negative impact on us.\****

The FDA and equivalent foreign regulatory authorities have the authority to require the recall or suspension, either temporarily or permanently, of commercialized products in the event of material deficiencies or defects in quality systems, product design or manufacture or in the event that a product poses an unacceptable risk to health. Regulatory authorities have broad discretion to require the recall or suspension of a product or to require that manufacturers alert customers of safety risks, and may do so even in circumstances where we do not believe our product poses an unacceptable risk to health. In addition, manufacturers may, under their own initiative, recall a product or suspend sales if any material deficiency in a product is found or alert customers of unanticipated safety risks. A government-mandated or voluntary recall or suspension by us, one of our distributors or any of our other third-party suppliers could occur as a result of an unacceptable risk to health, component failures, manufacturing errors, design or labeling defects or other deficiencies and issues. Recalls, suspensions or other notices relating to any products that we distribute would divert managerial and financial resources, and have an adverse effect on our reputation, financial condition and operating results.



Further, under the FDA's Medical Device Reporting regulations and equivalent regulations in other geographies, we are required to maintain appropriate quality systems and report incidents in which our product may have caused or contributed to serious injury or death in which our product malfunctioned and, if the malfunction were to recur, would likely cause or contribute to serious injury or death. Repeated product malfunctions may result in a voluntary or involuntary product recall or suspension of product sales, which could divert managerial and financial resources, impair our ability to manufacture our products in a cost-effective and timely manner and have an adverse effect on our reputation, financial condition and operating results. We have initiated product recalls in the past, and our risk of future product recalls may increase as we launch new products or offer new software updates for existing products.

Any adverse event involving any products that we distribute could result in future voluntary corrective actions, such as recalls or customer notifications, or regulatory agency action, which could include inspection, mandatory recall or other enforcement action. For example, the Australian Therapeutic Goods Administration (TGA) temporarily suspended our pump product sales in Australia commencing November 24, 2020, however sales of pump-related supplies were allowed to continue. Effective April 1, 2021, following discussions with the TGA, the temporary suspension was lifted for our t:slim X2 with Basal-IQ technology, subject to certain post-market surveillance obligations and other conditions. We have discontinued sales of earlier generation products in Australia and we only recently commenced offering our Control-IQ technology in Australia. There can be no assurance that the TGA will not reimpose the suspension of our pump product sales or impose other regulatory restrictions in the future. In addition, other regulatory bodies may take similar actions against us, and any regulatory challenges we encounter could have a negative impact on our product sales and harm our reputation. Any corrective actions we take in response to this action or future matters with the TGA or other regulatory bodies, whether voluntary or involuntary, will require the dedication of our time and capital, may distract management from operating our business, may harm our reputation and financial results or could result in additional regulatory scrutiny in other geographies.

***Our failure to comply with U.S. federal and state fraud and abuse laws, including anti-kickback laws and other U.S. federal and state anti-referral laws, could have a material, adverse impact on our business.***

There are numerous U.S. federal and state laws pertaining to healthcare fraud and abuse, including anti-kickback laws, physician self-referral laws, and false claims laws. Our relationships with healthcare providers and other third parties are subject to scrutiny under these laws. Violations of these laws are punishable by criminal and civil sanctions, including, in some instances, imprisonment and exclusion from participation in federal and state healthcare programs, including the Medicare, Medicaid and Veterans Administration health programs.

Healthcare fraud and abuse regulations are complex and evolving, and even minor irregularities can potentially give rise to claims that a statute or prohibition has been violated. The laws that may affect our ability to operate include:

- the federal healthcare programs' Anti-Kickback Statute, which prohibits, among other things, persons from knowingly and willfully soliciting, receiving, offering, paying or providing remuneration (including any kickback, bribe or rebate), directly or indirectly, overtly or covertly, in cash or in kind in exchange for or to induce either the referral of an individual for, or the purchase, lease, order or recommendation of, any good or service for which payment may be made under federal healthcare programs such as the Medicare and state Medicaid programs;
- federal and state false claims laws which prohibit, among other things, individuals or entities from knowingly presenting, or causing to be presented, claims for payment from Medicare, state Medicaid programs, or other third-party payors that are false or fraudulent;
- federal and state physician self-referral laws, such as the Stark Law, that prohibit a physician from referring Medicare or Medicaid patients to an entity providing "designated health services," including a company that furnishes durable medical equipment, with which the physician has a financial relationship unless that financial relationship meets an exception under the applicable law;
- federal and state laws, such as the Civil Monetary Penalties Law, that prohibit an individual or entity from offering or transferring remuneration to any person eligible for benefits under a federal or state health care program which such individual or entity knows or should know are likely to influence such eligible individual's choice of provider, practitioner or supplier of any item or service for which payment may be made under federal health care programs such as Medicare and state Medicaid programs;

- federal criminal laws enacted as part of HIPAA that prohibit executing a scheme to defraud any healthcare benefit program or making false statements relating to healthcare matters;
- federal disclosure laws, such as the Physician Payments Sunshine Act, which require certain manufacturers, including medical device manufacturers, to submit annual data pertaining to payments or other transfers of value to covered recipients, including physicians;
- the Federal Trade Commission Act and similar laws regulating advertisement and consumer protections;
- federal and state laws governing the use, disclosure and security of personal information, including protected health information, such as HIPAA and the Health Information Technology for Economic and Clinical Health; and
- foreign and U.S. state law equivalents of each of the above federal laws, such as anti-kickback and false claims laws which may apply to items or services reimbursed by any third-party payor, including commercial insurers.

Possible sanctions for violation of these laws include monetary fines, civil and criminal penalties, exclusion from Medicare, Medicaid and other federal healthcare programs, and forfeiture of amounts collected in violation of those prohibitions and in some circumstances, treble damages. Any violation of these laws, or any action against us for violation of these laws, even if we successfully defend against it, could result in a material adverse effect on our reputation, business, financial condition and operating results. The reporting requirements under the Physician Payments Sunshine Act have been expanded, and we will need to implement additional processes and controls in order to comply with these new tracking and disclosure obligations. Any failure to submit the required data in an accurate and timely manner may result in the imposition of civil monetary penalties. Federal government agencies have issued final rules making modifications to the Anti-Kickback Statute "safe harbors" and the Stark Law regulations, and the full impact of such modifications on the health care industry and our business operations is not yet known. Further, the federal government has published proposed rules for public comment which would make material modifications to HIPAA. It is unknown if or when these proposed rules may be adopted and what final form the proposed rules may take and how they may impact our business operations.

To enforce compliance with the federal laws, the U.S. Department of Justice (DOJ) in conjunction with other federal agencies, has increased its scrutiny of interactions between healthcare companies and healthcare providers, which has led to a number of investigations, prosecutions, convictions and settlements in the healthcare industry. Dealing with investigations can be time and resource-consuming and can divert management's attention from our core business. Additionally, if a healthcare company settles an investigation with the DOJ or other law enforcement agencies, we may be forced to agree to additional onerous compliance and reporting requirements as part of a consent decree or corporate integrity agreement. Any such investigation or settlement could increase our costs or otherwise have an adverse effect on our business.

The scope and enforcement of these laws is uncertain and subject to rapid change in the current environment of healthcare reform. Federal or state regulatory authorities might challenge our current or future activities under these laws. Any of these challenges could have a material adverse effect on our reputation, business, financial condition and operating results. Any state or federal regulatory review of us, regardless of the outcome, would be costly and time-consuming. Additionally, we cannot predict the impact of any changes in these laws and whether they might be retroactive.

***We may be liable if we engage in the promotion of the off-label use of our products.***

Our promotional materials and training methods must comply with FDA and other applicable laws and regulations, including the prohibition against the promotion of the off-label use of our products or the pre-promotion of unapproved products. Healthcare providers may use our products off-label, as the FDA does not restrict or regulate a physician's choice of treatment within the practice of medicine. However, if the FDA determines that our promotional materials or training constitutes promotion of an off-label use or the pre-promotion of an unapproved product, it could request that we modify our training or promotional materials or subject us to regulatory or enforcement actions, including the issuance of an untitled letter, a warning letter, injunction, seizure, civil fines and criminal penalties. It is also possible that other federal, state or foreign enforcement authorities might take action if they consider our promotional or training materials to constitute promotion of an unapproved use, which could result in significant fines or penalties. Although our policy is to refrain from statements that could be considered off-label promotion of our products or pre-promotion of an unapproved product, the FDA or another regulatory agency could disagree and conclude that we have engaged in improper promotional activities. In addition, the off-label use of our products may increase the risk of product liability claims, which are expensive to defend and could result in substantial damage awards against us and harm our reputation.

***Legislative or regulatory healthcare reforms may result in downward pressure on the price of and decrease reimbursement for our products, and uncertainty regarding the healthcare regulatory environment could have a material adverse effect on our business.***

The sales of our products depend in part on the availability of coverage and reimbursement from third-party payors such as government health administration authorities, private health insurers, health maintenance organizations and other healthcare-related organizations. Both the federal and state governments in the United States continue to propose and pass new legislation and regulations designed to, among other things, expand healthcare coverage to more individuals, contain or reduce the cost of healthcare, and improve the quality of healthcare outcomes. This legislation and regulation may result in decreased reimbursement for medical devices, which may create additional pressure to reduce the prices charged for medical devices. Reduced reimbursement rates could significantly decrease our revenue, which in turn would place significant downward pressure on our gross margins and impede our ability to become profitable.

The Affordable Care Act (ACA), substantially changed the way healthcare is financed by both governmental and private insurers, encourages improvements in the quality of healthcare items and services, and significantly impacts the medical device industry. However, a number of legislative changes have been proposed and adopted since the ACA was enacted, and legislation has also been and will likely continue to be proposed that could modify or repeal the ACA. In addition, the ACA continues to be the subject of various legal challenges. The uncertainties regarding the future of the ACA, and other healthcare reform initiatives, may have an adverse effect on our customers' purchasing decisions regarding our products.

In the future, additional changes could be made to governmental healthcare programs that could significantly impact the success of our products. Cost control initiatives could decrease the price that we receive for our products. At this time, we cannot predict which, if any, additional healthcare reform proposals will be adopted, when they may be adopted or what impact they may have on the existing regulatory environment, or our ability to operate our business. Any of these factors could have a material adverse effect on our operating results and financial condition.

***Climate change or other extreme weather conditions and related regulations may have a long-term impact on our business.\****

Climate-related events, including the increasing frequency of extreme weather events and their impact on the U.S., Mexico, Canada, and other major regions' critical infrastructure along with potential related regulations, have the potential to disrupt our business, our third-party suppliers, and/or the business of our customers. For example, a portion of our office facilities located in San Diego are in an area that is prone to flooding, which has occasionally caused temporary disruptions to our business operations and our third-party contract manufacturers are located, in regions subject to natural disasters, including earthquakes, hurricanes, floods, fires and other catastrophic events. We strive to partner with organizations that mitigate their business risks associated with climate change. However, we recognize that inherent risks related to climate change, other extreme weather conditions and related regulations exist wherever global business is conducted. While these dangers currently have a low-assessed risk of disrupting our normal business operations, they pose a potential long-term impact on our business.

## Risks Related to Our Common Stock

### *The price of our common stock may continue to fluctuate significantly.*

The trading price of our common stock has been volatile in recent years. We believe our stock price has been, and will continue to be, subject to wide fluctuations in response to a variety of factors, including the following:

- actual or anticipated fluctuations in our financial and operating results from period to period;
- our actual or perceived need for additional capital to fund our operations;
- market acceptance of our current products and products under development, and the recognition of our brand;
- introduction of proposed products, technologies or treatment techniques by us or our competitors;
- announcements of significant contracts, acquisitions or divestitures by us or our competitors;
- regulatory approval of our products or the products of our competitors, or the failure to obtain such approvals on the projected timeline or at all;
- the announcement of a product recall, suspension or other safety notice associated with our products or the products of our competitors, or other similar regulatory enforcement actions;
- the inclusion or removal of our stock from one or more market indexes;
- speculative trading practices of market participants;
- issuance of securities analysts' reports or recommendations;
- threatened or actual litigation and government investigations;
- sales of shares of our common stock by our employees, directors or principal stockholders; and
- general political or economic conditions, including the impacts and disruptions caused by the COVID-19 global pandemic.

These and other factors might cause the market price of our common stock to fluctuate substantially. Fluctuations in our stock price may negatively affect the liquidity of our common stock, which could further impact our stock price.

In recent years, the stock market has experienced significant price and volume fluctuations. This volatility has had a significant impact on the market price of securities issued by many companies across many industries. These changes may occur without regard to the financial condition or operating performance of the affected companies. Accordingly, the price of our common stock could fluctuate based upon factors that have little or nothing to do with our company, and these fluctuations could materially reduce the market price of our common stock.

***Anti-takeover provisions in our organizational documents and Delaware law may discourage or prevent a change of control, even if an acquisition would be beneficial to our stockholders, which could reduce our stock price and prevent our stockholders from replacing or removing our current management.***

Our amended and restated certificate of incorporation and bylaws contain provisions that could delay or prevent a change of control of our company or changes in our board of directors that our stockholders might consider favorable. Some of these provisions:

- authorize the issuance of preferred stock with powers, preferences and rights that may be senior to our common stock, which can be created and issued by the board of directors without prior stockholder approval;

- provide for the adoption of a staggered board of directors whereby the board is divided into three classes each of which has a different three-year term;
- provide that the number of directors shall be fixed by the board;
- prohibit our stockholders from filling board vacancies;
- provide for the removal of a director only with cause and then by the affirmative vote of the holders of a majority of the outstanding shares;
- prohibit stockholders from calling special stockholder meetings;
- prohibit stockholders from acting by written consent without holding a meeting of stockholders;
- require the vote of at least two-thirds of the outstanding shares to approve amendments to the certificate of incorporation or bylaws; and
- require advance written notice of stockholder proposals and director nominations.

We are subject to the provisions of Section 203 of the Delaware General Corporation Law, which may prohibit certain business combinations with stockholders owning 15% or more of our outstanding voting stock. These and other provisions in our amended and restated certificate of incorporation, bylaws and Delaware law could make it more difficult for stockholders or potential acquirers to obtain control of our board of directors or initiate actions that are opposed by our then-current board of directors, including a merger, tender offer or proxy contest involving our company. Any delay or prevention of a change of control transaction or changes in our board of directors could cause the market price of our common stock to decline.

***Our board of directors is authorized to issue and designate shares of our preferred stock in additional series without stockholder approval.***

Our amended and restated certificate of incorporation authorizes our board of directors, without the approval of our stockholders, to issue 5,000,000 shares of our preferred stock, subject to limitations prescribed by applicable law, rules and regulations and the provisions of our amended and restated certificate of incorporation, as shares of preferred stock in series, and to establish from time to time the number of shares to be included in each such series, and to fix the designation, powers, preferences and rights of the shares of each such series and the qualifications, limitations or restrictions thereof. The powers, preferences and rights of these additional series of preferred stock may be senior to or on parity with our common stock, and the issuance of such shares in the future may reduce the value of our common stock.

***Our ability to use our net operating loss carryforwards and certain other tax attributes may be limited.***

As of December 31, 2021, we had accumulated federal and state net operating loss (NOL) carryforwards of approximately \$301.2 million, and \$291.0 million, respectively, which included the reduction recorded in 2019 discussed below. Of the total federal NOL carryforwards, approximately \$112.1 million were generated after January 1, 2018, and therefore do not expire. NOL generated after January 1, 2018, is subject to 80% limitation in accordance with the Tax Cuts and Jobs Act of 2017. The remaining federal NOL carryforwards of \$189.1 million will begin to expire in 2026, and state tax loss carryforwards continue to expire in 2022, unless previously utilized. If there is an “ownership change” with respect to our company, as defined under Section 382 of the Code, the utilization of our NOL and research credit carryforwards may be subject to substantial limitations imposed by the Code, and similar state provisions. Limitations imposed on our ability to utilize NOL carryforwards could cause U.S. federal income taxes to be paid earlier than would be paid if such limitations were not in effect and could cause NOL carryforwards to expire unused, in each case reducing or eliminating the benefit of our NOL carryforwards. In general, an ownership change occurs whenever there is a shift in ownership of our company by more than 50% by one or more 5% stockholders over a specified time period.

We have completed analyses through December 31, 2020 to determine whether our net operating losses and credits are likely to be limited by Section 382. Based on the 2018 study completed in 2019, the Company determined that offerings of our securities caused an ownership change, as defined under Section 382, in 2018 and the resulting limitation significantly reduced the Company's ability to utilize its net operating loss and credit carryovers before they expire. As a result, in 2019 the Company significantly reduced its deferred tax assets for the net operating loss and research credit carryforwards that were projected to expire unused. In addition, future ownership changes under Section 382 may further limit the Company's ability to fully utilize any remaining tax benefits.

***We do not intend to pay cash dividends.***

We have never declared or paid cash dividends on our capital stock. We currently intend to retain all available funds and any future earnings for use in the operation and expansion of our business and do not anticipate paying any cash dividends in the foreseeable future. Accordingly, investors may have to sell some or all of their shares of our common stock in order to generate cash flow from their investment.

***If we fail to maintain an effective system of internal control over financial reporting, we may not be able to accurately report our financial results or prevent fraud. As a result, stockholders could lose confidence in our financial and other public reporting, which would harm our business and the trading price of our common stock.***

Effective internal controls over financial reporting are necessary for us to provide reliable financial reports and, together with adequate disclosure controls and procedures, are designed to prevent fraud. Any failure to implement required new or improved controls, or difficulties encountered in their implementation could cause us to fail to meet our reporting obligations. For example, Mr. Sheridan, our principal executive officer, and Ms. Vosseller, our principal financial and accounting officer, are involved in a personal relationship and share a primary residence. While our board of directors is informed of the relationship and appropriate actions have been taken to ensure compliance with Company policies and procedures, the existence of this relationship could create additional risk, or the perception of additional risk, that our controls and procedures may not be effective. In addition, any testing by us conducted in connection with Section 404(a) of the Sarbanes-Oxley Act, or any testing conducted by our independent registered public accounting firm in connection with Section 404(b) of the Sarbanes-Oxley Act may reveal deficiencies in our internal controls over financial reporting that are deemed to be material weaknesses or that may require prospective or retroactive changes to our consolidated financial statements or identify other areas for further attention or improvement. Inferior internal controls could also cause investors to lose confidence in our reported financial information, which could have a negative effect on the trading price of our common stock.

We are required to disclose changes made to our internal control procedures on a quarterly basis and our management is required to assess the effectiveness of these controls annually. Undetected material weaknesses in our internal controls could lead to financial statement restatements and require us to incur the expense of remediation.

***We may be at increased risk of securities class action litigation.***

In the past, securities class action litigation has been instituted against companies following periods of volatility in the overall market and in the price of a company's securities. We believe this risk may be particularly relevant to us as we have experienced significant stock price volatility in recent years. If we face such litigation, it could result in substantial costs and a diversion of management's attention and resources, which could harm our business, financial condition and results of operations. Our stock price volatility and the increase in our market capitalization during the past year may also result in higher expenses associated with our directors' and officers' liability insurance program.

***If securities or industry analysts do not publish research, or publish inaccurate or unfavorable research, about our business, our stock price and trading volume could decline.***

The trading market for our common stock depends, in part, on the research and reports that securities or industry analysts publish about us or our business. If one or more of the analysts who cover us downgrade our stock or publish inaccurate or unfavorable research about our business, our stock price would likely decline. In addition, if our operating results fail to meet the forecasts of analysts, our stock price would likely decline. If one or more of these analysts cease coverage of our company or fail to publish reports on us regularly, demand for our common stock could decrease, which might cause our stock price and trading volume to decline.

## ***Risks Related to Our Convertible Senior Notes***

***We have indebtedness in the form of convertible senior notes, which could adversely affect our financial condition and our ability to respond to changes in our business.***

In May 2020, we completed the offering of \$287.5 million principal amount of 1.50% Convertible Senior Notes due 2025 (the Notes), which we refer to as the Note Offering. Holders of the Notes will have the right to require us to repurchase their Notes upon the occurrence of a fundamental change (as defined in the indenture governing the Notes) at a purchase price equal to 100% of the principal amount of the Notes to be purchased, plus accrued and unpaid interest, if any. In addition, upon conversion of the Notes, unless we elect to deliver solely shares of our common stock to settle such conversion, we will be required to make cash payments in respect of the Notes being converted. Furthermore, the indenture governing the Notes provides that, in the event of an event of default (as defined in the indenture) for the Notes, the principal, premium, if any, and interest, if any, may become due prior to the maturity date for the Notes. There can be no assurance that we will be able to pay these amounts when due, or that we will be able to refinance this indebtedness on acceptable terms or at all.

As a result of our increased level of indebtedness due to the Notes Offering:

- our level of vulnerability to adverse economic conditions and competitive pressures may be heightened;
- we are required to dedicate a portion of our liquidity position or cash flow from operations to interest payments, limiting the availability of cash for other purposes;
- our flexibility in planning for, or reacting to, changes in our business and industry may be more limited; and
- our ability to obtain additional financing in the future for working capital, capital expenditures, acquisitions, investments or general corporate purposes may be impaired.

We cannot be sure that our leverage resulting from the completion of the Notes Offering will not materially and adversely affect our ability to finance our operations or capital needs or to engage in other business activities. In addition, we cannot be sure that additional financing will be available when required or, if available, will be on terms satisfactory to us.

***Servicing the Notes will require a significant amount of cash, and we may not have sufficient cash flow from our business to repay the Notes.***

Our ability to make scheduled payments of the principal and interest on or to refinance the Notes depends on our future business operations and liquidity, which are subject, to some extent, on economic, financial, regulatory, competitive and other factors that are beyond our control, including, without limitation, market acceptance of our products, regulatory approval for our products under development, and the impacts and disruptions caused by the COVID-19 global pandemic. Our business may not generate or sustain a level of cash flow from operations sufficient to service the Notes and any future indebtedness we may incur, while operating our business and making necessary capital expenditures. If we are unable to generate such cash flow, we may be required to adopt one or more alternatives, such as reducing or delaying capital expenditures, selling or licensing assets, refinancing indebtedness, or obtaining additional equity capital. These alternative measures may not be successful and may not permit us to meet our scheduled debt service obligations. Our ability to successfully engage in these activities will depend on a number of factors, including the value of our assets, our operating results and financial condition, the value of our common stock, and the status of the capital markets at such time. We may not be able to engage in any of these activities on commercially reasonable terms or at all, which could result in a default on the Notes or our future indebtedness.

***We may incur substantial additional debt or take other actions which could diminish our ability to make payments on the Notes.***

We and our subsidiaries are not prevented by the terms of the indenture governing the Notes, or otherwise, from incurring substantial additional indebtedness in the future, which may include the issuance of secured debt. We are not restricted under the terms of the indenture governing the Notes from incurring additional indebtedness, securing existing or future indebtedness, or recapitalizing our indebtedness. We are similarly not restricted under the terms of the indenture from taking a number of other actions that could have the effect of diminishing our ability to make payments on the Notes when due.

***We may not have the ability to raise the funds necessary to repurchase the Notes upon a fundamental change, or to settle conversions of the Notes, and our future indebtedness may contain limitations on our ability to pay cash upon repurchase or conversion of the Notes.***

Holders of the Notes have the right to require us to repurchase their Notes upon the occurrence of a fundamental change at a repurchase price equal to 100% of the principal amount of the Notes to be repurchased, plus accrued and unpaid interest, if any. In addition, upon conversion of the Notes, unless we elect to deliver solely shares of our common stock to settle such conversion, we will be required to make cash payments in respect of the Notes being converted. However, we may not have enough available cash or be able to obtain financing at the time we are required to make repurchases of Notes surrendered therefor or Notes being converted. In addition, our ability to repurchase the Notes or to pay cash upon conversions of the Notes may be limited by law, by regulatory authority or by agreements governing our future indebtedness. Our failure to repurchase Notes at a time when the repurchase is required by the indenture, or to pay any cash payable on future conversions of the Notes as required by the indenture, would constitute an event of default under the indenture. An event of default under the indenture, or the fundamental change itself, could also lead to an event of default under agreements governing any future indebtedness we may have issued. If the repayment of the related indebtedness were to be accelerated, we may not have sufficient funds to repay the indebtedness, while also repurchasing the Notes or making cash payments upon conversions thereof.

***The conditional conversion feature of the Notes may adversely affect our liquidity.***

In the event the conditional conversion feature of the Notes is triggered, holders of the Notes will be entitled to convert the Notes at any time during specified periods at their option. If one or more holders elect to convert their Notes, unless we elect to satisfy our conversion obligation by delivering solely shares of our common stock, we would be required to settle all or a portion of our conversion obligation through the payment of cash, which could adversely affect our liquidity. In addition, even if holders do not elect to convert their Notes, we could be required, under applicable accounting rules, to reclassify all or a portion of the outstanding principal of the Notes as a current rather than long-term liability, which would adversely affect our liquidity.

***Conversion of the Notes will, to the extent we deliver shares upon conversion of such Notes, dilute the ownership interest of existing stockholders and may otherwise have a negative impact on the trading price of our common stock.***

The conversion of some or all of the Notes will dilute the ownership interests of existing stockholders, including holders who had previously converted their Notes, to the extent we deliver shares upon conversion of any of the Notes. Any sales in the public market of the common stock issued upon the conversion of the Notes could adversely affect prevailing market prices of our common stock. In addition, the perception that some or all of the Notes may be converted into shares of our common stock in the future could have a negative impact on the trading price of our common stock.

***The fundamental change repurchase feature of the Notes may delay or prevent an otherwise beneficial takeover attempt.***

The terms of the Notes require us to repurchase the Notes in the event of a fundamental change. A takeover of the Company would trigger an option of the holders of the Notes to require us to repurchase the Notes. In addition, if a make-whole fundamental change (as defined in the indenture) occurs prior to the maturity date of the Notes, we will, in some cases, be required to increase the conversion rate of the Notes for a holder that elects to convert its Notes in connection with such make-whole fundamental change. These and other provisions set forth in the indenture may have the effect of delaying or preventing a takeover of the Company.

***The Capped Call Transactions may affect the value of the Notes and our common stock.***

In connection with the issuance of the Notes, we entered into capped call transactions (the Capped Call Transactions) with the option counterparties. The Capped Call Transactions are expected generally to reduce the potential dilution to our common stock upon any conversion of the Notes and/or offset any cash payments we are required to make in excess of the principal amount of converted Notes, as the case may be, with such reduction and/or offset subject to a cap.



The option counterparties or their respective affiliates may modify their hedge positions by entering into or unwinding various derivatives with respect to our common stock and/or purchasing or selling our common stock or other securities of ours in secondary market transactions prior to the maturity of the Notes (and are likely to do so during any observation period related to a conversion of Notes). This activity could also cause or avoid an increase or a decrease in the market price of our common stock or the Notes, which could affect a Note holder's ability to convert the Notes and, to the extent the activity occurs during any observation period related to a conversion of Notes, it could affect the number of shares and the value of the consideration that a Note holder will receive upon conversion of the Notes. In addition, if such Capped Call Transactions fail to become effective, the option counterparties or their respective affiliates may unwind their hedge positions with respect to our common stock, which could adversely affect the value of our common stock.

The potential effect, if any, of any of these transactions and activities on the market price of our common stock or the Notes will depend in part on market conditions and cannot be ascertained at this time, but any of these activities could adversely affect the value of our common stock and the value of the Notes and, under certain circumstances, the ability of the Note holders to convert the Notes.

We do not make any representation or prediction as to the direction or magnitude of any potential effect that the transactions described above may have on the value of the Notes or the trading price of our common stock. In addition, we do not make any representation that the option counterparties will engage in these transactions or that these transactions, once commenced, will not be discontinued without notice.

***We are subject to counterparty risk with respect to the Capped Call Transactions.***

The option counterparties are financial institutions, and we will be subject to the risk that any or all of them may default under the Capped Call Transactions. Our exposure to the credit risk of the option counterparties will not be secured by any collateral. If an option counterparty becomes subject to insolvency proceedings, we will become an unsecured creditor in those proceedings, with a claim equal to our exposure at that time under our transactions with that option counterparty. Our exposure will depend on many factors but, in general, an increase in our exposure will be correlated to an increase in the market price and volatility of our common stock. In addition, upon a default by an option counterparty, we may suffer more dilution than we currently anticipate with respect to our common stock. We can provide no assurances as to the financial stability or viability of the option counterparties.

Item 6. Exhibits.

Exhibit Number	Exhibit Description	Incorporated by Reference			Provided Herewith
		Form	File No.	Date of First Filing	Exhibit Number
10.1	<a href="#">Credit Agreement Between Tandem Diabetes Care, Inc., and Bank of America, N.A.</a>				X
10.2**	<a href="#">Confidential Intellectual Property Agreement, dated July 10, 2012, by and between Tandem Diabetes Care, Inc. and Smiths Medical ASD, Inc.</a>				X
31.1	<a href="#">Certification of John F. Sheridan, Chief Executive Officer, pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.</a>				X
31.2	<a href="#">Certification of Leigh A. Vosseller, Chief Financial Officer, pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.</a>				X
32.1*	<a href="#">Certification of John F. Sheridan, Chief Executive Officer, pursuant to U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.</a>				X
32.2*	<a href="#">Certification of Leigh A. Vosseller, Chief Financial Officer, pursuant to U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.</a>				X
101.INS	XBRL Instance Document.				X
101.SCH	XBRL Taxonomy Extension Schema Document.				X
101.CAL	XBRL Taxonomy Extension Calculation Linkbase Document.				X
101.DEF	XBRL Taxonomy Extension Definition Linkbase Document.				X
101.LAB	XBRL Taxonomy Extension Label Linkbase Document.				X
101.PRE	XBRL Taxonomy Extension Presentation Linkbase Document.				X
104	Cover Page Interactive Data File (embedded within the Inline XBRL Document contained in Exhibit 101).				X

\* This certification is not deemed "filed" for purposes of Section 18 of the Securities Exchange Act of 1934, or otherwise subject to the liability of that section. Such certification will not be deemed to be incorporated by reference into any filing under the Securities Act of 1933 or the Securities Exchange Act of 1934, except to the extent that the registrant specifically incorporates it by reference.

\*\* Confidential treatment has been granted with respect to certain portions of this exhibit pursuant to an application for confidential treatment sent to the Securities and Exchange Commission. Such portions are omitted from this filing and have been filed separately with the Securities and Exchange Commission.

**SIGNATURES**

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

Tandem Diabetes Care, Inc.

Dated August 3, 2022

By: /s/ John F. Sheridan  
John F. Sheridan  
President and Chief Executive Officer  
(on behalf of the registrant and as the registrant's  
Principal Executive Officer)

Dated August 3, 2022

By: /s/ Leigh A. Vosseller  
Leigh A. Vosseller  
Executive Vice President, Chief Financial Officer and Treasurer  
(on behalf of the registrant and as the registrant's  
Principal Financial and Accounting Officer)

---

**CREDIT AGREEMENT**

Dated as of May 18, 2022

among

**TANDEM DIABETES CARE, INC.,**

as the Borrower,

**THE SUBSIDIARY GUARANTORS FROM TIME TO TIME PARTY HERETO,**

as the Guarantors,

**BANK OF AMERICA, N.A.,** as Administrative Agent, a Swing Line Lender and an L/C Issuer,

**THE SUBSIDIARY GUARANTORS FROM TIME TO TIME PARTY HERETO,**

as the Guarantors,

**BANK OF AMERICA, N.A.,**

as Administrative Agent, a Swing Line Lender and  
an L/C Issuer,

and

The Other Lenders Party Hereto

## TABLE OF CONTENTS

ARTICLE I DEFINITIONS AND ACCOUNTING TERMS	<a href="#">8</a>
1.01 Defined Terms	<a href="#">8</a>
1.02 Other Interpretive Provisions	<a href="#">36</a>
1.03 Accounting Terms	<a href="#">37</a>
1.04 Rounding	<a href="#">37</a>
1.05 Times of Day	<a href="#">37</a>
1.06 References to Agreements and Laws	<a href="#">37</a>
1.07 Letter of Credit Amounts	<a href="#">38</a>
1.08 Currency Equivalents Generally	<a href="#">38</a>
1.09 Interest Rates	<a href="#">38</a>
ARTICLE II THE COMMITMENTS AND CREDIT EXTENSIONS	<a href="#">38</a>
2.01 Loans	<a href="#">39</a>
2.02 Borrowings, Conversions and Continuations of Loans	<a href="#">39</a>
2.03 Letters of Credit	<a href="#">40</a>
2.04 Swing Line Loans	<a href="#">48</a>
2.05 Prepayments	<a href="#">50</a>
2.06 Termination or Reduction of Commitments	<a href="#">51</a>
2.07 Repayment of Loans	<a href="#">51</a>
2.08 Interest	<a href="#">52</a>
2.09 Fees	<a href="#">53</a>
2.10 Computation of Interest and Fees; Retroactive Adjustments of Applicable Rate	<a href="#">53</a>
2.11 Evidence of Debt	<a href="#">54</a>
2.12 Payments Generally; Administrative Agent's Clawback	<a href="#">54</a>
2.13 Sharing of Payments by Lenders	<a href="#">56</a>
2.14 [Reserved.]	<a href="#">56</a>
2.15 Increase in Commitments	<a href="#">57</a>
2.16 Cash Collateral	<a href="#">59</a>
2.17 Defaulting Lenders	<a href="#">60</a>
ARTICLE III TAXES, YIELD PROTECTION AND ILLEGALITY	<a href="#">61</a>
3.01 Taxes	<a href="#">62</a>
3.02 Illegality	<a href="#">65</a>
3.03 Inability to Determine Rates	<a href="#">66</a>
3.04 Increased Costs	<a href="#">68</a>
3.05 Compensation for Losses	<a href="#">69</a>
3.06 Mitigation Obligations; Replacement of Lenders	<a href="#">69</a>
3.07 Survival	<a href="#">70</a>

ARTICLE IV CONDITIONS PRECEDENT TO CREDIT EXTENSIONS		<a href="#">70</a>
4.01	Conditions of Initial Credit Extension	<a href="#">70</a>
4.02	Conditions to All Credit Extensions	<a href="#">72</a>
ARTICLE V REPRESENTATIONS AND WARRANTIES		<a href="#">73</a>
5.01	Existence, Qualification and Power	<a href="#">73</a>
5.02	Authorization; No Contravention	<a href="#">73</a>
5.03	Governmental Authorization; Other Consents	<a href="#">73</a>
5.04	Binding Effect	<a href="#">73</a>
5.05	Financial Statements; No Material Adverse Effect	<a href="#">73</a>
5.06	Litigation	<a href="#">74</a>
5.07	No Default	<a href="#">74</a>
5.08	Ownership of Property; Liens; Investments	<a href="#">74</a>
5.09	Environmental Matters	<a href="#">74</a>
5.10	Insurance	<a href="#">75</a>
5.11	Taxes	<a href="#">75</a>
5.12	ERISA Compliance	<a href="#">75</a>
5.13	Subsidiaries; Equity Interests; Loan Parties	<a href="#">76</a>
5.14	Margin Regulations; Investment Company Act	<a href="#">76</a>
5.15	Disclosure	<a href="#">77</a>
5.16	Compliance with Laws	<a href="#">77</a>
5.17	Intellectual Property; Licenses, Etc	<a href="#">77</a>
5.18	Solvency	<a href="#">77</a>
5.19	Casualty, Etc.	<a href="#">77</a>
5.20	Labor Matters	<a href="#">77</a>
5.21	OFAC	<a href="#">78</a>
5.22	Anti-Corruption Laws	<a href="#">78</a>
5.23	Not an Affected Financial Institution	<a href="#">78</a>
5.24	Beneficial Ownership Certification	<a href="#">78</a>
5.25	Covered Entities	<a href="#">78</a>
ARTICLE VI AFFIRMATIVE COVENANTS		<a href="#">78</a>
6.01	Financial Statements	<a href="#">78</a>
6.02	Certificates; Other Information	<a href="#">79</a>
6.03	Notices	<a href="#">81</a>
6.04	Payment of Obligations; File Tax Returns	<a href="#">82</a>
6.05	Preservation of Existence, Etc.	<a href="#">82</a>
6.06	Maintenance of Properties	<a href="#">82</a>
6.07	Maintenance of Insurance	<a href="#">82</a>
6.08	Compliance with Laws	<a href="#">83</a>
6.09	Books and Records	<a href="#">83</a>

6.10	Inspection Rights	<a href="#">84</a>
6.11	Use of Proceeds	<a href="#">84</a>
6.12	Covenant to Guarantee Obligations and Give Security	<a href="#">84</a>
6.13	Compliance with Environmental Laws	<a href="#">86</a>
6.14	[Reserved]	<a href="#">86</a>
6.15	Further Assurances	<a href="#">86</a>
6.16	Compliance with Terms of Leaseholds	<a href="#">86</a>
6.17	[Reserved]	<a href="#">86</a>
6.18	Information Regarding Collateral	<a href="#">86</a>
6.19	Material Contracts	<a href="#">87</a>
6.20	Cash Collateral Accounts	<a href="#">87</a>
6.21	Anti-Corruption Laws; Sanctions	<a href="#">87</a>

#### ARTICLE VII NEGATIVE COVENANTS

7.01	Liens	<a href="#">87</a>
7.02	Indebtedness	<a href="#">88</a>
7.03	Investments	<a href="#">90</a>
7.04	Fundamental Changes	<a href="#">92</a>
7.05	Dispositions	<a href="#">92</a>
7.06	Restricted Payments	<a href="#">93</a>
7.07	Change in Nature of Business	<a href="#">94</a>
7.08	Transactions with Affiliates	<a href="#">95</a>
7.09	Burdensome Agreements	<a href="#">95</a>
7.10	Use of Proceeds	<a href="#">95</a>
7.11	Financial Covenants	<a href="#">96</a>
7.12	[Reserved]	<a href="#">96</a>
7.13	Sanctions	<a href="#">96</a>
7.14	Amendments of Organization Documents	<a href="#">96</a>
7.15	Accounting Changes	<a href="#">96</a>
7.16	Prepayments, Etc. of Indebtedness	<a href="#">96</a>
7.17	[Reserved]	<a href="#">96</a>
7.18	Anti-Corruption Laws	<a href="#">96</a>
7.19	[Reserved]	<a href="#">96</a>
7.20	Certain Transactions	<a href="#">96</a>

#### ARTICLE VIII EVENTS OF DEFAULT AND REMEDIES

8.01	Events of Default	<a href="#">97</a>
8.02	Remedies upon Event of Default	<a href="#">98</a>
8.03	Application of Funds	<a href="#">99</a>

ARTICLE IX ADMINISTRATIVE AGENT		<a href="#">100</a>
9.01	Appointment and Authority	<a href="#">100</a>
9.02	Rights as a Lender	<a href="#">100</a>
9.03	Exculpatory Provisions	<a href="#">100</a>
9.04	Reliance by Administrative Agent	<a href="#">101</a>
9.05	Delegation of Duties	<a href="#">102</a>
9.06	Resignation of Administrative Agent	<a href="#">102</a>
9.07	Non-Reliance on the Administrative Agent and the Other Lenders	<a href="#">104</a>
9.08	[Reserved]	<a href="#">104</a>
9.09	Administrative Agent May File Proofs of Claim; Credit Bidding	<a href="#">104</a>
9.10	Collateral and Guaranty Matters	<a href="#">105</a>
9.11	Secured Cash Management Agreements and Secured Hedge Agreements	<a href="#">106</a>
9.12	Certain ERISA Matters	<a href="#">106</a>
9.13	Recovery of Erroneous Payments	<a href="#">107</a>
ARTICLE X CONTINUING GUARANTY		<a href="#">108</a>
10.01	Guaranty	<a href="#">108</a>
10.02	Rights of Lenders	<a href="#">108</a>
10.03	Certain Waivers	<a href="#">108</a>
10.04	Obligations Independent	<a href="#">109</a>
10.05	Subrogation	<a href="#">109</a>
10.06	Termination; Reinstatement	<a href="#">109</a>
10.07	Subordination	<a href="#">109</a>
10.08	Stay of Acceleration	<a href="#">109</a>
10.09	Condition of Borrower	<a href="#">109</a>
10.10	Limitation on Guaranty	<a href="#">110</a>
10.11	Keepwell	<a href="#">110</a>
ARTICLE XI MISCELLANEOUS		<a href="#">110</a>
11.01	Amendments, Etc	<a href="#">110</a>
11.02	Notices; Effectiveness; Electronic Communications	<a href="#">111</a>
11.03	No Waiver; Cumulative Remedies; Enforcement	<a href="#">113</a>
11.04	Expenses; Indemnity; Damage Waiver	<a href="#">114</a>
11.05	Payments Set Aside	<a href="#">116</a>
11.06	Successors and Assigns	<a href="#">117</a>
11.07	Treatment of Certain Information; Confidentiality	<a href="#">120</a>
11.08	Right of Setoff	<a href="#">121</a>
11.09	Interest Rate Limitation	<a href="#">121</a>
11.10	Integration; Effectiveness	<a href="#">122</a>
11.11	Survival of Representations and Warranties	<a href="#">122</a>
11.12	Severability	<a href="#">122</a>



11.13	Replacement of Lenders	<a href="#">122</a>
11.14	Governing Law; Jurisdiction; Etc.	<a href="#">123</a>
11.15	WAIVER OF JURY TRIAL	<a href="#">124</a>
11.16	No Advisory or Fiduciary Responsibility	<a href="#">124</a>
11.17	Electronic Execution; Electronic Records; Counterparts	<a href="#">125</a>
11.18	USA PATRIOT Act	<a href="#">126</a>
11.19	Acknowledgement and Consent to Bail-In of Affected Financial Institutions	<a href="#">126</a>
11.20	Acknowledgement Regarding Any Supported QFCs	<a href="#">126</a>

## SCHEDULES

2.01A	Commitments and Applicable Percentages
2.01B	Swing Line Commitments
2.01C	Letter of Credit Commitments
5.13	Subsidiaries and Other Equity Investments
6.12	Guarantors
7.01	Existing Liens
7.02	Existing Indebtedness
7.03	Existing Investments
11.02(a)	Administrative Agent's Office, Certain Addresses for Notices
11.02(f)	Pension Plans

## EXHIBITS

*Form of*

A	Committed Loan Notice
B	Swing Line Loan Notice
C	Form of Note (Revolver)
D	Compliance Certificate
E	Assignment and Assumption
I	Perfection Certificate
M-1	U.S. Tax Compliance Certificate
M-2	U.S. Tax Compliance Certificate
M-3	U.S. Tax Compliance Certificate
M-4	U.S. Tax Compliance Certificate
N	Solvency Certificate
O	Notice of Prepayment
P	Form of Guaranty or Guaranty Supplement

## CREDIT AGREEMENT

This CREDIT AGREEMENT (“Agreement”) is entered into as of May 18, 2022, among TANDEM DIABETES CARE, INC., a Delaware corporation (the “Borrower”), certain Subsidiaries of the Borrower that may be required to provide Guarantees from time to time hereunder, each lender from time to time party hereto (collectively, the “Lenders” and individually, a “Lender”), and BANK OF AMERICA, N.A., as Administrative Agent, a Swing Line Lender and an L/C Issuer.

### PRELIMINARY STATEMENTS:

The Borrower has requested that the Lenders provide a revolving credit facility, and the Lenders have indicated their willingness to lend and the L/C Issuer has indicated its willingness to issue letters of credit, in each case, on the terms and subject to the conditions set forth herein.

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

### ARTICLE I DEFINITIONS AND ACCOUNTING TERMS

**1.01 Defined Terms.** As used in this Agreement, the following terms shall have the meanings set forth below:

“2025 Convertible Notes” means the 1.50% unsecured notes of the Borrower due 2025 in an aggregate principal amount of \$287,500,000 issued and sold on May 15, 2020, pursuant to the 2025 Indenture.

“2025 Indenture” means that certain Indenture, dated May 15, 2020, between the Borrower and U.S. Bank National Association, as Trustee.

“Acquisition Consideration” means, with respect to any Permitted Acquisition, the total cash and noncash consideration (including the fair market value of all Equity Interests issued or transferred to the sellers thereof, all indemnities, earnouts and other contingent payment obligations to, and the aggregate amounts paid or to be paid under noncompete, consulting and other affiliated agreements with, the sellers thereof, all write-downs of property and reserves for liabilities with respect thereto and all assumptions of debt, liabilities and other obligations in connection therewith) paid by or on behalf of the Borrower and its Subsidiaries for such Permitted Acquisition.

“Act” has the meaning specified in Section 11.18.

“Administrative Agent” means Bank of America in its capacity as administrative agent under any of the Loan Documents, or any successor administrative agent.

“Administrative Agent’s Office” means the Administrative Agent’s address and, as appropriate, account as set forth on Schedule 11.02, or such other address or account as the Administrative Agent may from time to time notify to the Borrower and the Lenders.

“Administrative Questionnaire” means an Administrative Questionnaire in substantially the form approved by the Administrative Agent.

“Affected Financial Institution” means (a) any EEA Financial Institution or (b) any UK Financial Institution.

“Affiliate” means, with respect to any Person, another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified.

“Aggregate Commitments” means the Commitments of all the Lenders.

“Agreement” has the meaning specified in the introductory paragraph hereto.

“Applicable Fee Rate” means, at any time, (a) from the Closing Date to the first Business Day immediately following the date on which the Administrative Agent receives a Compliance Certificate pursuant to Section 6.02(b) for the fiscal quarter ending June 30, 2022, 0.25% per annum and (b) thereafter, the applicable percentage per annum set forth below determined by reference to the Consolidated Net Leverage Ratio as set forth in the most recent Compliance Certificate received by the Administrative Agent pursuant to Section 6.02(b):

Applicable Fee Rate		
Pricing Level	Consolidated Net Leverage Ratio	Commitment Fee
1	≤ 1.00:1.00	0.20%
2	>1.00:1.00 but ≤ 2.00:1.00	0.25%
3	> 2.00:1.00 but ≤ 3.00:1.00	0.30%
4	> 3.00:1.00	0.35%

Any increase or decrease in the Applicable Fee Rate resulting from a change in the Consolidated Net Leverage Ratio shall become effective as of the first Business Day immediately following the date a Compliance Certificate is delivered pursuant to Section 6.02(b); provided, however, that if a Compliance Certificate is not delivered when due in accordance with such Section, then, upon the request of the Required Lenders, Pricing Level 4 shall apply as of the first Business Day after the date on which such Compliance Certificate was required to have been delivered and shall remain in effect until the date on which such Compliance Certificate is delivered.

Notwithstanding anything to the contrary contained in this definition, the determination of the Applicable Fee Rate for any period shall be subject to the provisions of Section 2.10(b).

“Applicable Law” means, as to any Person, all applicable Laws binding upon such Person or to which such a Person is subject.

“Applicable Percentage” means, with respect to any Lender at any time, the percentage (carried out to the ninth decimal place) of the Revolving Credit Facility represented by such Lender’s Commitment at such time, subject to adjustment as provided in Section 2.17. If the commitment of each Lender to make Loans and the obligation of the L/C Issuer to make L/C Credit Extensions have been terminated pursuant to Section 8.02, or if the Commitments have expired, then the Applicable Percentage of each Lender in respect of the Revolving Credit Facility shall be determined based on the Applicable Percentage of such Lender in respect of the Revolving Facility most recently in effect, giving effect to any subsequent assignments and to any Lender’s status as a Defaulting Lender at the time of determination. The initial Applicable Percentage of each Lender in respect of the Revolving Credit Facility is set forth opposite the name of such Lender on Schedule 2.01A or in the Assignment and Assumption pursuant to which such Lender becomes a party hereto, as applicable.

“Applicable Rate” means, (i) from the Closing Date to the first Business Day immediately following the date on which the Administrative Agent receives a Compliance Certificate pursuant to Section 6.02(b) for the fiscal quarter ending June 30, 2022, 0.50% per annum for Base Rate Loans and 1.50% per annum for Term SOFR Loans and Letter of Credit Fees and (ii) thereafter, the applicable percentage per annum set forth below determined by reference to the Consolidated Net Leverage Ratio as set forth in the most recent Compliance Certificate received by the Administrative Agent pursuant to Section 6.02(b):

Pricing Level	Applicable Rate		Base Rate
	Consolidated Net Leverage Ratio	Term SOFR	
1	≤ 1.00:1.00	1.25%	0.250%
2	>1.00:1.00 but ≤ 2.00:1.00	1.50%	0.50%
3	> 2.00:1.00 but ≤ 3.00:1.00	1.75%	0.75%
4	> 3.00:1.00	2.00%	1.00%

Any increase or decrease in the Applicable Rate resulting from a change in the Consolidated Net Leverage Ratio shall become effective as of the first Business Day immediately following the date a Compliance Certificate is delivered pursuant to [Section 6.02\(b\)](#); provided, however, that if a Compliance Certificate is not delivered when due in accordance with such Section, then, upon the request of the Required Lenders, Pricing Level 4 shall apply as of the first Business Day after the date on which such Compliance Certificate was required to have been delivered and shall remain in effect until the date on which such Compliance Certificate is delivered.

Notwithstanding anything to the contrary contained in this definition, the determination of the Applicable Rate for any period shall be subject to the provisions of [Section 2.10\(b\)](#).

“Applicable Revolving Credit Percentage” means with respect to any Revolving Credit Lender at any time, such Revolving Credit Lender’s Applicable Percentage in respect of the Revolving Credit Facility at such time.

“Appropriate Lender” means, at any time, (a) a Lender that has a Commitment with respect to the Revolving Credit Facility or holds a Revolving Credit Loan at such time, (b) with respect to the Letter of Credit Sublimit, (i) the L/C Issuer and (ii) if any Letters of Credit have been issued pursuant to [Section 2.03\(a\)](#), the Revolving Credit Lenders and (c) with respect to the Swing Line Sublimit, (i) the Swing Line Lender and (ii) if any Swing Line Loans are outstanding pursuant to [Section 2.04\(a\)](#), the Revolving Credit Lenders.

“Approved Fund” means any Fund that is administered or managed by (a) a Lender, (b) an Affiliate of a Lender or (c) an entity or an Affiliate of an entity that administers or manages a Lender.

“Assignment and Assumption” means an assignment and assumption entered into by a Lender and an Eligible Assignee (with the consent of any party whose consent is required by [Section 11.06\(b\)](#)), and accepted by the Administrative Agent, in substantially the form of [Exhibit E](#) or any other form (including electronic documentation generated by use of an electronic platform) approved by the Administrative Agent.

“Attributable Indebtedness” means, on any date, (a) in respect of any Capitalized Lease of any Person, the capitalized amount thereof that would appear on a balance sheet of such Person prepared as of such date in accordance with GAAP and (b) in respect of any Synthetic Lease Obligation, the capitalized amount of the remaining lease or similar payments under the relevant lease or other applicable agreement or instrument that would appear on a balance sheet of such Person prepared as of such date in accordance with GAAP if such lease or other agreement or instrument were accounted for as a Capitalized Lease.

“Audited Financial Statements” means the audited consolidated balance sheet of the Borrower and its Subsidiaries for the fiscal year ended December 31, 2021, and the related consolidated statements of operations and comprehensive income, stockholders’ equity and cash flows for such fiscal year of the Borrower and its Subsidiaries, including the notes thereto.

“Availability Period” means the period from and including the Closing Date to the earliest of (i) the Maturity Date for the Revolving Credit Facility, (ii) the date of termination of the Commitments pursuant to [Section 2.06](#), and (iii) the date of termination of the commitment of each Revolving Credit Lender to make Revolving Credit Loans and of the obligation of the L/C Issuer to make L/C Credit Extensions pursuant to [Section 8.02](#).

“Bail-In Action” means the exercise of any Write-Down and Conversion Powers by the applicable Resolution Authority in respect of any liability of an Affected Financial Institution.

“Bail-In Legislation” means, (a) with respect to any EEA Member Country implementing Article 55 of Directive 2014/59/EU of the European Parliament and of the Council of the European Union, the implementing law, rule, regulation or requirement for such EEA Member Country from time to time which is described in the EU Bail-In Legislation Schedule, and (b) with respect to the United Kingdom, Part I of the United Kingdom Banking Act 2009 (as amended from time to time) and any other law, regulation or rule applicable in the United Kingdom relating to the resolution of unsound or failing banks, investment firms or other financial institutions or their affiliates (other than through liquidation, administration or other insolvency proceedings).

“Bank of America” means Bank of America, N.A. and its successors.

“Base Rate” means for any day a fluctuating rate per annum equal to the highest of (a) the Federal Funds Rate plus 1/2 of 1% (b) the rate of interest in effect for such day as publicly announced from time to time by Bank of America as its “prime rate”, (c) Term SOFR plus 1.00%, and (d) 1.00%. The “prime rate” is a rate set by Bank of America based upon various factors including Bank of America’s costs and desired return, general economic conditions and other factors, and is used as a reference point for pricing some loans, which may be priced at, above, or below such announced rate. Any change in such prime rate announced by Bank of America shall take effect at the opening of business on the day specified in the public announcement of such change. If the Base Rate is being used as an alternate rate of interest pursuant to Section 3.03 hereof, then the Base Rate shall be the greater of clauses (a), (b) and (d) above and shall be determined without reference to clause (c) above.

“Base Rate Loan” means a Revolving Credit Loan that bears interest based on the Base Rate.

“Beneficial Ownership Certification” means a certification regarding beneficial ownership required by the Beneficial Ownership Regulation.

“Beneficial Ownership Regulation” means 31 C.F.R. § 1010.230.

“Benefit Plan” means any of (a) an “employee benefit plan” (as defined in ERISA) that is subject to Title I of ERISA, (b) a “plan” as defined in and subject to Section 4975 of the Code or (c) any Person whose assets include (for purposes of ERISA Section 3(42) or otherwise for purposes of Title I of ERISA or Section 4975 of the Code) the assets of any such “employee benefit plan” or “plan”.

“Borrower” has the meaning specified in the introductory paragraph hereto.

“Borrower Materials” has the meaning specified in Section 6.02.

“Borrowing” means a Revolving Credit Borrowing or a Swing Line Borrowing, as the context may require.

“Business Day” means any day other than a Saturday, Sunday or other day on which commercial banks are authorized to close under the Laws of, or are in fact closed in, the state where the Administrative Agent’s Office is located.

“Capital Expenditures” means, with respect to any Person for any period, any expenditure in respect of the purchase or other acquisition of any fixed or capital asset (excluding normal replacements and maintenance which are properly charged to current operations).

“Capitalized Lease” means any lease that has been or is required to be, in accordance with GAAP, recorded, classified and accounted for as a capitalized lease or financing lease (and excluding, for the avoidance of doubt, operating leases).

“Cash Collateral Account” means a blocked, non-interest bearing deposit account of one or more of the Loan Parties at Bank of America in the name of the Administrative Agent and under the sole dominion and control of the Administrative Agent, and otherwise established in a manner satisfactory to the Administrative Agent.

“Cash Collateralize” means to pledge and deposit with or deliver to the Administrative Agent, for the benefit of one or more of the L/C Issuer or Swing Line Lender (as applicable) and the Lenders, as collateral for L/C Obligations, Obligations in respect of Swing Line Loans, or obligations of Lenders to fund participations in respect of L/C Obligations or Swing Line Loans (as the context may require), (a) cash or deposit account balances, (b) backstop letters of credit entered into on terms, from issuers and in amounts satisfactory to the Administrative Agent, L/C Issuer or Swing Line Lender, and/or (c) if the Administrative Agent, the L/C Issuer or Swing Line Lender shall agree in their sole discretion, other credit support, in each case pursuant to documentation in form and substance satisfactory to (a) the Administrative Agent and (b) the L/C Issuer or the Swing Line Lender (as applicable). “Cash Collateral” shall have a meaning correlative to the foregoing and shall include the proceeds of such Cash Collateral and other credit support.

“Cash Equivalents” means any of the following types of Investments, to the extent owned by the Borrower or any of its Subsidiaries free and clear of all Liens (other than Liens created under the Collateral Documents):

(a) readily marketable obligations issued or directly and fully guaranteed or insured by the United States of America or any agency or instrumentality thereof having maturities of not more than 360 days from the date of acquisition thereof; provided that the full faith and credit of the United States of America is pledged in support thereof;

(b) time deposits with, or insured certificates of deposit or bankers’ acceptances of, any commercial bank that (i) (A) is a Lender or (B) is organized under the laws of the United States of America, any state thereof or the District of Columbia or is the principal banking subsidiary of a bank holding company organized under the laws of the United States of America, any state thereof or the District of Columbia, and is a member of the Federal Reserve System, (ii) issues (or the parent of which issues) commercial paper rated as described in clause (c) of this definition and (iii) has combined capital and surplus of at least \$1,000,000,000, in each case with maturities of not more than 90 days from the date of acquisition thereof;

(c) commercial paper issued by any Person organized under the laws of any state of the United States of America and rated at least “Prime-1” (or the then equivalent grade) by Moody’s or at least “A-1” (or the then equivalent grade) by S&P, in each case with maturities of not more than 180 days from the date of acquisition thereof;

(d) Investments, classified in accordance with GAAP as current assets of the Borrower or any of its Subsidiaries, in money market investment programs registered under the Investment Company Act of 1940, which are administered by financial institutions that have the highest rating obtainable from either Moody’s or S&P, and the portfolios of which principally comprise Investments of the character, quality and maturity described in clauses (a), (b) and (c) of this definition;

(e) other Investments, classified as “cash”, “cash equivalents” or “investments” in accordance with GAAP, and that are consistent with the Borrower’s Investment Objectives & Guidelines, as in effect on the Closing Date, together with any changes after the Closing Date as are reasonably satisfactory to Administrative Agent; and

(f) other Investments, classified in accordance with GAAP as current assets of the Borrower or any of its Subsidiaries, and that are consistent with the Borrower’s Investment Objectives & Guidelines, as in effect on the Closing Date, together with any changes after the Closing Date as are reasonably satisfactory to Administrative Agent.

“Cash Management Agreement” means any agreement to provide cash management services, including treasury, depository, overdraft, credit or debit card, electronic funds transfer and other cash management arrangements.

“Cash Management Bank” means (i) any Person that, at the time it enters into a Cash Management Agreement, is a Lender or an Affiliate of a Lender, in its capacity as a party to such Cash Management Agreement or (ii) any other person that enters into a Cash Management Agreement and that is a commercial or investment bank; provided, however, that for any of the foregoing to be included as a “Secured Cash Management Agreement” on any date of determination by the Administrative Agent, the applicable Cash Management Bank (other than the Administrative Agent or an Affiliate of the Administrative Agent) and the Borrower must have delivered a written notice to the Administrative Agent designating such Person as a Cash Management Bank prior to such date of determination.

“CERCLA” means the Comprehensive Environmental Response, Compensation and Liability Act of 1980.

“CERCLIS” means the Comprehensive Environmental Response, Compensation and Liability Information System maintained by the U.S. Environmental Protection Agency.

“CFC” means a Person that is a controlled foreign corporation under Section 957 of the Code.

“Change in Law” means the occurrence, after the date of this Agreement, of any of the following: (a) the adoption or taking effect of any law, rule, regulation or treaty, (b) any change in any law, rule, regulation or treaty or in the administration, interpretation, implementation or application thereof by any Governmental Authority or (c) the making or issuance of any request, rule, guideline or directive (whether or not having the force of law) by any Governmental Authority; provided that notwithstanding anything herein to the contrary, (x) the Dodd-Frank Wall Street Reform and Consumer Protection Act and all requests, rules, guidelines or directives thereunder or issued in connection therewith or in the implementation thereof and (y) all requests, rules, guidelines or directives promulgated by the Bank for International Settlements, the Basel Committee on Banking Supervision (or any successor or similar authority) or the United States or foreign regulatory authorities, in each case pursuant to Basel III, shall in each case be deemed to be a “Change in Law”, regardless of the date enacted, adopted, issued or implemented.

“Change of Control” means an event or series of events by which:

(a) any “person” or “group” (as such terms are used in Sections 13(d) and 14(d) of the Securities Exchange Act of 1934, but excluding any employee benefit plan of such person or its subsidiaries, and any person or entity acting in its capacity as trustee, agent or other fiduciary or administrator of any such plan) becomes the “beneficial owner” (as defined in Rules 13d-3 and 13d-5 under the Securities Exchange Act of 1934, except that a person or group shall be deemed to have “beneficial ownership” of all securities that such person or group has the right to acquire, whether such right is exercisable immediately or only after the passage of time (such right, an “option right”), directly or indirectly, of 35% or more of the equity securities of the Borrower entitled to vote for members of the board of directors or equivalent governing body of the Borrower on a fully-diluted basis (and taking into account all such securities that such “person” or “group” has the right to acquire pursuant to any option right); or

(b) during any period of twelve (12) consecutive months, a majority of the members of the board of directors or other equivalent governing body of the Borrower cease to be composed of individuals (i) who were members of that board or equivalent governing body on the first day of such period, (ii) whose election or nomination to that board or equivalent governing body was approved or reaffirmed by individuals referred to in clause (i) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body or (iii) whose election or nomination to that board or other equivalent governing body was approved or reaffirmed by individuals referred to in clauses (i) and (ii) above constituting at the time of such election or nomination at least a majority of that board or equivalent governing body.



“Closing Date” means the first date all the conditions precedent in Section 4.01 are satisfied or waived in accordance with Section 11.01.

“CME” means CME Group Benchmark Administration Limited as administrator of the forward-looking term Secured Overnight Financing Rate (SOFR) (or a successor administrator).

“Code” means the Internal Revenue Code of 1986.

“Collateral” means all of the “Collateral” or other similar term referred to in the Collateral Documents and all of the other property that is or is intended under the terms of the Collateral Documents to be subject to Liens in favor of the Administrative Agent for the benefit of the Secured Parties.

“Collateral Documents” means, collectively, the Security Agreement, the Intellectual Property Security Agreements, each of the collateral assignments, Security Agreement Supplements, security agreements, pledge agreements or other similar agreements delivered to the Administrative Agent pursuant to Section 6.12, and each of the other agreements, instruments or documents that creates or purports to create a Lien in favor of the Administrative Agent for the benefit of the Secured Parties.

“Commitment” means, as to each Lender, its obligation to (a) make Revolving Credit Loans to the Borrower pursuant to Section 2.01, (b) purchase participations in L/C Obligations, and (c) purchase participations in Swing Line Loans, in an aggregate principal amount at any one time outstanding not to exceed the amount set forth opposite such Lender’s name on Schedule 2.01 under the caption “Commitment” or opposite such caption in the Assignment and Assumption pursuant to which such Lender becomes a party hereto, as applicable, as such amount may be adjusted from time to time in accordance with this Agreement. The Commitment of all of the Lenders on the Closing Date shall be \$100,000,000.

“Committed Loan Notice” means a notice of (a) a Revolving Credit Borrowing, (b) a conversion of Loans from one Type to the other, or (c) a continuation of Term SOFR Loans, pursuant to Section 2.02(a), which shall be substantially in the form of Exhibit A or such other form as may be approved by the Administrative Agent, including any form on an electronic platform or electronic transmission system as shall be approved by the Administrative Agent, appropriately completed and signed by a Responsible Officer of the Borrower.

“Commodity Exchange Act” means the Commodity Exchange Act (7 U.S.C. § 1 *et seq.*), as amended from time to time, and any successor statute.

“Communication” means this Agreement, any Loan Document and any document, any amendment, approval, consent, information, notice, certificate, request, statement, disclosure or authorization related to any Loan Document.

“Compliance Certificate” means a certificate substantially in the form of Exhibit D.

“Conforming Changes” means, with respect to the use, administration of or any conventions associated with SOFR or any proposed Successor Rate or Term SOFR, as applicable, any conforming changes to the definitions of “Base Rate”, “SOFR”, “Term SOFR” and “Interest Period”, timing and frequency of determining rates and making payments of interest and other technical, administrative or operational matters (including, for the avoidance of doubt, the definitions of “Business Day” and “U.S. Government Securities Business Day”, timing of borrowing requests or prepayment, conversion or continuation notices and length of lookback periods) as may be appropriate, in the discretion of the Administrative Agent, to reflect the adoption and implementation of such applicable rate(s) and to permit the administration thereof by the Administrative Agent in a manner substantially consistent with market practice (or, if the Administrative Agent determines that adoption of any portion of such market practice is not administratively feasible or that no market practice for the administration of such rate exists, in such other manner of administration as the Administrative Agent determines is reasonably necessary in connection with the administration of this Agreement and any other Loan Document).

“Connection Income Taxes” means Other Connection Taxes that are imposed on or measured by net income (however denominated) or that are franchise Taxes or branch profits Taxes.

“Consolidated EBITDA” means, at any date of determination, an amount equal to Consolidated Net Income of the Borrower and its Subsidiaries on a consolidated basis for the most recently completed Measurement Period plus (a) the following to the extent deducted in calculating such Consolidated Net Income: (i) Consolidated Interest Charges, (ii) the provision for federal, state, local and foreign income taxes payable, (iii) depreciation and amortization expense, (iv) costs and expenses, including all stock-based compensation expenses, incurred pursuant to any management equity plan, stock option plan, stock incentive plan, stock purchase plan or other management or employee benefit plan, to the extent such costs or expenses are either non-cash or are funded with cash proceeds of the issuance of equity interests by Borrower; (v) any non-cash losses related to hedging, including, without limitation, resulting from hedging transactions for (x) interest rate risks associated with this Agreement or (y) the Convertible Notes; (vi) acquired in-process research and development expense in connection with an acquisition permitted hereunder by the Borrower or any of its Subsidiaries of any assets; (vii) restructuring or reorganization charges or reserves, including any one-time costs incurred in connection with acquisitions or investments permitted hereunder and other Investments and costs related to the closure, consolidation and integration of facilities, information technology infrastructure and legal entities, or other internal reorganizations or consolidations, and severance and retention bonuses; provided that, the aggregate amount of expenses added back pursuant to this clause (vii) shall not exceed 12% of Consolidated EBITDA for any applicable Measurement Period (prior to giving effect to the addbacks pursuant to this clause (vii)); (viii) costs paid and expenses incurred in connection with litigation settlements; (ix) unrealized losses on equity and securities investments, and changes in value of stock warrants and similar securities issued by the Borrower; (x) cost savings, operating expense reductions and synergies reasonably expected by Borrower in good faith to be realized as a result of any acquisition, other Investment or Disposition, in each case permitted hereunder, or any operational initiative, in each case within the eight consecutive fiscal quarters following the consummation of such acquisition, Investment, Disposition or initiative, calculated as though such cost savings and synergies had been realized on the first day of such period and net of the amount of actual benefits received during such period from such acquisition; provided that (A) a duly completed certificate (which may be included in a Compliance Certificate) signed by a Responsible Officer of the Borrower (summarizing in detail reasonably satisfactory to Administrative Agent the cash savings, operating expense reductions or synergies expected in connection with such acquisition, Investment, Disposition or initiative) shall have been delivered to the Administrative Agent, (B) no cost savings or synergies shall be added pursuant to this clause (x) to the extent duplicative of any expenses or charges otherwise added to Consolidated EBITDA, whether through a pro forma adjustment or otherwise, for such period and (C) the aggregate amount of cost savings and synergies added back pursuant to this clause (x) shall not exceed 20% of Consolidated EBITDA for any applicable Measurement Period (prior to giving effect to the addbacks pursuant to this clause (x)), (xi) any non-cash write-offs or write-downs, or non-cash impairment charges (including any impairment of intangibles or goodwill) not expected to become a cash item in any future period, (xii) any non-cash losses associated with changes in foreign currency exchange rates and (xiii) other non-cash losses, expenses or charges reducing such Consolidated Net Income which do not represent a cash item in such period or any future period (in each case of or by the Borrower and its Subsidiaries for such Measurement Period) and minus (b) the following to the extent included in calculating such Consolidated Net Income: (i) Federal, state, local and foreign income tax benefits, (ii) all non-cash items increasing Consolidated Net Income (other than reversals of non-cash items that were expected to become cash items to the extent such items were not added back to Consolidated EBITDA when accrued and accruals of revenue or recording of receivables in the ordinary course of business), (iii) any non-cash gain related to hedging, including, without limitation, resulting from hedging transactions for (x) interest rate risks associated with this Agreement or (y) the Convertible Notes, (iv) unrealized gains on equity and securities investments and (v) any non-cash gains associated with changes in foreign currency exchange rates (in each case of or by the Borrower and its Subsidiaries for such Measurement Period).

“Consolidated Funded Indebtedness” means, as of any date of determination, for the Borrower and its Subsidiaries on a consolidated basis, the sum of, without duplication, (a) the outstanding principal amount of all obligations, whether current or long-term, for borrowed money (including Obligations hereunder) and all obligations evidenced by bonds, debentures, notes, loan agreements or other similar instruments, (b) all purchase money Indebtedness, (c) all direct obligations arising under letters of credit (including standby and commercial), bankers’ acceptances, bank guaranties, surety bonds and similar instruments, in each case solely to the extent drawn by the beneficiary thereof, (d) all obligations in respect of the deferred purchase price of property or services (other than trade accounts payable in the ordinary course of business), (e) all Attributable Indebtedness, (f) without duplication, all Guarantees with respect to outstanding Indebtedness of the types specified in clauses (a) through (e), above of Persons other than the Borrower or any Subsidiary, and (g) all Indebtedness of the types referred to in clauses (a) through (f), above of any partnership or joint venture (other than a joint venture that is itself a corporation, limited liability company or similar entity) in which the Borrower or a Subsidiary is a general partner or joint venturer, unless such Indebtedness is expressly made non-recourse to the Borrower or such Subsidiary.

“Consolidated Funded Net Indebtedness” means, Consolidated Funded Indebtedness net of the sum of (a) the aggregate unrestricted cash and Cash Equivalents of the Borrower and its Subsidiaries maintained in the United States, plus (b) unrestricted Investments made in accordance with the Borrower’s Investment Objectives & Guidelines as in effect on the Closing Date, together with any changes after the Closing Date as are reasonably satisfactory to Administrative Agent, in an aggregate amount for the foregoing clauses (a) and (b) not to exceed \$100,000,000 at any time.

“Consolidated Interest Charges” means, for any Measurement Period, the sum of (a) all interest, premium payments, debt discount, fees, charges and related expenses in connection with borrowed money (including capitalized interest) or in connection with the deferred purchase price of assets, in each case to the extent treated as interest expense in accordance with GAAP, (b) all interest paid or payable with respect to discontinued operations and (c) the portion of rent expense under Capitalized Leases that is treated as interest expense in accordance with GAAP, in each case, of or by the Borrower and its Subsidiaries on a consolidated basis for the most recently completed Measurement Period.

“Consolidated Interest Coverage Ratio” means, as of any date of determination, the ratio of (a) Consolidated EBITDA to (b) Consolidated Interest Charges, in each case, of or by the Borrower and its Subsidiaries on a consolidated basis for the most recently completed Measurement Period.

“Consolidated Net Leverage Ratio” means, as of any date of determination, the ratio of (a) Consolidated Funded Net Indebtedness as of such date to (b) Consolidated EBITDA of the Borrower and its Subsidiaries on a consolidated basis for the most recently completed Measurement Period.

“Consolidated Net Income” means, at any date of determination, the net income (or loss) of the Borrower and its Subsidiaries on a consolidated basis for the most recently completed Measurement Period; provided that Consolidated Net Income shall exclude (a) extraordinary or infrequent gains or losses for such Measurement Period, (b) the net income of any Subsidiary during such Measurement Period to the extent that the declaration or payment of dividends or similar distributions by such Subsidiary of such income is not permitted by operation of the terms of its Organization Documents or any agreement, instrument or Law applicable to such Subsidiary during such Measurement Period, and (c) any income (or loss) for such Measurement Period of any Person if such Person is not a Subsidiary, except that the Borrower’s equity in the net income of any such Person for such Measurement Period shall be included in Consolidated Net Income up to the aggregate amount of cash actually distributed by such Person during such Measurement Period to the Borrower or a Subsidiary as a dividend or other distribution (and in the case of a dividend or other distribution to a Subsidiary, such Subsidiary is not precluded from further distributing such amount to the Borrower as described in clause (b) of this proviso).

“Contractual Obligation” means, as to any Person, any provision of any security issued by such Person or of any agreement, instrument or other undertaking to which such Person is a party or by which it or any of its property is bound.

“Control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise. “Controlling” and “Controlled” have meanings correlative thereto.

“Controlled Account” means each deposit account and securities account that is subject to an account control agreement in form and substance satisfactory to the Administrative Agent and the L/C Issuer.

“Convertible Notes” means the 2025 Convertible Notes.

“Convertible Notes Documents” means, collectively, the 2025 Indenture and all other agreements, instruments and other documents pursuant to which the Convertible Notes have been or will be issued or otherwise setting forth the terms of the Convertible Notes.

“Copyrights” means, collectively: (i) all copyrights, works protectable by copyright, copyright registrations and copyright applications anywhere in the world, (ii) all derivative works, counterparts, extensions and renewals of any of the foregoing and (iii) all rights corresponding to any of the foregoing throughout the world.

“Covered Entity” has the meaning specified in [Section 11.20\(b\)](#).

“Credit Extension” means each of the following: (a) a Borrowing and (b) an L/C Credit Extension.

“Daily Simple SOFR” with respect to any applicable determination date means the SOFR published on such date on the Federal Reserve Bank of New York’s website (or any successor source).

“Debtor Relief Laws” means the Bankruptcy Code of the United States, and all other liquidation, conservatorship, bankruptcy, assignment for the benefit of creditors, moratorium, rearrangement, receivership, insolvency, reorganization, or similar debtor relief Laws of the United States or other applicable jurisdictions from time to time in effect.

“Default” means any event or condition that constitutes an Event of Default or that, with the giving of any notice, the passage of time, or both, would be an Event of Default.

“Default Rate” means (a) when used with respect to Obligations other than Letter of Credit Fees, an interest rate equal to (i) the Base Rate plus (ii) the Applicable Rate, if any, applicable to Base Rate Loans plus (iii) 2% per annum; provided, however, that with respect to a Term SOFR Loan, the Default Rate shall be an interest rate equal to the interest rate (including any Applicable Rate) otherwise applicable to such Loan plus 2% per annum and (b) when used with respect to Letter of Credit Fees, a rate equal to the Applicable Rate plus 2% per annum.

“Defaulting Lender” means, subject to Section 2.17(b), any Lender that (a) has failed to (i) fund all or any portion of its Loans within two Business Days of the date such Loans were required to be funded hereunder unless such Lender notifies the Administrative Agent and the Borrower in writing that such failure is the result of such Lender’s determination that one or more conditions precedent to funding (each of which conditions precedent, together with any applicable default, shall be specifically identified in such writing) has not been satisfied, or (ii) pay to the Administrative Agent, the L/C Issuer, the Swing Line Lender or any other Lender any other amount required to be paid by it hereunder (including in respect of its participation in Letters of Credit or Swing Line Loans) within two Business Days of the date when due, (b) has notified the Borrower, the Administrative Agent, the L/C Issuer or the Swing Line Lender in writing that it does not intend to comply with its funding obligations hereunder, or has made a public statement to that effect (unless such writing or public statement relates to such Lender’s obligation to fund a Loan hereunder and states that such position is based on such Lender’s determination that a condition precedent to funding (which condition precedent, together with any applicable default, shall be specifically identified in such writing or public statement) cannot be satisfied), or (c) has failed, within three Business Days after written request by the Administrative Agent or the Borrower, to confirm in writing to the Administrative Agent and the Borrower that it will comply with its prospective funding obligations hereunder (provided that such Lender shall cease to be a Defaulting Lender pursuant to this clause (c) upon receipt of such written confirmation by the Administrative Agent and the Borrower). Any determination by the Administrative Agent that a Lender is a Defaulting Lender under any one or more of clauses (a) through (c) above, and of the effective date of such status, shall be conclusive and binding absent manifest error, and such Lender shall be deemed to be a Defaulting Lender (subject to Section 2.17(b)) as of the date established therefor by the Administrative Agent in a written notice of such determination, which shall be delivered by the Administrative Agent to the Borrower, the L/C Issuer, the Swing Line Lender and each other Lender promptly following such determination.

“Designated Jurisdiction” means any country or territory to the extent that such country or territory itself is the subject of any Sanction.

“Disposition” or “Dispose” means the sale, transfer, license, lease or other disposition (in one transaction or in a series of transactions and whether effected pursuant to a Division or otherwise) of any property by any Person (including any sale and leaseback transaction and any issuance of Equity Interests by a Subsidiary of such Person), including any sale, assignment, transfer or other disposal, with or without recourse, of any notes or accounts receivable or any rights and claims associated therewith.

“Dividing Person” has the meaning assigned to it in the definition of “Division.”

“Division” means the division of the assets, liabilities and/or obligations of a Person (the

“Dividing Person”) among two or more Persons (whether pursuant to a “plan of division” or similar arrangement), which may or may not include the Dividing Person and pursuant to which the Dividing Person may or may not survive.

“Division Successor” means any Person that, upon the consummation of a Division of a Dividing Person, holds all or any portion of the assets, liabilities and/or obligations previously held by such Dividing Person immediately prior to the consummation of such Division. A Dividing Person which retains any of its assets, liabilities and/or obligations after a Division shall be deemed a Division Successor upon the occurrence of such Division.

“Dollar” and “\$” mean lawful money of the United States.

“Domestic Subsidiary” means any Subsidiary that is organized under the laws of any political subdivision of the United States.

“EEA Financial Institution” means (a) any credit institution or investment firm established in any EEA Member Country which is subject to the supervision of an EEA Resolution Authority, (b) any entity established in an EEA Member Country which is a parent of an institution described in clause (a), of this definition, or (c) any financial institution established in an EEA Member Country which is a Subsidiary of an institution described in clauses (a) or (b) of this definition and is subject to consolidated supervision with its parent.

“EEA Member Country” means any of the member states of the European Union, Iceland, Liechtenstein, and Norway.

“EEA Resolution Authority” means any public administrative authority or any Person entrusted with public administrative authority of any EEA Member Country (including any delegee) having responsibility for the resolution of any EEA Financial Institution.

“Electronic Record” and “Electronic Signature” shall have the meanings assigned to them, respectively, by 15 USC §7006, as it may be amended from time to time.

“Eligible Assignee” means any Person that meets the requirements to be an assignee under Section 11.06(b)(iii) and (v) (subject to such consents, if any, as may be required under Section 11.06(b)(iii)).

“Environment” means ambient air, indoor air, surface water, groundwater, drinking water, soil, surface and subsurface strata, and natural resources such as wetland, flora and fauna.

“Environmental Laws” means any and all federal, state, local, and foreign statutes, laws (including common law), regulations, legally-binding standards, ordinances, rules, judgments, orders, decrees, permits, agreements with any Governmental Authority or governmental restrictions relating to pollution or the protection of the Environment or human health (to the extent related to exposure to hazardous materials), including those relating to the manufacture, generation, handling, transport, storage, treatment, Release or threat of Release of Hazardous Materials, air emissions and discharges to waste or public systems.

“Environmental Liability” means any liability, contingent or otherwise (including any liability for damages, costs of environmental remediation, fines, penalties or indemnities) whether based in contract, tort, implied or express warranty, strict liability, criminal or civil statute or common law, directly or indirectly relating to (a) any Environmental Law, (b) the generation, use, handling, transportation, storage, treatment or disposal of any Hazardous Materials, (c) exposure to any Hazardous Materials, (d) Release or threatened Release of any Hazardous Materials or (e) any contract, agreement or other consensual arrangement pursuant to which liability is assumed or imposed with respect to any of the foregoing.

“Environmental Permit” means any permit, certification, registration, approval, identification number, license or other authorization required under any Environmental Law.

“Equity Interests” means, with respect to any Person, all of the shares of capital stock of (or other ownership or profit interests in) such Person, all of the warrants, options or other rights for the purchase or acquisition from such Person of shares of capital stock of (or other ownership or profit interests in) such Person, all of the securities convertible into or exchangeable for shares of capital stock of (or other ownership or profit interests in) such Person or warrants, rights or options for the purchase or acquisition from such Person of such shares (or such other interests), and all of the other ownership or profit interests in such Person (including partnership, member or trust interests therein), whether voting or nonvoting, and whether or not such shares, warrants, options, rights or other interests are outstanding on any date of determination; provided that Convertible Notes and any other convertible notes issued by the Borrower in accordance with this Agreement shall not constitute Equity Interests.

“ERISA” means the Employee Retirement Income Security Act of 1974, as amended, and the rules and regulations promulgated thereunder.

“ERISA Affiliate” means any trade or business (whether or not incorporated) under common control with the Borrower within the meaning of Section 414(b) or (c) of the Code (and Sections 414(m) and (o) of the Code for purposes of provisions relating to Section 412 of the Code).

“ERISA Event” means (a) a Reportable Event with respect to a Pension Plan; (b) the withdrawal of the Borrower or any ERISA Affiliate from a Pension Plan subject to Section 4063 of ERISA during a plan year in which such entity was a “substantial employer” as defined in Section 4001(a)(2) of ERISA or a cessation of operations that is treated as such a withdrawal under Section 4062(e) of ERISA; (c) a complete or partial withdrawal by the Borrower or any ERISA Affiliate from a Multiemployer Plan or notification that a Multiemployer Plan is insolvent (within the meaning of Title IV of ERISA); (d) the filing of a notice of intent to terminate a Pension Plan or Multiemployer Plan, or the treatment of a Pension Plan or Multiemployer Plan amendment as a termination under Section 4041 or 4041A of ERISA; (e) the institution by the PBGC of proceedings to terminate a Pension Plan or Multiemployer Plan; (f) any event or condition which constitutes grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Pension Plan or Multiemployer Plan; (g) the determination that any Pension Plan is considered an at-risk plan (within the meaning of Section 430 of the Code or Section 303 of ERISA) or that a Multiemployer Plan is in endangered or critical status within the meaning of Section 432 of the Code or Sections 304 or 305 of ERISA; (h) the imposition of any liability under Title IV of ERISA, other than for PBGC premiums due but not delinquent under Section 4007 of ERISA, upon the Borrower or any ERISA Affiliate; (i) the engagement by the Borrower or any ERISA Affiliate in a transaction that could be subject to Section 4069 or Section 4212(c) of ERISA; or (j) a failure by the Borrower or any ERISA Affiliate to meet all applicable requirements under the Pension Funding Rules in respect of a Pension Plan or Multiemployer Plan, whether or not waived, or the failure by the Borrower or any ERISA Affiliate to make any required contribution to a Multiemployer Plan.

“EU Bail-In Legislation Schedule” means the EU Bail-In Legislation Schedule published by the Loan Market Association (or any successor person), as in effect from time to time.

“Event of Default” has the meaning specified in Section 8.01.

“Excluded Swap Obligation” means, with respect to any Guarantor, any Swap Obligation if, and to the extent that, all or a portion of the Guaranty of such Guarantor of, or the grant by such Guarantor of a security interest to secure, such Swap Obligation (or any Guaranty thereof) is or becomes illegal under the Commodity Exchange Act or any rule, regulation or order of the Commodity Futures Trading Commission (or the application or official interpretation of any thereof) by virtue of such Guarantor’s failure for any reason to constitute an “eligible contract participant” as defined in the Commodity Exchange Act (determined after giving effect to Section 10.11 and any other “keepwell, support or other agreement” for the benefit of such Guarantor and any and all guaranties of such Guarantor’s Swap Obligations by other Loan Parties) at the time the Guaranty of such Guarantor, or a grant by such Guarantor of a security interest, becomes effective with respect to such Swap Obligation. If a Swap Obligation arises under a master agreement governing more than one swap, such exclusion shall apply only to the portion of such Swap Obligation that is attributable to swaps for which such Guaranty or security interest is or becomes excluded in accordance with the first sentence of this definition.

“Excluded Taxes” means any of the following Taxes imposed on or with respect to any Recipient or required to be withheld or deducted from a payment to a Recipient, (a) Taxes imposed on or measured by net income (however denominated), franchise Taxes, and branch profits Taxes, in each case, (i) imposed as a result of such Recipient being organized under the laws of, or having its principal office or, in the case of any Lender, its Lending Office located in, the jurisdiction imposing such Tax (or any political subdivision thereof) or (ii) that are Other Connection Taxes, (b) in the case of a Lender, withholding Taxes imposed on amounts payable to or for the account of such Lender with respect to an applicable interest in a Loan or Commitment pursuant to a law in effect on the date on which (i) such Lender acquires such interest in the Loan or Commitment (other than pursuant to an assignment request by the Borrower under Section 11.13) or (ii) such Lender changes its Lending Office, except in each case to the extent that, pursuant to Section 3.01, amounts with respect to such Taxes were payable either to such Lender’s assignor immediately before such Lender became a party hereto or to such Lender immediately before it changed its Lending Office, (c) Taxes attributable to such Recipient’s failure to comply with Section 3.01(g) and (d) any U.S. federal withholding Taxes imposed pursuant to FATCA.

“FASB ASC” means the Accounting Standards Codification of the Financial Accounting Standards Board.

“FATCA” means Sections 1471 through 1474 of the Code, as of the date of this Agreement (or any amended or successor version that is substantively comparable and not materially more onerous to comply with) and any current or future regulations or official interpretations thereof and any agreements entered into pursuant to Section 1471(b)(1) of the Code, as of the date of this Agreement (or any amended or successor version described above) and any intergovernmental agreement (and related fiscal or regulatory legislation, or related official rules or practices) implementing the foregoing.

“FDA” means the United States Food and Drug Administration and any successor thereto.

“FDA Permits” has the meaning specified in Section 5.26(a).

“Federal Funds Rate” means, for any day, the rate per annum calculated by the Federal Reserve Bank of New York based on such day’s federal funds transactions by depository institutions (as determined in such manner as the Federal Reserve Bank of New York shall set forth on its public website from time to time) and published on the next succeeding Business Day by the Federal Reserve Bank of New York as the federal funds effective rate; provided that if the Federal Funds Rate as so determined would be less than zero, such rate shall be deemed to be zero for purposes of this Agreement.

“Fee Letter” means the letter agreement, dated as of the Closing Date, between the Borrower and the Administrative Agent.

“Flood Insurance Laws” means, collectively, (a) National Flood Insurance Reform Act of 1994 (which comprehensively revised the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973) as now or hereafter in effect or any successor statute thereto, (b) the Flood Insurance Reform Act of 2004 as now or hereafter in effect or any successor statute thereto and (c) the Biggert-Waters Flood Insurance Reform Act of 2012 as now or hereafter in effect or any successor statute thereto.

“Foreign Lender” means (a) if the Borrower is a U.S. Person, a Lender that is not a U.S. Person, and (b) if the Borrower is not a U.S. Person, a Lender that is resident or organized under laws of a jurisdiction other than that in which the Borrower is resident for tax purposes. For purposes of this definition, the United States, each State thereof and the District of Columbia shall be deemed to constitute a single jurisdiction.

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

“FRB” means the Board of Governors of the Federal Reserve System of the United States.



“Fronting Exposure” means, at any time there is a Defaulting Lender, (a) with respect to the L/C Issuer, such Defaulting Lender’s Applicable Percentage of the outstanding L/C Obligations other than L/C Obligations as to which such Defaulting Lender’s participation obligation has been reallocated to other Lenders or Cash Collateralized in accordance with the terms hereof, and (b) with respect to the Swing Line Lender, such Defaulting Lender’s Applicable Percentage of Swing Line Loans other than Swing Line Loans as to which such Defaulting Lender’s participation obligation has been reallocated to other Lenders in accordance with the terms hereof.

“Fund” means any Person (other than a natural Person) that is (or will be) engaged in making, purchasing, holding or otherwise investing in commercial loans and similar extensions of credit in the ordinary course of its activities.

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

“Governmental Authority” means the government of the United States or any other nation, or of any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government (including any supra-national bodies such as the European Union or the European Central Bank).

“Guarantee” means, as to any Person, (a) any obligation, contingent or otherwise, of such Person guaranteeing or having the economic effect of guaranteeing any Indebtedness or other obligation payable or performable by another Person (the “primary obligor”) in any manner, whether directly or indirectly, and including any obligation of such Person, direct or indirect, (i) to purchase or pay (or advance or supply funds for the purchase or payment of) such Indebtedness or other obligation, (ii) to purchase or lease property, securities or services for the purpose of assuring the obligee in respect of such Indebtedness or other obligation of the payment or performance of such Indebtedness or other obligation, (iii) to maintain working capital, equity capital or any other financial statement condition or liquidity or level of income or cash flow of the primary obligor so as to enable the primary obligor to pay such Indebtedness or other obligation, or (iv) entered into for the purpose of assuring in any other manner the obligee in respect of such Indebtedness or other obligation of the payment or performance thereof or to protect such obligee against loss in respect thereof (in whole or in part), or (b) any Lien on any assets of such Person securing any Indebtedness or other obligation of any other Person, whether or not such Indebtedness or other obligation is assumed by such Person (or any right, contingent or otherwise, of any holder of such Indebtedness to obtain any such Lien). The amount of any Guarantee shall be deemed to be an amount equal to the stated or determinable amount of the related primary obligation, or portion thereof, in respect of which such Guarantee is made or, if not stated or determinable, the maximum reasonably anticipated liability in respect thereof as determined by the guaranteeing Person in good faith. The term “Guarantee” as a verb has a corresponding meaning.

“Guarantors” means, collectively, (a) each Subsidiary of the Borrower listed on Schedule 6.12 and identified under the caption “GUARANTOR” on the signature pages hereto and each other Domestic Subsidiary of the Borrower that is a Material Subsidiary and that shall be required to execute and deliver a guaranty or guaranty supplement pursuant to Section 6.12 and (b) with respect to (i) Obligations owing by any Loan Party or any Subsidiary of a Loan Party (other than the Borrower) under any Hedge Agreement or any Cash Management Agreement and (ii) the payment and performance by each Specified Loan Party of its obligations under its Guaranty with respect to all Swap Obligations, the Borrower.

“Guaranty” means, collectively, the Guaranty made by the Guarantors under Article X in favor of the Secured Parties, together with each other guaranty and guaranty supplement delivered pursuant to Section 6.12.

“Hazardous Materials” means all explosive or radioactive substances or wastes and all hazardous or toxic substances, wastes or other pollutants including petroleum or petroleum distillates, natural gas, natural gas liquids, asbestos or asbestos-containing materials, polychlorinated biphenyls, radon gas, toxic mold, infectious or medical wastes and all other substances, wastes, chemicals, pollutants, contaminants or compounds of any nature in any form regulated pursuant to any Environmental Law.

“Hedge Bank” means (i) any Person that, at the time it enters into an interest rate Swap Contract permitted under Article VI or VII, is a Lender or an Affiliate of a Lender, in its capacity as a party to such Swap Contract or (ii) any other person that enters into an interest rate Swap Contract permitted under Article VI or VII and that is a commercial or investment bank designated by the Borrower as a “Hedge Bank” by written notice to the Administrative Agent.

“Immaterial Subsidiary” means any Subsidiary of the Borrower that (i) individually constitutes or holds less than three and one half percent (3.5%) of the Borrower’s consolidated total assets or generates less than three and one half percent (3.5%) of the Borrower’s Consolidated EBITDA, and (ii) when taken together with all then existing Immaterial Subsidiaries, such Subsidiary and such Immaterial Subsidiaries, in the aggregate, would constitute or hold less than seven percent (7.0%) of the Borrower’s consolidated total assets or generate less than seven percent (7.0%) of the Borrower’s Consolidated EBITDA, in each case of the foregoing clauses as of the last day of, or for, the most recently ended fiscal period for which financial statements were required to have been delivered pursuant to Section 6.01(a) or (b).

“Increase Effective Date” has the meaning assigned to such term in Section 2.15(a).

“Increase Joinder” has the meaning assigned to such term in Section 2.15(c).

“Incremental Commitments” means Incremental Revolving Commitments.

“Incremental Revolving Commitment” has the meaning assigned to such term in Section 2.15(a).

“Indebtedness” means, as to any Person at a particular time, without duplication, all of the following, whether or not included as indebtedness or liabilities in accordance with GAAP:

- (a) the outstanding principal amount of all obligations of such Person for borrowed money and all obligations of such Person evidenced by bonds, debentures, notes, loan agreements or other similar instruments;
- (b) all direct or contingent obligations of such Person arising under letters of credit (including standby and commercial), bankers’ acceptances, bank guaranties, surety bonds and similar instruments, in each case solely to the extent drawn by the beneficiary thereof;
- (c) net obligations of such Person under any Swap Contract;
- (d) all obligations of such Person to pay the deferred purchase price of property or services (other than trade accounts payable in the ordinary course of business and, in each case, not past due for more than 90 days);
- (e) indebtedness (excluding prepaid interest thereon) secured by a Lien on property owned by such Person (including indebtedness arising under conditional sales or other title retention agreements), whether or not such indebtedness shall have been assumed by such Person or is limited in recourse (provided that with respect to indebtedness that is limited in recourse to the asset(s) of that Person, such indebtedness shall be taken into account only to the extent of the lesser of the fair market value of such asset(s) subject to such Lien and the amount of indebtedness secured);

(f) all Attributable Indebtedness in respect of Capitalized Leases and Synthetic Lease Obligations of such Person;

(g) all obligations of such Person to purchase, redeem, retire, defease or otherwise make any payment in respect of any Equity Interest in such Person or any other Person or any warrant, right or option to acquire such Equity Interest, valued, in the case of a redeemable preferred interest, at the greater of its voluntary or involuntary liquidation preference plus accrued and unpaid dividends; and

(h) all Guarantees of such Person in respect of any of the foregoing.

For all purposes hereof, the Indebtedness of any Person shall include the Indebtedness of any partnership or joint venture (other than a joint venture that is itself a corporation, limited liability company or similar entity) in which such Person is a general partner or a joint venturer, unless such Indebtedness is expressly made non-recourse to such Person. The amount of any net obligation under any Swap Contract on any date shall be deemed to be the Swap Termination Value thereof as of such date.

“Indemnified Taxes” means (a) Taxes other than Excluded Taxes, imposed on or with respect to any payment made by or on account of any obligation of any Loan Party under any Loan Document and (b) to the extent not otherwise described in clause (a), Other Taxes.

“Indemnitees” has the meaning specified in Section 11.04(b).

“Information” has the meaning specified in Section 11.07.

“Intellectual Property” means: (i) all systems software and applications software (including source code and object code), all documentation for such software, including, without limitation, user manuals, flowcharts, functional specifications, operations manuals, and all formulas, processes, ideas and know-how embodied in any of the foregoing, (ii) concepts, discoveries, improvements and ideas, know-how, technology, reports, design information, trade secrets, practices, specifications, test procedures, maintenance manuals, research and development, inventions (whether or not patentable), blueprints, drawings, data, customer lists, catalogs and all physical embodiments of any of the foregoing and (iii) Patents, Copyright and Trademarks.

“Interest Payment Date” means, (a) as to any Term SOFR Loan, the last day of each Interest Period applicable to such Loan and the Maturity Date; provided, however, that if any Interest Period for a Term SOFR Loan exceeds three months, the respective dates that fall every three months after the beginning of such Interest Period shall also be Interest Payment Dates; and (b) as to any Base Rate Loan or Swing Line Loan, the last Business Day of each March, June, September and December and the Maturity Date.

“Interest Period” means as to each Term SOFR Loan, the period commencing on the date such Term SOFR Loan is disbursed or converted to or continued as a Term SOFR Loan and ending on the date one, three or six months thereafter, as selected by the Borrower in its Committed Loan Notice, or such other period that is twelve months or less requested by the Borrower and consented to by all the Appropriate Lenders and the Administrative Agent (in the case of each requested Interest Period, subject to availability); provided that:

(i) any Interest Period that would otherwise end on a day that is not a Business Day shall be extended to the next succeeding Business Day unless, in the case of a Term SOFR Loan, such Business Day falls in another calendar month, in which case such Interest Period shall end on the immediately preceding Business Day;

(ii) any Interest Period pertaining to a Term SOFR Loan that begins on the last Business Day of a calendar month (or on a day for which there is no numerically corresponding day in the calendar month at the end of such Interest Period) shall end on the last Business Day of the calendar month at the end of such Interest Period; and

(iii) no Interest Period shall extend beyond the Maturity Date.

“Investment” means, as to any Person, any direct or indirect acquisition or investment by such Person, whether by means of (a) the purchase or other acquisition of Equity Interests of another Person, (b) a loan, advance or capital contribution to, Guarantee or assumption of debt of, or purchase or other acquisition of any other debt or interest in, another Person, or (c) the purchase or other acquisition (in one transaction or a series of transactions) of assets of another Person that constitute a business unit or all or a substantial part of the business of, such Person. For purposes of covenant compliance, the amount of any Investment shall be the amount actually invested, without adjustment for subsequent increases or decreases in the value of such Investment, but reduced (at the Borrower’s option) by (i) in the case of an Investment in the form of a loan or advance, any return received by such Person in cash or Cash Equivalents in respect of such Investment, including interest paid and the repayment to such Person of principal thereof in cash or Cash Equivalents and (ii) in the case of any other Investment, any return in respect of such Investment, or the proceeds from the sale or other transfer of such Investment received by such Person in cash or Cash Equivalents.

“IP Rights” has the meaning specified in Section 5.17.

“IRS” means the United States Internal Revenue Service.

“ISP” means the International Standby Practices, International Chamber of Commerce Publication No. 590 (or such later version thereof as may be in effect at the applicable time).

“Issuer Documents” means with respect to any Letter of Credit, the Letter of Credit Application, and any other document, agreement and instrument entered into by the L/C Issuer and the Borrower (or any Subsidiary) or in favor of the L/C Issuer and relating to such Letter of Credit.

“Laws” means, collectively, all international, foreign, federal, state and local statutes, treaties, rules, guidelines, regulations, ordinances, codes and administrative or judicial precedents or authorities, including the interpretation or administration thereof by any Governmental Authority charged with the enforcement, interpretation or administration thereof, and all applicable administrative orders, directed duties, requests, licenses, authorizations and permits of, and agreements with, any Governmental Authority, in each case whether or not having the force of law.

“L/C Advance” means, with respect to each Revolving Credit Lender, such Lender’s funding of its participation in any L/C Borrowing in accordance with its Applicable Revolving Credit Percentage.

“L/C Borrowing” means an extension of credit resulting from a drawing under any Letter of Credit which has not been reimbursed on the date when made or refinanced as a Revolving Credit Borrowing.

“L/C Commitment” means, with respect to the L/C Issuer, the commitment of the L/C Issuer to issue Letters of Credit hereunder. The initial amount of the L/C Issuer’s L/C Commitment is set forth on Schedule 2.01C. The L/C Commitment of the L/C Issuer may be modified from time to time by agreement between the L/C Issuer and the Borrower, and notified to the Administrative Agent.

“L/C Credit Extension” means, with respect to any Letter of Credit, the issuance thereof or extension of the expiry date thereof, or the increase of the amount thereof.

“L/C Disbursement” means a payment made by an L/C Issuer pursuant to a Letter of Credit.

“L/C Issuer” means Bank of America in its capacity as issuer of Letters of Credit hereunder, or any successor issuer of Letters of Credit hereunder.

“L/C Obligations” means, as at any date of determination, the aggregate amount available to be drawn under all outstanding Letters of Credit plus the aggregate of all Unreimbursed Amounts, including all L/C Borrowings. For purposes of computing the amount available to be drawn under any Letter of Credit, the amount of such Letter of Credit shall be determined in accordance with Section 1.06. For all purposes of this Agreement, if on any date of determination a Letter of Credit has expired by its terms but any amount may still be drawn thereunder by reason of the operation of Rule 3.14 of the ISP, such Letter of Credit shall be deemed to be “outstanding” in the amount so remaining available to be drawn.

“Lender” has the meaning specified in the introductory paragraph hereto and, as the context requires, includes the Swing Line Lender.

“Lender Party” and “Lender Recipient Party” means collectively, the Lenders, the Swing Line Lender and the L/C Issuer.

“Lending Office” means, as to any Lender, the office or offices of such Lender described as such in such Lender’s Administrative Questionnaire, or such other office or offices as a Lender may from time to time notify the Borrower and the Administrative Agent, which office may include any Affiliate of such Lender or any domestic or foreign branch of such Lender or such Affiliate. Unless the context otherwise requires each reference to a Lender shall include its applicable Lending Office.

“Letter of Credit” means any standby letter of credit issued hereunder, providing for the payment of cash upon the honoring of a presentation thereunder.

“Letter of Credit Application” means an application and agreement for the issuance or amendment of a Letter of Credit in the form from time to time in use by the L/C Issuer.

“Letter of Credit Fee” has the meaning specified in Section 2.03(j).

“Letter of Credit Sublimit” means an amount equal to the lesser of (a) \$15,000,000 and (b) the Aggregate Commitments. The Letter of Credit Sublimit is part of, and not in addition to, the Revolving Credit Facility.

“Lien” means any mortgage, pledge, hypothecation, assignment, deposit arrangement, encumbrance, easement, right-of-way or other encumbrance on title to real property, lien (statutory or other), charge, or preference, priority or other security interest or preferential arrangement in the nature of a security interest of any kind or nature whatsoever (including any conditional sale or other title retention agreement, any easement, right of way or other encumbrance on title to real property, and any financing lease having substantially the same economic effect as any of the foregoing).

“Liquidity” means, as of any date of determination, for the Borrower and its Subsidiaries on a consolidated basis, an amount which equals the sum of (a) the aggregate unrestricted cash and Cash Equivalents of the Borrower and its Subsidiaries maintained in the United States, (b) unrestricted Investments made in accordance with the Borrower’s Investment Objectives & Guidelines as in effect on the Closing Date, together with any changes after the Closing Date as are reasonably satisfactory to Administrative Agent and (c) the aggregate principal amount of Revolving Loans available to be borrowed under Section 2.01.

“Liquidity Reporting Period” means the period beginning on the date that is one hundred twenty one (121) days prior to the stated maturity date of the Convertible Notes (including Indebtedness issued under Section 7.02(b)) to and including the date such Convertible Notes (including Indebtedness issued under Section 7.02(b)) are paid in full or otherwise discharged.

“Liquidity Threshold” shall mean Liquidity in excess of 100% of the amount required to pay in full in cash the then aggregate outstanding amount of Convertible Notes (including Indebtedness issued under Section 7.02(b)).

“Loan” means an extension of credit by a Lender to the Borrower under Article II in the form of a Revolving Credit Loan or a Swing Line Loan.

“Loan Documents” means this Agreement, including schedules and exhibits hereto, each Note, each Issuer Document, any agreement creating or perfecting rights in Cash Collateral pursuant to the provisions of Section 2.16 of this Agreement, the Collateral Documents and any amendments, modifications or supplements hereto or to any other Loan Document or waivers hereof or to any other Loan Document.

“Loan Parties” means, collectively, the Borrower and each Guarantor.

“Material Adverse Effect” means (a) a material adverse change in, or a material adverse effect upon, the operations, business, assets, liabilities or financial condition of the Borrower and its Subsidiaries taken as a whole; or (b) a material adverse effect on (i) the ability of any Loan Party to perform its payment Obligations under any Loan Document to which it is a party or (ii) the legality, validity, binding effect or enforceability against any Loan Party of any Loan Document to which it is a party.

“Material Asset” means any asset owned by any Loan Party that is, in the reasonable determination of the Borrower, material to the operation of the business of the Borrower and its Subsidiaries, taken as a whole.

“Material Contract” means each contract or agreement (a) material to the business, condition (financial or otherwise), operations, performance or properties of the Borrower and its Subsidiaries as a whole or (b) any other contract, agreement, permit or license, written or oral, of the Borrower and its Subsidiaries as to which the breach, nonperformance, cancellation or failure to renew by any party thereto, individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect.

“Material Intellectual Property,” shall mean Intellectual Property that, collectively, is material to the business of the Borrower and its Subsidiaries taken as a whole.

“Material Subsidiary” means any Subsidiary of the Borrower that is not an Immaterial Subsidiary.

“Maturity Date” means the earlier of (i) May 18, 2025 and (ii) the Springing Maturity Date; provided, however, that, in each case, if such date is not a Business Day, the Maturity Date shall be the immediately preceding Business Day.

“Measurement Period” means, at any date of determination, the most recently completed four fiscal quarters of the Borrower (commencing with the fiscal quarter ending June 30, 2022, and, for all fiscal quarters ending after the Closing Date, for which financial statements have been delivered or are required to have been delivered pursuant to Sections 6.01(a) and (b)).

“Minimum Collateral Amount” means, at any time, (a) with respect to Cash Collateral consisting of cash deposit account balances, an amount equal to 100% of the Fronting Exposure of the L/C Issuer with respect to Letters of Credit issued and outstanding at such time and (b) otherwise, an amount determined by the Administrative Agent and the L/C Issuer in their reasonable discretion.

“Moody's” means Moody's Investors Service, Inc. and any successor thereto.

“Multiemployer Plan” means any employee benefit plan of the type described in Section 4001(a)(3) of ERISA, to which the Borrower or any ERISA Affiliate makes or is obligated to make contributions, or during the preceding five plan years, has made or been obligated to make contributions or for which the Borrower or any ERISA Affiliate has any liability, contingent or otherwise.

“Multiple Employer Plan” means a Plan which has two or more contributing sponsors (including the Borrower or any ERISA Affiliate) at least two of whom are not under common control, as such a plan is described in Section 4064 of ERISA.

“Non-Consenting Lender” means any Lender that does not approve any consent, waiver or amendment that (a) requires the approval of all Lenders or all affected Lenders in accordance with the terms of Section 11.01 and (b) has been approved by the Required Lenders.

“Non-Defaulting Lender” means, at any time, each Lender that is not a Defaulting Lender at such time.

“Note” means a Revolving Credit Note.

“Notice of Loan Prepayment” means a notice of prepayment with respect to a Loan, which shall be substantially in the form of Exhibit Q or such other form as may be approved by the Administrative Agent (including any form on an electronic platform or electronic transmission system as shall be approved by the Administrative Agent), appropriately completed and signed by a Responsible Officer.

“NPL” means the National Priorities List under CERCLA.

“Obligations” means all advances to, and debts, liabilities, obligations, covenants and duties of, any Loan Party arising under any Loan Document or otherwise with respect to any Loan, Letter of Credit, Secured Cash Management Agreement or Secured Hedge Agreement, in each case whether direct or indirect (including those acquired by assumption), absolute or contingent, due or to become due, now existing or hereafter arising and including interest and fees that accrue after the commencement by or against any Loan Party or any Affiliate thereof of any proceeding under any Debtor Relief Laws naming such Person as the debtor in such proceeding, regardless of whether such interest and fees are allowed claims in such proceeding; provided that, without limiting the foregoing, the Obligations include (a) the obligation to pay principal, interest, Letter of Credit commissions, charges, expenses, fees, indemnities and other amounts payable by any Loan Party under any Loan Document and (b) the obligation of the Loan Parties to reimburse any amount in respect of any of the foregoing that the Administrative Agent or any Lender, in each case in its sole discretion, may elect to pay or advance on behalf of the Loan Parties; provided further that the Obligations shall exclude any Excluded Swap Obligations.

“OFAC” means the Office of Foreign Assets Control of the United States Department of the Treasury.

“Organization Documents” means, (a) with respect to any corporation, the charter or certificate or articles of incorporation and the bylaws (or equivalent or comparable constitutive documents with respect to any non-U.S. jurisdiction); (b) with respect to any limited liability company, the certificate or articles of formation or organization and operating or limited liability agreement; and (c) with respect to any partnership, joint venture, trust or other form of business entity, the partnership, joint venture or other applicable agreement of formation or organization and any agreement, instrument, filing or notice with respect thereto filed in connection with its formation or organization with the applicable Governmental Authority in the jurisdiction of its formation or organization and, if applicable, any certificate or articles of formation or organization of such entity.

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

“Other Taxes” means all present or future stamp, court or documentary, intangible, recording, filing or similar Taxes that arise from any payment made under, from the execution, delivery, performance, enforcement or registration of, from the receipt or perfection of a security interest under, or otherwise with respect to any Loan Document, except any such Taxes that are Other Connection Taxes imposed with respect to an assignment (other than an assignment made pursuant to Section 3.06).

“Outstanding Amount” means (a) with respect to Revolving Credit Loans and Swing Line Loans on any date, the aggregate outstanding principal amount thereof after giving effect to any borrowings and prepayments or repayments of Revolving Credit Loans and Swing Line Loans, as the case may be, occurring on such date; and (b) with respect to any L/C Obligations on any date, the amount of such L/C Obligations on such date after giving effect to any L/C Credit Extension occurring on such date and any other changes in the aggregate amount of the L/C Obligations as of such date, including as a result of any reimbursements by the Borrower of Unreimbursed Amounts.

“Participant” has the meaning specified in [Section 11.06\(d\)](#).

“Participant Register” has the meaning specified in [Section 11.06\(d\)](#).

“Patents” means collectively: (i) all patents, all inventions and patent applications anywhere in the world, (ii) all improvements, counterparts, reissues, divisional, re-examinations, extensions, continuations (in whole or in part) and renewals of any of the foregoing and improvements thereon, and (iii) all rights corresponding to any of the foregoing throughout the world.

“PBGC” means the Pension Benefit Guaranty Corporation.

“Pension Funding Rules” means the rules of the Code and ERISA regarding minimum funding standards with respect to Pension Plans and set forth in Sections 412, 430, 431, 432 and 436 of the Code and Sections 302, 303, 304 and 305 of ERISA.

“Pension Plan” means any employee pension benefit plan (including a Multiple Employer Plan but excluding a Multiemployer Plan) that is maintained or is contributed to by the Borrower and any ERISA Affiliate or with respect to which the Borrower or any ERISA Affiliate has any liability and is either covered by Title IV of ERISA or is subject to the minimum funding standards under Section 412 of the Code.

“Perfection Certificate” shall mean a certificate in the form of [Exhibit I-1](#) or any other form approved by the Administrative Agent, as the same shall be supplemented from time to time by a Perfection Certificate Supplement or otherwise.

“Perfection Certificate Supplement” shall mean a certificate supplement in the form of [Exhibit I-2](#) or any other form approved by the Administrative Agent.

“Permitted Acquisition” shall mean an acquisition permitted under [Section 7.03\(g\)](#).

“Permitted Priority Debt” means Indebtedness of the Borrower, in an amount not to exceed at any time \$25,000,000; provided that (a) such Indebtedness, if secured, is secured solely by the Borrower’s accounts receivable and inventory, cash proceeds thereof, and cash, and (b) the holders or lenders thereof have executed and delivered to the Administrative Agent an intercreditor agreement reasonably satisfactory to the Administrative Agent and the Required Lenders, providing for the subordination of the Liens in favor of the Secured Parties on such assets to the Liens on such assets in favor of the lenders and agent under such Permitted Priority Debt.

“Person” means any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, Governmental Authority or other entity.

“Plan” means any employee benefit plan within the meaning of Section 3(3) of ERISA (including a Pension Plan), maintained for employees of the Borrower or any ERISA Affiliate or any such Plan to which the Borrower or any ERISA Affiliate is required to contribute on behalf of any of its employees, and for which the Borrower or any ERISA Affiliate has any liability, contingent or otherwise.

“Platform” has the meaning specified in [Section 6.02](#).



“PTE” means a prohibited transaction class exemption issued by the U.S. Department of Labor, as any such exemption may be amended from time to time.

“Public Lender” has the meaning specified in Section 6.02.

“Recipient” means the Administrative Agent, any Lender, the L/C Issuer or any other recipient of any payment to be made by or on account of any obligation of any Loan Party hereunder.

“Register” has the meaning specified in Section 11.06(c).

“Regulation U” means Regulation U of the FRB, as in effect from time to time and all official rulings and interpretations thereunder or thereof.

“Related Parties” means, with respect to any Person, such Person’s Affiliates and the partners, directors, officers, employees, agents, trustees, administrators, managers, advisors and representatives of such Person and of such Person’s Affiliates.

“Release” means any release, spill, emission, discharge, deposit, disposal, leaking, pumping, pouring, dumping, emptying, injection or leaching into the Environment, or into, from or through any building, structure or facility.

“Relevant Governmental Body” means the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York, or a committee officially endorsed or convened by the Board of Governors of the Federal Reserve System or the Federal Reserve Bank of New York, or any successor thereto.

“Reportable Event” means any of the events set forth in Section 4043(c) of ERISA.

“Request for Credit Extension” means (a) with respect to a Borrowing, conversion or continuation of Revolving Credit Loans, a Committed Loan Notice, (b) with respect to an L/C Credit Extension, a Letter of Credit Application, and (c) with respect to a Swing Line Loan, a Swing Line Loan Notice.

“Required Lenders” means, at any time, Lenders holding more than 50% of the sum of the (a) Total Outstandings (with the aggregate amount of each Revolving Credit Lender’s risk participation and funded participation in L/C Obligations and Swing Line Loans being deemed “held” by such Revolving Credit Lender for purposes of this definition) and (b) aggregate unused Commitments; provided that the amount of any participation in any Swing Line Loan and Unreimbursed Amounts that such Defaulting Lender has failed to fund that have not been reallocated to and funded by another Lender shall be deemed to be held by the Lender that is the Swing Line Lender or the L/C Issuer, as the case may be, in making such determination; provided further that, at any time two or more unaffiliated Lenders are party the Agreement, Required Lenders shall be composed of at least two such Lenders, provided further that, this definition is subject to Section 3.03.

“Rescindable Amount” has the meaning as defined in Section 2.12(b)(ii).

“Resolution Authority” means an EEA Resolution Authority or, with respect to any UK Financial Institution, a UK Resolution Authority.

“Responsible Officer” means the chief executive officer, president, chief financial officer, vice president of finance, treasurer, assistant treasurer or controller of a Loan Party, and solely for purposes of the delivery of incumbency certificates pursuant to Section 4.01, the secretary or any assistant secretary of a Loan Party and, solely for purposes of notices given pursuant to Article II, any other officer of the Borrower so designated by any of the foregoing officers in a notice to the Administrative Agent or any other officer or employee of the applicable Loan Party designated in or pursuant to an agreement between the applicable Loan Party and the Administrative Agent. Any document delivered hereunder that is signed by a Responsible Officer of a Loan Party shall be conclusively presumed to have been authorized by all necessary corporate, partnership and/or other action on the part of such Loan Party and such Responsible Officer shall be conclusively presumed to have acted on behalf of such Loan Party. To the extent reasonably requested by the Administrative Agent, each Responsible Officer will provide an incumbency certificate and to the extent reasonably requested by the Administrative Agent, appropriate authorization documentation, in form and substance satisfactory to the Administrative Agent.

“Restricted Payment” means any dividend or other distribution (whether in cash, securities or other property) with respect to any capital stock or other Equity Interest of any Person or any of its Subsidiaries, or any payment (whether in cash, securities or other property), including any sinking fund or similar deposit, on account of the purchase, redemption, retirement, defeasance, acquisition, cancellation or termination of any such capital stock or other Equity Interest, or on account of any return of capital to any Person’s stockholders, partners or members (or the equivalent of any thereof), or any option, warrant or other right to acquire any such dividend or other distribution or payment.

“Revolving Credit Borrowing” means a borrowing consisting of simultaneous Revolving Credit Loans of the same Type and, in the case of Term SOFR Loans, having the same Interest Period made by each of the Revolving Credit Lenders pursuant to Section 2.01.

“Revolving Credit Exposure” means, as to any Lender at any time, the aggregate principal amount at such time of its outstanding Revolving Credit Loans and such Lender’s participation in L/C Obligations and Swing Line Loans at such time.

“Revolving Credit Facility” means, at any time, the aggregate amount of the Revolving Credit Lenders’ Commitments at such time.

“Revolving Credit Lender” means, at any time, any Lender that has a Commitment at such time.

“Revolving Credit Loan” has the meaning specified in Section 2.01.

“Revolving Credit Note” means a promissory note made by the Borrower in favor of a Revolving Credit Lender evidencing Revolving Credit Loans or Swing Line Loans, as the case may be, made by such Revolving Credit Lender, substantially in the form of Exhibit C.

“S&P” means Standard & Poor’s Financial Services LLC, a subsidiary of S&P Global Inc., and any successor thereto.

“Sanction(s)” means any sanction administered or enforced by the United States Government (including without limitation, OFAC), the United Nations Security Council, the European Union, Her Majesty’s Treasury (“HMT”) or other relevant sanctions authority applicable to the Borrower or its Subsidiaries.

“Scheduled Unavailability Date” has the meaning specified in Section 3.03(b).

“SEC” means the Securities and Exchange Commission, or any Governmental Authority succeeding to any of its principal functions.

“Secured Cash Management Agreement” means any Cash Management Agreement that is entered into by and between any Loan Party or Subsidiary of a Loan Party and any Cash Management Bank.

“Secured Hedge Agreement” means any interest rate Swap Contract permitted under Article VI or VII that is entered into by and between any Loan Party or Subsidiary of a Loan Party and any Hedge Bank.

“Secured Parties” means, collectively, the Administrative Agent, the Lenders, the L/C Issuer, the Hedge Banks, the Cash Management Banks, each co-agent or sub-agent appointed by the Administrative Agent from time to time pursuant to Section 9.05, and the other Persons the Obligations owing to which are or are purported to be secured by the Collateral under the terms of the Collateral Documents.

“Security Agreement” means the Security and Pledge Agreement, dated as of the Closing Date, executed in favor of the Administrative Agent by each of the Loan Parties, together with each security agreement supplement delivered pursuant to Section 6.12.

“Security Agreement Supplement” means a supplement to the Security Agreement in form and substance reasonably satisfactory to Administrative Agent.

“SOFR” means the Secured Overnight Financing Rate as administered by the Federal Reserve Bank of New York (or a successor administrator).

“SOFR Adjustment” with respect to Daily Simple SOFR means 0.10% (10 basis points); and with respect to Term SOFR means 0.10% (10 basis points) for an Interest Period of one-month’s duration, 0.15% (15 basis points) for an Interest Period of three-month’s duration, 0.25% (25 basis points) for an Interest Period of six-months’ duration.

“Solvent” and “Solvency” mean, with respect to any Person on any date of determination, that on such date, (a) the fair value of the property of such Person is greater than the total amount of liabilities, including contingent liabilities, of such Person, (b) the present fair salable value of the assets of such Person is not less than the amount that will be required to pay the probable liability of such Person on its debts as they become absolute and matured, (c) such Person does not intend to, and does not believe that it will, incur debts or liabilities beyond such Person’s ability to pay such debts and liabilities as they mature, (d) such Person is not engaged in business or a transaction, and is not about to engage in business or a transaction, for which such Person’s property would constitute an unreasonably small capital, and (e) such Person is able to pay its debts and liabilities, contingent obligations and other commitments as they mature in the ordinary course of business. The amount of contingent liabilities at any time shall be computed as the amount that, in the light of all the facts and circumstances existing at such time, represents the amount that would reasonably be expected to become an actual or matured liability.

“Specified Acquisition” means one or more Permitted Acquisitions in a six months period with an aggregate Acquisition Consideration of not less than \$50,000,000 elected by the Borrower by notice to the Administrative Agent taken together to be a Specified Acquisition pursuant to a Specified Acquisition Leverage Ratio Notice; provided that, (A) no more than one Specified Acquisition may be in effect at any one time, (B) no more than one Specified Acquisition may be elected with respect to a particular acquisition, and (C) no more than two Specified Acquisitions in total may be elected prior to the Maturity Date.

“Specified Acquisition Leverage Ratio Notice” means a written notice from the Borrower to the Administrative Agent (a) delivered not later than the date by which the Loan Parties are required to provide financial statements pursuant to Sections 6.01(a) and (b) for the most recently ended fiscal quarter or fiscal year, as the case may be, in which the Borrower seeks to invoke an adjustment to the Consolidated Net Leverage Ratio, and (b) which describes the Specified Acquisition which formed the basis for such request.

“Specified Loan Party” means any Loan Party that is not an “eligible contract participant” under the Commodity Exchange Act (determined prior to giving effect to Section 10.11).

“Springing Maturity Date” shall mean any date during the period commencing from the date that is ninety-one (91) days prior to the stated maturity of the Convertible Notes (including Indebtedness issued under Section 7.02(b)) through the date the outstanding amount of the Convertible Notes (including Indebtedness issued under Section 7.02(b)) are paid in full, that the Borrower does not satisfy the Liquidity Threshold.

“Subsidiary” of a Person means a corporation, partnership, joint venture, limited liability company or other business entity of which a majority of the shares of securities or other interests having ordinary voting power for the election of directors or other governing body (other than securities or interests having such power only by reason of the happening of a contingency) are at the time beneficially owned, or the management of which is otherwise controlled, directly, or indirectly through one or more intermediaries, or both, by such Person. Unless otherwise specified, all references herein to a “Subsidiary” or to “Subsidiaries” shall refer to a Subsidiary or Subsidiaries of the Borrower.

“Successor Rate” has the meaning specified in Section 3.03(b).

“Swap Contract” means (a) any and all rate swap transactions, basis swaps, credit derivative transactions, forward rate transactions, commodity swaps, commodity options, forward commodity contracts, equity or equity index swaps or options, bond or bond price or bond index swaps or options or forward bond or forward bond price or forward bond index transactions, interest rate options, forward foreign exchange transactions, cap transactions, floor transactions, collar transactions, currency swap transactions, cross-currency rate swap transactions, currency options, spot contracts, or any other similar transactions or any combination of any of the foregoing (including any options to enter into any of the foregoing), whether or not any such transaction is governed by or subject to any master agreement, and (b) any and all transactions of any kind, and the related confirmations, which are subject to the terms and conditions of, or governed by, any form of master agreement published by the International Swaps and Derivatives Association, Inc., any International Foreign Exchange Master Agreement, or any other master agreement (any such master agreement, together with any related schedules, a “Master Agreement”), including any such obligations or liabilities under any Master Agreement.

“Swap Obligations” means with respect to any Guarantor any obligation to pay or perform under any agreement, contract or transaction that constitutes a “swap” within the meaning of Section 1a(47) of the Commodity Exchange Act.

“Swap Termination Value” means, in respect of any one or more Swap Contracts, after taking into account the effect of any legally enforceable netting agreement relating to such Swap Contracts, (a) for any date on or after the date such Swap Contracts have been closed out and termination value(s) determined in accordance therewith, such termination value(s), and (b) for any date prior to the date referenced in clause (a), the amount(s) determined as the mark-to-market value(s) for such Swap Contracts, as determined based upon one or more mid-market or other readily available quotations provided by any recognized dealer in such Swap Contracts (which may include a Lender or any Affiliate of a Lender).

“Swing Line Borrowing” means a borrowing of a Swing Line Loan pursuant to Section 2.04.

“Swing Line Commitment” means as to any Lender (a) the amount set forth opposite such Lender’s name on Schedule 2.01B hereof or (b) if such Lender has entered into an Assignment and Assumption or has otherwise assumed a Swing Line Commitment after the Closing Date, the amount set forth for such Lender as its Swing Line Commitment in the Register maintained by the Administrative Agent pursuant to Section 11.06(c).

“Swing Line Lender” means Bank of America in its capacity as provider of Swing Line Loans, or any successor swing line lender hereunder, in an amount up to the Swing Line Commitment.

“Swing Line Loan” has the meaning specified in Section 2.04(a).

“Swing Line Loan Notice” means a notice of a Swing Line Borrowing pursuant to Section 2.04(b), which shall be substantially in the form of Exhibit B or such other form as approved by the Administrative Agent (including any form on an electronic platform or electronic transmission system as shall be approved by the Administrative Agent), appropriately completed and signed by a Responsible Officer of the Borrower.

“Swing Line Sublimit” means an amount equal to the lesser of (a) \$15,000,000 and (b) the Revolving Credit Facility. The Swing Line Sublimit is part of, and not in addition to, the Revolving Credit Facility.

“Synthetic Lease Obligation” means the monetary obligation of a Person under (a) a so-called synthetic, off-balance sheet or tax retention lease, or (b) an agreement for the use or possession of property (including sale and leaseback transactions), in each case, creating obligations that do not appear on the balance sheet of such Person but which, upon the application of any Debtor Relief Laws to such Person, would be characterized as the indebtedness of such Person (without regard to accounting treatment).

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

“Term SOFR” means:

(a) for any Interest Period with respect to a Term SOFR Loan, the rate per annum equal to the Term SOFR Screen Rate two U.S. Government Securities Business Days prior to the commencement of such Interest Period with a term equivalent to such Interest Period; provided that if the rate is not published prior to 11:00 a.m. on such determination date then Term SOFR means the Term SOFR Screen Rate on the first U.S. Government Securities Business Day immediately prior thereto, in each case, plus the SOFR Adjustment for such Interest Period; and

(b) for any interest calculation with respect to a Base Rate Loan on any date, the rate per annum equal to the Term SOFR Screen Rate with a term of one month commencing that day;

provided that if the Term SOFR determined in accordance with either of the foregoing provisions (a) or (b) of this definition would otherwise be less than zero, the Term SOFR shall be deemed zero for purposes of this Agreement.

“Term SOFR Loan” means a Loan that bears interest at a rate based on clause (a) of the definition of Term SOFR.

“Term SOFR Screen Rate” means the forward-looking SOFR term rate administered by CME (or any successor administrator satisfactory to the Administrative Agent) and published on the applicable Reuters screen page (or such other commercially available source providing such quotations as may be designated by the Administrative Agent from time to time).

“Threshold Amount” means \$50,000,000.

“Total Credit Exposure” means, as to any Lender at any time, the unused Commitments and Revolving Credit Exposure of such Lender at such time.

“Total Outstandings” means the aggregate Outstanding Amount of all Loans and all L/C Obligations.

“Total Revolving Credit Outstandings” means the aggregate Outstanding Amount of all Revolving Credit Loans, Swing Line Loans and L/C Obligations.

“Trademarks” means, collectively: (i) all trademarks, trade names, corporate names, company names, business names, fictitious business names, internet domain names, trade styles, service marks, logos, other business identifiers, whether registered or unregistered, all registrations and recordings thereof, and all applications in connection therewith (other than each United States application to register any trademark or service mark prior to the filing under applicable Law of a verified statement of use for such trademark or service mark) anywhere in the world, (ii) all counterparts, extensions and renewals of any of the foregoing and (iii) (v) all rights corresponding to any of the foregoing (including the goodwill) throughout the world.

“Transaction” means, collectively, the entering into by the Loan Parties and their applicable Subsidiaries of the Loan Documents, and the payment of the fees and expenses incurred in connection with the consummation of the foregoing.

“Type” means, with respect to a Loan, its character as a Base Rate Loan or a Term SOFR Loan.

“UCC” means the Uniform Commercial Code as in effect in the State of New York; provided that, if perfection or the effect of perfection or non-perfection or the priority of any security interest in any Collateral is governed by the Uniform Commercial Code as in effect in a jurisdiction other than the State of New York, “UCC” means the Uniform Commercial Code as in effect from time to time in such other jurisdiction for purposes of the provisions hereof relating to such perfection, effect of perfection or non-perfection or priority.

“UCP” means the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 600 (or such later version thereof as may be in effect at the applicable time).

“UK Financial Institution” means any BRRD Undertaking (as such term is defined under the PRA Rulebook (as amended from time to time) promulgated by the United Kingdom Prudential Regulation Authority) or any person subject to IFPRU 11.6 of the FCA Handbook (as amended from time to time) promulgated by the United Kingdom Financial Conduct Authority, which includes certain credit institutions and investment firms, and certain affiliates of such credit institutions or investment firms.

“UK Resolution Authority” means the Bank of England or any other public administrative authority having responsibility for the resolution of any UK Financial Institution.

“United States” and “U.S.” mean the United States of America.

“Unreimbursed Amount” has the meaning specified in Section 2.03(f).

“U.S. Government Securities Business Day” means any Business Day, except any Business Day on which any of the Securities Industry and Financial Markets Association, the New York Stock Exchange or the Federal Reserve Bank of New York is not open for business because such day is a legal holiday under the federal laws of the United States or the laws of the State of New York, as applicable.

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

“U.S. Tax Compliance Certificate” has the meaning specified in Section 3.01(g)(ii)(B)(3).

“**Write-Down and Conversion Powers**” means, (a) with respect to any EEA Resolution Authority, the write-down and conversion powers of such EEA Resolution Authority from time to time under the Bail-In Legislation for the applicable EEA Member Country, which write-down and conversion powers are described in the EU Bail-In Legislation Schedule, and (b) with respect to the United Kingdom, any powers of the applicable Resolution Authority under the Bail-In Legislation to cancel, reduce, modify or change the form of a liability of any UK Financial Institution or any contract or instrument under which that liability arises, to convert all or part of that liability into shares, securities or obligations of that person or any other person, to provide that any such contract or instrument is to have effect as if a right had been exercised under it or to suspend any obligation in respect of that liability or any of the powers under that Bail-In Legislation that are related to or ancillary to any of those powers.

**1.02 Other Interpretive Provisions.** With reference to this Agreement and each other Loan Document, unless otherwise specified herein or in such other Loan Document:

The definitions of terms herein shall apply equally to the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine and neuter forms. The words “include,” “includes” and “including” shall be deemed to be followed by the phrase “without limitation.” The word “will” shall be construed to have the same meaning and effect as the word “shall.” Unless the context requires otherwise, (i) any definition of or reference to any agreement, instrument or other document (including any Organization Document) shall be construed as referring to such agreement, instrument or other document as from time to time amended, supplemented or otherwise modified (subject to any restrictions on such amendments, supplements or modifications set forth herein or in any other Loan Document), (ii) any reference herein to any Person shall be construed to include such Person’s successors and assigns, (iii) the words “hereto,” “herein,” “hereof” and “hereunder,” and words of similar import when used in any Loan Document, shall be construed to refer to such Loan Document in its entirety and not to any particular provision thereof, (iv) all references in a Loan Document to Articles, Sections, Preliminary Statements, Exhibits and Schedules shall be construed to refer to Articles and Sections of, and Preliminary Statements, Exhibits and Schedules to, the Loan Document in which such references appear, (v) any reference to any law shall include all statutory and regulatory rules, regulations, orders and provisions consolidating, amending, replacing or interpreting such law and any reference to any law, rule or regulation shall, unless otherwise specified, refer to such law, rule or regulation as amended, modified, replaced or supplemented from time to time, and (vi) the words “asset” and “property” shall be construed to have the same meaning and effect and to refer to any and all tangible and intangible assets and properties, including cash, securities, accounts and contract rights.

(b) In the computation of periods of time from a specified date to a later specified date, the word “from” means “from and including,” the words “to” and “until” each mean “to but excluding,” and the word “through” means “to and including.”

(c) Each reference to “basis points” or “bps” shall be interpreted in accordance with the convention that 100 bps = 1.0%.

(d) Section headings herein and in the other Loan Documents are included for convenience of reference only and shall not affect the interpretation of this Agreement or any other Loan Document.

(e) Any reference herein to a merger, transfer, consolidation, amalgamation, consolidation, assignment, sale, disposition or transfer, or similar term, shall be deemed to apply to a division of or by a limited liability company, or an allocation of assets to a series of a limited liability company (or the unwinding of such a division or allocation), as if it were a merger, transfer, consolidation, amalgamation, consolidation, assignment, sale, disposition or transfer, or similar term, as applicable, to, of or with a separate Person. Any division of a limited liability company shall constitute a separate Person hereunder (and each division of any limited liability company that is a Subsidiary, joint venture or any other like term shall also constitute such a Person or entity).

**1.03 Accounting Terms.** (a) Generally. All accounting terms not specifically or completely defined herein shall be construed in conformity with, and all financial data (including financial ratios and other financial calculations) required to be submitted pursuant to this Agreement shall be prepared in conformity with, GAAP (except as otherwise expressly noted herein) as in effect from time to time (subject to Section 1.03(b) below), applied in a manner consistent with that used in preparing the Audited Financial Statements, except as otherwise specifically prescribed herein. Notwithstanding the foregoing, for purposes of determining compliance with any covenant (including the computation of any financial covenant) contained herein, Indebtedness of the Borrower and its Subsidiaries shall be deemed to be carried at 100% of the outstanding principal amount thereof, and the effects of FASB ASC 825 and FASB ASC 470-20 on financial liabilities shall be disregarded.

(b) Changes in GAAP. If at any time any change in GAAP would affect the computation of any financial ratio or requirement set forth in any Loan Document, and either the Borrower or the Required Lenders shall so request, the Administrative Agent, the Lenders and the Borrower shall negotiate in good faith to amend such ratio or requirement to preserve the original intent thereof in light of such change in GAAP; provided that, until so amended, (A) such ratio or requirement shall continue to be computed in accordance with GAAP prior to such change therein and (B) the Borrower shall provide to the Administrative Agent and the Lenders financial statements and other documents required under this Agreement or as reasonably requested hereunder setting forth a reconciliation between calculations of such ratio or requirement made before and after giving effect to such change in GAAP. Without limiting the foregoing, leases shall continue to be classified and accounted for purposes of covenant compliance and calculations hereunder on a basis consistent with that reflected in the Audited Financial Statements for all purposes of this Agreement, notwithstanding any change in GAAP relating thereto, unless the parties hereto shall enter into a mutually acceptable amendment addressing such changes, as provided for above.

(c) Pro Forma Basis. All defined terms used in the calculation of the financial covenants set forth herein, if applicable, shall be calculated as of any date, on an historical pro forma basis giving effect (by inclusion or exclusion, as applicable) to the Transactions, any Acquisition or other Investment, any issuance, incurrence, assumption, refinancing, repricing or permanent repayment of Indebtedness (including Indebtedness issued, incurred or assumed as a result of, or to finance, any relevant transaction and for which any such financial ratio is being calculated), all sales, transfers and other dispositions or discontinuance of any Subsidiary, line of business or division, or any conversion of a Subsidiary Guarantor to Subsidiary or of a Subsidiary to a Subsidiary Guarantor, in each case to the extent permitted hereunder and that have occurred during Measurement Period being used to calculate such financial ratio, or subsequent to the end of the Measurement Period but prior to such date or prior to or simultaneously with the event for which a determination under this definition is made, as if each such event occurred on the first day of the Measurement Period.

**1.04 Rounding.** Any financial ratios required to be maintained by the Borrower pursuant to this Agreement shall be calculated by dividing the appropriate component by the other component, carrying the result to one place more than the number of places by which such ratio is expressed herein and rounding the result up or down to the nearest number (with a rounding-up if there is no nearest number).

**1.05 Times of Day.** Unless otherwise specified, all references herein to times of day shall be references to Eastern time (daylight or standard, as applicable).

**1.06 References to Agreements and Laws.** Unless otherwise expressly provided herein, (a) references to agreements (including the Loan Documents) and other contractual instruments shall be deemed to include all subsequent amendments, restatements, extensions, supplements and other modifications thereto, but only to the extent that such amendments, restatements, extensions, supplements and other modifications are not prohibited by any Loan Document; and (b) references to any Law shall include all statutory and regulatory provisions consolidating, amending, replacing, supplementing or interpreting such Law and, unless otherwise specified, shall refer to such Law as amended, modified or supplemented from time to time.



**1.07 Letter of Credit Amounts.** Unless otherwise specified herein, the amount of a Letter of Credit at any time shall be deemed to be the stated amount of such Letter of Credit in effect at such time; provided, however, that with respect to any Letter of Credit that, by its terms or the terms of any Issuer Document related thereto, provides for one or more automatic increases in the stated amount thereof, the amount of such Letter of Credit shall be deemed to be the maximum stated amount of such Letter of Credit after giving effect to all such increases, whether or not such maximum stated amount is in effect at such time.

**1.08 Currency Equivalents Generally.** Any amount specified in this Agreement (other than in Articles II, IX and X) or any of the other Loan Documents to be in Dollars shall also include the equivalent of such amount in any currency other than Dollars, such equivalent amount thereof in the applicable currency to be determined by the Administrative Agent at such time on the basis of the Spot Rate (as defined below) for the purchase of such currency with Dollars. For purposes of this Section 1.07, the "Spot Rate" for a currency means the rate determined by the Administrative Agent to be the rate quoted by the Person acting in such capacity as the spot rate for the purchase by such Person of such currency with another currency through its principal foreign exchange trading office at approximately 11:00 a.m. on the date two Business Days prior to the date of such determination; provided that the Administrative Agent may obtain such spot rate from another financial institution designated by the Administrative Agent if the Person acting in such capacity does not have as of the date of determination a spot buying rate for any such currency.

**1.09 Interest Rates.** The Administrative Agent does not warrant, nor accept responsibility, nor shall the Administrative Agent have any liability with respect to the administration, submission or any other matter related to any reference rate referred to herein or with respect to any rate (including, for the avoidance of doubt, the selection of such rate and any related spread or other adjustment) that is an alternative or replacement for or successor to any such rate (including, without limitation, any Successor Rate) (or any component of any of the foregoing) or the effect of any of the foregoing, or of any Conforming Changes. The Administrative Agent and its affiliates or other related entities may engage in transactions or other activities that affect any reference rate referred to herein, or any alternative, successor or replacement rate (including, without limitation, any Successor Rate) (or any component of any of the foregoing) or any related spread or other adjustments thereto, in each case, in a manner adverse to the Borrower. The Administrative Agent may select information sources or services in its reasonable discretion to ascertain any reference rate referred to herein or any alternative, successor or replacement rate (including, without limitation, any Successor Rate) (or any component of any of the foregoing), in each case pursuant to the terms of this Agreement, and shall have no liability to the Borrower, any Lender or any other person or entity for damages of any kind, including direct or indirect, special, punitive, incidental or consequential damages, costs, losses or expenses (whether in tort, contract or otherwise and whether at law or in equity), for any error or other action or omission related to or affecting the selection, determination, or calculation of any rate (or component thereof) provided by any such information source or service.

**ARTICLE II**  
**THE COMMITMENTS AND CREDIT EXTENSIONS**

**2.01 Loans.**

The Revolving Credit Borrowings. Subject to the terms and conditions set forth herein, each Revolving Credit Lender severally agrees to make loans (each such loan, a “Revolving Credit Loan”) to the Borrower from time to time, on any Business Day during the Availability Period, in an aggregate amount not to exceed at any time outstanding the amount of such Lender’s Commitment; provided, however, that after giving effect to any Revolving Credit Borrowing, (i) the Total Revolving Credit Outstandings shall not exceed the Revolving Credit Facility, and (ii) the Revolving Credit Exposure shall not exceed such Revolving Credit Lender’s Commitment. Within the limits of each Revolving Credit Lender’s Commitment, and subject to the other terms and conditions hereof, the Borrower may borrow under this Section 2.01, prepay under Section 2.05, and reborrow under this Section 2.01. Revolving Credit Loans may be Base Rate Loans or Term SOFR Loans, as further provided herein.

**2.02 Borrowings, Conversions and Continuations of Loans.** (a) Each Revolving Credit Borrowing, each conversion of Revolving Credit Loans from one Type to the other, and each continuation of Term SOFR Loans shall be made upon the Borrower’s irrevocable notice to the Administrative Agent, which may be given by (A) telephone or (B) a Committed Loan Notice; provided that any telephonic notice must be confirmed immediately by delivery to the Administrative Agent of a Committed Loan Notice. Each such Committed Loan Notice must be received by the Administrative Agent not later than 12:00 p.m. (i) two Business Days prior to the requested date of any Borrowing of, conversion to or continuation of Term SOFR Loans or of any conversion of Term SOFR Loans to Base Rate Loans, and (ii) on the requested date of any Borrowing of Base Rate Loans; provided, however, that if the Borrower wishes to request Term SOFR Loans having an Interest Period other than one, three or six months in duration as provided in the definition of “Interest Period,” the applicable notice must be received by the Administrative Agent not later than 12:00 p.m. four Business Days prior to the requested date of such Borrowing, conversion or continuation, whereupon the Administrative Agent shall give prompt notice to the Appropriate Lenders of such request and determine whether the requested Interest Period is acceptable to all of them. Not later than 12:00 p.m., three Business Days before the requested date of such Borrowing, conversion or continuation, the Administrative Agent shall notify the Borrower (which notice may be by telephone) whether or not the requested Interest Period has been consented to by all the Lenders and the Administrative Agent. Each Borrowing of, conversion to or continuation of Term SOFR Loans shall be in a principal amount of \$5,000,000 or a whole multiple of \$1,000,000 in excess thereof. Except as provided in Sections 2.03(f) and 2.04(c), each Borrowing of or conversion to Base Rate Loans shall be in a principal amount of \$500,000 or a whole multiple of \$100,000 in excess thereof. Each Committed Loan Notice shall specify (i) whether the Borrower is requesting a Revolving Credit Borrowing, a conversion of Revolving Credit Loans from one Type to the other, or a continuation of Term SOFR Loans, (ii) the requested date of the Borrowing, conversion or continuation, as the case may be (which shall be a Business Day), (iii) the principal amount of Revolving Credit Loans to be borrowed, converted or continued, (iv) the Type of Revolving Credit Loans to be borrowed or to which existing Revolving Credit Loans are to be converted, and (v) if applicable, the duration of the Interest Period with respect thereto. If the Borrower fails to specify a Type of Revolving Credit Loan in a Committed Loan Notice or if the Borrower fails to give a timely notice requesting a conversion or continuation, then the applicable Revolving Credit Loans shall be made as, or converted to, Base Rate Loans. Any such automatic conversion to Base Rate Loans shall be effective as of the last day of the Interest Period then in effect with respect to the applicable Term SOFR Loans. If the Borrower requests a Borrowing of, conversion to, or continuation of Term SOFR Loans in any such Committed Loan Notice, but fails to specify an Interest Period, it will be deemed to have specified an Interest Period of one month.

(b) Following receipt of a Committed Loan Notice, the Administrative Agent shall promptly notify each Lender of the amount of its Applicable Percentage of the applicable Revolving Credit Loans, and if no timely notice of a conversion or continuation is provided by the Borrower, the Administrative Agent shall notify each Lender of the details of any automatic conversion to Base Rate Loans described in the preceding subsection. In the case of a Revolving Credit Borrowing, each Lender shall make the amount of its Revolving Credit Loan available to the Administrative Agent in immediately available funds at the Administrative Agent's Office not later than 1:00 p.m. on the Business Day specified in the applicable Committed Loan Notice. Upon satisfaction of the applicable conditions set forth in Section 4.02 (and, if such Borrowing is the initial Credit Extension, Section 4.01), the Administrative Agent shall make all funds so received available to the Borrower in like funds as received by the Administrative Agent either by (i) crediting the account of the Borrower on the books of Bank of America with the amount of such funds or (ii) wire transfer of such funds, in each case in accordance with instructions provided to (and reasonably acceptable to) the Administrative Agent by the Borrower; provided, however, that if, on the date the Committed Loan Notice with respect to such Borrowing is given by the Borrower, there are L/C Borrowings outstanding, then the proceeds of such Borrowing, first, shall be applied to the payment in full of any such L/C Borrowings, and second, shall be made available to the Borrower as provided above.

(c) Except as otherwise provided herein, a Term SOFR Loan may be continued or converted only on the last day of an Interest Period for such Term SOFR Loan. During the existence of an Event of Default, no Loans may be requested as, converted to or continued as Term SOFR Loans without the consent of the Required Lenders.

(d) The Administrative Agent shall promptly notify the Borrower and the Lenders of the interest rate applicable to any Interest Period for Term SOFR Loans upon determination of such interest rate.

(e) After giving effect to all Committed Borrowings, all conversions of Revolving Credit Loans from one Type to the other, and all continuations of Revolving Credit Loans as the same Type, there shall not be more than seven (7) Interest Periods in effect with respect to Revolving Credit Loans.

(f) Notwithstanding anything to the contrary in this Agreement, any Lender may exchange, continue or rollover all of the portion of its Loans in connection with any refinancing, extension, loan modification or similar transaction permitted by the terms of this Agreement, pursuant to a cashless settlement mechanism approved by the Borrower, the Administrative Agent, and such Lender.

(g) With respect to SOFR or Term SOFR, the Administrative Agent will have the right to make Conforming Changes from time to time and, notwithstanding anything to the contrary herein or in any other Loan Document, any amendments implementing such Conforming Changes will become effective without any further action or consent of any other party to this Agreement or any other Loan Document; provided that, with respect to any such amendment effected, the Administrative Agent shall post each such amendment implementing such Conforming Changes to the Borrower and the Lenders reasonably promptly after such amendment becomes effective.

### **2.03 Letters of Credit.**

(a) General. Subject to the terms and conditions set forth herein, in addition to the Loans provided for in Section 2.01, the Borrower may request the L/C Issuer, in reliance on the agreements of the Revolving Credit Lenders set forth in this Section, to issue, at any time and from time to time during the Availability Period, Letters of Credit denominated in Dollars for its own account or the account of any of its Subsidiaries in such form as is acceptable to the L/C Issuer in its reasonable determination. Letters of Credit issued hereunder shall constitute utilization of the Commitments.

(b) Notice of Issuance, Amendment, Extension, Reinstatement or Renewal. To request the issuance of a Letter of Credit (or the amendment of the terms and conditions, extension of the terms and conditions, extension of the expiration date, or reinstatement of amounts paid, or renewal of an outstanding Letter of Credit), the Borrower shall deliver (or transmit by electronic communication, if arrangements for doing so have been approved by the L/C Issuer) to the L/C Issuer and to the Administrative Agent not later than 12:00 p.m. at least two Business Days (or such later date and time as the Administrative Agent and the L/C Issuer may agree in a particular instance in their sole discretion) prior to the proposed issuance date or date of amendment, as the case may be a notice requesting the issuance of a Letter of Credit, or identifying the Letter of Credit to be amended, extended, reinstated or renewed, and specifying the date of issuance, amendment, extension, reinstatement or renewal (which shall be a Business Day), the date on which such Letter of Credit is to expire (which shall comply with subsection (d) of this Section), the amount of such Letter of Credit, the name and address of the beneficiary thereof, the purpose and nature of the requested Letter of Credit and such other information as shall be reasonably necessary to prepare, amend, extend, reinstate or renew such Letter of Credit. If reasonably requested by the L/C Issuer, the Borrower also shall submit a letter of credit application and reimbursement agreement on the L/C Issuer's standard form in connection with any request for a Letter of Credit. In the event of any inconsistency between the terms and conditions of this Agreement and the terms and conditions of any form of letter of credit application and reimbursement agreement or other agreement submitted by the Borrower to, or entered into by the Borrower with, the L/C Issuer relating to any Letter of Credit, the terms and conditions of this Agreement shall control.

If any Borrower so requests in any applicable Letter of Credit Application (or the amendment of an outstanding Letter of Credit), the L/C Issuer may, in its sole discretion, agree to issue a Letter of Credit that has automatic extension provisions (each, an "Auto-Extension Letter of Credit"); provided that any such Auto-Extension Letter of Credit shall permit the L/C Issuer to prevent any such extension at least once in each twelve-month period (commencing with the date of issuance of such Letter of Credit) by giving prior notice to the beneficiary thereof not later than a day (the "Non-Extension Notice Date") in each such twelve-month period to be agreed upon by the applicable Borrower and the L/C Issuer at the time such Letter of Credit is issued. Unless otherwise directed by the L/C Issuer, the Borrower shall not be required to make a specific request to the L/C Issuer for any such extension. Once an Auto-Extension Letter of Credit has been issued, the Revolving Lenders shall be deemed to have authorized (but may not require) the L/C Issuer to permit the extension of such Letter of Credit at any time to an expiration date not later than the date permitted pursuant to Section 2.03(d); provided that the L/C Issuer shall not (A) permit any such extension if (1) the L/C Issuer has determined that it would not be permitted, or would have no obligation, at such time to issue such Letter of Credit in its extended form under the terms hereof (except that the expiration date may be extended to a date that is no more than one (1) year from the then-current expiration date) or (2) it has received notice (which may be in writing or by telephone (if promptly confirmed in writing)) on or before the day that is seven (7) Business Days before the Non-Extension Notice Date from the Administrative Agent that the Lenders holding a majority of the Revolving Commitments have elected not to permit such extension or (B) be obligated to permit such extension if it has received notice (which may be in writing or by telephone (if promptly confirmed in writing)) on or before the day that is seven (7) Business Days before the Non-Extension Notice Date from the Administrative Agent, any Revolving Lender or any Borrower that one or more of the applicable conditions set forth in Section 4.02 is not then satisfied, and in each such case directing the L/C Issuer not to permit such extension.

(c) Limitations on Amounts, Issuance and Amendment. A Letter of Credit shall be issued, amended, extended, reinstated or renewed only if (and upon issuance, amendment, extension, reinstatement or renewal of each Letter of Credit the Borrower shall be deemed to represent and warrant that), after giving effect to such issuance, amendment, extension, reinstatement or renewal (i) the aggregate amount of the outstanding Letters of Credit issued by the L/C Issuer shall not exceed its L/C Commitment, (ii) the aggregate L/C Obligations shall not exceed the Letter of Credit Sublimit, (iii) the Revolving Credit Exposure of any Lender shall not exceed its Commitment and (iv) the total Revolving Credit Exposures shall not exceed the total Commitments.

(i) The L/C Issuer shall not be under any obligation to issue any Letter of Credit if:

(A) any order, judgment or decree of any Governmental Authority or arbitrator shall by its terms purport to enjoin or restrain the L/C Issuer from issuing the Letter of Credit, or any Law applicable to the L/C Issuer or any request or directive (whether or not having the force of law) from any Governmental Authority with jurisdiction over the L/C Issuer shall prohibit, or request that the L/C Issuer refrain from, the issuance of letters of credit generally or the Letter of Credit in particular or shall impose upon the L/C Issuer with respect to the Letter of Credit any restriction, reserve or capital requirement (for which the L/C Issuer is not otherwise compensated hereunder) not in effect on the Closing Date, or shall impose upon the L/C Issuer any unreimbursed loss, cost or expense which was not applicable on the Closing Date and which the L/C Issuer in good faith deems material to it;

(B) the issuance of such Letter of Credit would violate one or more policies of the L/C Issuer applicable to letters of credit generally;

(C) except as otherwise agreed by the Administrative Agent and the L/C Issuer, the Letter of Credit is in an initial stated amount less than \$500,000; or

(D) any Revolving Credit Lender is at that time a Defaulting Lender, unless the L/C Issuer has entered into arrangements, including the delivery of Cash Collateral, satisfactory to the L/C Issuer (in its sole discretion) with the Borrower or such Lender to eliminate the L/C Issuer's actual or potential Fronting Exposure (after giving effect to Section 2.17(a)(iv)) with respect to the Defaulting Lender arising from either the Letter of Credit then proposed to be issued or that Letter of Credit and all other L/C Obligations as to which the L/C Issuer has actual or potential Fronting Exposure, as it may elect in its sole discretion.

(ii) The L/C Issuer shall be under no obligation to amend any Letter of Credit if (A) the L/C Issuer would have no obligation at such time to issue the Letter of Credit in its amended form under the terms hereof, or (B) the beneficiary of the Letter of Credit does not accept the proposed amendment to the Letter of Credit.

(d) Expiration Date. Each Letter of Credit shall have a stated expiration date no later than the earlier of (i) the date twelve months after the date of the issuance of such Letter of Credit (or, in the case of any extension of the expiration date thereof, whether automatic or by amendment, twelve months after the then current expiration date of such Letter of Credit) and (ii) the date that is five Business Days prior to the Maturity Date.

(e) Participations. By the issuance of a Letter of Credit (or an amendment to a Letter of Credit increasing the amount or extending the expiration date thereof), and without any further action on the part of the L/C Issuer or the Revolving Credit Lenders, the L/C Issuer hereby grants to each Revolving Credit Lender, and each Revolving Credit Lender hereby acquires from the L/C Issuer, a participation in such Letter of Credit equal to such Lender's Applicable Percentage of the aggregate amount available to be drawn under such Letter of Credit. Each Revolving Credit Lender acknowledges and agrees that its obligation to acquire participations pursuant to this subsection (e) in respect of Letters of Credit is absolute, unconditional and irrevocable and shall not be affected by any circumstance whatsoever, including any amendment, extension, reinstatement or renewal of any Letter of Credit or the occurrence and continuance of a Default or reduction or termination of the Commitments.

In consideration and in furtherance of the foregoing, each Revolving Credit Lender hereby absolutely, unconditionally and irrevocably agrees to pay to the Administrative Agent, for account of the L/C Issuer, such Lender's Applicable Percentage of each L/C Disbursement made by the L/C Issuer not later than 1:00 p.m. on the Business Day specified in the notice provided by the Administrative Agent to the Revolving Credit Lenders pursuant to Section 2.03(f) until such L/C Disbursement is reimbursed by the Borrower or at any time after any reimbursement payment is required to be refunded to the Borrower for any reason, including after the Maturity Date. Such payment shall be made without any offset, abatement, withholding or reduction whatsoever. Each such payment shall be made in the same manner as provided in Section 2.02 with respect to Loans made by such Lender (and Section 2.02 shall apply, mutatis mutandis, to the payment obligations of the Revolving Credit Lenders pursuant to this Section 2.03), and the Administrative Agent shall promptly pay to the L/C Issuer the amounts so received by it from the Revolving Credit Lenders. Promptly following receipt by the Administrative Agent of any payment from the Borrower pursuant to Section 2.03(f), the Administrative Agent shall distribute such payment to the L/C Issuer or, to the extent that the Revolving Credit Lenders have made payments pursuant to this subsection (e) to reimburse the L/C Issuer, then to such Revolving Credit Lenders and the L/C Issuer as their interests may appear. Any payment made by a Lender pursuant to this paragraph to reimburse the L/C Issuer for any L/C Disbursement shall not constitute a Loan and shall not relieve the Borrower of its obligation to reimburse such L/C Disbursement.

Each Revolving Credit Lender further acknowledges and agrees that its participation in each Letter of Credit will be automatically adjusted to reflect such Lender's Applicable Percentage of the aggregate amount available to be drawn under such Letter of Credit at each time such Lender's Commitment is amended pursuant to the operation of Section 2.14 or 2.15, as a result of an assignment in accordance with Section 11.06 or otherwise pursuant to this Agreement.

If any Revolving Credit Lender fails to make available to the Administrative Agent for the account of the L/C Issuer any amount required to be paid by such Lender pursuant to the foregoing provisions of this Section 2.03(e), then, without limiting the other provisions of this Agreement, the L/C Issuer shall be entitled to recover from such Lender (acting through the Administrative Agent), on demand, such amount with interest thereon for the period from the date such payment is required to the date on which such payment is immediately available to the L/C Issuer at a rate per annum equal to the greater of the Federal Funds Rate and a rate determined by the L/C Issuer in accordance with banking industry rules on interbank compensation, plus any administrative, processing or similar fees customarily charged by the L/C Issuer in connection with the foregoing. If such Lender pays such amount (with interest and fees as aforesaid), the amount so paid shall constitute such Lender's Revolving Credit Loan included in the relevant Revolving Credit Borrowing or L/C Advance in respect of the relevant L/C Borrowing, as the case may be. A certificate of the L/C Issuer submitted to any Revolving Credit Lender (through the Administrative Agent) with respect to any amounts owing under this subsection (e) shall be conclusive absent manifest error.

(f) Reimbursement. If the L/C Issuer shall make any L/C Disbursement in respect of a Letter of Credit, the Borrower shall reimburse the L/C Issuer in respect of such L/C Disbursement by paying to the Administrative Agent an amount equal to such L/C Disbursement not later than 12:00 noon on (i) the Business Day that the Borrower receives notice of such L/C Disbursement, if such notice is received prior to 10:00 a.m. or (ii) the Business Day immediately following the day that the Borrower receives such notice, if such notice is not received prior to such time, provided that, if such L/C Disbursement is not less than \$500,000, the Borrower may, subject to the conditions to borrowing set forth herein, request in accordance with Section 2.02 or Section 2.04 that such payment be financed with a Borrowing of Base Rate Revolving Credit Loans or Swing Line Loan in an equivalent amount and, to the extent so financed, the Borrower's obligation to make such payment shall be discharged and replaced by the resulting Borrowing of Base Rate Loans or Swing Line Loan. If the Borrower fails to make such payment when due, the Administrative Agent shall notify each Revolving Credit Lender of the applicable L/C Disbursement, the payment then due from the Borrower in respect thereof (the "Unreimbursed Amount") and such Lender's Applicable Percentage thereof. In such event, the Borrower shall be deemed to have requested a Revolving Credit Borrowing of Base Rate Loans to be disbursed on the date of payment by the L/C Issuer under a Letter of Credit in an amount equal to the Unreimbursed Amount, without regard to the minimum and multiples specified in Section 2.02 for the principal amount of Base Rate Loans, but subject to the amount of the unutilized portion of the aggregate Commitments and the conditions set forth in Section 4.02 (other than the delivery of a Committed Loan Notice). Any notice given by the L/C Issuer or the Administrative Agent pursuant to this Section 2.03(f) may be given by telephone if immediately confirmed in writing; provided that the lack of such an immediate confirmation shall not affect the conclusiveness or binding effect of such notice.

(g) Obligations Absolute. The Borrower's obligation to reimburse L/C Disbursements as provided in subsection (f) of this Section shall be absolute, unconditional and irrevocable, and shall be performed strictly in accordance with the terms of this Agreement under any and all circumstances whatsoever and irrespective of:

- (i) any lack of validity or enforceability of this Agreement, any other Loan Document or any Letter of Credit, or any term or provision herein or therein;
- (ii) the existence of any claim, counterclaim, setoff, defense or other right that the Borrower or any Subsidiary may have at any time against any beneficiary or any transferee of such Letter of Credit (or any Person for whom any such beneficiary or any such transferee may be acting), the L/C Issuer or any other Person, whether in connection with this Agreement, the transactions contemplated hereby or by such Letter of Credit or any agreement or instrument relating thereto, or any unrelated transaction;
- (iii) any draft, demand, certificate or other document presented under a Letter of Credit proving to be forged, fraudulent, invalid or insufficient in any respect or any statement in such draft or other document being untrue or inaccurate in any respect; or any loss or delay in the transmission or otherwise of any document required in order to make a drawing under such Letter of Credit;
- (iv) waiver by the L/C Issuer of any requirement that exists for the L/C Issuer's protection and not the protection of the Borrower or any waiver by the L/C Issuer which does not in fact materially prejudice the Borrower;
- (v) honor of a demand for payment presented electronically even if such Letter of Credit required that demand be in the form of a draft;
- (vi) any payment made by the L/C Issuer in respect of an otherwise complying item presented after the date specified as the expiration date of, or the date by which documents must be received under such Letter of Credit if presentation after such date is authorized by the UCC, the ISP or the UCP, as applicable;

(vii) payment by the L/C Issuer under a Letter of Credit against presentation of a draft or other document that does not comply strictly with the terms of such Letter of Credit; or any payment made by the L/C Issuer under such Letter of Credit to any Person purporting to be a trustee in bankruptcy, debtor-in-possession, assignee for the benefit of creditors, liquidator, receiver or other representative of or successor to any beneficiary or any transferee of such Letter of Credit, including any arising in connection with any proceeding under any Debtor Relief Law; or

(viii) any other event or circumstance whatsoever, whether or not similar to any of the foregoing, that might, but for the provisions of this Section, constitute a legal or equitable discharge of, or provide a right of setoff against, the Borrower's obligations hereunder.

The Borrower shall promptly examine a copy of each Letter of Credit and each amendment thereto that is delivered to it and, in the event of any claim of noncompliance with the Borrower's instructions or other irregularity, the Borrower will immediately notify the L/C Issuer. The Borrower shall be conclusively deemed to have waived any such claim against the L/C Issuer and its correspondents unless such notice is given as aforesaid.

None of the Administrative Agent, the Lenders, the L/C Issuer, or any of their Related Parties shall have any liability or responsibility by reason of or in connection with the issuance or transfer of any Letter of Credit by the L/C Issuer or any payment or failure to make any payment thereunder (irrespective of any of the circumstances referred to in the preceding sentence), or any error, omission, interruption, loss or delay in transmission or delivery of any draft, notice or other communication under or relating to any Letter of Credit (including any document required to make a drawing thereunder), any error in interpretation of technical terms, any error in translation or any consequence arising from causes beyond the control of the L/C Issuer; provided that the foregoing shall not be construed to excuse the L/C Issuer from liability to the Borrower to the extent of any direct damages (as opposed to consequential damages, claims in respect of which are hereby waived by the Borrower to the extent permitted by Applicable Law) suffered by the Borrower that are caused by the L/C Issuer's failure to exercise care when determining whether drafts and other documents presented under a Letter of Credit comply with the terms thereof. The parties hereto expressly agree that, in the absence of gross negligence or willful misconduct on the part of the L/C Issuer (as finally determined by a court of competent jurisdiction), the L/C Issuer shall be deemed to have exercised care in each such determination, and that:

(i) the L/C Issuer may replace a purportedly lost, stolen, or destroyed original Letter of Credit or missing amendment thereto with a certified true copy marked as such or waive a requirement for its presentation;

(ii) the L/C Issuer may accept documents that appear on their face to be in substantial compliance with the terms of a Letter of Credit without responsibility for further investigation, regardless of any notice or information to the contrary, and may make payment upon presentation of documents that appear on their face to be in substantial compliance with the terms of such Letter of Credit and without regard to any non-documentary condition in such Letter of Credit;

(iii) the L/C Issuer shall have the right, in its sole discretion, to decline to accept such documents and to make such payment if such documents are not in strict compliance with the terms of such Letter of Credit; and

(iv) this sentence shall establish the standard of care to be exercised by the L/C Issuer when determining whether drafts and other documents presented under a Letter of Credit comply with the terms thereof (and the parties hereto hereby waive, to the extent permitted by Applicable Law, any standard of care inconsistent with the foregoing).



Without limiting the foregoing, none of the Administrative Agent, the Lenders, the L/C Issuer, or any of their Related Parties shall have any liability or responsibility by reason of (i) any presentation that includes forged or fraudulent documents or that is otherwise affected by the fraudulent, bad faith, or illegal conduct of the beneficiary or other Person, (ii) the L/C Issuer declining to take-up documents and make payment (A) against documents that are fraudulent, forged, or for other reasons by which that it is entitled not to honor or (B) following the Borrower's waiver of discrepancies with respect to such documents or request for honor of such documents or (iii) the L/C Issuer retaining proceeds of a Letter of Credit based on an apparently applicable attachment order, blocking regulation, or third-party claim notified to the L/C Issuer.

(h) Applicability of ISP and UCP; Limitation of Liability. Unless otherwise expressly agreed by the L/C Issuer and the Borrower when a Letter of Credit is issued by it the rules of the ISP shall apply to each standby Letter of Credit. Notwithstanding the foregoing, the L/C Issuer shall not be responsible to the Borrower for, and the L/C Issuer's rights and remedies against the Borrower shall not be impaired by, any action or inaction of the L/C Issuer required or permitted under any law, order, or practice that is required or permitted to be applied to any Letter of Credit or this Agreement, including the Law or any order of a jurisdiction where the L/C Issuer or the beneficiary is located, the practice stated in the ISP or UCP, as applicable, or in the decisions, opinions, practice statements, or official commentary of the ICC Banking Commission, the Bankers Association for Finance and Trade - International Financial Services Association (BAFT-IFSA), or the Institute of International Banking Law & Practice, whether or not any Letter of Credit chooses such law or practice.

(i) Actions of L/C Issuer. The L/C Issuer shall act on behalf of the Lenders with respect to any Letters of Credit issued by it and the documents associated therewith, and the L/C Issuer shall have all of the benefits and immunities (A) provided to the Administrative Agent in Article IX with respect to any acts taken or omissions suffered by the L/C Issuer in connection with Letters of Credit issued by it or proposed to be issued by it and Issuer Documents pertaining to such Letters of Credit as fully as if the term "Administrative Agent" as used in Article IX included the L/C Issuer with respect to such acts or omissions, and (B) as additionally provided herein with respect to the L/C Issuer.

(j) Letter of Credit Fees. The Borrower shall pay to the Administrative Agent for the account of each Revolving Credit Lender in accordance with its Applicable Percentage a Letter of Credit fee (the "Letter of Credit Fee") for each Letter of Credit equal to the Applicable Rate times the daily amount available to be drawn under such Letter of Credit. For purposes of computing the daily amount available to be drawn under any Letter of Credit, the amount of such Letter of Credit shall be determined in accordance with Section 1.06. Letter of Credit Fees shall be (i) due and payable on the first Business Day after the end of each March, June, September and December, commencing with the first such date to occur after the issuance of such Letter of Credit, on the Maturity Date and thereafter on demand and (ii) computed on a quarterly basis in arrears. If there is any change in the Applicable Rate during any quarter, the daily amount available to be drawn under each Letter of Credit shall be computed and multiplied by the Applicable Rate separately for each period during such quarter that such Applicable Rate was in effect. Notwithstanding anything to the contrary contained herein, upon the request of the Required Lenders, while any Event of Default exists, all Letter of Credit Fees shall accrue at the Default Rate.

(k) Fronting Fee and Documentary and Processing Charges Payable to L/C Issuer. The Borrower shall pay directly to the L/C Issuer for its own account a fronting fee with respect to each Letter of Credit, at the rate per annum equal to the percentage separately agreed upon between the Borrower and the L/C Issuer, computed on the daily amount available to be drawn under such Letter of Credit on a quarterly basis in arrears. Such fronting fee shall be due and payable on the tenth Business Day after the end of each March, June, September and December in respect of the most recently-ended quarterly period (or portion thereof, in the case of the first payment), commencing with the first such date to occur after the issuance of such Letter of Credit, on the Maturity Date and thereafter on demand. For purposes of computing the daily amount available to be drawn under any Letter of Credit, the amount of such Letter of Credit shall be determined in accordance with Section 1.06. In addition, the Borrower shall pay directly to the L/C Issuer for its own account the customary issuance, presentation, amendment and other processing fees, and other standard costs and charges, of the L/C Issuer relating to letters of credit as from time to time in effect. Such customary fees and standard costs and charges are due and payable on demand and are nonrefundable.

(l) Disbursement Procedures. The L/C Issuer for any Letter of Credit shall, within the time allowed by Applicable Laws or the specific terms of the Letter of Credit following its receipt thereof, examine all documents purporting to represent a demand for payment under such Letter of Credit. The L/C Issuer shall promptly after such examination notify the Administrative Agent and the Borrower in writing of such demand for payment if the L/C Issuer has made or will make an L/C Disbursement thereunder; provided that any failure to give or delay in giving such notice shall not relieve the Borrower of its obligation to reimburse the L/C Issuer and the Lenders with respect to any such L/C Disbursement.

(m) Interim Interest. If the L/C Issuer for any Letter of Credit shall make any L/C Disbursement, then, unless the Borrower shall reimburse such L/C Disbursement in full on the date such L/C Disbursement is made, the unpaid amount thereof shall bear interest, for each day from and including the date such L/C Disbursement is made to but excluding the date that the Borrower reimburses such L/C Disbursement, at the rate per annum then applicable to Base Rate Loans; provided that if the Borrower fails to reimburse such L/C Disbursement when due pursuant to subsection (f) of this Section, then Section 2.08(b) shall apply. Interest accrued pursuant to this subsection shall be for account of the L/C Issuer, except that interest accrued on and after the date of payment by any Lender pursuant to subsection (f) of this Section to reimburse the L/C Issuer shall be for account of such Lender to the extent of such payment.

(n) Replacement of the L/C Issuer. The L/C Issuer may be replaced at any time by written agreement between the Borrower, the Administrative Agent, the replaced L/C Issuer and the successor L/C Issuer. The Administrative Agent shall notify the Lenders of any such replacement of the L/C Issuer. At the time any such replacement shall become effective, the Borrower shall pay all unpaid fees accrued for the account of the replaced L/C Issuer pursuant to Section 2.03(j). From and after the effective date of any such replacement, (i) the successor L/C Issuer shall have all the rights and obligations of an L/C Issuer under this Agreement with respect to Letters of Credit to be issued by it thereafter and (ii) references herein to the term "L/C Issuer" shall be deemed to include such successor or any previous L/C Issuer, or such successor and all previous L/C Issuer, as the context shall require. After the replacement of the L/C Issuer hereunder, the replaced L/C Issuer shall remain a party hereto and shall continue to have all the rights and obligations of an L/C Issuer under this Agreement with respect to Letters of Credit issued by it prior to such replacement, but shall not be required to issue additional Letters of Credit.

(o) Cash Collateralization. If any Event of Default shall occur and be continuing, on the Business Day that the Borrower receives notice from the Administrative Agent or the Required Lenders (or, if the maturity of the Loans has been accelerated, Revolving Credit Lenders with L/C Obligations representing at least 66-2/3% of the total L/C Obligations) demanding the deposit of Cash Collateral pursuant to this subsection (o), the Borrower shall immediately deposit into an account established and maintained on the books and records of the Administrative Agent (the "Collateral Account") an amount in cash equal to 100% of the total L/C Obligations as of such date plus any accrued and unpaid interest thereon, provided that the obligation to deposit such Cash Collateral shall become effective immediately, and such deposit shall become immediately due and payable, without demand or other notice of any kind, upon the occurrence of any Event of Default with respect to the Borrower described in subsection (f) of Section 8.01. Such deposit shall be held by the Administrative Agent as collateral for the payment and performance of the obligations of the Borrower under this Agreement. In addition, and without limiting the foregoing or subsection (d) of this Section, if any L/C Obligations remain outstanding after the expiration date specified in said subsection (d), the Borrower shall immediately deposit into the Collateral Account an amount in cash equal to 100% of such L/C Obligations as of such date plus any accrued and unpaid interest thereon.

The Administrative Agent shall have exclusive dominion and control, including the exclusive right of withdrawal, over the Collateral Account. Other than any interest earned on the investment of such deposits, which investments shall be made at the option and sole discretion of the Administrative Agent and at the Borrower's risk and expense, such deposits shall not bear interest. Interest or profits, if any, on such investments shall accumulate in the Collateral Account. Moneys in the Collateral Account shall be applied by the Administrative Agent to reimburse the L/C Issuer for L/C Disbursements for which it has not been reimbursed, together with related fees, costs, and customary processing charges, and, to the extent not so applied, shall be held for the satisfaction of the reimbursement obligations of the Borrower for the L/C Obligations at such time or, if the maturity of the Loans has been accelerated (but subject to the consent of Lenders with L/C Obligations representing 66-2/3% of the total L/C Obligations), be applied to satisfy other obligations of the Borrower under this Agreement. If the Borrower is required to provide an amount of Cash Collateral hereunder as a result of the occurrence of an Event of Default, such amount (to the extent not applied as aforesaid) shall be returned to the Borrower within three Business Days after all Events of Default have been cured or waived.

(p) Conflict with Issuer Documents. In the event of any conflict between the terms hereof and the terms of any Issuer Document, the terms hereof shall control.

**2.04 Swing Line Loans.** (a) The Swing Line. Subject to the terms and conditions set forth herein, the Swing Line Lender, in reliance upon the agreements of the other Lenders set forth in this Section 2.04, shall make loans (each such loan, a "Swing Line Loan") to the Borrower from time to time on any Business Day during the Availability Period in an aggregate amount not to exceed at any time outstanding the amount of the Swing Line Sublimit; provided, however, that after giving effect to any Swing Line Loan, (i) the Total Revolving Credit Outstandings shall not exceed the Revolving Credit Facility at such time, and (ii) the Revolving Credit Exposure of any Revolving Credit Lender shall not exceed such Lender's Commitment, (y) the Borrower shall not use the proceeds of any Swing Line Loan to refinance any outstanding Swing Line Loan, and (z) the Swing Line Lender shall not be under any obligation to make any Swing Line Loan if it shall determine (which determination shall be conclusive and binding absent manifest error) that it has, or by such Credit Extension may have, Fronting Exposure. Within the foregoing limits, and subject to the other terms and conditions hereof, the Borrower may borrow under this Section 2.04, prepay under Section 2.05, and reborrow under this Section 2.04. Each Swing Line Loan shall bear interest only at a rate based on the Base Rate. Immediately upon the making of a Swing Line Loan, each Revolving Credit Lender shall be deemed to, and hereby irrevocably and unconditionally agrees to, purchase from the Swing Line Lender a risk participation in such Swing Line Loan in an amount equal to the product of such Revolving Credit Lender's Applicable Revolving Credit Percentage times the amount of such Swing Line Loan.

(b) Borrowing Procedures. Each Swing Line Borrowing shall be made upon the Borrower's irrevocable notice to the Swing Line Lender and the Administrative Agent, which may be given by (A) telephone or (B) by a Swing Line Loan Notice; provided that any telephonic notice must be confirmed promptly by delivery to the Swing Line Lender and the Administrative Agent of a Swing Line Loan Notice. Each such notice must be received by the Swing Line Lender and the Administrative Agent not later than 1:00 p.m. on the requested borrowing date, and shall specify (i) the amount to be borrowed, which shall be a minimum of \$100,000, and (ii) the requested borrowing date, which shall be a Business Day. Promptly after receipt by the Swing Line Lender of any Swing Line Loan Notice, the Swing Line Lender will confirm with the Administrative Agent (by telephone or in writing) that the Administrative Agent has also received such Swing Line Loan Notice and, if not, the Swing Line Lender will notify the Administrative Agent (by telephone or in writing) of the contents thereof. Unless the Swing Line Lender has received notice (by telephone or in writing) from the Administrative Agent (including at the request of any Revolving Credit Lender) prior to 2:00 p.m. on the date of the proposed Swing Line Borrowing (A) directing the Swing Line Lender not to make such Swing Line Loan as a result of the limitations set forth in the first proviso to the first sentence of Section 2.04(a), or (B) that one or more of the applicable conditions specified in Article IV is not then satisfied, then, subject to the terms and conditions hereof, the Swing Line Lender will, not later than 3:00 p.m. on the borrowing date specified in such Swing Line Loan Notice, make the amount of its Swing Line Loan available to the Borrower.

(c) Refinancing of Swing Line Loans.

(i) The Swing Line Lender at any time in its sole and absolute discretion may request, on behalf of the Borrower (which hereby irrevocably authorizes the Swing Line Lender to so request on its behalf), that each Revolving Credit Lender make a Base Rate Loan in an amount equal to such Lender's Applicable Revolving Credit Percentage of the amount of Swing Line Loans then outstanding. Such request shall be made in writing (which written request shall be deemed to be a Committed Loan Notice for purposes hereof) and in accordance with the requirements of Section 2.02, without regard to the minimum and multiples specified therein for the principal amount of Base Rate Loans, but subject to the unutilized portion of the Revolving Credit Facility and the conditions set forth in Section 4.02. The Swing Line Lender shall furnish the Borrower with a copy of the applicable Committed Loan Notice promptly after delivering such notice to the Administrative Agent. Each Revolving Credit Lender shall make an amount equal to its Applicable Revolving Credit Percentage of the amount specified in such Committed Loan Notice available to the Administrative Agent in immediately available funds (and the Administrative Agent may apply Cash Collateral available with respect to the applicable Swing Line Loan) for the account of the Swing Line Lender at the Administrative Agent's Office not later than 1:00 p.m. on the day specified in such Committed Loan Notice, whereupon, subject to Section 2.04(c)(ii), each Revolving Credit Lender that so makes funds available shall be deemed to have made a Base Rate Loan to the Borrower in such amount. The Administrative Agent shall remit the funds so received to the Swing Line Lender.

(ii) If for any reason any Swing Line Loan cannot be refinanced by such a Revolving Credit Borrowing in accordance with Section 2.04(c)(i), the request for Base Rate Loans submitted by the Swing Line Lender as set forth herein shall be deemed to be a request by the Swing Line Lender that each of the Revolving Credit Lenders fund its risk participation in the relevant Swing Line Loan and each Revolving Credit Lender's payment to the Administrative Agent for the account of the Swing Line Lender pursuant to Section 2.04(c)(i) shall be deemed payment in respect of such participation.

(iii) If any Revolving Credit Lender fails to make available to the Administrative Agent for the account of the Swing Line Lender any amount required to be paid by such Lender pursuant to the foregoing provisions of this Section 2.04(c) by the time specified in Section 2.04(c)(i), the Swing Line Lender shall be entitled to recover from such Lender (acting through the Administrative Agent), on demand, such amount with interest thereon for the period from the date such payment is required to the date on which such payment is immediately available to the Swing Line Lender at a rate per annum equal to the greater of the Federal Funds Rate and a rate determined by the Swing Line Lender in accordance with banking industry rules on interbank compensation, plus any administrative, processing or similar fees customarily charged by the Swing Line Lender in connection with the foregoing. If such Lender pays such amount (with interest and fees as aforesaid), the amount so paid shall constitute such Lender's Revolving Credit Loan included in the relevant Revolving Credit Borrowing or funded participation in the relevant Swing Line Loan, as the case may be. A certificate of the Swing Line Lender submitted to any Lender (through the Administrative Agent) with respect to any amounts owing under this subsection (iii) shall be conclusive absent manifest error.

(iv) Each Revolving Credit Lender's obligation to make Revolving Credit Loans or to purchase and fund risk participations in Swing Line Loans pursuant to this Section 2.04(c) shall be absolute and unconditional and shall not be affected by any circumstance, including (A) any setoff, counterclaim, recoupment, defense or other right which such Lender may have against the Swing Line Lender, the Borrower or any other Person for any reason whatsoever, (B) the occurrence or continuance of a Default, or (C) any other occurrence, event or condition, whether or not similar to any of the foregoing; provided, however, that each Revolving Credit Lender's obligation to make Revolving Credit Loans pursuant to this Section 2.04(c) is subject to the conditions set forth in Section 4.02. No such funding of risk participations shall relieve or otherwise impair the obligation of the Borrower to repay Swing Line Loans, together with interest as provided herein.

(d) Repayment of Participations.

(i) At any time after any Revolving Credit Lender has purchased and funded a risk participation in a Swing Line Loan, if the Swing Line Lender receives any payment on account of such Swing Line Loan, the Swing Line Lender will distribute to such Revolving Credit Lender its Applicable Revolving Credit Percentage thereof in the same funds as those received by the Swing Line Lender.

(ii) If any payment received by the Swing Line Lender in respect of principal or interest on any Swing Line Loan is required to be returned by the Swing Line Lender under any of the circumstances described in Section 11.05 (including pursuant to any settlement entered into by the Swing Line Lender in its discretion), each Revolving Credit Lender shall pay to the Swing Line Lender its Applicable Revolving Credit Percentage thereof on demand of the Administrative Agent, plus interest thereon from the date of such demand to the date such amount is returned, at a rate per annum equal to the Federal Funds Rate. The Administrative Agent will make such demand upon the request of the Swing Line Lender. The obligations of the Lenders under this subsection shall survive the payment in full of the Obligations and the termination of this Agreement.

(e) Interest for Account of Swing Line Lender. The Swing Line Lender shall be responsible for invoicing the Borrower for interest on the Swing Line Loans. Until each Revolving Credit Lender funds its Base Rate Loan or risk participation pursuant to this Section 2.04 to refinance such Revolving Credit Lender's Applicable Revolving Credit Percentage of any Swing Line Loan, interest in respect of such Applicable Revolving Credit Percentage shall be solely for the account of the Swing Line Lender.

(f) Payments Directly to Swing Line Lender. The Borrower shall make all payments of principal and interest in respect of the Swing Line Loans directly to the Swing Line Lender.

**2.05 Prepayments.**

(a) Optional. (i) The Borrower may, upon notice to the Administrative Agent pursuant to delivery to the Administrative Agent of a Notice of Loan Prepayment (which Notice of Loan Prepayment may, at the Borrower's election, be subject to one or more conditions, provided the Borrower shall compensate each Lender for any additional amounts required pursuant to Section 3.05 suffered as a result of the revocation of any conditional Notice of Loan Prepayment), at any time or from time to time voluntarily prepay Revolving Credit Loans in whole or in part without premium or penalty; provided that (i) such notice must be received by the Administrative Agent not later than 12:00 p.m. (A) two Business Days prior to any date of prepayment of Term SOFR Loans and (B) on the date of prepayment of Base Rate Loans; (ii) any prepayment of Term SOFR Loans shall be in a principal amount of \$1,000,000 or a whole multiple of \$100,000 in excess thereof; and (iii) any prepayment of Base Rate Loans shall be in a principal amount of \$500,000 or a whole multiple of \$100,000 in excess thereof or, in each case, if less, the entire principal amount thereof then outstanding. Each such notice shall specify the date and amount of such prepayment and the Type(s) of Revolving Credit Loans to be prepaid and, if Term SOFR Loans are to be prepaid, the Interest Period(s) of such Loans. The Administrative Agent will promptly notify each Lender of its receipt of each such notice, and of the amount of such Lender's Applicable Percentage of such prepayment. If such notice is given by the Borrower, the Borrower shall make such prepayment and the payment amount specified in such notice shall be due and payable on the date specified therein. Any prepayment of any Term SOFR Loan shall be accompanied by all accrued interest on the amount prepaid, together with any additional amounts required pursuant to Section 3.05. Subject to Section 2.17, each such prepayment shall be applied to the Revolving Credit Loans of the Lenders in accordance with their respective Applicable Percentages.

(ii) The Borrower may, upon notice to the Swing Line Lender pursuant to delivery to the Swing Line Lender of a Notice of Loan Prepayment (with a copy to the Administrative Agent), at any time or from time to time, voluntarily prepay Swing Line Loans in whole or in part without premium or penalty; provided that (A) such notice must be received by the Swing Line Lender and the Administrative Agent not later than 1:00 p.m. on the date of the prepayment, and (B) any such prepayment shall be in a minimum principal amount of \$100,000. Each such notice shall specify the date and amount of such prepayment. If such notice is given by the Borrower, the Borrower shall make such prepayment and the payment amount specified in such notice shall be due and payable on the date specified therein.

(b) Mandatory.

(i) If for any reason the Total Revolving Credit Outstandings at any time exceed the Revolving Credit Facility at such time, the Borrower shall immediately prepay Revolving Credit Loans, Swing Line Loans and L/C Borrowings and/or Cash Collateralize the L/C Obligations (other than the L/C Borrowings) in an aggregate amount equal to such excess.

(ii) Prepayments of the Revolving Credit Facility made pursuant to this Section 2.05(b), first, shall be applied ratably to the L/C Borrowings and the Swing Line Loans, second, shall be applied ratably to the outstanding Revolving Credit Loans, and, third, shall be used to Cash Collateralize the remaining L/C Obligations. Upon the drawing of any Letter of Credit that has been Cash Collateralized, the funds held as Cash Collateral shall be applied (without any further action by or notice to or from the Borrower or any other Loan Party) to reimburse the L/C Issuer or the Revolving Credit Lenders, as applicable.

**2.06 Termination or Reduction of Commitments.** (a) Optional. The Borrower may, upon notice to the Administrative Agent, terminate the Revolving Credit Facility, the Letter of Credit Sublimit or the Swing Line Sublimit, or from time to time permanently reduce the Revolving Credit Facility, the Letter of Credit Sublimit or the Swing Line Sublimit; provided that (i) any such notice shall be received by the Administrative Agent not later than 12:00 p.m. three Business Days prior to the date of termination or reduction, (ii) any such partial reduction shall be in an aggregate amount of \$5,000,000 or any whole multiple of \$1,000,000 in excess thereof, (iii) such reduction or termination may, at the Borrower's election, be subject to one or more conditions specified by the Borrower in such notice (provided the Borrower shall compensate each Lender for any additional amounts required pursuant to Section 3.05 suffered as a result of the revocation of any conditional Notice of Loan Prepayment delivered in connection with any such reduction or termination) and (iv) the Borrower shall not terminate or reduce (A) the Revolving Credit Facility if, after giving effect thereto and to any concurrent prepayments hereunder, the Total Revolving Credit Outstandings would exceed the Revolving Credit Facility, (B) the Letter of Credit Sublimit if, after giving effect thereto, the Outstanding Amount of L/C Obligations not fully Cash Collateralized hereunder would exceed the Letter of Credit Sublimit, or (C) the Swing Line Sublimit if, after giving effect thereto and to any concurrent prepayments hereunder, the Outstanding Amount of Swing Line Loans would exceed the Swing Line Sublimit.

(b) Mandatory. If after giving effect to any reduction or termination of Commitments under this Section 2.06, the Letter of Credit Sublimit or the Swing Line Sublimit exceeds the Revolving Credit Facility at such time, the Letter of Credit Sublimit or the Swing Line Sublimit, as the case may be, shall be automatically reduced by the amount of such excess.

(c) Application of Commitment Reductions; Payment of Fees. The Administrative Agent will promptly notify the Lenders of any termination or reduction of the Letter of Credit Sublimit, Swing Line Sublimit or the Commitment under this Section 2.06. Upon any reduction of the Commitments, the Commitment of each Revolving Credit Lender shall be reduced by such Lender's Applicable Revolving Credit Percentage of such reduction amount. All fees in respect of the Revolving Credit Facility accrued until the effective date of any termination of the Revolving Credit Facility shall be paid on the effective date of such termination.

## 2.07 Repayment of Loans.

(a) Revolving Credit Loans. The Borrower shall repay to the Revolving Credit Lenders on the Maturity Date for the Revolving Credit Facility the aggregate principal amount of all Revolving Credit Loans outstanding on such date.

(b) Swing Line Loans. The Borrower shall repay each Swing Line Loan on the earlier to occur of (i) the date ten Business Days after such Loan is made and (ii) the Maturity Date. At any time that there shall exist a Defaulting Lender, immediately upon the request of any Swing Line Lender, the Borrower shall repay the outstanding Swing Line Loans made by such Swing Line Lender in an amount sufficient to eliminate any Fronting Exposure in respect of such Swing Line Loans.

**2.08 Interest.** (a) Subject to the provisions of Section 2.08(b), (i) each Term SOFR Loan shall bear interest on the outstanding principal amount thereof for each Interest Period at a rate per annum equal to Term SOFR for such Interest Period plus the Applicable Rate; (ii) each Base Rate Loan shall bear interest on the outstanding principal amount thereof from the applicable borrowing date at a rate per annum equal to the Base Rate plus the Applicable Rate; and (iii) each Swing Line Loan shall bear interest on the outstanding principal amount thereof from the applicable borrowing date at a rate per annum equal to the Base Rate plus the Applicable Rate.

(b) (i) If any amount of principal of any Loan is not paid when due (without regard to any applicable grace periods), whether at stated maturity, by acceleration or otherwise, such amount shall thereafter bear interest at a fluctuating interest rate per annum at all times equal to the Default Rate to the fullest extent permitted by Applicable Laws.

(ii) If any amount (other than principal of any Loan) payable by the Borrower under any Loan Document is not paid when due (without regard to any applicable grace periods), whether at stated maturity, by acceleration or otherwise, then upon the request of the Required Lenders such amount shall thereafter bear interest at a fluctuating interest rate per annum at all times equal to the Default Rate to the fullest extent permitted by Applicable Laws.

(iii) Upon the request of the Required Lenders, while any Event of Default exists (other than as set forth in Sections 2.08(b)(i) and (b)(ii) above), the Borrower shall pay interest on the principal amount of all outstanding Obligations hereunder at a fluctuating interest rate per annum at all times equal to the Default Rate to the fullest extent permitted by Applicable Laws.

(iv) Upon the request of the Required Lenders, accrued and unpaid interest on past due amounts (including interest on past due interest) shall be due and payable upon demand.

(c) Interest on each Loan shall be due and payable in arrears on each Interest Payment Date applicable thereto and at such other times as may be specified herein. Interest hereunder shall be due and payable in accordance with the terms hereof before and after judgment, and before and after the commencement of any proceeding under any Debtor Relief Law.

**2.09 Fees.** In addition to certain fees described in Sections 2.03(j) and (k):

(a) Commitment Fee. The Borrower shall pay to the Administrative Agent for the account of each Revolving Credit Lender in accordance with its Applicable Revolving Credit Percentage, a commitment fee at a rate per annum equal to the Applicable Fee Rate times the actual daily amount by which the Revolving Credit Facility exceeds the sum of (i) the Outstanding Amount of Revolving Credit Loans and (ii) the Outstanding Amount of L/C Obligations, subject to adjustment as provided in Section 2.17. To the extent there is more than one non-affiliated Lender, the Outstanding Amount of Swing Line Loans shall not be counted towards or considered usage of the Aggregate Commitments for purposes of determining the commitment fee. The commitment fee shall accrue at all times during the Availability Period, including at any time during which one or more of the conditions in Article IV is not met, and shall be due and payable quarterly in arrears on the last Business Day of each March, June, September and December, commencing with the first such date to occur after the Closing Date, and on the last day of the Availability Period for the Revolving Credit Facility. The commitment fee shall be calculated quarterly in arrears, and if there is any change in the Applicable Fee Rate during any quarter, the actual daily amount shall be computed and multiplied by the Applicable Fee Rate separately for each period during such quarter that such Applicable Fee Rate was in effect.

(b) Other Fees. The Borrower shall pay to the Administrative Agent for its own respective accounts fees in the amounts and at the times specified in the Fee Letter. Such fees shall be fully earned when paid and shall not be refundable for any reason whatsoever.

**2.10 Computation of Interest and Fees; Retroactive Adjustments of Applicable Rate.** (a) All computations of interest for Base Rate Loans (including Base Rate Loans determined by reference to the Term SOFR) shall be made on the basis of a year of 365 or 366 days, as the case may be, and actual days elapsed. All other computations of fees and interest shall be made on the basis of a 360-day year and actual days elapsed (which results in more fees or interest, as applicable, being paid than if computed on the basis of a 365-day year). Interest shall accrue on each Loan for the day on which the Loan is made, and shall not accrue on a Loan, or any portion thereof, for the day on which the Loan or such portion is paid; provided that any Loan that is repaid on the same day on which it is made shall, subject to Section 2.12(a), bear interest for one day. Each determination by the Administrative Agent of an interest rate or fee hereunder shall be conclusive and binding for all purposes, absent manifest error.

(b) If, as a result of any restatement of or other adjustment to the financial statements of the Borrower or for any other reason, the Borrower or the Lenders determine that (i) the Consolidated Net Leverage Ratio as calculated by the Borrower as of any applicable date was inaccurate and (ii) a proper calculation of the Consolidated Net Leverage Ratio would have resulted in higher pricing for such period, the Borrower shall immediately and retroactively be obligated to pay to the Administrative Agent for the account of the applicable Lenders or the L/C Issuer, as the case may be, promptly on demand by the Administrative Agent (or, after the occurrence of an actual or deemed entry of an order for relief with respect to the Borrower under the Bankruptcy Code of the United States, automatically and without further action by the Administrative Agent, any Lender or the L/C Issuer), an amount equal to the excess of the amount of interest and fees that should have been paid for such period over the amount of interest and fees actually paid for such period. This subsection (b) shall not limit the rights of the Administrative Agent, any Lender or the L/C Issuer, as the case may be, under Section 2.03(f), 2.03(j) or 2.08(b) or under Article VIII. The Borrower's obligations under this subsection shall survive the termination of the Aggregate Commitments and the repayment of all other Obligations hereunder.



**2.11 Evidence of Debt.** (a) The Credit Extensions made by each Lender shall be evidenced by one or more accounts or records maintained by such Lender in the ordinary course of business. The Administrative Agent shall maintain the Register in accordance with Section 11.06(c). The accounts or records maintained by each Lender shall be conclusive absent manifest error of the amount of the Credit Extensions made by the Lenders to the Borrower and the interest and payments thereon. Any failure to so record or any error in doing so shall not, however, limit or otherwise affect the obligation of the Borrower hereunder to pay any amount owing with respect to the Obligations. In the event of any conflict between the accounts and records maintained by any Lender and the Register, the Register shall control in the absence of manifest error. Upon the request of any Lender made through the Administrative Agent, the Borrower shall execute and deliver to such Lender (through the Administrative Agent) a Note, which shall evidence such Lender's Loans in addition to such accounts or records. Each Lender may attach schedules to its Note and endorse thereon the date, Type (if applicable), amount and maturity of its Loans and payments with respect thereto.

(b) In addition to the accounts and records referred to in Section 2.11(a), each Lender and the Administrative Agent shall maintain in accordance with its usual practice accounts or records evidencing the purchases and sales by such Lender of participations in Letters of Credit and Swing Line Loans. In the event of any conflict between the accounts and records maintained by the Administrative Agent and the accounts and records of any Lender in respect of such matters, the accounts and records of the Administrative Agent shall control in the absence of manifest error.

**2.12 Payments Generally; Administrative Agent's Clawback.** (a) General. All payments to be made by the Borrower shall be made free and clear of and without condition or deduction for any counterclaim, defense, recoupment or setoff. Except as otherwise expressly provided herein, all payments by the Borrower hereunder shall be made to the Administrative Agent, for the account of the respective Lenders to which such payment is owed, at the Administrative Agent's Office in Dollars and in immediately available funds not later than 2:00 p.m. on the date specified herein. The Administrative Agent will promptly distribute to each Lender its Applicable Percentage in respect of the relevant Facility (or other applicable share as provided herein) of such payment in like funds as received by wire transfer to such Lender's Lending Office. All payments received by the Administrative Agent after 2:00 p.m. shall be deemed received on the next succeeding Business Day and any applicable interest or fee shall continue to accrue. If any payment to be made by the Borrower shall come due on a day other than a Business Day, payment shall be made on the next following Business Day, and such extension of time shall be reflected in computing interest or fees, as the case may be.

(b) (i) Funding by Lenders; Presumption by Administrative Agent. Unless the Administrative Agent shall have received notice from a Lender prior to the proposed date of any Borrowing of Term SOFR Loans (or, in the case of any Borrowing of Base Rate Loans, prior to 12:00 noon on the date of such Borrowing) that such Lender will not make available to the Administrative Agent such Lender's share of such Borrowing, the Administrative Agent may assume that such Lender has made such share available on such date in accordance with Section 2.02 (or, in the case of a Borrowing of Base Rate Loans, that such Lender has made such share available in accordance with and at the time required by Section 2.02) and may, in reliance upon such assumption, make available to the Borrower a corresponding amount. In such event, if a Lender has not in fact made its share of the applicable Borrowing available to the Administrative Agent, then the applicable Lender and the Borrower severally agree to pay to the Administrative Agent forthwith on demand such corresponding amount in immediately available funds with interest thereon, for each day from and including the date such amount is made available to the Borrower to but excluding the date of payment to the Administrative Agent, at (A) in the case of a payment to be made by such Lender, the greater of the Federal Funds Rate and a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation, plus any administrative, processing or similar fees customarily charged by the Administrative Agent in connection with the foregoing, and (B) in the case of a payment to be made by the Borrower, the interest rate applicable to Base Rate Loans. If the Borrower and such Lender shall pay such interest to the Administrative Agent for the same or an overlapping period, the Administrative Agent shall promptly remit to the Borrower the amount of such interest paid by the Borrower for such period. If such Lender pays its share of the applicable Borrowing to the Administrative Agent, then the amount so paid shall constitute such Lender's Loan included in such Borrowing. Any payment by the Borrower shall be without prejudice to any claim the Borrower may have against a Lender that shall have failed to make such payment to the Administrative Agent.

(ii) Payments by Borrower; Presumptions by Administrative Agent. Unless the Administrative Agent shall have received notice from the Borrower prior to the date on which any payment is due to the Administrative Agent for the account of the Lenders or the L/C Issuer hereunder that the Borrower will not make such payment, the Administrative Agent may assume that the Borrower has made such payment on such date in accordance herewith and may, in reliance upon such assumption, distribute to the Lenders or the L/C Issuer, as the case may be, the amount due.

With respect to any payment that the Administrative Agent makes for the account of the Lenders or the L/C Issuer hereunder as to which the Administrative Agent determines (which determination shall be conclusive absent manifest error) that any of the following applies (such payment referred to as the “Rescindable Amount”): (1) the Borrower has not in fact made such payment; (2) the Administrative Agent has made a payment in excess of the amount so paid by the Borrower (whether or not then owed); or (3) the Administrative Agent has for any reason otherwise erroneously made such payment; then each of the Lenders or the L/C Issuer, as the case may be, severally agrees to repay to the Administrative Agent forthwith on demand the Rescindable Amount so distributed to such Lender or the L/C Issuer, in immediately available funds with interest thereon, for each day from and including the date such amount is distributed to it to but excluding the date of payment to the Administrative Agent, at the greater of the Federal Funds Rate and a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation.

A notice of the Administrative Agent to any Lender or the Borrower with respect to any amount owing under this subsection (b) shall be conclusive, absent manifest error.

(c) Failure to Satisfy Conditions Precedent. If any Lender makes available to the Administrative Agent funds for any Loan to be made by such Lender as provided in the foregoing provisions of this Article II, and such funds are not made available to the Borrower by the Administrative Agent because the conditions to the applicable Credit Extension set forth in Article IV are not satisfied or waived in accordance with the terms hereof, the Administrative Agent shall return such funds (in like funds as received from such Lender) to such Lender, without interest.

(d) Obligations of Lenders Several. The obligations of the Lenders hereunder to make Revolving Credit Loans, to fund participations in Letters of Credit and Swing Line Loans and to make payments pursuant to Section 11.04(c) are several and not joint. The failure of any Lender to make any Loan, to fund any such participation or to make any payment under Section 11.04(c) on any date required hereunder shall not relieve any other Lender of its corresponding obligation to do so on such date, and no Lender shall be responsible for the failure of any other Lender to so make its Loan, to purchase its participation or to make its payment under Section 11.04(c).

(e) Funding Source. Nothing herein shall be deemed to obligate any Lender to obtain the funds for any Loan in any particular place or manner or to constitute a representation by any Lender that it has obtained or will obtain the funds for any Loan in any particular place or manner.

(f) Insufficient Funds. If at any time insufficient funds are received by and available to the Administrative Agent to pay fully all amounts of principal, L/C Borrowings, interest and fees then due hereunder, such funds shall be applied (i) first, toward payment of interest and fees then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of interest and fees then due to such parties, and (ii) second, toward payment of principal and L/C Borrowings then due hereunder, ratably among the parties entitled thereto in accordance with the amounts of principal and L/C Borrowings then due to such parties.

**2.13 Sharing of Payments by Lenders.** If any Lender shall, by exercising any right of setoff or counterclaim or otherwise, obtain payment in respect of (a) Obligations due and payable to such Lender hereunder and under the other Loan Documents at such time in excess of its ratable share (according to the proportion of (i) the amount of such Obligations due and payable to such Lender at such time to (ii) the aggregate amount of the Obligations due and payable to all Lenders hereunder and under the other Loan Documents at such time) of payments on account of the Obligations due and payable to all Lenders hereunder and under the other Loan Documents at such time obtained by all the Lenders at such time or (b) Obligations owing (but not due and payable) to such Lender hereunder and under the other Loan Documents at such time in excess of its ratable share (according to the proportion of (i) the amount of such Obligations owing (but not due and payable) to such Lender at such time to (ii) the aggregate amount of the Obligations owing (but not due and payable) to all Lenders hereunder and under the other Loan Documents at such time) of payment on account of the Obligations owing (but not due and payable) to all Lenders hereunder and under the other Loan Documents at such time obtained by all of the Lenders at such time then the Lender receiving such greater proportion shall (a) notify the Administrative Agent of such fact, and (b) purchase (for cash at face value) participations in the Loans and subparticipations in L/C Obligations and Swing Line Loans of the other Lenders, or make such other adjustments as shall be equitable, so that the benefit of all such payments shall be shared by the Lenders ratably in accordance with the aggregate amount of Obligations then due and payable to the Lenders or owing (but not due and payable) to the Lenders, as the case may be, provided that:

(i) if any such participations or subparticipations are purchased and all or any portion of the payment giving rise thereto is recovered, such participations or subparticipations shall be rescinded and the purchase price restored to the extent of such recovery, without interest; and

(ii) the provisions of this Section shall not be construed to apply to (A) any payment made by or on behalf of the Borrower pursuant to and in accordance with the express terms of this Agreement (including the application of funds arising from the existence of a Defaulting Lender), (B) the application of Cash Collateral provided for in Section 2.16, or (C) any payment obtained by a Lender as consideration for the assignment of or sale of a participation in any of its Loans or subparticipations in L/C Obligations or Swing Line Loans to any assignee or participant, other than an assignment to the Borrower or any Subsidiary thereof (as to which the provisions of this Section shall apply).

Each Loan Party consents to the foregoing and agrees, to the extent it may effectively do so under Applicable Law, that any Lender acquiring a participation pursuant to the foregoing arrangements may exercise against such Loan Party rights of setoff and counterclaim with respect to such participation as fully as if such Lender were a direct creditor of such Loan Party in the amount of such participation.

**2.14 [Reserved].**

## 2.15 Increase in Commitments.

(a) Borrower Request. The Borrower may by written notice to the Administrative Agent elect to request prior to the Maturity Date for the Revolving Credit Facility, an increase to the existing Commitments (each, an “Incremental Revolving Commitment”), by an aggregate amount not in excess of the lesser of (x) \$250,000,000 and (y) an amount that, after giving pro forma effect to the incurrence of such Incremental Revolving Commitment (assuming that such Incremental Revolving Commitment is fully drawn) and the application of the proceeds therefrom, would not result in a Consolidated Net Leverage Ratio greater than the then applicable ratio specified in Section 7.11(b) less 0.50 to 1.00 (determined on the basis of the financial information most recently delivered to the Administrative Agent and the Lenders pursuant to Section 6.01(a) or (b)) as though such Incremental Revolving Commitment had been consummated as of the first day of the fiscal period covered thereby). Each such notice shall specify (i) the date (each, an “Increase Effective Date”) on which the Borrower proposes that the Incremental Commitments shall be effective, which shall be a date not less than 10 Business Days after the date on which such notice is delivered to the Administrative Agent and (ii) the identity of each Eligible Assignee to whom the Borrower proposes any portion of such Incremental Commitments be allocated and the amounts of such allocations; provided that any existing Lender approached to provide all or a portion of the Incremental Commitments may elect or decline, in its sole discretion, to provide such Incremental Commitment. Each Incremental Commitment shall be in an aggregate amount of \$10,000,000 or any whole multiple of \$500,000 in excess thereof (provided that such amount may be less than \$10,000,000 if such amount represents all remaining availability under the aggregate limit in respect of Incremental Commitments set forth in above).

(b) Conditions. The Incremental Commitments shall become effective as of the Increase Effective Date; provided that:

(i) each of the conditions set forth in Section 4.02 shall be satisfied;

(ii) no Default shall have occurred and be continuing or would result from the borrowings to be made on the Increase Effective Date;

(iii) the representations and warranties contained in Article V and the other Loan Documents are true and correct in all material respects (or, with respect to representations and warranties qualified by materiality, in all respects) on and as of the Increase Effective Date, except to the extent that such representations and warranties specifically refer to an earlier date, in which case they shall have been true and correct in all material respects (or, with respect to representations and warranties qualified by materiality, in all respects) as of such earlier date, and except that for purposes of this Section 2.15(b), the representations and warranties contained in Section 5.05(a) and Section 5.05(b) shall be deemed to refer to the most recent financial statements furnished pursuant to subsections (a) and (b), respectively, of Section 6.01;

(iv) on a pro forma basis (assuming that the Incremental Revolving Commitments are fully drawn), the Borrower shall be in compliance with each of the covenants set forth in Section 7.11 as of the end of the latest fiscal quarter for which internal financial statements are available;

(v) the Borrower shall make any breakage payments in connection with any adjustment of Revolving Credit Loans pursuant to Section 2.15(d);

(vi) the Borrower shall deliver or cause to be delivered officer’s certificates and legal opinions of the type delivered on the Closing Date to the extent reasonably requested by, and in form and substance reasonably satisfactory to, the Administrative Agent; and

(vii) (x) upon the reasonable request of any Lender providing an Incremental Revolving Commitment made at least seven (7) days prior to the Increase Effective Date, the Borrower shall have provided to such Lender, and such Lender shall be reasonably satisfied with, the documentation and other information so requested in connection with applicable “know your customer” and anti-money-laundering rules and regulations, including, without limitation, the Act, in each case at least five (5) days prior to the Increase Effective Date and (y) at least five (5) days prior to the Increase Effective Date, any Loan Party that qualifies as a “legal entity customer” under the Beneficial Ownership Regulation shall have delivered, to each Lender that so requests, a Beneficial Ownership Certification in relation to such Loan Party.

(c) Terms of New Loans and Commitments. Other than in respect of customary arrangement, upfront, structuring, underwriting and other similar fees, the terms and provisions of Revolving Credit Loans made pursuant to new Commitments shall be identical to the Revolving Credit Loans. The Incremental Commitments shall be effected by a joinder agreement (the “Increase Joinder”) executed by the Borrower, the Administrative Agent and each Lender making such Incremental Commitment, in form and substance reasonably satisfactory to each of them. Notwithstanding the provisions of Section 11.01, the Increase Joinder may, without the consent of any other Lenders, effect such amendments to this Agreement and the other Loan Documents as may be necessary or appropriate, in the reasonable opinion of the Administrative Agent, to effect the provisions of this Section 2.15. In addition, unless otherwise specifically provided herein, all references in Loan Documents to Revolving Credit Loans shall be deemed, unless the context otherwise requires, to include references to Revolving Credit Loans made pursuant to Incremental Revolving Commitments made pursuant to this Agreement. This Section 2.15 shall supersede any provisions in Section 2.13 or Section 11.01 to the contrary.

(d) Adjustment of Revolving Credit Loans. To the extent the Commitments being in-creased on the relevant Increase Effective Date are Incremental Revolving Commitments, then each Revolving Credit Lender that is acquiring an Incremental Revolving Commitment on the Increase Effective Date shall make a Revolving Credit Loan, the proceeds of which will be used to prepay the Revolving Credit Loans of the other Revolving Credit Lenders immediately prior to such Increase Effective Date, so that, after giving effect thereto, the Revolving Credit Loans outstanding are held by the Revolving Credit Lenders pro rata based on their Commitments after giving effect to such Increase Effective Date. If there is a new borrowing of Revolving Credit Loans on such Increase Effective Date, the Revolving Credit Lenders after giving effect to such Increase Effective Date shall make such Revolving Credit Loans in accordance with Section 2.01.

(e) Reserved.

(f) Equal and Ratable Benefit. The Loans and Commitments established pursuant to this subsection shall constitute Loans and Commitments under, and shall be entitled to all the benefits afforded by, this Agreement and the other Loan Documents, and shall, without limiting the foregoing, benefit equally and ratably from the Guarantees and security interests created by the Collateral Documents, except that the new Loans may be subordinated in right of payment or the Liens securing the new Loans may be subordinated, in each case, to the extent set forth in the Increase Joinder. The Loan Parties shall take any actions reasonably required by the Administrative Agent to ensure and/or demonstrate that the Lien and security interests granted by the Collateral Documents continue to be perfected under the UCC or otherwise after giving effect to the establishment of any such new Commitments.

## 2.16 Cash Collateral.

(a) Certain Credit Support Events. If (i) the L/C Issuer has honored any full or partial drawing request under any Letter of Credit and such drawing has resulted in an L/C Borrowing, (ii) as of the Letter of Credit Expiration Date, any L/C Obligation for any reason remains outstanding, (iii) the Borrower shall be required to provide Cash Collateral pursuant to Section 8.02(c), or (iv) there shall exist a Defaulting Lender, the Borrower shall immediately (in the case of clause (iii) above) or within one Business Day (in all other cases), following any request by the Administrative Agent or the L/C Issuer, provide Cash Collateral in an amount not less than the applicable Minimum Collateral Amount (determined in the case of Cash Collateral provided pursuant to clause (iv) above, after giving effect to Section 2.17(a)(iv) and any Cash Collateral provided by the Defaulting Lender). If at any time the Administrative Agent determines that any funds held as Cash Collateral are subject to any right or claim of any Person other than the Administrative Agent or that the total amount of such funds is less than the aggregate Outstanding Amount of all L/C Obligations, the Borrower will, forthwith upon demand by the Administrative Agent, pay to the Administrative Agent, as additional funds to be deposited as Cash Collateral, an amount equal to the excess of (x) such aggregate Outstanding Amount over (y) the total amount of funds, if any, then held as Cash Collateral that the Administrative Agent determines to be free and clear of any such right and claim. Upon the drawing of any Letter of Credit for which funds are on deposit as Cash Collateral, such funds shall be applied, to the extent permitted under Applicable Laws, to reimburse the L/C Issuer. Additionally, if the Administrative Agent notifies the Borrower at any time that the Outstanding Amount of all L/C Obligations at such time exceeds 100% of the Letter of Credit Sublimit then in effect, then, within two Business Days after receipt of such notice, the Borrower shall provide Cash Collateral for the Outstanding Amount of the L/C Obligations in an amount not less than the amount by which the Outstanding Amount of all L/C Obligations exceeds the Letter of Credit Sublimit.

(b) Grant of Security Interest. The Borrower, and to the extent provided by any Defaulting Lender, such Defaulting Lender, hereby grants to (and subjects to the control of) the Administrative Agent, for the benefit of the Administrative Agent, the L/C Issuer and the Lenders, and agrees to maintain, a first priority security interest in all such cash, deposit accounts and all balances therein, and all other property so provided as collateral pursuant hereto, and in all proceeds of the foregoing, all as security for the obligations to which such Cash Collateral may be applied pursuant to Section 2.16(c). If at any time the Administrative Agent determines that Cash Collateral is subject to any right or claim of any Person other than the Administrative Agent or the L/C Issuer as herein provided, or that the total amount of such Cash Collateral is less than the Minimum Collateral Amount, the Borrower will, promptly upon demand by the Administrative Agent, pay or provide to the Administrative Agent additional Cash Collateral in an amount sufficient to eliminate such deficiency. All Cash Collateral (other than credit support not constituting funds subject to deposit) shall be maintained in one or more Controlled Accounts at Bank of America. The Borrower shall pay on demand therefor from time to time all customary account opening, activity and other administrative fees and charges in connection with the maintenance and disbursement of Cash Collateral.

(c) Application. Notwithstanding anything to the contrary contained in this Agreement, Cash Collateral provided under any of this Section 2.16 or Sections 2.03, 2.05, 2.06, 2.17 or 8.02 in respect of Letters of Credit shall be held and applied to the satisfaction of the specific L/C Obligations, obligations to fund participations therein (including, as to Cash Collateral provided by a Defaulting Lender, any interest accrued on such obligation) and other obligations for which the Cash Collateral was so provided, prior to any other application of such property as may be provided for herein.

(d) Release. Cash Collateral (or the appropriate portion thereof) provided to reduce Fronting Exposure or to secure other obligations shall be released promptly following (i) the elimination of the applicable Fronting Exposure or other obligations giving rise thereto (including by the termination of Defaulting Lender status of the applicable Lender (or, as appropriate, its assignee following compliance with Section 11.06(b)(vi)) or (ii) the determination by the Administrative Agent and the L/C Issuer that there exists excess Cash Collateral; provided, however, (x) any such release shall be without prejudice to, and any disbursement or other transfer of Cash Collateral shall be and remain subject to, any other Lien conferred under the Loan Documents and the other applicable provisions of the Loan Documents, and (y) the Person providing Cash Collateral and the L/C Issuer may agree that Cash Collateral shall not be released but instead held to support future anticipated Fronting Exposure or other obligations.

## 2.17 Defaulting Lenders.

(a) Adjustments. Notwithstanding anything to the contrary contained in this Agreement, if any Lender becomes a Defaulting Lender, then, until such time as that Lender is no longer a Defaulting Lender, to the extent permitted by Applicable Law:

(i) Waivers and Amendments. Such Defaulting Lender's right to approve or disapprove any amendment, waiver or consent with respect to this Agreement shall be restricted as set forth in Section 11.01 and in the definition of "Required Lender".

(ii) Defaulting Lender Waterfall. Any payment of principal, interest, fees or other amounts received by the Administrative Agent for the account of such Defaulting Lender (whether voluntary or mandatory, at maturity, pursuant to Article VIII or otherwise) or received by the Administrative Agent from a Defaulting Lender pursuant to Section 11.08 shall be applied at such time or times as may be determined by the Administrative Agent as follows: first, to the payment of any amounts owing by such Defaulting Lender to the Administrative Agent hereunder; second, to the payment on a pro rata basis of any amounts owing by such Defaulting Lender to the L/C Issuer or Swing Line Lender hereunder; third, to Cash Collateralize the L/C Issuer's Fronting Exposure with respect to such Defaulting Lender in accordance with Section 2.16; fourth, as the Borrower may request (so long as no Default or Event of Default exists), to the funding of any Loan in respect of which such Defaulting Lender has failed to fund its portion thereof as required by this Agreement, as determined by the Administrative Agent; fifth, if so determined by the Administrative Agent and the Borrower, to be held in a deposit account and released pro rata in order to (x) satisfy such Defaulting Lender's potential future funding obligations with respect to Loans under this Agreement and (y) Cash Collateralize the L/C Issuer's future Fronting Exposure with respect to such Defaulting Lender with respect to future Letters of Credit issued under this Agreement, in accordance with Section 2.16; sixth, to the payment of any amounts owing to the Lenders, the L/C Issuer or Swing Line Lender as a result of any judgment of a court of competent jurisdiction obtained by any Lender, the L/C Issuer or the Swing Line Lender against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement; seventh, so long as no Default or Event of Default exists, to the payment of any amounts owing to the Borrower as a result of any judgment of a court of competent jurisdiction obtained by the Borrower against such Defaulting Lender as a result of such Defaulting Lender's breach of its obligations under this Agreement; and eighth, to such Defaulting Lender or as otherwise directed by a court of competent jurisdiction; provided that if (x) such payment is a payment of the principal amount of any Loans or L/C Borrowings in respect of which such Defaulting Lender has not fully funded its appropriate share, and (y) such Loans were made or the related Letters of Credit were issued at a time when the conditions set forth in Section 4.02 were satisfied or waived, such payment shall be applied solely to pay the Loans of, and L/C Obligations owed to, all Non-Defaulting Lenders on a pro rata basis prior to being applied to the payment of any Loans of, or L/C Obligations owed to, such Defaulting Lender until such time as all Loans and funded and unfunded participations in L/C Obligations and Swing Line Loans are held by the Lenders pro rata in accordance with the Commitments hereunder without giving effect to Section 2.17(a)(iv). Any payments, prepayments or other amounts paid or payable to a Defaulting Lender that are applied (or held) to pay amounts owed by a Defaulting Lender or to post Cash Collateral pursuant to this Section 2.17(a)(i) shall be deemed paid to and redirected by such Defaulting Lender, and each Lender irrevocably consents hereto.

(iii) Certain Fees.

(A) No Defaulting Lender shall be entitled to receive any fee payable under Section 2.09(a) for any period during which that Lender is a Defaulting Lender (and the Borrower shall not be required to pay any such fee that otherwise would have been required to have been paid to that Defaulting Lender).

(B) Each Defaulting Lender shall be entitled to receive Letter of Credit Fees for any period during which that Lender is a Defaulting Lender only to the extent allocable to its Applicable Percentage of the stated amount of Letters of Credit for which it has provided Cash Collateral pursuant to Section 2.16.

(C) With respect to any fee payable under Section 2.09(a) or (b) or any Letter of Credit Fee not required to be paid to any Defaulting Lender pursuant to subsection (A) or (B) above, the Borrower shall (x) pay to each Non-Defaulting Lender that portion of any such fee otherwise payable to such Defaulting Lender with respect to such Defaulting Lender's participation in L/C Obligations or Swing Line Loans that has been reallocated to such Non-Defaulting Lender pursuant to subsection (iv) below, (y) pay to the L/C Issuer and Swing Line Lender, as applicable, the amount of any such fee otherwise payable to such Defaulting Lender to the extent allocable to such L/C Issuer's or Swing Line Lender's Fronting Exposure to such Defaulting Lender, and (z) not be required to pay the remaining amount of any such fee.

(iv) Reallocation of Applicable Percentages to Reduce Fronting Exposure. All or any part of such Defaulting Lender's participation in L/C Obligations and Swing Line Loans shall be reallocated among the Non-Defaulting Lenders in accordance with their respective Applicable Percentages (calculated without regard to such Defaulting Lender's Commitment) but only to the extent that such reallocation does not cause the aggregate Revolving Credit Exposure of any Non-Defaulting Lender to exceed such Non-Defaulting Lender's Commitment. Subject to Section 11.19, no reallocation hereunder shall constitute a waiver or release of any claim of any party hereunder against a Defaulting Lender arising from that Lender having become a Defaulting Lender, including any claim of a Non-Defaulting Lender as a result of such Non-Defaulting Lender's increased exposure following such reallocation.

(v) Cash Collateral, Repayment of Swing Line Loans. If the reallocation described in subsection (a)(iv) above cannot, or can only partially, be effected, the Borrower shall, without prejudice to any right or remedy available to it hereunder or under Applicable Law, (x) first, prepay Swing Line Loans in an amount equal to the Swing Line Lenders' Fronting Exposure and (y) second, Cash Collateralize the L/C Issuers' Fronting Exposure in accordance with the procedures set forth in Section 2.16.

(b) Defaulting Lender Cure. If the Borrower, the Administrative Agent, the Swing Line Lender and the L/C Issuer agree in writing that a Lender is no longer a Defaulting Lender, the Administrative Agent will so notify the parties hereto, whereupon as of the effective date specified in such notice and subject to any conditions set forth therein (which may include arrangements with respect to any Cash Collateral), that Lender will, to the extent applicable, purchase at par that portion of outstanding Loans of the other Lenders or take such other actions as the Administrative Agent may determine to be necessary to cause the Revolving Credit Loans and funded and unfunded participations in Letters of Credit and Swing Line Loans to be held on a pro rata basis by the Lenders in accordance with their Applicable Percentages (without giving effect to Section 2.17(a)(iv)), whereupon such Lender will cease to be a Defaulting Lender; provided that no adjustments will be made retroactively with respect to fees accrued or payments made by or on behalf of the Borrower while that Lender was a Defaulting Lender; and provided, further, that except to the extent otherwise expressly agreed by the affected parties, no change hereunder from Defaulting Lender to Lender will constitute a waiver or release of any claim of any party hereunder arising from that Lender's having been a Defaulting Lender.

(c) New Swing Line Loans/Letters of Credit. So long as any Revolving Credit Lender is a Defaulting Lender, (i) the Swing Line Lender shall not be required to fund any Swing Line Loans unless it is satisfied that it will have no Fronting Exposure after giving effect to such Swing Line Loan and (ii) the L/C Issuer shall not be required to issue, extend, increase, reinstate or renew any Letter of Credit unless it is satisfied that it will have no Fronting Exposure after giving effect thereto.



**ARTICLE III  
TAXES, YIELD PROTECTION AND ILLEGALITY**

**3.01 Taxes.** (a) Defined Terms: For purposes of this Section 3.01, the term “Applicable Law” includes FATCA and the term “Lender” includes any L/C Issuer.

(b) Payments Free of Taxes. Any and all payments by or on account of any obligation of any Loan Party under any Loan Document shall be made without deduction or withholding for any Taxes, except as required by Applicable Law. If any Applicable Law (as determined in the good faith discretion of an applicable withholding agent) requires the deduction or withholding of any Tax from any such payment by the applicable withholding agent, then the applicable withholding agent shall be entitled to make such deduction or withholding and shall timely pay the full amount deducted or withheld to the relevant Governmental Authority in accordance with Applicable Law and, if such Tax is an Indemnified Tax, then the sum payable by the applicable Loan Party shall be increased as necessary so that after such deduction or withholding has been made (including such deductions and withholdings applicable to additional sums payable under this Section 3.01) the applicable Recipient receives an amount equal to the sum it would have received had no such deduction or withholding been made.

(c) Payment of Other Taxes by Borrower. The Borrower shall timely pay to the relevant Governmental Authority in accordance with Applicable Law, or at the option of the Administrative Agent timely reimburse it for the payment of, any Other Taxes.

(d) Indemnification by Borrower. The Borrower shall indemnify each Recipient, within 10 days after demand therefor, for the full amount of any Indemnified Taxes (including Indemnified Taxes imposed or asserted on or attributable to amounts payable under this Section 3.01) payable or paid by such Recipient or required to be withheld or deducted from a payment to such Recipient and any reasonable expenses arising therefrom or with respect thereto, whether or not such Indemnified Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to the Borrower by a Lender (with a copy to the Administrative Agent), or by the Administrative Agent on its own behalf or on behalf of a Lender, shall be conclusive absent manifest error.

(e) Indemnification by the Lenders. Each Lender shall severally indemnify the Administrative Agent, within 10 days after demand therefor, for (i) any Indemnified Taxes attributable to such Lender (but only to the extent that the Borrower has not already indemnified the Administrative Agent for such Indemnified Taxes and without limiting the obligation of the Borrower to do so), (ii) any Taxes attributable to such Lender’s failure to comply with the provisions of Section 11.06(d) relating to the maintenance of a Participant Register and (iii) any Excluded Taxes attributable to such Lender, in each case, that are payable or paid by the Administrative Agent in connection with any Loan Document, and any reasonable expenses arising therefrom or with respect thereto, whether or not such Taxes were correctly or legally imposed or asserted by the relevant Governmental Authority. A certificate as to the amount of such payment or liability delivered to any Lender by the Administrative Agent shall be conclusive absent manifest error. Each Lender hereby authorizes the Administrative Agent to set off and apply any and all amounts at any time owing to such Lender under any Loan Document or otherwise payable by the Administrative Agent to the Lender from any other source against any amount due to the Administrative Agent under this subsection (e).

(f) Evidence of Payments. As soon as practicable after any payment of Taxes by the Borrower to a Governmental Authority as provided in this Section 3.01, the Borrower shall deliver to the Administrative Agent the original or a certified copy of a receipt issued by such Governmental Authority evidencing such payment, a copy of any return required by Applicable Laws to report such payment or other evidence of such payment reasonably satisfactory to the Administrative Agent.

(g) Status of Lenders; Tax Documentation.

(i) Any Lender that is entitled to an exemption from or reduction of withholding Tax with respect to payments made under any Loan Document shall deliver to the Borrower and the Administrative Agent, at the time or times reasonably requested by the Borrower or the Administrative Agent, such properly completed and executed documentation reasonably requested by the Borrower or the Administrative Agent as will permit such payments to be made without withholding or at a reduced rate of withholding. In addition, any Lender, if reasonably requested by the Borrower or the Administrative Agent, shall deliver such other documentation prescribed by Applicable Law or reasonably requested by the Borrower or the Administrative Agent as will enable the Borrower or the Administrative Agent to determine whether or not such Lender is subject to backup withholding or information reporting requirements. Notwithstanding anything to the contrary in the preceding two sentences, the completion, execution and submission of such documentation (other than such documentation set forth in Section 3.01(g)(ii)(A), (ii)(B) and (ii)(D) below) shall not be required if in the Lender's reasonable judgment such completion, execution or submission would subject such Lender to any material unreimbursed cost or expense or would materially prejudice the legal or commercial position of such Lender.

(ii) Without limiting the generality of the foregoing, in the event that the Borrower is a U.S. Person:

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

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

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

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

(3) in the case of a Foreign Lender claiming the benefits of the exemption for portfolio interest under Section 881(c) of the Code, (x) a certificate substantially in the form of Exhibit M-1 to the effect that such Foreign Lender is not a "bank" within the meaning of Section 881(c)(3)(A) of the Code, a "10 percent shareholder" of the Borrower within the meaning of Section 871(h)(3)(B) of the Code, or a "controlled foreign corporation" described in Section 881(c)(3)(C) of the Code (a "U.S. Tax Compliance Certificate") and (y) executed copies of IRS Form W-8BEN-E (or W-8BEN, as applicable); or

(4) to the extent a Foreign Lender is not the beneficial owner, executed copies of IRS Form W-8IMY, accompanied by IRS Form W-8ECI, IRS Form W-8BEN-E (or W-8BEN, as applicable), a U.S. Tax Compliance Certificate substantially in the form of Exhibit M-2 or Exhibit M-3, IRS Form W-9, and/or other certification documents from each beneficial owner, as applicable; provided that if the Foreign Lender is a partnership and one or more direct or indirect partners of such Foreign Lender are claiming the portfolio interest exemption, such Foreign Lender may provide a U.S. Tax Compliance Certificate substantially in the form of Exhibit M-4 on behalf of each such direct and indirect partner;

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

(D) if a payment made to a Lender under any Loan Document would be subject to U.S. federal withholding Tax imposed by FATCA if such Lender were to fail to comply with the applicable reporting requirements of FATCA (including those contained in Section 1471(b) or 1472(b) of the Code, as applicable), such Lender shall deliver to the Borrower and the Administrative Agent at the time or times prescribed by law and at such time or times reasonably requested by the Borrower or the Administrative Agent such documentation prescribed by Applicable Law (including as prescribed by Section 1471(b)(3)(C)(i) of the Code) and such additional documentation reasonably requested by the Borrower or the Administrative Agent as may be necessary for the Borrower and the Administrative Agent to comply with their obligations under FATCA and to determine that such Lender has complied with such Lender's obligations under FATCA or to determine the amount to deduct and withhold from such payment. Solely for purposes of this clause (D), "FATCA" shall include any amendments made to FATCA after the date of this Agreement.

(iii) Each Lender agrees that if any form or certification it previously delivered pursuant to this Section 3.01 expires or becomes obsolete or inaccurate in any respect, it shall update such form or certification or promptly notify the Borrower and the Administrative Agent in writing of its legal inability to do so.

(h) **Treatment of Certain Refunds.** Unless required by Applicable Laws, at no time shall the Administrative Agent have any obligation to file for or otherwise pursue on behalf of a Lender or the L/C Issuer, or have any obligation to pay to any Lender or the L/C Issuer, any refund of Taxes withheld or deducted from funds paid for the account of such Lender or the L/C Issuer, as the case may be. If any Recipient determines, in its sole discretion exercised in good faith, that it has received a refund of any Taxes as to which it has been indemnified by the Borrower or with respect to which the Borrower has paid additional amounts pursuant to this [Section 3.01](#), it shall pay to the Borrower an amount equal to such refund (but only to the extent of indemnity payments made, or additional amounts paid, by the Borrower under this [Section 3.01](#) with respect to the Taxes giving rise to such refund), net of all out-of-pocket expenses (including Taxes) incurred by such Recipient, and without interest (other than any interest paid by the relevant Governmental Authority with respect to such refund), provided that the Borrower, upon the request of the Recipient, agrees to repay the amount paid over to the Borrower (plus any penalties, interest or other charges imposed by the relevant Governmental Authority) to the Recipient in the event the Recipient is required to repay such refund to such Governmental Authority. Notwithstanding anything to the contrary in this subsection, in no event will the applicable Recipient be required to pay any amount to the Borrower pursuant to this subsection the payment of which would place the Recipient in a less favorable net after-Tax position than such Recipient would have been in if Tax subject to indemnification and giving rise to such refund had not been deducted, withheld or otherwise imposed and the indemnification payments or additional amounts with respect to such Tax had never been paid. This subsection shall not be construed to require any Recipient to make available its tax returns (or any other information relating to its Taxes that it deems confidential) to the Borrower or any other Person.

(i) **Survival.** Each party's obligations under this [Section 3.01](#) shall survive the resignation or replacement of the Administrative Agent or any assignment of rights by, or the replacement of, a Lender or the L/C Issuer, the termination of the Commitments and the repayment, satisfaction or discharge of all other Obligations.

**3.02 Illegality.** If any Lender determines that any Law has made it unlawful, or that any Governmental Authority has asserted that it is unlawful, for any Lender or its applicable Lending Office to make, maintain or fund Loans whose interest is determined by reference to SOFR or Term SOFR, or to determine or charge interest rates based upon SOFR or Term SOFR, then, upon notice thereof by such Lender to the Borrower (through the Administrative Agent), (a) any obligation of such Lender to make or continue Term SOFR Loans or to convert Base Rate Loans to Term SOFR Loans shall be suspended, and (b) if such notice asserts the illegality of such Lender making or maintaining Base Rate Loans the interest rate on which is determined by reference to the Term SOFR component of the Base Rate, the interest rate on which Base Rate Loans of such Lender shall, if necessary to avoid such illegality, be determined by the Administrative Agent without reference to the Term SOFR component of the Base Rate, in each case until such Lender notifies the Administrative Agent and the Borrower that the circumstances giving rise to such determination no longer exist. Upon receipt of such notice, (i) the Borrower shall, upon demand from such Lender (with a copy to the Administrative Agent), prepay or, if applicable, convert all Term SOFR Loans of such Lender to Base Rate Loans (the interest rate on which Base Rate Loans of such Lender shall, if necessary to avoid such illegality, be determined by the Administrative Agent without reference to the Term SOFR component of the Base Rate), either on the last day of the Interest Period therefor, if such Lender may lawfully continue to maintain such Term SOFR Loan to such day, or immediately, if such Lender may not lawfully continue to maintain such Term SOFR Loan and (ii) if such notice asserts the illegality of such Lender determining or charging interest rates based upon SOFR, the Administrative Agent shall during the period of such suspension compute the Base Rate applicable to such Lender without reference to the Term SOFR component thereof until the Administrative Agent is advised in writing by such Lender that it is no longer illegal for such Lender to determine or charge interest rates based upon SOFR. Upon any such prepayment or conversion, the Borrower shall also pay accrued interest on the amount so prepaid or converted, together with any additional amounts required pursuant to [Section 3.05](#).

### 3.03 Inability to Determine Rates.

(a) If in connection with any request for a Term SOFR Loan or a conversion of Base Rate Loans to Term SOFR Loans or a continuation of any of such Loans, as applicable, (i) the Administrative Agent determines (which determination shall be conclusive absent manifest error) that (A) no Successor Rate has been determined in accordance with Section 3.03(b), and the circumstances under clause (i) of Section 3.03(b) or the Scheduled Unavailability Date has occurred, or (B) adequate and reasonable means do not otherwise exist for determining Term SOFR for any requested Interest Period with respect to a proposed Term SOFR Loan or in connection with an existing or proposed Base Rate Loan, or (ii) the Administrative Agent or the Required Lenders determine that for any reason that Term SOFR for any requested Interest Period with respect to a proposed Loan does not adequately and fairly reflect the cost to such Lenders of funding such Loan, the Administrative Agent will promptly so notify the Borrower and each Lender

Thereafter, (x) the obligation of the Lenders to make or maintain Term SOFR Loans, or to convert Base Rate Loans to Term SOFR Loans, shall be suspended (to the extent of the affected Term SOFR Loans or Interest Periods), and (y) in the event of a determination described in the preceding sentence with respect to the Term SOFR component of the Base Rate, the utilization of the Term SOFR component in determining the Base Rate shall be suspended, in each case until the Administrative Agent (or, in the case of a determination by the Required Lenders described in clause (ii) of this Section 3.03(a), until the Administrative Agent upon instruction of the Required Lenders) revokes such notice.

Upon receipt of such notice, (i) the Borrower may revoke any pending request for a Borrowing of, or conversion to, or continuation of Term SOFR Loans (to the extent of the affected Term SOFR Loans or Interest Periods) or, failing that, will be deemed to have converted such request into a request for a Committed Borrowing of Base Rate Loans in the amount specified therein and (ii) any outstanding Term SOFR Loans shall be deemed to have been converted to Base Rate Loans immediately at the end of their respective applicable Interest Period.

(b) Replacement of Term SOFR or Successor Rate. Notwithstanding anything to the contrary in this Agreement or any other Loan Documents, if the Administrative Agent determines (which determination shall be conclusive absent manifest error), or the Borrower or Required Lenders notify the Administrative Agent (with, in the case of the Required Lenders, a copy to the Borrower) that the Borrower or Required Lenders (as applicable) have determined, that:

(i) adequate and reasonable means do not exist for ascertaining one month, three month and six month interest periods of Term SOFR, including, without limitation, because the Term SOFR Screen Rate is not available or published on a current basis and such circumstances are unlikely to be temporary; or

(ii) CME or any successor administrator of the Term SOFR Screen Rate or a Governmental Authority having jurisdiction over the Administrative Agent or such administrator with respect to its publication of Term SOFR, in each case acting in such capacity, has made a public statement identifying a specific date after which one month, three month and six month interest periods of Term SOFR or the Term SOFR Screen Rate shall or will no longer be made available, or permitted to be used for determining the interest rate of U.S. dollar denominated syndicated loans, or shall or will otherwise cease, provided that, at the time of such statement, there is no successor administrator that is satisfactory to the Administrative Agent, that will continue to provide such interest periods of Term SOFR after such specific date (the latest date on which one month, three month and six month interest periods of Term SOFR or the Term SOFR Screen Rate are no longer available permanently or indefinitely, the "Scheduled Unavailability Date"); then, on a date and time determined by the Administrative Agent (any such date, the "Term SOFR Replacement Date"), which date shall be at the end of an Interest Period or on the relevant interest payment date, as applicable, for interest calculated and, solely with respect to clause (ii) above, no later than the Scheduled Unavailability Date, Term SOFR will be replaced hereunder and under any Loan Document with Daily Simple SOFR plus the SOFR Adjustment for any payment period for interest calculated that can be determined by the Administrative Agent, in each case, without any amendment to, or further action or consent of any other party to, this Agreement or any other Loan Document (the "Successor Rate").

If the Successor Rate is Daily Simple SOFR plus the SOFR Adjustment, all interest payments will be payable on a monthly basis.

Notwithstanding anything to the contrary herein, (i) if the Administrative Agent determines that Daily Simple SOFR is not available on or prior to the Term SOFR Replacement Date, or (ii) if the events or circumstances of the type described in Section 3.03(b)(i) or (ii) have occurred with respect to the Successor Rate then in effect, then in each case, the Administrative Agent and the Borrower may amend this Agreement solely for the purpose of replacing Term SOFR or any then current Successor Rate in accordance with this Section 3.03 at the end of any Interest Period, relevant interest payment date or payment period for interest calculated, as applicable, with an alternative benchmark rate giving due consideration to any evolving or then existing convention for similar U.S. dollar denominated credit facilities syndicated and agented in the United States for such alternative benchmark, and, in each case, including any mathematical or other adjustments to such benchmark giving due consideration to any evolving or then existing convention for similar U.S. dollar denominated credit facilities syndicated and agented in the United States for such benchmark, which adjustment or method for calculating such adjustment shall be published on an information service as selected by the Administrative Agent from time to time in its reasonable discretion and may be periodically updated. For the avoidance of doubt, any such proposed rate and adjustments, shall constitute a "Successor Rate". Any such amendment shall become effective at 5:00 p.m. on the fifth Business Day after the Administrative Agent shall have posted such proposed amendment to all Lenders and the Borrower unless, prior to such time, Lenders comprising the Required Lenders have delivered to the Administrative Agent written notice that such Required Lenders object to such amendment.

The Administrative Agent will promptly (in one or more notices) notify the Borrower and each Lender of the implementation of any Successor Rate.

Any Successor Rate shall be applied in a manner consistent with market practice; provided that to the extent such market practice is not administratively feasible for the Administrative Agent, such Successor Rate shall be applied in a manner as otherwise reasonably determined by the Administrative Agent.

Notwithstanding anything else herein, if at any time any Successor Rate as so determined would otherwise be less than **zero%**, the Successor Rate will be deemed to be **zero%** for the purposes of this Agreement and the other Loan Documents.

In connection with the implementation of a Successor Rate, the Administrative Agent will have the right to make Conforming Changes from time to time and, notwithstanding anything to the contrary herein or in any other Loan Document, any amendments implementing such Conforming Changes will become effective without any further action or consent of any other party to this Agreement; provided that, with respect to any such amendment effected, the Administrative Agent shall post each such amendment implementing such Conforming Changes to the Borrower and the Lenders reasonably promptly after such amendment becomes effective.

For purposes of this Section 3.03, those Lenders that either have not made, or do not have an obligation under this Agreement to make, the relevant Loans in Dollars shall be excluded from any determination of Required Lenders.

**3.04 Increased Costs.** (a) Increased Costs Generally. If any Change in Law shall:

- (i) impose, modify or deem applicable any reserve, special deposit, compulsory loan, insurance charge or similar requirement against assets of, deposits with or for the account of, or credit extended or participated in by, any Lender (except any reserve requirement) or the L/C Issuer;
- (ii) subject any Recipient to any Taxes (other than (A) Indemnified Taxes, (B) Taxes described in clauses (b) through (d) of the definition of “Excluded Taxes” and (C) Connection Income Taxes) on its loans, loan principal, letters of credit, commitments, or other obligations, or its deposits, reserves, other liabilities or capital attributable thereto; or
- (iii) impose on any Lender or the L/C Issuer any other condition, cost or expense affecting this Agreement or Term SOFR Loans made by such Lender or any Letter of Credit or participation therein;

and the result of any of the foregoing shall be to increase the cost to such Lender of making, converting to, continuing or maintaining any Loan (or of maintaining its obligation to make any such Loan), or to increase the cost to such Lender or the L/C Issuer of participating in, issuing or maintaining any Letter of Credit (or of maintaining its obligation to participate in or to issue any Letter of Credit), or to reduce the amount of any sum received or receivable by such Lender or the L/C Issuer hereunder (whether of principal, interest or any other amount) then, upon request of such Lender or the L/C Issuer, the Borrower will pay to such Lender or the L/C Issuer, as the case may be, such additional amount or amounts as will compensate such Lender or the L/C Issuer, as the case may be, for such additional costs incurred or reduction suffered. Notwithstanding anything in this Section 3.04 to the contrary, no Lender shall receive compensation pursuant to this Section 3.04, unless such Lender is generally seeking compensation from other borrowers in the United States loan market with respect to similarly affected loans under agreements with such borrowers having provisions similar to this Section 3.04. Any demand for increased amounts pursuant to Section 3.04(a) or (b) shall be deemed a representation as to the foregoing.

(b) Capital Requirements. If any Lender or the L/C Issuer determines that any Change in Law affecting such Lender or the L/C Issuer or any Lending Office of such Lender or such Lender's or the L/C Issuer's holding company, if any, regarding capital or liquidity requirements has or would have the effect of reducing the rate of return on such Lender's or the L/C Issuer's capital or on the capital of such Lender's or the L/C Issuer's holding company, if any, as a consequence of this Agreement, the Commitments of such Lender or the Loans made by, or participations in Letters of Credit or Swing Line Loans held by, such Lender, or the Letters of Credit issued by the L/C Issuer, to a level below that which such Lender or the L/C Issuer or such Lender's or the L/C Issuer's holding company could have achieved but for such Change in Law (taking into consideration such Lender's or the L/C Issuer's policies and the policies of such Lender's or the L/C Issuer's holding company with respect to capital adequacy), then from time to time the Borrower will pay to such Lender or the L/C Issuer, as the case may be, such additional amount or amounts as will compensate such Lender or the L/C Issuer or such Lender's or the L/C Issuer's holding company for any such reduction suffered.

(c) Certificates for Reimbursement. A certificate of a Lender or the L/C Issuer setting forth the amount or amounts necessary to compensate such Lender or the L/C Issuer or its holding company, as the case may be, as specified in subsection (a) or (b) of this Section and delivered to the Borrower shall be conclusive absent manifest error. The Borrower shall pay such Lender or the L/C Issuer, as the case may be, the amount shown as due on any such certificate within 10 days after receipt thereof.

(d) Delay in Requests. Failure or delay on the part of any Lender or the L/C Issuer to demand compensation pursuant to the foregoing provisions of this Section 3.04 shall not constitute a waiver of such Lender's or the L/C Issuer's right to demand such compensation, provided that the Borrower shall not be required to compensate a Lender or the L/C Issuer pursuant to the foregoing provisions of this Section for any increased costs incurred or reductions suffered more than nine months prior to the date that such Lender or the L/C Issuer, as the case may be, notifies the Borrower of the Change in Law giving rise to such increased costs or reductions and of such Lender's or the L/C Issuer's intention to claim compensation therefor (except that, if the Change in Law giving rise to such increased costs or reductions is retroactive, then the nine-month period referred to above shall be extended to include the period of retroactive effect thereof).

**3.05 Compensation for Losses.** Upon demand of any Lender (with a copy to the Administrative Agent) from time to time, the Borrower shall promptly compensate such Lender for and hold such Lender harmless from any loss, cost or expense incurred by it as a result of:

(a) any continuation, conversion, payment or prepayment of any Loan other than a Base Rate Loan on a day other than the last day of the Interest Period for such Loan (whether voluntary, mandatory, automatic, by reason of acceleration, or otherwise);

(b) any failure by the Borrower (for a reason other than the failure of such Lender to make a Loan) to prepay, borrow, continue or convert any Loan other than a Base Rate Loan on the date or in the amount notified by the Borrower; or

(c) any assignment of a Term SOFR Loan on a day other than the last day of the Interest Period therefor as a result of a request by the Borrower pursuant to Section 11.13; including any loss or expense arising from the liquidation or reemployment of funds obtained by it to maintain such Loan or from fees payable to terminate the deposits from which such funds were obtained. The Borrower shall also pay any customary administrative fees charged by such Lender in connection with the foregoing. A certificate of any Lender setting forth any amount or amounts that such Lender is entitled to receive pursuant to this Section shall be delivered to the Borrower and shall be conclusive absent manifest error.

**3.06 Mitigation Obligations; Replacement of Lenders.** (a) Designation of a Different Lending Office. Each Lender may make any Credit Extension to the Borrower through any Lending Office, provided that the exercise of this option shall not affect the obligation of the Borrower to repay the Credit Extension in accordance with the terms of this Agreement. If any Lender requests compensation under Section 3.04, or requires the Borrower to pay any Indemnified Taxes or additional amounts to any Lender, the L/C Issuer, or any Governmental Authority for the account of any Lender or the L/C Issuer pursuant to Section 3.01, or if any Lender gives a notice pursuant to Section 3.02, then at the request of the Borrower such Lender or the L/C Issuer shall, as applicable, use reasonable efforts to designate a different Lending Office for funding or booking its Loans hereunder or to assign its rights and obligations hereunder to another of its offices, branches or affiliates, if, in the judgment of such Lender or the L/C Issuer, such designation or assignment (i) would eliminate or reduce amounts payable pursuant to Section 3.01 or 3.04, as the case may be, in the future, or eliminate the need for the notice pursuant to Section 3.02, as applicable, and (ii) in each case, would not subject such Lender or the L/C Issuer, as the case may be, to any unreimbursed cost or expense and would not otherwise be disadvantageous to such Lender or the L/C Issuer, as the case may be. The Borrower hereby agrees to pay all reasonable costs and expenses incurred by any Lender or the L/C Issuer in connection with any such designation or assignment.



(b) Replacement of Lenders. If any Lender requests compensation under Section 3.04, or if the Borrower is required to pay any Indemnified Taxes or additional amounts to any Lender or any Governmental Authority for the account of any Lender pursuant to Section 3.01, and in each case, such Lender has declined or is unable to designate a different lending office in accordance with Section 3.06(a), the Borrower may replace such Lender in accordance with Section 11.13.

**3.07 Survival.** All of the Borrower's obligations under this Article III shall survive termination of the Aggregate Commitments, repayment of all other Obligations hereunder, and resignation of the Administrative Agent.

#### ARTICLE IV CONDITIONS PRECEDENT TO CREDIT EXTENSIONS

**4.01 Conditions of Initial Credit Extension.** The obligation of the L/C Issuer and each Lender to make its initial Credit Extension hereunder is subject to satisfaction (or waiver) of the following conditions precedent:

(a) The Administrative Agent's receipt of the following, each of which shall be originals, telecopies or electronic copies (including "PDF" files) (telecopies and electronic copies followed promptly by originals, if requested by the Administrative Agent) unless otherwise specified, each properly executed by a Responsible Officer of the signing Loan Party, each dated the Closing Date (or, in the case of certificates of governmental officials, a recent date before the Closing Date) and each in form and substance reasonably satisfactory to the Administrative Agent and each of the Lenders:

- (i) executed counterparts of this Agreement, sufficient in number for distribution to the Administrative Agent, each Lender and the Borrower;
- (ii) a Note executed by the Borrower in favor of each Lender requesting a Note at least two (2) Business Days prior to the Closing Date;
- (iii) executed counterpart of the Security Agreement, together with:
  - (A) certificates and instruments representing the Securities Collateral referred to therein accompanied by undated stock powers or instruments of transfer executed in blank;
  - (B) proper financing statements in form appropriate for filing under the Uniform Commercial Code of all jurisdictions that the Administrative Agent may deem necessary in order to perfect the Liens created under the Security Agreement, covering the Collateral described in the Security Agreement;
  - (C) certified copies of UCC, United States Patent and Trademark Office and United States Copyright Office, tax and judgment lien searches, or equivalent reports or searches, each of a recent date listing all effective financing statements, lien notices or comparable documents (together with copies of such financing statements and documents) that name any Loan Party as debtor and that are filed in those state and county jurisdictions in which any Loan Party is organized or maintains its principal place of business and such other searches that are required by the Perfection Certificate or that the Administrative Agent deems necessary or appropriate, none of which encumber the Collateral covered or intended to be covered by the Collateral Documents (other than Liens permitted hereunder);
  - (D) a Perfection Certificate, in substantially the form of Exhibit I-1, duly executed by each of the Loan Parties; and

(E) evidence that all other actions, recordings and filings that the Administrative Agent may deem necessary or desirable in order to perfect the Liens created under the Security Agreement has been taken (including receipt of duly executed payoff letters, UCC-3 termination statements and landlords' and bailees' waiver and consent agreements);

(iv) a Copyright Security Agreement, Patent Security Agreement and Trademark Security Agreement (as each such term is defined in the Security Agreement and to the extent applicable) (together with each other intellectual property security agreement delivered pursuant to Section 6.12, in each case as amended, the "Intellectual Property Security Agreement"), duly executed by each Loan Party, together with evidence that all action that the Administrative Agent may deem necessary or reasonably desirable in order to perfect the Liens created under the Intellectual Property Security Agreement has been taken;

(v) such certificates of resolutions or other action, incumbency certificates and/or other certificates of Responsible Officers of each Loan Party as the Administrative Agent may reasonably require evidencing the identity, authority and capacity of each Responsible Officer thereof authorized to act as a Responsible Officer in connection with this Agreement and the other Loan Documents to which such Loan Party is a party or is to be a party;

(vi) such documents and certifications as the Administrative Agent may reasonably require to evidence that each Loan Party is duly organized or formed, and that each Loan Party is validly existing, in good standing and qualified to engage in business in each jurisdiction where its ownership, lease or operation of properties or the conduct of its business requires such qualification, except to the extent that failure to do so would not reasonably be expected to have a Material Adverse Effect;

(vii) a favorable opinion of Sullivan & Cromwell LLP, counsel to the Loan Parties, addressed to the Administrative Agent and each Lender, in form and substance reasonably acceptable to Administrative Agent, addressing such matters concerning the Loan Parties and the Loan Documents as the Administrative Agent may reasonably request;

(viii) a certificate of a Responsible Officer of each Loan Party either (A) attaching copies of all consents, licenses and approvals required in connection with the consummation by such Loan Party of the Transaction and the execution, delivery and performance by such Loan Party and the validity against such Loan Party of the Loan Documents to which it is a party, and such consents, licenses and approvals shall be in full force and effect, or (B) stating that no such consents, licenses or approvals are so required;

(ix) a certificate signed by a Responsible Officer of the Borrower certifying (A) that the conditions specified in Sections 4.02(a) and (b) have been satisfied, (B) that there has been no event or circumstance since the date of the Audited Financial Statements that has had or would be reasonably expected to have, either individually or in the aggregate, a Material Adverse Effect; and (C) a calculation of the Consolidated Net Leverage Ratio as of the last day of the fiscal quarter of the Borrower most recently ended prior to the Closing Date;

(x) a certificate attesting to the Solvency of the Borrower and its Subsidiaries on a consolidated basis after giving effect to the Transaction, from its chief financial officer, substantially in the form of Exhibit N;

(xi) a business plan and budget of the Borrower and its Subsidiaries on a consolidated basis, including forecasts prepared by management of the Borrower, of consolidated statements of income of the Borrower and its Subsidiaries on a monthly basis, starting with the month beginning after the Closing Date through December 31, 2021;

(xii) evidence that all insurance required to be maintained pursuant to the Loan Documents has been obtained and is in effect, together with the certificates of insurance, naming the Administrative Agent, on behalf of the Secured Parties, as an additional insured or loss payee, as the case may be, under all insurance policies (including flood insurance policies) maintained with respect to the assets and properties of the Loan Parties that constitutes Collateral; and

(xiii) such other assurances, certificates, documents, consents or opinions as the Administrative Agent, the L/C Issuer, the Swing Line Lender or any Lender reasonably may require.

(b) (x) Upon the reasonable request of any Lender made at least ten (10) days prior to the Closing Date, the Borrower shall have provided to such Lender, and such Lender shall be reasonably satisfied with, the documentation and other information so requested in connection with applicable “know your customer” and anti-money-laundering rules and regulations, including, without limitation, the Act, in each case at least five (5) days prior to the Closing Date and (y) at least five (5) days prior to the Closing Date, any Loan Party that qualifies as a “legal entity customer” under the Beneficial Ownership Regulation shall have delivered, to each Lender that so requests, a Beneficial Ownership Certification in relation to such Loan Party.

(c) (i) All fees required to be paid to the Administrative Agent on or before the Closing Date shall have been paid and (ii) all fees required to be paid to the Lenders on or before the Closing Date shall have been paid.

(d) Unless waived by the Administrative Agent, the Borrower shall have paid all reasonable and documented fees, charges and disbursements of counsel to the Administrative Agent (directly to such counsel if requested by the Administrative Agent) to the extent invoiced at least two (2) Business Days prior to the Closing Date, plus such additional amounts of such fees, charges and disbursements as shall constitute such counsel’s reasonable estimate of such fees, charges and disbursements incurred or to be incurred by it through the closing proceedings (provided that such estimate shall not thereafter preclude a final settling of accounts between the Borrower and the Administrative Agent).

Without limiting the generality of the provisions of the last paragraph of Section 9.03, for purposes of determining compliance with the conditions specified in this Section 4.01, the Administrative Agent and each Lender that has signed this Agreement shall be deemed to have consented to, approved or accepted or to be satisfied with, each document or other matter required thereunder to be consented to or approved by or acceptable or satisfactory to the Administrative Agent or a Lender unless, in the case of a Lender, the Administrative Agent shall have received notice from such Lender prior to the proposed Closing Date specifying its objection thereto.

**4.02 Conditions to All Credit Extensions.** The obligation of each Lender to honor any Request for Credit Extension (other than a Committed Loan Notice requesting only a conversion of Loans to the other Type, or a continuation of Term SOFR Loans) is subject to the following conditions precedent:

(a) The representations and warranties of the Borrower contained in Article V or any other Loan Document shall be true and correct in all material respects (or, with respect to representations and warranties qualified by materiality, in all respects) on and as of the date of such Credit Extension, except to the extent that such representations and warranties specifically refer to an earlier date, in which case they shall be true and correct in all material respects (or, with respect to representations and warranties qualified by materiality, in all respects) as of such earlier date, and except that for purposes of this Section 4.02, the representations and warranties contained in Sections 5.05(a) and (b) shall be deemed to refer to the most recent statements furnished pursuant to Sections 6.01(a) and (b), respectively.

(b) No Default or Event of Default shall exist, or would result from such proposed Credit Extension or from the application of the proceeds thereof.

(c) The Administrative Agent and, if applicable, the L/C Issuer or the Swing Line Lender shall have received a Request for Credit Extension in accordance with the requirements hereof.

Each Request for Credit Extension (other than a Committed Loan Notice requesting only a conversion of Loans to the other Type or a continuation of Term SOFR Loans) submitted by the Borrower shall be deemed to be a representation and warranty that the conditions specified in Sections 4.02(a) and (b) have been satisfied on and as of the date of the applicable Credit Extension.

**ARTICLE V  
REPRESENTATIONS AND WARRANTIES**

The Borrower represents and warrants to the Administrative Agent and the Lenders that:

**5.01 Existence, Qualification and Power.** Each Loan Party and each of its Subsidiaries (a) is duly organized or formed, validly existing and, as applicable, in good standing under the Laws of the jurisdiction of its incorporation or organization, (b) has all requisite power and authority and all requisite governmental licenses, authorizations, consents and approvals to (i) own or lease its assets and carry on its business and (ii) execute, deliver and perform its obligations under the Loan Documents to which it is a party and consummate the Transaction, and (c) is duly qualified and is licensed and, as applicable, in good standing under the Laws of each jurisdiction where its ownership, lease or operation of properties or the conduct of its business requires such qualification or license; except in each case referred to in clause (b)(i) or (c), to the extent that failure to do so would not reasonably be expected to have a Material Adverse Effect.

**5.02 Authorization; No Contravention.** The execution, delivery and performance by each Loan Party of each Loan Document to which such Person is or is to be a party have been duly authorized by all necessary corporate or other organizational action, and do not and will not (a) contravene the terms of any of such Person's Organization Documents; (b) conflict with or result in any breach or contravention of, or the creation of (or the requirement to create) any Lien under, or require any payment to be made under (i) any Contractual Obligation to which such Person is a party or affecting such Person or the properties of such Person or any of its Subsidiaries except to the extent it could not reasonably be expected to have a Material Adverse Effect or (ii) any order, injunction, writ or decree of any Governmental Authority or any arbitral award to which such Person or its property is subject; or (c) violate any Applicable Law.

**5.03 Governmental Authorization; Other Consents.** No approval, consent, exemption, authorization, or other action by, or notice to, or filing with, any Governmental Authority or any other Person is necessary or required in connection with (a) the execution, delivery or performance by any Loan Party of this Agreement or any other Loan Document, or for the consummation of the Transaction, (b) the grant by any Loan Party of the Liens granted by it pursuant to the Collateral Documents or (c) the perfection or maintenance of the Liens created under the Collateral Documents, in each case, other than (i) authorizations, approvals, consents, actions, exemptions, notices and filings which have been duly obtained, (ii) filings to perfect the Liens created by the Collateral Documents, and (iii) SEC filings to disclose the entry into this Agreement following the Closing Date.

**5.04 Binding Effect.** This Agreement has been, and each other Loan Document, when delivered hereunder, will have been, duly executed and delivered by each Loan Party that is party thereto. This Agreement constitutes, and each other Loan Document when so delivered will constitute, a legal, valid and binding obligation of such Loan Party, enforceable against each Loan Party that is party thereto in accordance with its terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other laws affecting creditors' rights generally and subject to general principles of equity.

**5.05 Financial Statements; No Material Adverse Effect.** (a) The Audited Financial Statements (i) were prepared in accordance with GAAP consistently applied throughout the period covered thereby, except as otherwise expressly noted therein; and (ii) fairly present in all material respects the financial condition of the Borrower and its Subsidiaries on a consolidated basis as of the date thereof and their results of operations, cash flows and changes in shareholders' equity for the period covered thereby in accordance with GAAP consistently applied throughout the period covered thereby, except as otherwise expressly noted therein.

(b) The unaudited consolidated balance sheet of the Borrower and its Subsidiaries dated March 31, 2022, and the related consolidated statements of operations and comprehensive income, stockholders' equity and cash flows for the fiscal quarter ended on that date (i) were prepared in accordance with GAAP consistently applied throughout the period covered thereby, except as otherwise expressly noted therein, and (ii) fairly present in all material respects the financial condition of the Borrower and its Subsidiaries as of the date thereof and their results of operations, cash flows and changes in shareholders' equity for the period covered thereby, subject, in the case of clauses (i) and (ii), to the absence of footnotes and to normal year-end audit adjustments.

(c) Since the date of the balance sheet included in the Audited Financial Statements, there has been no event or circumstance, either individually or in the aggregate, that has had or would reasonably be expected to have a Material Adverse Effect.

(d) The consolidated forecasted statement of income of the Borrower and its Subsidiaries delivered pursuant to Section 6.01(d), was prepared in good faith on the basis of the assumptions stated therein, which assumptions were believed by the Borrower to be reasonable at the time of delivery thereof.

**5.06 Litigation.** There are no actions, suits, proceedings, claims or disputes pending or, to the knowledge of the Borrower, threatened in writing or contemplated, at law, in equity, in arbitration or before any Governmental Authority, by or against the Borrower or any of its Subsidiaries or against any of their properties or revenues that (a) involve this Agreement, any other Loan Document or the consummation of the Transaction, or (b) either individually or in the aggregate would reasonably be expected to have a Material Adverse Effect.

**5.07 No Default.** Neither any Loan Party nor any Subsidiary thereof is in default under or with respect to, or a party to, any Contractual Obligation that would, either individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. No Default has occurred and is continuing or would result from the consummation of the transactions contemplated by this Agreement or any other Loan Document.

**5.08 Ownership of Property; Liens; Investments.** Each Loan Party and each of its Subsidiaries has good record and marketable title in fee simple to, or valid leasehold interests in, all real property necessary or used in the ordinary conduct of its business, except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

**5.09 Environmental Matters.**

(a) Except as would not, individually or in the aggregate, reasonably be expected to result in any Material Adverse Effect:

(i) (i) To the knowledge of the Loan Parties or any of their respective Subsidiaries none of the properties currently or formerly owned, leased or operated by any Loan Party or any of its Subsidiaries is listed or formally proposed for listing on the NPL or on the CERCLIS or any analogous foreign, state or local list or is adjacent to any such property; (ii) there are no, and to the knowledge of the Loan Parties and their Subsidiaries never have been any underground or above-ground storage tanks or any surface impoundments, septic tanks, pits, sumps or lagoons in which Hazardous Materials are being or have been treated, stored or disposed on any property currently owned, leased or operated by any Loan Party or any of its Subsidiaries or, to the best of the knowledge of the Loan Parties, on any property formerly owned, leased or operated by any Loan Party or any of its Subsidiaries; (iii) to the knowledge of the Loan Parties there is not and never has been any asbestos or asbestos-containing material on, at or in any property currently owned, leased or operated by any Loan Party or any of its Subsidiaries other than in compliance with Environmental Laws; (iv) Hazardous Materials have not been Released on, at, under or from any property currently or formerly owned, leased or operated by any Loan Party or any of its Subsidiaries or any property by or on behalf, or otherwise arising from the operations, of any Loan Party or any of its Subsidiaries; and (v) no Loan Party or any of its Subsidiaries has become subject to any Environmental Liability or knows of any facts or circumstances that could reasonably be expected to give rise to any Environmental Liability.

(ii) (i) Neither any Loan Party nor any of its Subsidiaries is undertaking, and has not completed, either individually or together with other potentially responsible parties, any investigation or assessment or remedial or response action relating to any actual or threatened Release of Hazardous Materials at, on, under, or from any site, location or operation, either voluntarily or pursuant to the order of any Governmental Authority or the requirements of any Environmental Law; and (ii) all Hazardous Materials generated, used, treated, handled or stored at, or transported by any Loan Party or any of its Subsidiaries to or from, any property currently or formerly owned, leased or operated by any Loan Party or any of its Subsidiaries have been disposed of in a manner which could not reasonably be expected to result in liability to any Loan Party or any of its Subsidiaries.

(iii) The Loan Parties and their respective Subsidiaries: (A) are, and within the period of all applicable statutes of limitation have been, in compliance with all applicable Environmental Laws; (B) hold all Environmental Permits (each of which is in full force and effect) required for any of their current operations or for any property owned, leased, or otherwise operated by any of them; (C) are, and within the period of all applicable statutes of limitation have been, in compliance with all of their Environmental Permits; (D) to the extent within the control of the Loan Parties and their respective Subsidiaries, will timely renew and comply with each of their Environmental Permits and any additional Environmental permits that may be required of any of them without material expense, and timely comply with any current, future or potential Environmental Law without material expense; and (E) are not aware of any new requirements proposed for adoption or implementation under any Environmental Law.

(b) The Loan Parties and their respective Subsidiaries conduct in the ordinary course of business a review of the effect of existing Environmental Laws and claims alleging potential liability or responsibility for violation of any Environmental Law on their respective businesses, operations and properties, and as a result thereof the Borrower has reasonably concluded that such Environmental Laws and claims would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

**5.10 Insurance.** The properties of the Borrower and its Subsidiaries are insured with financially sound and reputable insurance companies not Affiliates of the Borrower, in such amounts, with such deductibles and covering such risks as are customarily carried by companies engaged in similar businesses and owning similar properties in localities where the Borrower or the applicable Subsidiary operates.

**5.11 Taxes.** The Borrower and each of its Subsidiaries have timely filed all federal, state and other material tax returns and reports required to be filed, and have paid all federal, state and other material Taxes (whether or not shown on a tax return), levied or imposed upon it or its properties, income or assets otherwise due and payable, except (a) those which are being contested in good faith by appropriate proceedings diligently conducted and for which adequate reserves have been provided in accordance with GAAP or (b) to the extent that the failure to do so would not be reasonably expected to have a Material Adverse Effect.

**5.12 ERISA Compliance.** (a) Except as could not reasonably be expected, either individually or in the aggregate, to have a Material Adverse Effect, (i) each Plan is in compliance in all material respects with the applicable provisions of ERISA, the Code and other federal or state laws, and (ii) each Pension Plan or Multiemployer Plan that is intended to be a qualified plan under Section 401(a) of the Code has received a favorable determination letter from the Internal Revenue Service to the effect that the form of such Plan is qualified under Section 401(a) of the Code and the trust related thereto has been determined by the Internal Revenue Service to be exempt from federal income tax under Section 501(a) of the Code, or an application for such a letter is currently being processed by the Internal Revenue Service and, to the knowledge of the Borrower, nothing has occurred that would prevent or cause the loss of such tax-qualified status.

(b) There are no pending or, to the knowledge of the Borrower, threatened claims, actions or lawsuits, or action by any Governmental Authority, with respect to any Plan that would reasonably be expected to have a Material Adverse Effect. There has been no prohibited transaction or violation of the fiduciary responsibility rules with respect to any Plan that has resulted or would reasonably be expected to result in a Material Adverse Effect.

(c) No ERISA Event has occurred, and neither the Borrower nor any ERISA Affiliate is aware of any fact, event or circumstance that would reasonably be expected to constitute or result in an ERISA Event with respect to any Pension Plan or Multiemployer Plan that, either individually or in the aggregate, has had or would reasonably be expected to have a Material Adverse Effect.

(d) The Borrower represents and warrants as of the Closing Date that the Borrower is not and will not be using “plan assets” (within the meaning of 29 CFR § 2510.3-101, as modified by Section 3(42) of ERISA) of one or more Benefit Plans in connection with the Loans, the Letters of Credit or the Commitments.

(e) The present value of all accrued benefits under each Pension Plan (based on those assumptions used to fund such Pension Plan) did not, as of the last annual valuation date prior to the date on which this representation is made or deemed made, exceed the value of the assets of such Pension Plan allocable to such accrued benefits by a material amount. As of the most recent valuation date for each Multiemployer Plan, the potential liability of the Borrower or any ERISA Affiliate for a complete withdrawal from such Multiemployer Plan (within the meaning of Section 4203 or Section 4205 of ERISA), when aggregated with such potential liability for a complete withdrawal from all Multiemployer Plans, is zero.

(f) Each employee benefit plan maintained or contributed to by any Loan Party or any Subsidiary of any Loan Party with respect to employees employed outside the United States that is not subject to United States law, other than any governmental arrangement (a “Foreign Plan”) has been maintained in compliance with its terms and with the requirements of any and all applicable requirements of Law and has been maintained, where required, in good standing with applicable regulatory authorities, except to the extent that the failure so to comply would not reasonably be expected, either individually or in the aggregate, to have a Material Adverse Effect. The present value of the accrued benefit liabilities (whether or not vested) under each Foreign Plan that is funded, determined as of the end of the most recently ended fiscal year of the Borrower or Subsidiary, as applicable, on the basis of actuarial assumptions, each of which is reasonable, did not exceed the current value of the property of such Foreign Plan by a material amount, and for each Foreign Plan that is not funded, the obligations of such Foreign Plan are properly accrued.

**5.13 Subsidiaries; Equity Interests; Loan Parties.** As of the Closing Date, the Borrower has no Subsidiaries other than those specifically disclosed in Part (a) of Schedule 5.13, and all of the outstanding Equity Interests in such Subsidiaries have been validly issued, are fully paid and non-assessable and are owned by the Borrower or a Subsidiary in the amounts specified on Part (a) of Schedule 5.13 free and clear of all Liens except those created under the Collateral Documents or otherwise permitted hereunder. As of the Closing Date, the Borrower has no equity investments in any other corporation or entity other than those specifically disclosed in Part (b) of Schedule 5.13. Set forth on Part (d) of Schedule 5.13 is a complete and accurate list of all Loan Parties, showing as of the Closing Date (as to each Loan Party) the jurisdiction of its incorporation, the address of its principal place of business and its U.S. taxpayer identification number or, in the case of any non-U.S. Loan Party that does not have a U.S. taxpayer identification number, its unique identification number issued to it by the jurisdiction of its incorporation. As of the Closing Date, the copy of the charter (or similar organizational document) of each Loan Party and each amendment thereto provided pursuant to Section 4.01(a)(vi) is a true and correct copy of each such document, each of which is valid and in full force and effect.

**5.14 Margin Regulations; Investment Company Act.**

(a) The Borrower is not engaged and will not engage, principally or as one of its important activities, in the business of purchasing or carrying margin stock (within the meaning of Regulation U), or extending credit for the purpose of purchasing or carrying margin stock.

(b) None of the Borrower, any Person Controlling the Borrower, or any Subsidiary is required to be registered as an “investment company” under the Investment Company Act of 1940.

**5.15 Disclosure.** No report, financial statement, certificate or other information furnished (whether in writing or orally) by or on behalf of any Loan Party to the Administrative Agent or any Lender in connection with the transactions contemplated hereby and the negotiation of this Agreement or delivered hereunder or under any other Loan Document, at the Closing Date or at the time furnished (in the case of all other reports, financial statements, certificates or other information), contains any material misstatement of fact or omits to state any material fact necessary to make the statements therein (taken as a whole together with all documents previously delivered to the Administrative Agent or any Lender or published by the Borrower with the SEC and after taking into account all updates thereto), in the light of the circumstances under which they were made, not misleading; provided that, with respect to projected financial information, the Borrower represents only that such information was prepared in good faith based upon assumptions believed to be reasonable at the time; it being understood that such forecasts are as to future events and are not to be viewed as facts, that no assurance can be given that any particular forecast will be realized and that actual results during the period or periods covered by any such forecasts may differ significantly from the projected results.

**5.16 Compliance with Laws.** Each Loan Party and each Subsidiary thereof is in compliance in all material respects with the requirements of all Applicable Laws (including, without limitation, the Controlled Substances Act) and all orders, writs, injunctions and decrees applicable to it or to its properties, except in such instances in which (a) such requirement of Law or order, writ, injunction or decree is being contested in good faith by appropriate proceedings diligently conducted or (b) the failure to comply therewith, either individually or in the aggregate, could not reasonably be expected to have a Material Adverse Effect.

**5.17 Intellectual Property; Licenses, Etc.** Except as would not reasonably be expected to have a Material Adverse Effect, the Borrower and each of its Subsidiaries own, or possess the right to use, all of the Trademarks, Copyrights, Patents, trade secrets, know-how and other Intellectual Property rights (collectively, "IP Rights") that are reasonably necessary for the operation of their respective businesses as currently conducted, without conflict with the rights of any other Person. Except as would not reasonably be expected to have a Material Adverse Effect, to the knowledge of the Borrower, the conduct of the business of Borrower and its Subsidiaries does not infringe, misappropriate or otherwise violate any IP Rights of any other Person. No claim or litigation regarding any of the foregoing is pending or, to the knowledge of the Borrower, threatened in writing, which, either individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect. To the knowledge of the Borrower, there has been no unauthorized use, access, interruption, modification, corruption or malfunction of any information technology assets or systems (or any information or transactions stored or contained therein or transmitted thereby) owned or used by the Borrower or any of its Subsidiaries, which, either individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect.

**5.18 Solvency.** The Borrower, together with its Subsidiaries on a consolidated basis, is Solvent.

**5.19 Casualty, Etc.** Neither the businesses nor the properties of any Loan Party or any of its Subsidiaries are affected by any fire, explosion, accident, strike, lockout or other labor dispute, drought, storm, hail, earthquake, embargo, act of God or of the public enemy or other casualty (whether or not covered by insurance), condemnation or eminent domain proceeding that, either individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect.

**5.20 Labor Matters.** There are no collective bargaining agreements or Multiemployer Plans covering the employees of the Borrower or any of its Subsidiaries as of the Closing Date and neither the Borrower nor any Subsidiary has suffered any strikes, walkouts, work stoppages or other material labor difficulty within the last five years.



**5.21 OFAC.** Neither the Borrower, nor any of its Subsidiaries, nor, to the knowledge of the Borrower and its Subsidiaries, any director, officer, employee, agent, affiliate or representative thereof, is an individual or entity that is, or is owned or controlled by one or more individuals or entities that are (a) currently the subject or target of any Sanctions, (b) included on OFAC's List of Specially Designated Nationals or HMT's Consolidated List of Financial Sanctions Targets, or any similar list enforced by any other relevant sanctions authority or (c) located, organized or resident in a Designated Jurisdiction. The Borrower and its Subsidiaries have conducted their businesses in compliance in all material respects with all applicable Sanctions and have instituted and maintained policies and procedures designed to promote and achieve compliance with such Sanctions.

**5.22 Anti-Corruption Laws.** The Borrower and its Subsidiaries have conducted their businesses in compliance in all material respects with the United States Foreign Corrupt Practices Act of 1977, the UK Bribery Act 2010, and other applicable anti-corruption legislation in other jurisdictions and have instituted and maintained policies and procedures designed to promote and achieve compliance with such laws.

**5.23 Not an Affected Financial Institution.** Neither the Borrower nor any Guarantor is an Affected Financial Institution.

**5.24 Beneficial Ownership Certification.** As of the Closing Date, the information included in the Beneficial Ownership Certification, if applicable, is true and correct in all respects.

**5.25 Covered Entities.** No Loan Party is a Covered Entity.

#### ARTICLE VI AFFIRMATIVE COVENANTS

So long as any Lender shall have any Commitment hereunder, any Loan or other Obligation hereunder shall remain unpaid or unsatisfied, or any Letter of Credit shall remain outstanding, the Borrower shall, and shall (except in the case of the covenants set forth in Sections 6.01, 6.02, 6.03 and 6.11) cause each Subsidiary to:

**6.01 Financial Statements.** Deliver to the Administrative Agent for distribution to each Lender:

(a) as soon as available, but in any event within 90 days after the end of each fiscal year of the Borrower, a consolidated balance sheet of the Borrower and its Subsidiaries as at the end of such fiscal year, and the related consolidated statements of operations and comprehensive income, changes in stockholders' equity, and cash flows for such fiscal year, setting forth in each case in comparative form the figures for the previous fiscal year, all in reasonable detail and prepared in accordance with GAAP, audited and accompanied by a report and opinion of an independent certified public accountant of nationally recognized standing reasonably acceptable to the Required Lenders, which report and opinion shall be prepared in accordance with generally accepted auditing standards and shall not be subject to any "going concern" or like qualification or exception or any qualification or exception as to the scope of such audit (other than any such qualification or exception that is expressly solely with respect to, or expressly solely resulting from, the Maturity Date to the extent scheduled to occur within one (1) year from the time such opinion is delivered) (it being understood that the delivery by Borrower of an Annual Report on Form 10-K shall satisfy the requirements of this Section 6.01(a));

(b) as soon as available, but in any event within 45 days after the end of each of the first three fiscal quarters of each fiscal year of the Borrower, a consolidated balance sheet of the Borrower and its Subsidiaries as at the end of such fiscal quarter, the related consolidated statements of operations and comprehensive income and changes in stockholders' equity for such fiscal quarter and for the portion of the Borrower's fiscal year then ended, and cash flows for the portion of the Borrower's fiscal year then ended, setting forth in each case in comparative form the figures for the corresponding fiscal quarter of the previous fiscal year and the corresponding portion of the previous fiscal year, all in reasonable detail, certified by the chief executive officer, chief financial officer, vice president of finance, treasurer or controller of the Borrower as fairly presenting the financial condition, results of operations, shareholders' equity and cash flows of the Borrower and its Subsidiaries in accordance with GAAP, subject only to normal year-end audit adjustments and the absence of footnotes (it being understood that the delivery by Borrower of a Quarterly Report on Form 10-Q shall satisfy the requirements of this Section 6.01(b));

(c) [reserved]; and

(d) as soon as available, but in any event within 60 days after the end of each fiscal year of the Borrower, an annual business plan and budget of the Borrower and its Subsidiaries on a consolidated basis, including forecasts prepared by management of the Borrower, of a consolidated statement of income of the Borrower and its Subsidiaries on a quarterly basis for the immediately following fiscal year, in form and detail reasonably satisfactory to Administrative Agent.

As to any information contained in materials furnished pursuant to Section 6.02(d), the Borrower shall not be separately required to furnish such information under Section 6.01(a) or (b) above, but the foregoing shall not be in derogation of the obligation of the Borrower to furnish the information and materials described in Sections 6.01(a) and (b) above at the times specified therein.

**6.02 Certificates; Other Information.** Deliver to the Administrative Agent for distribution to each Lender:

(a) [reserved]

(b) concurrently with the delivery of the financial statements referred to in Sections 6.01(a) and (b), a duly completed Compliance Certificate signed by the chief executive officer, chief financial officer, vice president of finance, treasurer or controller of the Borrower (which delivery may, unless the Administrative Agent, or a Lender requests executed originals, be by electronic communication including fax or email and shall be deemed to be an original authentic counterpart thereof for all purposes);

(c) promptly after any request by the Administrative Agent or any Lender, copies of any detailed audit reports, management letters or recommendations submitted to the board of directors (or the audit committee of the board of directors) of any Loan Party by independent accountants in connection with the accounts or books of any Loan Party or any of its Subsidiaries, or any audit of any of them;

(d) promptly after the same are available, copies of each annual report, proxy or financial statement or other report or communication sent to the stockholders of the Borrower, and copies of all annual, regular, periodic and special reports and registration statements which the Borrower may file or be required to file with the SEC under Section 13 or 15(d) of the Securities Exchange Act of 1934, or with any national securities exchange, and in any case not otherwise required to be delivered to the Administrative Agent pursuant hereto;

(e) promptly after any request by the Administrative Agent or any Lender, copies of any statement or report furnished to any holder of debt securities of any Loan Party or of any of its Subsidiaries pursuant to the terms of any indenture, loan or credit or similar agreement and not otherwise required to be furnished to the Lenders pursuant to Section 6.01 or any other clause of this Section 6.02;

(f) commencing on the first Business Day of the beginning of the Liquidity Reporting Period and on the first Business Day of each calendar month thereafter through the date the Convertible Notes (including Indebtedness issued under Section 7.02(b)) are paid in full, a report in form and detail reasonably satisfactory to Administrative Agent that sets forth a current summary of the Borrower's Liquidity;

(g) promptly after receipt thereof by any Loan Party or any Subsidiary thereof, copies of any significant notice or other correspondence received from the SEC (or comparable agency in any applicable non-U.S. jurisdiction) concerning any investigation or possible investigation or other similar inquiry by such agency regarding financial or other operational results of any Loan Party or any Subsidiary thereof, other than comment letters received with respect to the Borrower's public filings, that is or would reasonably be expected to be material to the Loan Parties;

(h) promptly following any request therefor, information and documentation reasonably requested by the Administrative Agent or any Lender for purposes of compliance with applicable "know your customer" and anti-money-laundering rules and regulations, including, without limitation, the Act and the Beneficial Ownership Regulation;

(i) promptly after receipt thereof by any Loan Party or any Subsidiary thereof, copies of all notices, requests and other documents (including amendments, waivers and other modifications) so received under or pursuant to any instrument, indenture, loan or credit or similar agreement regarding or related to any breach or default by any party thereto or any other event, in each case, that would materially impair the value of the interests or the rights of any Loan Party or otherwise have a Material Adverse Effect and, from time to time upon request by the Administrative Agent, such information and reports regarding such instruments, indentures and loan and credit and similar agreements as the Administrative Agent may reasonably request;

(j) promptly after the assertion or occurrence thereof, notice of any action or proceeding against or of any noncompliance by any Loan Party or any of its Subsidiaries with any Environmental Law or Environmental Permit that in each case would reasonably be expected to have a Material Adverse Effect;

(k) concurrently with the delivery of the financial statements referred to in Sections 6.01(a) and (b), (i) a report supplementing Schedules 11(a), 11(b), 11(c) and 11(d) of the Perfection Certificate, setting forth (A) a list of registration numbers for all Patents, Trademarks and Copyrights awarded to the Borrower or any Subsidiary thereof during such fiscal year and (B) a list of all Patent applications, Trademark applications and Copyright applications submitted by the Borrower or any Subsidiary thereof during such fiscal year and the status of each such application; and (ii) a report supplementing Schedules 5.13 and 7.03 containing a description of all changes in the information included in such Schedules as may be necessary for such Schedules to be accurate and complete, each such report to be signed by a Responsible Officer of the Borrower and to be in a form reasonably satisfactory to the Administrative Agent;

(l) promptly, such additional information regarding the business, financial, legal or corporate affairs of any Loan Party or any Subsidiary thereof, or compliance with the terms of the Loan Documents, as the Administrative Agent or any Lender may from time to time reasonably request.

Documents required to be delivered pursuant to [Section 6.01\(a\)](#) or [\(b\)](#) or [Section 6.02\(d\)](#), (to the extent any such documents are included in materials otherwise filed with the SEC) may be delivered electronically and if so delivered, shall be deemed to have been delivered on the date (i) on which the Borrower posts such documents, or provides a link thereto on the Borrower's website on the Internet at the website address listed on [Schedule 11.02](#) or at <http://www.sec.gov>; or (ii) on which such documents are posted on the Borrower's behalf on an Internet or intranet website, if any, to which each Lender and the Administrative Agent have access (whether a commercial, third-party website or whether sponsored by the Administrative Agent); provided that the Borrower shall notify the Administrative Agent (by telecopier or electronic mail) of the posting of any such documents and, if requested, provide to the Administrative Agent by electronic mail electronic versions (i.e., soft copies) of such documents.

The Borrower hereby acknowledges that (a) the Administrative Agent may, but shall not be obligated to, make available to the Lenders and the L/C Issuer materials and/or information provided by or on behalf of the Borrower hereunder (collectively, "Borrower Materials") by posting the Borrower Materials on IntraLinks, Syndtrak, ClearPar, or a substantially similar electronic transmission system (the "Platform") and (b) certain of the Lenders (each, a "Public Lender") may have personnel who do not wish to receive material non-public information with respect to the Borrower or its Affiliates, or the respective securities of any of the foregoing, and who may be engaged in investment and other market-related activities with respect to such Persons' securities. The Borrower hereby agrees that it will use commercially reasonable efforts to identify that portion of the Borrower Materials that may be distributed to the Public Lenders and that (w) all such Borrower Materials shall be clearly and conspicuously marked "PUBLIC" which, at a minimum, shall mean that the word "PUBLIC" shall appear prominently on the first page thereof; (x) by marking Borrower Materials "PUBLIC," the Borrower shall be deemed to have authorized the Administrative Agent, the L/C Issuer and the Lenders to treat such Borrower Materials as not containing any material non-public information (although it may be sensitive and proprietary) with respect to the Borrower or its securities for purposes of United States federal and state securities laws (provided, however, that to the extent such Borrower Materials constitute Information, they shall be treated as set forth in [Section 11.07](#)); (y) all Borrower Materials marked "PUBLIC" are permitted to be made available through a portion of the Platform designated "Public Side Information;" and (z) the Administrative Agent shall be entitled to treat any Borrower Materials that are not marked "PUBLIC" as being suitable only for posting on a portion of the Platform not designated "Public Side Information."

**6.03 Notices.** Promptly notify the Administrative Agent for distribution to each Lender after a Responsible Officer of the Borrower first learns of or acquires knowledge with respect to:

(a) of the occurrence of any Default;

(b) of any matter that has resulted or would reasonably be expected to result in a Material Adverse Effect, including (i) receipt by the Borrower or its Subsidiaries of any notice of a material breach or non-performance of, or any default under, a Material Contract asserting a default by such Person where such alleged default would permit such counterparty to terminate such Material Contract; (ii) the filing or commencement of any action, suit, dispute, litigation, investigation, proceeding or suspension involving any Loan Party or any Subsidiary or any of their respective properties and any Governmental Authority; or (iii) the commencement of, or any material development in, any litigation or proceeding affecting the Borrower or any Subsidiary, including pursuant to any applicable Environmental Laws, in each case that has resulted or would reasonably be expected to result in a Material Adverse Effect;

(c) of the occurrence of any ERISA Event that, either individually or together with any other ERISA Events, would reasonably be expected to have a Material Adverse Effect; and

(d) [reserved];

(e) of any change in the information provided in the Beneficial Ownership Certification that would result in a change to the list of beneficial owners identified in such certification.

Each notice pursuant to Section 6.03 shall be accompanied by a statement of a Responsible Officer of the Borrower setting forth details of the occurrence referred to therein and stating what action the Borrower has taken and proposes to take with respect thereto. Each notice pursuant to Section 6.03(a) shall describe with particularity any and all provisions of this Agreement and any other Loan Document that have been breached.

Notwithstanding the foregoing requirements of Sections 6.01 through 6.03, to the extent any information or document required to be delivered thereunder (i) may not be disclosed under Applicable Law or any binding agreement with a third party (so long as such agreement is not entered into in contemplation of this Agreement) (it being understood and agreed that in the case of any prohibition under any binding agreement, the Borrower shall use commercially reasonable efforts to obtain any waivers necessary to enable the disclosure, inspection, examination, or discussion of such document information or other matter), (ii) is subject to attorney-client or similar privilege, or (iii) constitutes trade secrets or proprietary information which would reasonably be expected to be lost or forfeited if disclosed to the Administrative Agent or any Lender, the Loan Parties shall not be required to disclose or deliver such information or document, and the failure to so disclose or deliver such information or document shall not constitute a Default or Event of Default hereunder; provided, further, that the Borrower shall, to the extent permitted by Applicable Law, notify the Administrative Agent that such information or document has been withheld pursuant to this paragraph.

**6.04 Payment of Obligations; File Tax Returns.** (a) Pay and discharge as the same shall become due and payable (i) all material Tax liabilities, assessments and governmental charges or levies upon it or its properties or assets, unless the same are being contested in good faith by appropriate proceedings diligently conducted and adequate reserves in accordance with GAAP are being maintained by the Borrower or such Subsidiary; (ii) all material lawful claims which, if unpaid, would by law become a Lien upon its property; and (iii) all Indebtedness having an aggregate outstanding principal amount of more than the Threshold Amount, as and when due and payable, but subject to any subordination provisions contained in any instrument or agreement evidencing such Indebtedness and any applicable grace or cure periods; and (b) timely file all material tax returns required to be filed, except in the case of this clause (b) to the extent that failure to do so would not reasonably be expected to have a Material Adverse Effect.

**6.05 Preservation of Existence, Etc.** (a) Preserve, renew and maintain in full force and effect its legal existence and good standing under the Laws of the jurisdiction of its organization except in a transaction permitted by Section 7.04 or 7.05 and (b) take all reasonable action to maintain all rights, privileges, permits, licenses and franchises necessary or desirable in the normal conduct of its business, except to the extent that failure to do so would not reasonably be expected to have a Material Adverse Effect.

**6.06 Maintenance of Properties.** (a) Maintain, preserve and protect all of its material properties and equipment necessary in the operation of its business in good working order and condition, ordinary wear and tear excepted; and (b) make all necessary repairs thereto and renewals and replacements thereof in each case except where the failure to do so would not reasonably be expected to have a Material Adverse Effect.

**6.07 Maintenance of Insurance.** (a) Maintain with financially sound and reputable insurance companies not Affiliates of the Borrower, insurance with respect to its properties and business against loss or damage of the kinds customarily insured against by Persons engaged in the same or similar business, of such types and in such amounts as are customarily carried under similar circumstances by such other Persons and all such insurance shall (i) provide for not less than 30 days' prior notice to the Administrative Agent of termination, lapse or cancellation of such insurance, (ii) name the Administrative Agent as additional insured on behalf of the Secured Parties (in the case of liability insurance) or loss payee (in the case of property insurance), as applicable, and (iii) if reasonably requested by the Administrative Agent, include a breach of warranty clause.

(b) If any portion of any real property of the Borrower is at any time located in an area identified by the Federal Emergency Management Agency (or any successor agency) as a Special Flood Hazard Area with respect to which flood insurance has been made available under the National Flood Insurance Act of 1968 (as now or hereafter in effect or successor act thereto), then the Borrower shall, or shall cause each Loan Party to (i) maintain, or cause to be maintained, with a financially sound and reputable insurer, flood insurance in an amount and otherwise sufficient to comply with all applicable rules and regulations promulgated pursuant to the Flood Insurance Laws and (ii) deliver to the Administrative Agent evidence of such compliance in form and substance reasonably acceptable to the Administrative Agent.

(c) **Evidence of Insurance.** Cause the Administrative Agent to be named as lenders' loss payable, loss payee or mortgagee, as its interest may appear, and/or additional insured with respect of any such insurance providing liability coverage or coverage in respect of any Collateral, and cause, unless otherwise agreed to by the Administrative Agent, each provider of any such insurance to agree, by endorsement upon the policy or policies issued by it or by independent instruments furnished to the Administrative Agent that it will give the Administrative Agent thirty (30) days prior written notice before any such policy or policies shall be altered or cancelled (or ten (10) days prior notice in the case of cancellation due to the nonpayment of premiums). Annually, upon expiration of current insurance coverage, the Loan Parties shall provide, or cause to be provided, to the Administrative Agent, such evidence of insurance as required by the Administrative Agent, including, but not limited to: (i) certified copies of such insurance policies, (ii) evidence of such insurance policies (including, without limitation and as applicable, ACORD Form 28 certificates (or similar form of insurance certificate), and ACORD Form 25 certificates (or similar form of insurance certificate)), (iii) declaration pages for each insurance policy and (iv) lender's loss payable endorsement if the Administrative Agent for the benefit of the Secured Parties is not on the declarations page for such policy. As requested by the Administrative Agent, the Loan Parties agree to deliver to the Administrative Agent an Authorization to Share Insurance Information.

**6.08 Compliance with Laws.** Comply in all material respects with the requirements of all Applicable Laws (including, without limitation, the Controlled Substances Act) and all orders, writs, injunctions and decrees applicable to it or to its business or property, except in such instances in which (a) such requirement of Law or order, writ, injunction or decree is being contested in good faith by appropriate proceedings diligently conducted; or (b) the failure to comply therewith would not reasonably be expected to have a Material Adverse Effect.

**6.09 Books and Records.** (a) Maintain proper books of record and account, in which full, true and correct entries in conformity with GAAP consistently applied shall be made of all financial transactions and matters involving the assets and business of the Borrower or such Subsidiary, as the case may be, in all material respects; and (b) maintain such books of record and account in material conformity with all applicable requirements of any Governmental Authority having regulatory jurisdiction over the Borrower or such Subsidiary, as the case may be.

**6.10 Inspection Rights.** Permit representatives and independent contractors of the Administrative Agent and each Lender to visit and inspect any of its properties, to examine its corporate, financial and operating records, and make copies thereof or abstracts therefrom, and to discuss its affairs, finances and accounts with its directors, officers, and independent public accountants (so long as a representative of the Borrower is provided a reasonable opportunity to participate in any such discussion), all at the expense of the Borrower (provided that, unless an Event of Default has occurred and is continuing, only one such visit per fiscal year shall be at the Borrower's expense) and at such reasonable times during normal business hours and as often as may be reasonably desired, upon reasonable advance notice to the Borrower; provided, however, that when an Event of Default exists and is continuing, the Administrative Agent or any Lender (or any of their respective representatives or independent contractors) may do any of the foregoing at the expense of the Borrower at any time during normal business hours and without advance notice. Notwithstanding anything to the contrary contained herein or any other provision of the Loan Documents, no Loan Party nor any of its Subsidiaries will be required to disclose or permit the inspection of any document, information or other matter (i) in respect of which disclosure to any Lender (or their respective representatives or contractors) is prohibited by any Applicable Law or any binding agreement with a third party (so long as such agreement is not entered into in contemplation of this Agreement) (it being understood and agreed that in the case of any prohibition under any binding agreement, the Borrower shall use commercially reasonable efforts to obtain any waivers necessary to enable the disclosure, inspection, examination, or discussion of such document, information or other matter), (ii) that is subject to attorney-client or similar privilege, which would reasonably be expected to be lost or forfeited if disclosed to the Administrative Agent or any Lender (it being understood and agreed that the Borrower shall notify the Administrative Agent as to the scope of the information that is not being provided because of such attorney-client or similar privilege) or (iii) constitutes trade secrets or proprietary information which would reasonably be expected to be lost or forfeited if disclosed to the Administrative Agent or any Lender.

**6.11 Use of Proceeds.** Use the proceeds of the Credit Extensions for general corporate purposes not in contravention of any Law or of any Loan Document.

**6.12 Covenant to Guarantee Obligations and Give Security.** (a) Upon the formation or acquisition of any new direct or indirect Subsidiary (other than any, Immaterial Subsidiary or any CFC or Subsidiary that is held directly or indirectly by a CFC or a Subsidiary the principal purpose of which is holding equity interest in one or more CFCs) by any Loan Party (including, without limitation, upon the formation of any Subsidiary that is a Division Successor), then the Borrower shall, at the Borrower's expense:

(i) within 30 Business Days after such formation or acquisition, cause such Subsidiary, and cause each direct and indirect parent of such Subsidiary (if it has not already done so), to duly execute and deliver to the Administrative Agent a guaranty or guaranty supplement, substantially in the form of Exhibit P, guaranteeing the other Loan Parties' obligations under the Loan Documents;

(ii) within 30 Business Days after such formation or acquisition, furnish to the Administrative Agent a description of the real and personal properties of such Subsidiary in reasonable detail;

(iii) within 60 Business Days after such formation or acquisition, cause such Subsidiary and each direct and indirect parent of such Subsidiary (if it has not already done so) to duly execute and deliver to the Administrative Agent Security Agreement Supplements, Perfection Certificate, Intellectual Property Security Agreements and other security and pledge agreements (including delivery of all certificates, if any, representing the Equity Interests in and of such Subsidiary, and other instruments of the type specified in Section 4.01(a)(iii) and Section 4.01(a)(iv) (G)), securing payment of all the Obligations of such Subsidiary or such parent, as the case may be, under the Loan Documents and constituting Liens on all such interests and personal properties, other than Excluded Property (as such term is defined in the Security Agreement);

(iv) within 60 days after such formation or acquisition, cause such Subsidiary and each direct and indirect parent of such Subsidiary (if it has not already done so) to take whatever reasonable action (including the filing of Uniform Commercial Code financing statements, the giving of notices and the endorsement of notices on title documents) may be necessary or advisable in the opinion of the Administrative Agent to vest in the Administrative Agent (or in any representative of the Administrative Agent designated by it) valid and subsisting Liens on the properties purported to be subject to the Security Agreement Supplements, Intellectual Property Security Agreements, and security and pledge agreements delivered pursuant to this Section 6.12, enforceable against all third parties in accordance with their terms, provided that no filings or other actions shall be required in any jurisdiction outside the United States;

(v) [reserved]; and

(vi) within 60 days after such formation or acquisition, deliver to the Administrative Agent, upon the reasonable request of the Administrative Agent in its sole discretion, a signed copy of a favorable opinion, addressed to the Administrative Agent and the other Secured Parties, of counsel for the Loan Parties reasonably acceptable to the Administrative Agent as to the matters contained in clauses (i), (ii), and (iv) above.

(b) Upon the acquisition of any property by any Loan Party (including, without limitation, any acquisition pursuant to a Division), if such property is of a type intended to constitute Collateral under the Loan Documents and which, in the reasonable judgment of the Administrative Agent, shall not already be subject to a perfected security interest in favor of the Administrative Agent for the benefit of the Secured Parties, then the Borrower shall, at the Borrower's expense:

(i) within 30 Business Days after such acquisition, furnish to the Administrative Agent a description of the property so acquired;

(ii) within 30 Business Days after such acquisition, cause the applicable Loan Party to duly execute and deliver to the Administrative Agent Security Agreement Supplements, Intellectual Property Security Agreement supplements, and other security and pledge agreements reasonably required by the Administrative Agent, securing payment of all the Obligations of the applicable Loan Party under the Loan Documents and constituting Liens on all such properties;

(iii) within 30 days after such acquisition, cause the applicable Loan Party to take whatever action (including the filing of Uniform Commercial Code financing statements, the giving of notices and the endorsement of notices on title documents) may be necessary or advisable in the opinion of the Administrative Agent to vest in the Administrative Agent (or in any representative of the Administrative Agent designated by it) valid and subsisting Liens on such property, enforceable against all third parties, provided that no filings or other actions shall be required in any jurisdiction outside the United States;

(iv) [reserved]; and

(v) within 60 days after such acquisition, deliver to the Administrative Agent, upon the reasonable request of the Administrative Agent in its sole discretion, a signed copy of a favorable opinion, addressed to the Administrative Agent and the other Secured Parties, of counsel for the Loan Parties reasonably acceptable to the Administrative Agent as to the matters contained in clauses (ii) and (iii) above.

(c) [reserved].

(d) At any time upon the reasonable request of the Administrative Agent, promptly execute and deliver any and all further instruments and documents and take all such other action as the Administrative Agent may reasonably request in obtaining the full benefits of, or (as applicable) in perfecting and preserving the Liens of, such guaranties, Security Agreement Supplements and other security and pledge agreements, provided that no filings or other actions shall be required in any jurisdiction outside the United States.



**6.13 Compliance with Environmental Laws.** Comply, and cause all lessees and other Persons operating or occupying its properties to comply, in all material respects, with all applicable Environmental Laws and Environmental Permits; obtain and renew all Environmental Permits necessary for its operations and properties; and conduct any investigation, study, sampling and testing, cleanup, removal, remedial or other action required under applicable Environmental Laws to address all Hazardous Materials at, on, under or emanating from any of properties owned, leased or operated by it in accordance with all Environmental Laws, except, in each case, where failure to do so would not reasonably be expected to result in a Material Adverse Effect.

**6.14 [Reserved].**

**6.15 Further Assurances.** Promptly upon request by the Administrative Agent, or any Lender through the Administrative Agent, (a) correct any material defect or error that may be discovered in any Loan Document or in the execution, acknowledgment, filing or recordation thereof, and (b) do, execute, acknowledge, deliver, record, re-record, file, re-file, register and re-register any and all such further acts, deeds, certificates, assurances and other instruments as the Administrative Agent, or the Required Lenders through the Administrative Agent, may reasonably require from time to time in order to (i) carry out more effectively the purposes of the Loan Documents, (ii) to the fullest extent permitted by Applicable Law, subject any Loan Party's or any of its Subsidiaries' properties, assets, rights or interests to the Liens now or hereafter intended to be covered by any of the Collateral Documents, (iii) perfect and maintain the validity, effectiveness and priority of any of the Collateral Documents and any of the Liens intended to be created thereunder and (iv) assure, convey, grant, assign, transfer, preserve, protect and confirm more effectively unto the Secured Parties the rights granted or now or hereafter intended to be granted to the Secured Parties under any Loan Document or under any other instrument executed in connection with any Loan Document to which any Loan Party or any of its Subsidiaries is or is to be a party, and cause each of its Subsidiaries to do so, provided that no filings or other action shall be required in any jurisdiction outside the United States.

**6.16 Compliance with Terms of Leaseholds.** Make all payments and otherwise perform all obligations in respect of all leases of real property to which the Borrower or any of its Subsidiaries is a party, keep such leases in full force and effect and not allow such leases to lapse or be terminated or any rights to renew such leases to be forfeited or cancelled, notify the Administrative Agent of any default by any party with respect to such leases and cooperate with the Administrative Agent in all respects to cure any such default, and cause each of its Subsidiaries to do so, except, in any case, where the failure to do so, either individually or in the aggregate, would not be reasonably likely to have a Material Adverse Effect.

**6.17 [Reserved].**

**6.18 Information Regarding Collateral.** (a) Not effect any change (i) in any Loan Party's legal name, (ii) in the location of any Loan Party's chief executive office, (iii) in any Loan Party's identity or organizational structure, (iv) in any Loan Party's Federal Taxpayer Identification Number or organizational identification number, if any, or (v) in any Loan Party's jurisdiction of organization (in each case, including by merging with or into any other entity, reorganizing, dissolving, liquidating, reorganizing or organizing in any other jurisdiction), until (A) it shall have given the Administrative Agent not less than 5 days' prior written notice (in the form of certificate signed by a Responsible Officer), or such lesser notice period agreed to by the Administrative Agent, of its intention so to do, clearly describing such change and providing such other information in connection therewith as the Administrative Agent may reasonably request and (B) it shall have taken all action reasonably satisfactory to the Administrative Agent to maintain the perfection and priority of the security interest of the Administrative Agent for the benefit of the Secured Parties in the Collateral, if applicable. Each Loan Party agrees to promptly provide the Administrative Agent with certified Organization Documents reflecting any of the changes described in the preceding sentence.

(b) Concurrently with the delivery of financial statements pursuant to Section 6.01(a), deliver to the Administrative Agent a Perfection Certificate Supplement.

**6.19 Material Contracts.** (x) Perform and observe all the terms and provisions of each Material Contract to be performed or observed by it, (y) not take any action which would cause each such Material Contract to cease to be in full force and effect and (z) enforce each such Material Contract in accordance with its terms, except, in any case, where the failure to do so, either individually or in the aggregate, would not reasonably be expected to have a Material Adverse Effect.

**6.20 Cash Collateral Accounts.** Within 120 days after the Closing Date, maintain, and cause each of the other Loan Parties to maintain, all Cash Collateral Accounts with Bank of America or another commercial bank located in the United States, which has accepted the assignment of such accounts to the Administrative Agent for the benefit of the Secured Parties pursuant to the terms of the Security Agreement.

**6.21 Anti-Corruption Laws; Sanctions.** Conduct its businesses in compliance in all material respects with the United States Foreign Corrupt Practices Act of 1977, the UK Bribery Act 2010, and other applicable anti-corruption legislation in other jurisdictions and with all applicable Sanctions, and maintain policies and procedures designed to promote and achieve compliance with such laws and Sanctions.

## ARTICLE VII NEGATIVE COVENANTS

So long as any Lender shall have any Commitment hereunder, any Loan or other Obligation hereunder shall remain unpaid or unsatisfied, or any Letter of Credit shall remain outstanding, the Borrower shall not, nor shall it permit any Subsidiary to, directly or indirectly:

**7.01 Liens.** Create, incur, assume or suffer to exist any Lien upon any of its property, assets or revenues, whether now owned or hereafter acquired, other than the following:

- (a) Liens pursuant to any Loan Document;
- (b) Liens existing on the date hereof and listed on Schedule 7.01 and any renewals or extensions thereof, provided that (i) the property covered thereby is not changed, except to cover any additions, improvements or expansions thereto, (ii) the amount secured or benefited thereby is not increased except as contemplated by Section 7.02(e) and (iii) any renewal or extension of the obligations secured or benefited thereby is permitted by Section 7.02(e);
- (c) Liens for *ad valorem* property Taxes not yet due or Liens for Taxes which are being contested in good faith and by appropriate proceedings diligently conducted, if adequate reserves with respect thereto are maintained on the books of the applicable Person in accordance with GAAP;
- (d) carriers', warehousemen's, mechanics', materialmen's, repairmen's or other like Liens arising in the ordinary course of business which are not overdue for a period of more than 90 days or which are being contested in good faith and by appropriate proceedings diligently conducted, if adequate reserves with respect thereto are maintained on the books of the applicable Person in accordance with GAAP;
- (e) pledges or deposits in the ordinary course of business in connection with workers' compensation, unemployment insurance and other social security legislation, other than any Lien imposed by ERISA;
- (f) deposits to secure the performance of bids, trade contracts and leases (other than Indebtedness), statutory obligations, surety and appeal bonds, performance bonds and other obligations of a like nature incurred to the extent not prohibited under this Agreement;

(g) easements, rights-of-way, restrictions and other similar encumbrances affecting real property which, in the aggregate, do not in any case materially interfere with the ordinary conduct of the business of the applicable Person, and any zoning or similar law or right reserved to or vested in any Governmental Authority to control or regulate the use of any real property that does not materially interfere with the ordinary conduct of the business of the Borrower and its Subsidiaries;

(h) Liens securing judgments for the payment of money (or appeal or other surety bonds relating to such judgments) not constituting an Event of Default under Section 8.01(h);

(i) Liens securing Indebtedness permitted under Section 7.02(g); provided that (i) such Liens do not at any time encumber any property other than the property financed by such Indebtedness and the proceeds thereto and (ii) the Indebtedness secured thereby does not exceed the cost or fair market value, whichever is lower, of the property being acquired on the date of acquisition;

(j) bankers' Liens, rights of setoff and other similar Liens existing solely with respect to cash and Cash Equivalents on deposit in one or more accounts maintained by any Loan Party or any of its Subsidiaries with any Lender, in each case in the ordinary course of business in favor of the bank or banks with which such accounts are maintained, securing solely the customary amounts owing to such bank with respect to customary cash management and operating account arrangements; provided that in no case shall any such Liens secure the repayment of any Indebtedness not permitted hereunder;

(k) Liens arising out of judgments or awards not resulting in an Event of Default; provided that the applicable Loan Party or Subsidiary shall in good faith be prosecuting an appeal or proceedings for review;

(l) any interest or title of a lessor, licensor or sublessor under any lease, license or sublease entered into by any Loan Party or any Subsidiary thereof in the ordinary course of business and covering only the assets so leased, licensed or subleased;

(m) [reserved];

(n) Liens assumed by the Borrower or any of its Subsidiaries, as applicable, in connection with a Permitted Acquisition that secures Indebtedness that is permitted pursuant to Section 7.02(h);

(o) other Liens securing Indebtedness outstanding and permitted pursuant to Section 7.02(j) in an aggregate principal amount not to exceed the greater of (i) 20% of Consolidated EBITDA for the most recent Measurement Period prior to incurrence of such Lien and (ii) \$20,000,000; provided that no such Lien shall extend to or cover any real property;

(p) Liens in favor of customs and revenue authorities arising as a matter of law to secure payment of customs duties in connection with the importation of goods in the ordinary course of business;

(q) Liens described in the definition of "Permitted Priority Debt"; provided that such Liens do not secure Indebtedness in excess of \$25,000,000 in the aggregate at any time; and

(r) licenses, sublicenses, covenants not to sue, releases or similar rights or immunities with respect to IP Rights that do not secure any Indebtedness, in each case incurred in the ordinary course of business.

**7.02 Indebtedness.** Create, incur, assume or suffer to exist any Indebtedness, except:

(a) obligations (contingent or otherwise) existing or arising under any Swap Contract, provided that such obligations are (or were) entered into by such Person in the ordinary course of business for the purpose of mitigating risks associated with fluctuations in interest rates or foreign exchange rates and;

(b) (i) Indebtedness evidenced by the Convertible Notes, (ii) additional Indebtedness of the Borrower issued under the Convertible Notes Documents or other unsecured convertible notes; provided that immediately before and immediately after giving pro forma effect to the incurrence of such Indebtedness under this clause (ii), (A) no Event of Default shall have occurred and be continuing, and (B) the Borrower and its Subsidiaries shall be in pro forma compliance with all of the covenants set forth in Section 7.11, such compliance to be determined on the basis of the financial information most recently delivered to the Administrative Agent and the Lenders pursuant to Section 6.01(a) or (b) as though such Indebtedness had been incurred as of the first day of the fiscal period covered thereby and (iii) any refinancings, refundings, renewals or extensions of Indebtedness evidenced by the Convertible Notes; provided that in the case of this clause (iii) the amount of such Indebtedness is not increased (other than in accordance with clause (ii) of this Section 7.02(b)) at the time of such refinancing, refunding, renewal or extension except by an amount equal to a reasonable premium or other reasonable amount paid, and fees and expenses reasonably incurred, in connection with such refinancing and by an amount equal to any existing commitments unutilized thereunder, as a result of or in connection with such refinancing, refunding, renewal or extension; and provided, further, that in the case of this clause (iii) the terms relating to principal amount, amortization, maturity, collateral (if any) and subordination (if any), and other market terms taken as a whole, of any such refinancing, refunding, renewing or extending Indebtedness, and of any agreement entered into and of any instrument issued in connection therewith, are no less favorable in any material respect to the Loan Parties or the Lenders than the terms of any agreement or instrument governing the Indebtedness being refinanced, refunded, renewed or extended, or otherwise reflect market terms at the time as reasonably determined by the Borrower, and the interest rate applicable to any such refinancing, refunding, renewing or extending Indebtedness does not exceed the then applicable market interest rate, as reasonably determined by the Borrower;

(c) Indebtedness of (A) a Subsidiary of the Borrower owed to the Borrower or a wholly-owned Domestic Subsidiary of the Borrower, (B) any Loan Party owed to any other Loan Party, which Indebtedness, in each case of clauses (A) and (B) shall, in the case of Indebtedness owed to the Borrower or another Loan Party, constitute "Pledged Collateral" under the Security Agreement, and (C) any Subsidiaries of the Borrower that are not Loan Parties owed to any Subsidiaries of the Borrower that are not Loan Parties;

(d) Indebtedness under the Loan Documents;

(e) Indebtedness outstanding on the date hereof and listed on Schedule 7.02 and any refinancings, refundings, renewals or extensions thereof; provided that the amount of such Indebtedness is not increased at the time of such refinancing, refunding, renewal or extension except by an amount equal to a reasonable premium or other reasonable amount paid, and fees and expenses reasonably incurred, in connection with such refinancing and by an amount equal to any existing commitments unutilized thereunder and the direct or any contingent obligor with respect thereto is not changed, as a result of or in connection with such refinancing, refunding, renewal or extension; and provided, further, that the terms relating to principal amount, amortization, maturity, collateral (if any) and subordination (if any), and other material terms taken as a whole, of any such refinancing, refunding, renewing or extending Indebtedness, and of any agreement entered into and of any instrument issued in connection therewith, are no less favorable in any material respect to the Loan Parties or the Lenders than the terms of any agreement or instrument governing the Indebtedness being refinanced, refunded, renewed or extended or otherwise reflect market terms at the time as reasonably determined by the Borrower;

(f) Guarantees of the Borrower or any Guarantor in respect of Indebtedness otherwise permitted hereunder of the Borrower or any other Guarantor;

(g) Indebtedness in respect of Capitalized Leases, Synthetic Lease Obligations and purchase money obligations for fixed or capital assets within the limitations set forth in Section 7.01(i); provided, however, that the aggregate amount of all such Indebtedness at any one time outstanding shall not exceed \$25,000,000;

(h) Indebtedness of any Person that becomes a Subsidiary of the Borrower after the date hereof in accordance with the terms of Section 7.03(g), which Indebtedness is existing at the time such Person becomes a Subsidiary of the Borrower (other than Indebtedness incurred solely in contemplation of such Person's becoming a Subsidiary of the Borrower); provided, however, that the aggregate amount of all such Indebtedness shall not exceed \$30,000,000 in the aggregate at any time;

(i) unsecured Indebtedness in an aggregate principal amount not to exceed \$20,000,000 at any time outstanding; provided that Consolidated Net Leverage Ratio of the Borrower, calculated on a pro forma basis for the most recent Measurement Period after giving effect to such Indebtedness, would not result in a Consolidated Net Leverage Ratio greater than the then applicable ratio specified in Section 7.11(b) (determined on the basis of the financial information most recently delivered to the Administrative Agent and the Lenders pursuant to Section 6.01(a) or (b) as though such Indebtedness had been incurred as of the first day of the fiscal period covered thereby);

(j) other Indebtedness in an aggregate principal amount not to exceed the greater of (i) 20% of Consolidated EBITDA for the most recent Measurement Period prior to incurrence of such Indebtedness and (ii) \$20,000,000 at any time outstanding;

(k) Indebtedness relating to endorsements of negotiable instruments received by a Loan Party in ordinary course of such Loan Party's business;

(l) Indebtedness incurred in the ordinary course of business under performance, bid, statutory, surety, customs and appeal bonds aggregating not more than \$10,000,000 at any time outstanding;

(m) Indebtedness incurred in respect of any Secured Cash Management Agreement;

(n) accounts payable to trade creditors for goods and services and current operating liabilities (not the result of the borrowing of money) incurred in the ordinary course of Borrower's or its Subsidiary's business in accordance with customary terms and paid within the specified time, unless contested in good faith by appropriate proceedings and reserved for in accordance with GAAP; and

(o) Permitted Priority Debt; provided that such Indebtedness does not exceed \$25,000,000 in the aggregate at any time outstanding.

**7.03 Investments.** Make or hold any Investments, except:

(a) Investments held by the Borrower and its Subsidiaries in the form of Cash Equivalents;

(b) advances to officers, directors and employees of the Borrower and Subsidiaries in an aggregate amount not to exceed \$10,000,000 at any time outstanding, for loans, travel, entertainment, relocation and analogous ordinary business purposes;

(c) (i) Investments by the Borrower and its Subsidiaries in their respective Subsidiaries outstanding as of the Closing Date, (ii) additional Investments by the Borrower and its Subsidiaries in Loan Parties, (iii) additional Investments by Subsidiaries of the Borrower that are not Loan Parties in other Subsidiaries that are not Loan Parties; and (iv) so long as no Default has occurred and is continuing or would result from such Investment, additional Investments by the Loan Parties in wholly-owned Foreign Subsidiaries that are not Loan Parties in an aggregate amount invested from the date hereof not to exceed the greater of (i) 50% of Consolidated EBITDA for the most recent Measurement Period prior to incurrence of such Indebtedness and (ii) \$50,000,000;

(d) Investments consisting of extensions of credit in the nature of accounts receivable or notes receivable arising from the grant of trade credit in the ordinary course of business, and Investments received in satisfaction or partial satisfaction thereof from financially troubled account debtors to the extent reasonably necessary in order to prevent or limit loss;

(e) to the extent constituting Investments, Liens permitted under Section 7.01, Guarantees permitted by Section 7.02, Dispositions permitted under Section 7.05, Investments permitted under Section 7.04 and Investments arising as a result of payments permitted by Section 7.16;

(f) Investments existing on the date hereof (other than those referred to in Section 7.03(c)(i)) and set forth on Schedule 7.03 and any renewals, amendments and replacements thereof that do not increase the amount thereof of any such Investment, net of cash returns thereon, or require that any additional Investment be made (unless otherwise permitted hereunder);

(g) the purchase or other acquisition of all of the Equity Interests in, or all or substantially all of the property of, any Person that, upon the consummation thereof, will be wholly-owned directly by the Borrower or one or more of its wholly-owned Subsidiaries (including as a result of a merger or consolidation); provided that, with respect to each purchase or other acquisition made pursuant to this Section 7.03(g):

(i) any such newly-created or acquired Subsidiary shall comply with the requirements of Section 6.12;

(ii) (A) immediately before and immediately after giving pro forma effect to any such purchase or other acquisition, no Event of Default shall have occurred and be continuing and (B) immediately after giving effect to such purchase or other acquisition, the Borrower and its Subsidiaries shall be in pro forma compliance with all of the covenants set forth in Section 7.11, such compliance to be determined on the basis of the financial information most recently delivered to the Administrative Agent and the Lenders pursuant to Section 6.01(a) or (b), as though such purchase or other acquisition had been consummated as of the first day of the fiscal period covered thereby; and

(iii) the Borrower shall have delivered to the Administrative Agent and each Lender, on or no later than five Business Days after the date on which any such purchase or other acquisition is consummated, a certificate of a Responsible Officer, in form and substance reasonably satisfactory to the Administrative Agent and the Required Lenders, certifying that all of the requirements set forth in this clause (g) have been satisfied.

(h) Swap Contracts permitted pursuant to Section 7.02(a);

(i) other Investments not exceeding \$50,000,000 in the aggregate in any fiscal year of the Borrower;

(j) Investments (including debt obligations) received in connection with the bankruptcy or reorganization of suppliers and customers and in settlement of delinquent obligations of, and other disputes with, customers and suppliers arising in the ordinary course of business;

(k) deposits of cash made in the ordinary course of business to secure performance of (i) operating leases and (ii) other contractual obligations that do not constitute Indebtedness; provided, however, that the aggregate amount of all such deposits at any one time outstanding shall not exceed \$10,000,000;

(l) Investments of any Person existing at the time such Person is acquired in an acquisition permitted pursuant to clause (g) above to the extent that such Investments were not made in contemplation of or in connection with such Person becoming a Subsidiary or such Permitted Acquisition, and any modification, replacement, renewal or extension thereof which does not increase the amount of such Investment unless such increase is otherwise permitted hereunder;

(m) Investments in the Convertible Notes or other permitted convertible notes resulting in the issuance of Equity Interests in exchange for or upon conversion of such notes;

(n) Investments funded with the proceeds of the issuance or sale of Equity Interests of the Borrower, or in exchange for such Equity Interests;

- (o) the increase in value of any Investment otherwise permitted pursuant to this [Section 7.03](#);
- (p) Investments in the ordinary course consisting of UCC Article 3 endorsements for collection or deposit and UCC Article 4 customary trade arrangements with customers consistent with past practices;
- (q) to the extent constituting Investments, purchases and acquisitions of inventory, supplies, materials and equipment in the ordinary course of business; and
- (r) licenses, sublicenses, covenants not to sue, releases or similar rights or immunities with respect to IP Rights, in each case, in the ordinary course of business or in the good faith business judgment of Borrower.

**7.04 Fundamental Changes.** Merge, dissolve, liquidate, consolidate with or into another Person, or Dispose of (whether in one transaction or in a series of transactions) all or substantially all of its assets (whether now owned or hereafter acquired) to or in favor of any Person (including, in each case, pursuant to a Division), except that, so long as no Default exists or would result therefrom:

(a) any Subsidiary may merge with (i) the Borrower, provided that the Borrower shall be the continuing or surviving Person, or (ii) any one or more other Subsidiaries, provided that when any wholly-owned Subsidiary is merging with another Subsidiary, such wholly-owned Subsidiary or another wholly-owned Subsidiary shall be the continuing or surviving Person; provided further, that when any Material Subsidiary is merging with another Subsidiary, the surviving Subsidiary shall be a Material Subsidiary;

(b) any Loan Party may Dispose of all or substantially all of its assets (upon voluntary liquidation or otherwise) to the Borrower or to another Loan Party;

(c) any Subsidiary that is not a Loan Party may dispose of all or substantially all its assets (including any Disposition that is in the nature of a liquidation) to (i) another Subsidiary that is not a Loan Party or (ii) to a Loan Party;

(d) in connection with any acquisition permitted under [Section 7.03](#), any Subsidiary of the Borrower may merge into or consolidate with any other Person or permit any other Person to merge into or consolidate with it; provided that (i) the Person surviving such merger shall be a wholly-owned Subsidiary of the Borrower and (ii) in the case of any such merger to which any Loan Party (other than the Borrower) is a party, such Loan Party or another Loan Party is the surviving Person;

(e) so long as no Default has occurred and is continuing or would result therefrom, any Subsidiary of the Borrower may merge into or consolidate with any other Person or permit any other Person to merge into or consolidate with it; provided, however, that in each case, immediately after giving effect thereto (i) in the case of any such merger to which the Borrower is a party, the Borrower is the surviving corporation and (ii) in the case of any such merger to which any Loan Party (other than the Borrower) is a party, such Loan Party is the surviving corporation; and

(f) any Immaterial Subsidiary of the Borrower may dispose of all or substantially all of its assets, or merge or consolidate with any other Person;

(g) in connection with any Investment otherwise permitted under [Section 7.03](#), any Disposition permitted under [Section 7.05](#) or a Restricted Payment permitted under [Section 7.06](#).

**7.05 Dispositions.** Make any Disposition, except:

(a) Dispositions of obsolete or worn out property or property no longer used or useful in the operations of any Loan Party or Subsidiary, whether now owned or hereafter acquired, in the ordinary course of business;

(b) Dispositions of inventory in the ordinary course of business;

(c) Dispositions of equipment or real property to the extent that (i) such property is exchanged for credit against the purchase price of similar replacement property or (ii) the proceeds of such Disposition are reasonably promptly applied to the purchase price of such replacement property;

(d) Dispositions of property by (A) any Subsidiary to the Borrower or to a wholly-owned Subsidiary, and (B) any Loan Party to any other Loan Party, or an entity that becomes a Loan Party; provided that if the transferor of such property is a Guarantor, the transferee thereof must be or become a Loan Party;

(e) Dispositions permitted by Section 7.03, Section 7.04 or Section 7.06;

(f) licenses, sublicenses, covenants not to sue, releases or similar rights or immunities with respect to IP Rights granted in the ordinary course of business or in the good faith business judgment of Borrower;

(g) Dispositions by the Borrower and its Subsidiaries not otherwise permitted under this Section 7.05; provided that (i) at the time of such Disposition, no Default shall exist or would result from such Disposition, (ii) the aggregate book value of all property Disposed of in reliance on this subsection (g) shall not exceed (A) \$10,000,000 in the aggregate during any fiscal year and (B) \$30,000,000 in the aggregate during the term of this Agreement and (iii) at least 75% of the price for such asset shall be paid to the Borrower or such Subsidiary in cash or Cash Equivalents;

(h) (i) lapses or expirations of registrations or any applications for registration of any IP Rights at the end of the applicable maximum statutory term or (ii) lapses, expirations or other abandonment of any IP Rights in the good faith business judgment of Borrower, except in the case of this clause (ii) for any such lapse, expiration or abandonment that would reasonably be expected to have a Material Adverse Effect;

(i) Dispositions of Equity Interests in a Subsidiary that is not a Loan Party to another Subsidiary that is not a Loan Party;

(j) Dispositions of accounts receivable for purposes of collection in the ordinary course of business;

(k) Dispositions of intellectual property rights that are no longer used or useful in the business of the Borrower and its Subsidiaries;

(l) the discount, write-off or Disposition of overdue accounts receivable or the sale of any such accounts receivable for the purpose of collection to any collection agency;

(m) the unwinding of any Swap Contract;

(n) Restricted Payments permitted by Section 7.06 and Investments permitted by Section 7.04;

(o) so long as no Default shall occur and be continuing, the grant of any option or other right to purchase any asset in a transaction that would be permitted under the provisions of Section 7.05(g); and

(p) Dispositions of accounts receivable for factoring and similar transactions made in the reasonable business judgment of the Borrower.

**7.06 Restricted Payments.** Declare or make, directly or indirectly, any Restricted Payment, or incur any obligation (contingent or otherwise) to do so, except that:



- (a) each Subsidiary may make Restricted Payments to the Borrower, any Subsidiaries of the Borrower and any other Person that owns a direct Equity Interest in such Subsidiary, ratably according to their respective holdings of the type of Equity Interest in respect of which such Restricted Payment is being made (or a greater than ratable basis to the Borrower or a Subsidiary of the Borrower);
- (b) the Borrower and each Subsidiary may declare and make dividend payments or other distributions payable solely in the common stock or other common Equity Interests of such Person;
- (c) the Borrower and each Subsidiary may purchase, redeem or otherwise acquire its common Equity Interests with the proceeds received from the substantially concurrent issue of new common Equity Interests;
- (d) so long as no Event of Default has occurred and is continuing or would result therefrom, the Borrower may purchase, redeem or otherwise acquire for cash Equity Interests issued by it and held by officers, directors or employees or former officers, directors or employees; provided that the aggregate amount of Equity Interests purchased, redeemed or otherwise acquired pursuant to this clause (d) shall not exceed (A) \$10,000,000 in the aggregate during any fiscal year and (B) \$30,000,000 in the aggregate during the term of this Agreement;
- (e) the Borrower may (i) declare or pay cash dividends to its stockholders and (ii) purchase, redeem or otherwise acquire for cash Equity Interests issued by it (A) if immediately before and after giving pro forma effect to such purchase, redemption or acquisition of Equity Interests, the Consolidated Net Leverage Ratio of the Borrower shall be less than or equal to the then applicable level set forth in Section 7.11(b) less 1.00, to 1.00, determined on the basis of the financial information most recently delivered to the Administrative Agent and the Lenders pursuant to Section 6.01(a) or (b) as though such purchase, redemption or acquisition had been consummated as of the first day of the fiscal period covered thereby, and (B) (x) with respect to clause (i) (A) no Event of Default has occurred and is continuing at the time of such declaration and (B) such dividend is paid within 60 days of such declaration and (y) with respect to clause (ii), no Event of Default has occurred and is continuing at the time of such purchase, redemption or acquisition or would result from such purchase, redemption or acquisition; and
- (f) so long as no Event of Default has occurred and is continuing pursuant to Sections 8.01(a), (f) and (g)(i) or would reasonably be expected to occur after giving effect to such Restricted Payment, other Restricted Payments in an aggregate amount not to exceed \$15,000,000 in any fiscal year;
- (g) to the extent constituting Restricted Payments, so long as no Event of Default has occurred and is continuing pursuant to Sections 8.01(a), (f) and (g)(i) or would reasonably be expected to occur after giving effect to such Restricted Payment, distributions and other payments in respect of Indebtedness incurred pursuant to Section 7.02(b) pursuant to the terms thereof.
- 7.07 Change in Nature of Business.** Engage in any material line of business substantially different from those lines of business conducted by the Borrower and its Subsidiaries on the date hereof or any business substantially related, complementary, adjacent or incidental thereto.

**7.08 Transactions with Affiliates.** Enter into any transaction of any kind with any Affiliate of the Borrower, whether or not in the ordinary course of business, other than (i) transactions between Loan Parties, (ii) transactions on terms substantially as favorable to the Borrower or such Subsidiary as would be obtainable by the Borrower or such Subsidiary at the time in a comparable arm's length transaction with a Person other than an Affiliate, (iii) transactions otherwise permitted under Sections 7.02, 7.03, 7.04, 7.05, 7.06 or 7.16, (iv) transactions between Subsidiaries of the Loan Parties that are not Loan Parties, (v) arrangements or transactions that constitute customary compensation (including performance, discretionary, retention, relocation, transaction and other special bonuses and payment, severance payments and payments pursuant to employment agreements), other benefits (including retirement, health, stock option and other benefit plans, life insurance, disability insurance and other equity (or equity-linked) awards) and indemnification of, and other employment arrangements with, directors, officers, and employees of any Loan Parties or its Subsidiaries, in each case, in the ordinary course of business, (vi) transactions set forth on Schedule 7.08 or any amendment to such transactions to the extent such an amendment is not materially adverse to the Lenders, or (vii) transactions (with any series of related transactions being aggregated for the purposes of this clause (vii)) including consideration of less than \$5,000,000 in the aggregate.

**7.09 Burdensome Agreements.** Enter into or permit to exist any Contractual Obligation (other than this Agreement or any other Loan Document) that (a) limits the ability (i) of any Subsidiary to make Restricted Payments to the Borrower or any Guarantor or to otherwise transfer property to or invest in the Borrower or any Guarantor, except for any agreement in effect (A) on the date hereof and set forth on Schedule 7.09 or (B) at the time any Subsidiary becomes a Subsidiary of the Borrower, so long as such agreement was not entered into solely in contemplation of such Person becoming a Subsidiary of the Borrower, (ii) of any Subsidiary to Guarantee the Indebtedness of the Borrower, except for any agreement in effect on the date hereof and set forth on Schedule 7.09 or any amendment to such agreement that is not materially adverse to the Lenders, or (iii) of the Borrower or any Subsidiary to create, incur, assume or suffer to exist Liens on property of such Person; provided, however, that this clause (iii) shall not prohibit (i) restrictions or conditions imposed, incurred or provided in favor of any holder of Indebtedness permitted under Section 7.02(g) solely to the extent any such restrictions or conditions relate to the property financed by or the subject of such Indebtedness, (ii) customary provisions in contracts solely restricting the assignment of such contracts (including, without limitation, any leases and in-bound licenses of Intellectual Property) so long as such provisions were not entered into solely in contemplation of such Person becoming a Loan Party, or (iii) limitations associated with, or any document or instrument governing, Liens permitted under Section 7.01; or (b) requires the grant of a Lien to secure an obligation of such Person if a Lien is granted to secure another obligation of such Person, in each case, other than, (i) restrictions and conditions imposed by Applicable Law or by the Loan Documents, (ii) any documentation governing Indebtedness permitted to exist pursuant to clause (h) of Section 7.02 (or any permitted refinancing thereof), (iii) customary provisions in leases, subleases, permitted licenses and other contracts entered into in the ordinary course of business restricting the assignment thereof or restricting the assignment, pledge, transfer or sublease or sublicense of the property leased, licensed or otherwise the subject thereof, (iv) restrictions or conditions in any Indebtedness permitted pursuant to Section 7.02 that is incurred or assumed by Subsidiaries that are not Loan Parties to the extent such restrictions or conditions are no more restrictive in any material respect than the restrictions and conditions in the Loan Documents, or are otherwise consistent with market terms for such Indebtedness as reasonably determined by the Borrower, (v) restrictions or conditions imposed by any agreement relating to purchase money Indebtedness and other secured Indebtedness or to leases, subleases and licenses permitted by this Agreement if such restrictions or conditions apply only to the property or assets securing such Indebtedness or the property leased, subleased or licensed, (vi) customary provisions in contracts for the disposition of any assets permitted hereunder; provided that the restrictions in any such contract shall apply only to the assets that is to be disposed of and such disposition is permitted hereunder, (vii) customary provisions regarding confidentiality or restricting assignment, pledges or transfer of any permitted license entered into in the ordinary course of business; and (viii) customary provisions in joint venture agreements and other similar agreements applicable to joint ventures and applicable solely to such joint venture, provided that such Investments in joint ventures are otherwise permitted hereunder.

**7.10 Use of Proceeds.** Use the proceeds of any Credit Extension, whether directly or indirectly, and whether immediately, incidentally or ultimately, to purchase or carry margin stock (within the meaning of Regulation U) or to extend credit to others for the purpose of purchasing or carrying margin stock or to refund indebtedness originally incurred for such purpose.

**7.11 Financial Covenants.** (a) Consolidated Interest Coverage Ratio. Permit the Consolidated Interest Coverage Ratio as of the end of any Measurement Period (commencing with the fiscal quarter ending June 30, 2022) to be less than 3.00:1.00.

(b) Consolidated Net Leverage Ratio. Permit the Consolidated Net Leverage Ratio as of the end of any Measurement Period to be greater than the ratio set forth below opposite such period:

Measurement Period Ending	Maximum Consolidated Net Leverage Ratio
Closing Date through December 31, 2023	4.00:1.00
March 31, 2024 and each fiscal quarter thereafter	3.50:1.00

provided, however, notwithstanding the foregoing, following any Specified Acquisition by a Loan Party, and following the delivery of a Specified Acquisition Leverage Ratio Notice, the Loan Parties shall have the ability, not more than twice during the term of this Agreement, to increase the Maximum Consolidated Net Leverage Ratio set forth above by 0.50 with respect to the fiscal quarter during which such Specified Acquisition occurs and the next three (3) fiscal quarters thereafter (such period referred to herein as the “Increased Total Net Leverage Period”); provided, further, that at least two (2) complete fiscal quarters must have elapsed between the end of the first Increased Total Net Leverage Period and the beginning of the second Increased Total Net Leverage Period.

**7.12 [Reserved].**

**7.13 Sanctions.** Directly or indirectly, use the proceeds of any Credit Extension, or lend, contribute or otherwise make available such proceeds to any Subsidiary, joint venture partner or other Person, to fund any activities of or business with any Person that, at the time of such funding, is the subject of Sanctions, or in any other manner that will result in a violation by any Person (including any Person participating in the transaction, whether as Lender, Administrative Agent, L/C Issuer, Swing Line Lender, or otherwise) of Sanctions.

**7.14 Amendments of Organization Documents.** Amend any of its Organization Documents in a manner materially adverse to the interests of the Lenders.

**7.15 Accounting Changes.** Make any change in (a) accounting policies or financial reporting practices, except as required or permitted by GAAP, or (b) fiscal year.

**7.16 Prepayments, Etc. of Indebtedness.** Prepay, redeem, purchase, defease or otherwise satisfy prior to the scheduled maturity thereof in any manner, or make any payment in violation of any subordination terms of, any subordinated Indebtedness, except (a) the prepayment of the Credit Extensions in accordance with the terms of this Agreement and (b) regularly scheduled or required repayments or redemptions of Indebtedness set forth in Schedule 7.02 and refinancings and refundings of such Indebtedness in compliance with Section 7.02(e).

**7.17 [Reserved].**

**7.18 Anti-Corruption Laws.** Directly or indirectly use the proceeds of any Credit Extension for any purpose which would breach the United States Foreign Corrupt Practices Act of 1977, the UK Bribery Act 2010, and other anti-corruption legislation in other jurisdictions in any material respect.

**7.19 [Reserved].**

**7.20 Certain Transactions.** Notwithstanding anything herein to the contrary, in no event shall any Loan Party (i) dispose of any Material Intellectual Property to any Subsidiary that is not a Loan Party, or (ii) contribute or otherwise Invest any Material Intellectual Property to or in any Subsidiary that is not a Loan Party, in each case, other than non-exclusive licenses in the ordinary course of business.

**ARTICLE VIII  
EVENTS OF DEFAULT AND REMEDIES**

**8.01 Events of Default.** Any of the following shall constitute an event of default (each, an “Event of Default”):

(a) Non-Payment. The Borrower or any other Loan Party fails to (i) pay when and as required to be paid herein, any amount of principal of any Loan or any L/C Obligation or deposit any funds as Cash Collateral in respect of L/C Obligations, or (ii) pay within three Business Days after the same becomes due, any interest on any Loan or on any L/C Obligation, or any fee due hereunder, or (iii) pay within five Business Days after the same becomes due, any other amount payable hereunder or under any other Loan Document; or

(b) Specific Covenants. The Borrower fails to perform or observe any term, covenant or agreement contained in any of (i) Sections 6.01 and Section 6.02(b), and such failure shall continue unremedied for a period of five days, (ii) Sections 6.02, 6.03(a), 6.05(a), 6.11, 6.12 (solely with respect to Material Subsidiaries) or Article VII; or

(c) Other Defaults. Any Loan Party fails to perform or observe any other covenant or agreement (not specified in Section 8.01(a) or (b) above) contained in any Loan Document on its part to be performed or observed and such failure continues for 30 days from the earlier to occur of (i) a Responsible Officer of any Loan Party having knowledge of such failure or (ii) the date on which the Administrative Agent notifies the Borrower in writing of such failure; provided that, if within such 30-day period, the Borrower commences efforts to cure such failure, and the Borrower diligently and in good faith continues to pursue such cure, then such failure shall not become an Event of Default hereunder unless and until it shall remain unremedied for a period of 45 days from the occurrence thereof (unless, in any event, the Administrative Agent reasonably determines that such failure is not capable of remedy); or

(d) Representations and Warranties. Any representation, warranty, certification or statement of fact made or deemed made by or on behalf of the Borrower or any other Loan Party herein, in any other Loan Document, or in any document delivered in connection herewith or therewith shall be incorrect or misleading in any material respect when made or deemed made; or

(e) Cross-Default. (i) Any Loan Party or any Subsidiary thereof (A) fails to make any payment when due beyond any applicable notice or grace period (whether by scheduled maturity, required prepayment, acceleration, demand, or otherwise) in respect of any Indebtedness or Guarantee (other than Indebtedness hereunder and Indebtedness under Swap Contracts) having an aggregate principal amount (including undrawn committed or available amounts and including amounts owing to all creditors under any combined or syndicated credit arrangement) of more than the Threshold Amount, or (B) fails to observe or perform any other agreement or condition relating to any such Indebtedness or Guarantee or contained in any instrument or agreement evidencing, securing or relating thereto, or any other event occurs, the effect of which default or other event is to cause, or to permit the holder or holders of such Indebtedness or the beneficiary or beneficiaries of such Guarantee (or a trustee or agent on behalf of such holder or holders or beneficiary or beneficiaries) to cause, with the giving of notice if required and the passage of any applicable grace period, such Indebtedness to be demanded or to become due or to be repurchased, prepaid, defeased or redeemed (automatically or otherwise), or an offer to repurchase, prepay, defease or redeem such Indebtedness to be made, prior to its stated maturity, or such Guarantee to become payable or Cash Collateral in respect thereof to be demanded; or (ii) there occurs under any Swap Contract an Early Termination Date (as defined in such Swap Contract) resulting from (A) any event of default under such Swap Contract as to which a Loan Party or any Subsidiary thereof is the Defaulting Party (as defined in such Swap Contract) or (B) any Termination Event (as so defined) under such Swap Contract as to which a Loan Party or any Subsidiary thereof is an Affected Party (as so defined) and, in either event, the Swap Termination Value owed by such Loan Party or such Subsidiary as a result thereof is greater than the Threshold Amount; or

(f) Insolvency Proceedings, Etc. Any Loan Party or any Subsidiary thereof institutes or consents to the institution of any proceeding under any Debtor Relief Law, or makes an assignment for the benefit of creditors; or applies for or consents to the appointment of any receiver, trustee, custodian, conservator, liquidator, rehabilitator or similar officer for it or for all or any material part of its property; or any receiver, trustee, custodian, conservator, liquidator, rehabilitator or similar officer is appointed without the application or consent of such Person and the appointment continues undischarged or unstayed for 60 calendar days; or any proceeding under any Debtor Relief Law relating to any such Person or to all or any material part of its property is instituted without the consent of such Person and continues undismissed or unstayed for 60 calendar days, or an order for relief is entered in any such proceeding; or

(g) Inability to Pay Debts; Attachment. (i) Any Loan Party or any Subsidiary thereof becomes unable or admits in writing its inability or fails generally to pay its debts as they become due, or (ii) any writ or warrant of attachment or execution or similar process is issued or levied against all or any material part of the property of any such Person and is not released, vacated or fully bonded within 45 days after its issue or levy; or

(h) Judgments. There is entered against any Loan Party or any Subsidiary thereof (i) one or more final judgments or orders for the payment of money in an aggregate amount (as to all such judgments and orders) exceeding the Threshold Amount (to the extent not covered by independent third-party insurance as to which the insurer is rated at least "A" by A.M. Best Company, has been notified of the potential claim and does not dispute coverage), or (ii) any one or more non-monetary final judgments that have, or would reasonably be expected to have, individually or in the aggregate, a Material Adverse Effect and, in either case, (A) enforcement proceedings are commenced by any creditor upon such judgment or order, or (B) there is a period of 60 consecutive days during which a stay of enforcement of such judgment, by reason of a pending appeal or otherwise, is not in effect; or

(i) ERISA. An ERISA Event occurs with respect to a Pension Plan or Multiemployer Plan which has resulted or would reasonably be expected to result in liability of the Borrower or any of its Subsidiaries to the Pension Plan, Multiemployer Plan or the PBGC in an aggregate amount in excess of the Threshold Amount; or

(j) Invalidity of Loan Documents. Any material provision of any Loan Document, at any time after its execution and delivery and for any reason other than as expressly permitted hereunder or thereunder or satisfaction in full of all the Obligations (other than contingent indemnification obligations for which no claims have been made), ceases to be in full force and effect; or any Loan Party or any other Person contests in any manner the validity or enforceability of any provision of any Loan Document; or any Loan Party denies that it has any or further liability or obligation under any provision of any Loan Document, other than as a result of full payment of amounts outstanding thereunder, or purports to revoke, terminate or rescind any provision of any Loan Document; or

(k) Change of Control. There occurs any Change of Control; or

(l) Collateral Documents. Any Collateral Document after delivery thereof pursuant to Section 4.01 or 6.12 shall for any reason (other than pursuant to the terms thereof or as expressly permitted hereunder) cease to create a valid and perfected first priority Lien (subject to Liens permitted by Section 7.01) on a material portion of the Collateral purported to be covered thereby.

**8.02 Remedies upon Event of Default.** If any Event of Default occurs and is continuing, the Administrative Agent shall, at the request of, or may, with the consent of, the Required Lenders, take any or all of the following actions:

(a) declare the commitment of each Lender to make Loans and any obligation of the L/C Issuer to make L/C Credit Extensions to be terminated, whereupon such commitments and obligation shall be terminated;

(b) declare the unpaid principal amount of all outstanding Loans, all interest accrued and unpaid thereon, and all other amounts owing or payable hereunder or under any other Loan Document to be immediately due and payable, without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived by the Borrower;

- (c) require that the Borrower Cash Collateralize the L/C Obligations (in an amount equal to the Minimum Collateral Amount with respect thereto); and
- (d) exercise on behalf of itself, the Lenders and the L/C Issuer all rights and remedies available to it, the Lenders and the L/C Issuer under the Loan Documents;

provided, however, that upon the occurrence of an event described in Section 8.01(f) or (g), the obligation of each Lender to make Loans and any obligation of the L/C Issuer to make L/C Credit Extensions shall automatically terminate, the unpaid principal amount of all outstanding Loans and all interest and other amounts as aforesaid shall automatically become due and payable, and the obligation of the Borrower to Cash Collateralize the L/C Obligations as aforesaid shall automatically become effective, in each case without further act of the Administrative Agent or any Lender.

**8.03 Application of Funds.** After the exercise of remedies provided for in Section 8.02 (or after the Loans have automatically become immediately due and payable and the L/C Obligations have automatically been required to be Cash Collateralized as set forth in the proviso to Section 8.02), any amounts received on account of the Obligations shall, subject to the provisions of Sections 2.16 and 2.17, be applied by the Administrative Agent in the following order:

First, to payment of that portion of the Obligations constituting fees, indemnities, expenses and other amounts (including fees, charges and disbursements of counsel to the Administrative Agent and amounts payable under Article III) payable to the Administrative Agent in its capacity as such;

Second, to payment of that portion of the Obligations constituting fees, indemnities and other amounts (other than principal, interest and Letter of Credit Fees) payable to the Lenders and the L/C Issuer (including fees, charges and disbursements of counsel to the respective Lenders and the L/C Issuer) arising under the Loan Documents and amounts payable under Article III, ratably among them in proportion to the respective amounts described in this clause Second payable to them;

Third, to payment of that portion of the Obligations constituting accrued and unpaid Letter of Credit Fees and interest on the Loans, L/C Borrowings and other Obligations arising under the Loan Documents, ratably among the Lenders and the L/C Issuer in proportion to the respective amounts described in this clause Third payable to them;

Fourth, to payment of that portion of the Obligations constituting unpaid principal of the Loans, L/C Borrowings and Obligations then owing under Secured Hedge Agreements and Secured Cash Management Agreements, ratably among the Lenders, the L/C Issuer, the Hedge Banks and the Cash Management Banks in proportion to the respective amounts described in this clause Fourth held by them;

Fifth, to the Administrative Agent for the account of the L/C Issuer, to Cash Collateralize that portion of L/C Obligations comprised of the aggregate undrawn amount of Letters of Credit to the extent not otherwise Cash Collateralized by the Borrower pursuant to Sections 2.03 and 2.16; and

Last, the balance, if any, after all of the Obligations have been indefeasibly paid in full, to the Borrower or as otherwise required by Law.

Subject to Sections 2.03(c) and 2.16, amounts used to Cash Collateralize the aggregate undrawn amount of Letters of Credit pursuant to clause Fifth above shall be applied to satisfy drawings under such Letters of Credit as they occur. If any amount remains on deposit as Cash Collateral after all Letters of Credit have either been fully drawn or expired, such remaining amount shall be applied to the other Obligations, if any, in the order set forth above.

Notwithstanding the foregoing, Obligations arising under Secured Cash Management Agreements and Secured Hedge Agreements shall be excluded from the application described above if the Administrative Agent has not received written notice thereof, together with such supporting documentation as the Administrative Agent may request, from the applicable Cash Management Bank or Hedge Bank, as the case may be. Each Cash Management Bank or Hedge Bank not a party to this Agreement that has given the notice contemplated by the preceding sentence shall, by such notice, be deemed to have acknowledged and accepted the appointment of the Administrative Agent pursuant to the terms of Article IX hereof for itself and its Affiliates as if a "Lender" party hereto.

## ARTICLE IX ADMINISTRATIVE AGENT

**9.01 Appointment and Authority.** (a) Each of the Lenders and the L/C Issuer hereby irrevocably appoints Bank of America to act on its behalf as the Administrative Agent hereunder and under the other Loan Documents and authorizes the Administrative Agent to take such actions on its behalf and to exercise such powers as are delegated to the Administrative Agent by the terms hereof or thereof, together with such actions and powers as are reasonably incidental thereto (including entering into, executing and delivering any intercreditor agreement on behalf of the Secured Parties with any of the agent, holders or lenders of Permitted Priority Debt, as contemplated under the definition of "Permitted Priority Debt"). Except as provided under Section 9.06 and 9.10, the provisions of this Article are solely for the benefit of the Administrative Agent, the Lenders and the L/C Issuer, and neither the Borrower nor any other Loan Party shall have rights as a third party beneficiary of any of such provisions. It is understood and agreed that the use of the term "agent" herein or in any other Loan Documents (or any other similar term) with reference to the Administrative Agent is not intended to connote any fiduciary or other implied (or express) obligations arising under agency doctrine of any Applicable Law. Instead such term is used as a matter of market custom, and is intended to create or reflect only an administrative relationship between contracting parties.

(b) The Administrative Agent shall also act as the "collateral agent" under the Loan Documents, and each of the Lenders (including in its capacities as a potential Hedge Bank and a potential Cash Management Bank) and the L/C Issuer hereby irrevocably appoints and authorizes the Administrative Agent to act as the agent of such Lender and the L/C Issuer for purposes of acquiring, holding and enforcing any and all Liens on Collateral granted by any of the Loan Parties to secure any of the Obligations, together with such powers and discretion as are reasonably incidental thereto. In this connection, the Administrative Agent, as "collateral agent" and any co-agents, sub-agents and attorneys-in-fact appointed by the Administrative Agent pursuant to Section 9.05 for purposes of holding or enforcing any Lien on the Collateral (or any portion thereof) granted under the Collateral Documents, or for exercising any rights and remedies thereunder at the direction of the Administrative Agent, shall be entitled to the benefits of all provisions of this Article IX and Article XI (including Section 11.04(c)), as though such co-agents, sub-agents and attorneys-in-fact were the "collateral agent" under the Loan Documents, as if set forth in full herein with respect thereto.

**9.02 Rights as a Lender.** The Person serving as the Administrative Agent hereunder shall have the same rights and powers in its capacity as a Lender as any other Lender and may exercise the same as though it were not the Administrative Agent and the term "Lender" or "Lenders" shall, unless otherwise expressly indicated or unless the context otherwise requires, include the Person serving as the Administrative Agent hereunder in its individual capacity. Such Person and its Affiliates may accept deposits from, lend money to, own securities of, act as the financial advisor or in any other advisory capacity for and generally engage in any kind of business with the Borrower or any Subsidiary or other Affiliate thereof as if such Person were not the Administrative Agent hereunder and without any duty to account therefor to the Lenders.

**9.03 Exculpatory Provisions.**

(a) The Administrative Agent shall not have any duties or obligations except those expressly set forth herein and in the other Loan Documents, and its duties hereunder shall be administrative in nature. Without limiting the generality of the foregoing, the Administrative Agent:

(i) shall not be subject to any fiduciary or other implied duties, regardless of whether a Default has occurred and is continuing;

(ii) shall not have any duty to take any discretionary action or exercise any discretionary powers, except discretionary rights and powers expressly contemplated hereby or by the other Loan Documents that the Administrative Agent is required to exercise as directed in writing by the Required Lenders (or such other number or percentage of the Lenders as shall be expressly provided for herein or in the other Loan Documents), provided that the Administrative Agent shall not be required to take any action that, in its opinion or the opinion of its counsel, may expose the Administrative Agent to liability or that is contrary to any Loan Document or Applicable Law, including for the avoidance of doubt any action that may be in violation of the automatic stay under any Debtor Relief Law or that may effect a forfeiture, modification or termination of property of a Defaulting Lender in violation of any Debtor Relief Law;

(iii) shall not have any duty or responsibility to disclose, and shall not be liable for the failure to disclose, to any Lender or the L/C Issuer, any credit or other information concerning the business, prospects, operations, property, financial and other condition or creditworthiness of any of the Loan Parties or any of their Affiliates, that is communicated to, obtained by or in the possession of, the Administrative Agent or any of their Related Parties in any capacity, except for notices, reports and other documents expressly required to be furnished to the Lenders by the Administrative Agent herein;

(iv) shall not be liable for any action taken or not taken by it (A) with the consent or at the request of the Required Lenders (or such other number or percentage of the Lenders as shall be necessary, or as the Administrative Agent shall believe in good faith shall be necessary, under the circumstances as provided in Sections 11.01 and 8.02) or (B) in the absence of its own gross negligence or willful misconduct, as determined by a court of competent jurisdiction by a final and nonappealable judgment. The Administrative Agent shall be deemed not to have knowledge of any Default unless and until notice describing such Default is given in writing to the Administrative Agent by the Borrower, a Lender or the L/C Issuer; and

(v) shall not be responsible for or have any duty to ascertain or inquire into (A) any statement, warranty or representation made in or in connection with this Agreement or any other Loan Document, (B) the contents of any certificate, report or other document delivered hereunder or thereunder or in connection herewith or therewith, (C) the performance or observance of any of the covenants, agreements or other terms or conditions set forth herein or therein or the occurrence of any Default, (D) the validity, enforceability, effectiveness or genuineness of this Agreement, any other Loan Document or any other agreement, instrument or document, or the creation, perfection or priority of any Lien purported to be created by the Collateral Documents, (D) the value or the sufficiency of any Collateral, or (E) the satisfaction of any condition set forth in Article IV or elsewhere herein, other than to confirm receipt of items expressly required to be delivered to the Administrative Agent.

**9.04 Reliance by Administrative Agent.** The Administrative Agent shall be entitled to rely upon, and shall not incur any liability for relying upon, any notice, request, certificate, consent, statement, instrument, document or other writing (including any electronic message, Internet or intranet website posting or other distribution) believed by it to be genuine and to have been signed, sent or otherwise authenticated by the proper Person. The Administrative Agent also may rely upon any statement made to it orally or by telephone and believed by it to have been made by the proper Person, and shall not incur any liability for relying thereon. In determining compliance with any condition hereunder to the making of a Loan, or the issuance, extension, renewal or increase of a Letter of Credit, that by its terms must be fulfilled to the satisfaction of a Lender or the L/C Issuer, the Administrative Agent may presume that such condition is satisfactory to such Lender or the L/C Issuer unless the Administrative Agent shall have received notice to the contrary from such Lender or the L/C Issuer prior to the making of such Loan or the issuance of such Letter of Credit. The Administrative Agent may consult with legal counsel (who may be counsel for the Borrower), independent accountants and other experts selected by it, and shall not be liable for any action taken or not taken by it in accordance with the advice of any such counsel, accountants or experts.



**9.05 Delegation of Duties.** The Administrative Agent may perform any and all of its duties and exercise its rights and powers hereunder or under any other Loan Document by or through any one or more sub-agents appointed by the Administrative Agent. The Administrative Agent and any such sub-agent may perform any and all of its duties and exercise its rights and powers by or through their respective Related Parties. The exculpatory provisions of this Article shall apply to any such sub-agent and to the Related Parties of the Administrative Agent and any such sub-agent, and shall apply to their respective activities in connection with the syndication of the credit facilities provided for herein as well as activities as Administrative Agent. The Administrative Agent shall not be responsible for the negligence or misconduct of any sub-agents except to the extent that a court of competent jurisdiction determines in a final and nonappealable judgment that the Administrative Agent acted with gross negligence or willful misconduct in the selection of such sub-agents.

**9.06 Resignation of Administrative Agent.**

(a) The Administrative Agent may at any time give notice of its resignation to the Lenders, the L/C Issuer and the Borrower. Upon receipt of any such notice of resignation, the Required Lenders shall have the right, in consultation with the Borrower, to appoint a successor, which shall be a bank with an office in the United States, or an Affiliate of any such bank with an office in the United States. If no such successor shall have been so appointed by the Required Lenders and shall have accepted such appointment within 30 days after the retiring Administrative Agent gives notice of its resignation (or such earlier day as shall be agreed by the Required Lenders) (the "Resignation Effective Date"), then the retiring Administrative Agent may (but shall not be obligated to) on behalf of the Lenders and the L/C Issuer, appoint a successor Administrative Agent meeting the qualifications set forth above; provided that in no event shall any such successor Administrative Agent be a Defaulting Lender. Whether or not a successor has been appointed, such resignation shall become effective in accordance with such notice on the Resignation Effective Date.

(b) If the Person serving as Administrative Agent is a Defaulting Lender pursuant to clause (d) of the definition thereof, the Required Lenders may, to the extent permitted by Applicable Law, by notice in writing to the Borrower and such Person remove such Person as Administrative Agent and, in consultation with the Borrower, appoint a successor. If no such successor shall have been so appointed by the Required Lenders and shall have accepted such appointment within 30 days (or such earlier day as shall be agreed by the Required Lenders) (the "Removal Effective Date"), then such removal shall nonetheless become effective in accordance with such notice on the Removal Effective Date.

(c) With effect from the Resignation Effective Date or the Removal Effective Date (as applicable) (1) the retiring Administrative Agent shall be discharged from its duties and obligations hereunder and under the other Loan Documents (except that in the case of any collateral security held by the Administrative Agent on behalf of the Lenders or the L/C Issuer under any of the Loan Documents, the retiring Administrative Agent shall continue to hold such collateral security until such time as a successor Administrative Agent is appointed) and (2) except for any indemnity payments or other amounts then owed to the retiring Administrative Agent, all payments, communications and determinations provided to be made by, to or through the Administrative Agent shall instead be made by or to each Lender and the L/C Issuer directly, until such time, if any, as the Required Lenders appoint a successor Administrative Agent as provided for above. Upon the acceptance of a successor's appointment as Administrative Agent hereunder, such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring Administrative Agent (other than as provided in Section 3.01(i) and other than any rights to indemnity payments or other amounts owed to the retiring Administrative Agent as of the Resignation Effective Date or the Removal Effective Date, as applicable), and the retiring Administrative Agent shall be discharged from all of its duties and obligations hereunder or under the other Loan Documents (if not already discharged therefrom as provided above in this Section). The fees payable by the Borrower to a successor Administrative Agent shall be the same as those payable to its predecessor unless otherwise agreed between the Borrower and such successor. After the retiring Administrative Agent's resignation or removal hereunder and under the other Loan Documents, the provisions of this Article and Section 11.04 shall continue in effect for the benefit of such retiring Administrative Agent, its sub-agents and their respective Related Parties in respect of any actions taken or omitted to be taken by any of them (i) while the retiring Administrative Agent was acting as Administrative Agent and (ii) after such resignation or removal for as long as any of them continues to act in any capacity hereunder or under the other Loan Documents, including (a) acting as collateral agent or otherwise holding any collateral security on behalf of any of the Lenders and (b) in respect of any actions taken in connection with transferring the agency to any successor Administrative Agent.

(d) Any resignation or removal by Bank of America as Administrative Agent pursuant to this Section shall also constitute its resignation as L/C Issuer and Swing Line Lender. If Bank of America resigns as an L/C Issuer, it shall retain all the rights, powers, privileges and duties of the L/C Issuer hereunder with respect to all Letters of Credit outstanding as of the effective date of its resignation as L/C Issuer and all L/C Obligations with respect thereto, including the right to require the Lenders to make Base Rate Loans or fund risk participations in Unreimbursed Amounts pursuant to Section 2.03(c). If Bank of America resigns as Swing Line Lender, it shall retain all the rights of the Swing Line Lender provided for hereunder with respect to Swing Line Loans made by it and outstanding as of the effective date of such resignation, including the right to require the Lenders to make Base Rate Loans or fund risk participations in outstanding Swing Line Loans pursuant to Section 2.04(c). Upon the appointment by the Borrower of a successor L/C Issuer or Swing Line Lender hereunder (which successor shall in all cases be a Lender other than a Defaulting Lender), (a) such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring L/C Issuer or Swing Line Lender, as applicable, (b) the retiring L/C Issuer and Swing Line Lender shall be discharged from all of their respective duties and obligations hereunder or under the other Loan Documents, and (c) the successor L/C Issuer shall issue letters of credit in substitution for the Letters of Credit, if any, outstanding at the time of such succession or make other arrangements reasonably satisfactory to Bank of America to effectively assume the obligations of Bank of America with respect to such Letters of Credit.

**9.07 Non-Reliance on the Administrative Agent and the Other Lenders.** Each Lender and the L/C Issuer expressly acknowledges that the Administrative Agent has not made any representation or warranty to it, and that no act by the Administrative Agent hereafter taken, including any consent to, and acceptance of any assignment or review of the affairs of any Loan Party or any Affiliate thereof, shall be deemed to constitute any representation or warranty by the Administrative Agent to any Lender or the L/C Issuer as to any matter, including whether the Administrative Agent has disclosed material information in its (or its Related Parties') possession. Each Lender and the L/C Issuer represents to the Administrative Agent that it has, independently and without reliance upon the Administrative Agent, any other Lender or any of their Related Parties and based on such documents and information as it has deemed appropriate, made its own credit analysis of, appraisal of, and investigation into, the business, prospects, operations, property, financial and other condition and creditworthiness of the Loan Parties and their Subsidiaries, and all applicable bank or other regulatory Laws relating to the transactions contemplated hereby, and made its own decision to enter into this Agreement and to extend credit to the Borrower hereunder. Each Lender and the L/C Issuer also acknowledges that it will, independently and without reliance upon the Administrative Agent, any other Lender or any of their Related Parties and based on such documents and information as it shall from time to time deem appropriate, continue to make its own credit analysis, appraisals and decisions in taking or not taking action under or based upon this Agreement, any other Loan Document or any related agreement or any document furnished hereunder or thereunder, and to make such investigations as it deems necessary to inform itself as to the business, prospects, operations, property, financial and other condition and creditworthiness of the Loan Parties. Each Lender and the L/C Issuer represents and warrants that (i) the Loan Documents set forth the terms of a commercial lending facility and (ii) it is engaged in making, acquiring or holding commercial loans in the ordinary course and is entering into this Agreement as a Lender or L/C Issuer for the purpose of making, acquiring or holding commercial loans and providing other facilities set forth herein as may be applicable to such Lender or L/C Issuer, and not for the purpose of purchasing, acquiring or holding any other type of financial instrument, and each Lender and the L/C Issuer agrees not to assert a claim in contravention of the foregoing. Each Lender and the L/C Issuer represents and warrants that it is sophisticated with respect to decisions to make, acquire and/or hold commercial loans and to provide other facilities set forth herein, as may be applicable to such Lender or such L/C Issuer, and either it, or the Person exercising discretion in making its decision to make, acquire and/or hold such commercial loans or to provide such other facilities, is experienced in making, acquiring or holding such commercial loans or providing such other facilities.

**9.08 [Reserved].**

**9.09 Administrative Agent May File Proofs of Claim; Credit Bidding.** In case of the pendency of any proceeding under any Debtor Relief Law or any other judicial proceeding relative to any Loan Party, the Administrative Agent (irrespective of whether the principal of any Loan or L/C Obligation shall then be due and payable as herein expressed or by declaration or otherwise and irrespective of whether the Administrative Agent shall have made any demand on the Borrower) shall be entitled and empowered, by intervention in such proceeding or otherwise:

(a) to file and prove a claim for the whole amount of the principal and interest owing and unpaid in respect of the Loans, L/C Obligations and all other Obligations that are owing and unpaid and to file such other documents as may be necessary or advisable in order to have the claims of the Lenders, the L/C Issuer and the Administrative Agent (including any claim for the reasonable compensation, expenses, disbursements and advances of the Lenders, the L/C Issuer and the Administrative Agent and their respective agents and counsel and all other amounts due the Lenders, the L/C Issuer and the Administrative Agent under Sections 2.03(h) and (i), 2.09 and 11.04) allowed in such judicial proceeding; and

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

and any custodian, receiver, assignee, trustee, liquidator, sequesteror or other similar official in any such judicial proceeding is hereby authorized by each Lender and the L/C Issuer to make such payments to the Administrative Agent and, if the Administrative Agent shall consent to the making of such payments directly to the Lenders and the L/C Issuer, to pay to the Administrative Agent any amount due for the reasonable compensation, expenses, disbursements and advances of the Administrative Agent and its agents and counsel, and any other amounts due the Administrative Agent under Sections 2.09 and 11.04.

Nothing contained herein shall be deemed to authorize the Administrative Agent to authorize or consent to or accept or adopt on behalf of any Lender or the L/C Issuer any plan of reorganization, arrangement, adjustment or composition affecting the Obligations or the rights of any Lender or the L/C Issuer to authorize the Administrative Agent to vote in respect of the claim of any Lender or the L/C Issuer in any such proceeding.

The Secured Parties hereby irrevocably authorize the Administrative Agent, at the direction of the Required Lenders, to credit bid all or any portion of the Obligations (including accepting some or all of the Collateral in satisfaction of some or all of the Obligations pursuant to a deed in lieu of foreclosure or otherwise) and in such manner purchase (either directly or through one or more acquisition vehicles) all or any portion of the Collateral (a) at any sale thereof conducted under the provisions of the Bankruptcy Code of the United States, including under Sections 363, 1123 or 1129 of the Bankruptcy Code of the United States, or any similar Laws in any other jurisdictions to which a Loan Party is subject, (b) at any other sale or foreclosure or acceptance of collateral in lieu of debt conducted by (or with the consent or at the direction of) the Administrative Agent (whether by judicial action or otherwise) in accordance with any Applicable Law. In connection with any such credit bid and purchase, the Obligations owed to the Secured Parties shall be entitled to be, and shall be, credit bid on a ratable basis (with Obligations with respect to contingent or unliquidated claims receiving contingent interests in the acquired assets on a ratable basis that would vest upon the liquidation of such claims in an amount proportional to the liquidated portion of the contingent claim amount used in allocating the contingent interests) in the asset or assets so purchased (or in the Equity Interests or debt instruments of the acquisition vehicle or vehicles that are used to consummate such purchase). In connection with any such bid (i) the Administrative Agent shall be authorized to form one or more acquisition vehicles to make a bid, (ii) to adopt documents providing for the governance of the acquisition vehicle or vehicles (provided that any actions by the Administrative Agent with respect to such acquisition vehicle or vehicles, including any disposition of the assets or Equity Interests thereof shall be governed, directly or indirectly, by the vote of the Required Lenders, irrespective of the termination of this Agreement and without giving effect to the limitations on actions by the Required Lenders contained in clauses (a) through (j) of Section 11.01 of this Agreement, and (iii) to the extent that Obligations that are assigned to an acquisition vehicle are not used to acquire Collateral for any reason (as a result of another bid being higher or better, because the amount of Obligations assigned to the acquisition vehicle exceeds the amount of debt credit bid by the acquisition vehicle or otherwise), such Obligations shall automatically be reassigned to the Lenders pro rata and the Equity Interests and/or debt instruments issued by any acquisition vehicle on account of the Obligations that had been assigned to the acquisition vehicle shall automatically be cancelled, without the need for any Secured Party or any acquisition vehicle to take any further action.

**9.10 Collateral and Guaranty Matters.** Without limiting the provisions of Section 9.09, each of the Lenders (including in its capacities as a potential Hedge Bank and a potential Cash Management Bank) and the L/C Issuer irrevocably authorize the Administrative Agent, at its option and in its discretion:

(a) to release any Lien on any property granted to or held by the Administrative Agent under any Loan Document (i) upon termination of the Aggregate Commitments and payment in full of all Obligations (other than (A) contingent indemnification obligations and (B) obligations and liabilities under Secured Cash Management Agreements and Secured Hedge Agreements as to which arrangements satisfactory to the applicable Cash Management Bank or Hedge Bank shall have been made) and the expiration or termination of all Letters of Credit (other than Letters of Credit as to which other arrangements satisfactory to the Administrative Agent and the L/C Issuer shall have been made), (ii) that is sold or otherwise disposed of or to be sold or otherwise disposed of as part of or in connection with any sale or other disposition permitted hereunder or under any other Loan Document to a Person that is not a Loan Party, (iii) that constitutes "Excluded Property" (as such term is defined in the Security Agreement), or (iv) if approved, authorized or ratified in writing in accordance with Section 11.01;

(b) to release any Guarantor from its obligations under the Guaranty if such Person ceases to be a Subsidiary as a result of a transaction permitted under the Loan Documents; and

(c) to subordinate any Lien on any property granted to or held by the Administrative Agent under any Loan Document to the holder of any Lien on such property that is permitted by Section 7.01(i).

Upon request by the Administrative Agent at any time, the Required Lenders will confirm in writing the Administrative Agent's authority to release or subordinate its interest in particular types or items of property, or to release any Guarantor from its obligations under the Guaranty pursuant to this Section 9.10. In each case as specified in this Section 9.10, the Administrative Agent will, at the Borrower's expense, execute and deliver to the applicable Loan Party such documents as such Loan Party may reasonably request to evidence the release of such item of Collateral from the assignment and security interest granted under the Collateral Documents or to subordinate its interest in such item, or to release such Guarantor from its obligations under the Guaranty, in each case in accordance with the terms of the Loan Documents and this Section 9.10.

The Administrative Agent shall not be responsible for or have a duty to ascertain or inquire into any representation or warranty regarding the existence, value or collectability of the Collateral, the existence, priority or perfection of the Administrative Agent's Lien thereon, or any certificate prepared by any Loan Party in connection therewith, nor shall the Administrative Agent be responsible or liable to the Lenders for any failure to monitor or maintain any portion of the Collateral.

**9.11 Secured Cash Management Agreements and Secured Hedge Agreements.** Except as otherwise expressly set forth herein or in any Guaranty or any Collateral Document, no Cash Management Bank or Hedge Bank that obtains the benefits of Section 8.03, any Guaranty or any Collateral by virtue of the provisions hereof or of any Guaranty or any Collateral Document shall have any right to notice of any action or to consent to, direct or object to any action hereunder or under any other Loan Document or otherwise in respect of the Collateral (including the release or impairment of any Collateral) other than in its capacity as a Lender and, in such case, only to the extent expressly provided in the Loan Documents. Notwithstanding any other provision of this Article IX to the contrary, the Administrative Agent shall not be required to verify the payment of, or that other satisfactory arrangements have been made with respect to, Obligations arising under Secured Cash Management Agreements and Secured Hedge Agreements unless the Administrative Agent has received written notice of such Obligations, together with such supporting documentation as the Administrative Agent may reasonably request, from the applicable Cash Management Bank or Hedge Bank, as the case may be.

#### **9.12 Certain ERISA Matters.**

(a) Each Lender (x) represents and warrants, as of the date such Person became a Lender party hereto, to, and (y) covenants, from the date such Person became a Lender party hereto to the date such Person ceases being a Lender party hereto, for the benefit of, the Administrative Agent and not, for the avoidance of doubt, to or for the benefit of the Borrower or any other Loan Party, that at least one of the following is and will be true:

(i) such Lender is not using “plan assets” (within the meaning of Section 3(42) of ERISA or otherwise) of one or more Benefit Plans with respect to such Lender’s entrance into, participation in, administration of and performance of the Loans, the Letters of Credit, the Commitments or this Agreement;

(ii) the transaction exemption set forth in one or more PTEs, such as PTE 84-14 (a class exemption for certain transactions determined by independent qualified professional asset managers), PTE 95-60 (a class exemption for certain transactions involving insurance company general accounts), PTE 90-1 (a class exemption for certain transactions involving insurance company pooled separate accounts), PTE 91-38 (a class exemption for certain transactions involving bank collective investment funds) or PTE 96-23 (a class exemption for certain transactions determined by in-house asset managers), is applicable with respect to such Lender’s entrance into, participation in, administration of and performance of the Loans, the Letters of Credit, the Commitments and this Agreement;

(iii) (A) such Lender is an investment fund managed by a “Qualified Professional Asset Manager” (within the meaning of Part VI of PTE 84-14), (B) such Qualified Professional Asset Manager made the investment decision on behalf of such Lender to enter into, participate in, administer and perform the Loans, the Letters of Credit, the Commitments and this Agreement, (C) the entrance into, participation in, administration of and performance of the Loans, the Letters of Credit, the Commitments and this Agreement satisfies the requirements of sub-sections (b) through (g) of Part I of PTE 84-14 and (D) to the best knowledge of such Lender, the requirements of subsection (a) of Part I of PTE 84-14 are satisfied with respect to such Lender’s entrance into, participation in, administration of and performance of the Loans, the Letters of Credit, the Commitments and this Agreement; or

(iv) such other representation, warranty and covenant as may be agreed in writing between the Administrative Agent, in its sole discretion, and such Lender.

(b) In addition, unless either (1) clause (i) in the immediately preceding subsection (a) is true with respect to a Lender or (2) a Lender has provided another representation, warranty and covenant in accordance with clause (iv) in the immediately preceding subsection (a), such Lender further (x) represents and warrants, as of the date such Person became a Lender party hereto, to, and (y) covenants, from the date such Person became a Lender party hereto to the date such Person ceases being a Lender party hereto, for the benefit of, the Administrative Agent and not, for the avoidance of doubt, to or for the benefit of the Borrower or any other Loan Party, that the Administrative Agent is not a fiduciary with respect to the assets of such Lender involved in such Lender’s entrance into, participation in, administration of and performance of the Loans, the Letters of Credit, the Commitments and this Agreement (including in connection with the reservation or exercise of any rights by the Administrative Agent under this Agreement, any Loan Document or any documents related hereto or thereto).

**9.13 Recovery of Erroneous Payments.** Without limitation of any other provision in this Agreement, if at any time the Administrative Agent makes a payment hereunder in error to any Lender Recipient Party, whether or not in respect of an Obligation due and owing by the Borrower at such time, where such payment is a Rescindable Amount, then in any such event, each Lender Recipient Party receiving a Rescindable Amount severally agrees to repay to the Administrative Agent forthwith on demand the Rescindable Amount received by such Lender Recipient Party in immediately available funds in the currency so received, with interest thereon, for each day from and including the date such Rescindable Amount is received by it to but excluding the date of payment to the Administrative Agent, at the greater of the Federal Funds Rate and a rate determined by the Administrative Agent in accordance with banking industry rules on interbank compensation. Each Lender Recipient Party irrevocably waives any and all defenses, including any “discharge for value” (under which a creditor might otherwise claim a right to retain funds mistakenly paid by a third party in respect of a debt owed by another) or similar defense to its obligation to return any Rescindable Amount. The Administrative Agent shall inform each Lender Recipient Party promptly upon determining that any payment made to such Lender Recipient Party comprised, in whole or in part, a Rescindable Amount.

**ARTICLE X**  
**CONTINUING GUARANTY**

**10.01 Guaranty.** Each Guarantor hereby absolutely and unconditionally guarantees, as a guaranty of payment and performance and not merely as a guaranty of collection, prompt payment when due, whether at stated maturity, by required prepayment, upon acceleration, demand or otherwise, and at all times thereafter, of any and all of the Obligations, whether for principal, interest, premiums, fees, indemnities, damages, costs, expenses or otherwise, of the Borrower to the Secured Parties, and whether arising hereunder or under any other Loan Document, any Secured Cash Management Agreement or any Secured Hedge Agreement (including all renewals, extensions, amendments, refinancings and other modifications thereof and all costs, attorneys' fees and expenses incurred by the Secured Parties in connection with the collection or enforcement thereof). Without limiting the generality of the foregoing, the Obligations shall include any such indebtedness, obligations, and liabilities, or portion thereof, which may be or hereafter become unenforceable or compromised or shall be an allowed or disallowed claim under any proceeding or case commenced by or against any Guarantor or the Borrower under any Debtor Relief Laws. The Administrative Agent's books and records showing the amount of the Obligations shall be admissible in evidence in any action or proceeding, and shall be binding upon Guarantors, and conclusive for the purpose of establishing the amount of the Obligations. This Guaranty shall not be affected by the genuineness, validity, regularity or enforceability of the Obligations or any instrument or agreement evidencing any Obligations, or by the existence, validity, enforceability, perfection, non-perfection or extent of any collateral therefor, or by any fact or circumstance relating to the Obligations which might otherwise constitute a defense (other than payment in full of the Obligations (other than contingent indemnification obligations for which no claims have been made)) to the obligations of any Guarantor under this Guaranty, and each Guarantor hereby irrevocably waives any defenses it may now have or hereafter acquire in any way relating to any or all of the foregoing.

**10.02 Rights of Lenders.** Each Guarantor consents and agrees that the Secured Parties may, at any time and from time to time, without notice or demand, and without affecting the enforceability or continuing effectiveness hereof: (a) amend, extend, renew, compromise, discharge, accelerate or otherwise change the time for payment or the terms of the Obligations or any part thereof; (b) take, hold, exchange, enforce, waive, release, fail to perfect, sell, or otherwise dispose of any security for the payment of this Guaranty or any Obligations; (c) apply such security and direct the order or manner of sale thereof as the Administrative Agent, the L/C Issuer and the Lenders in their sole discretion may determine; and (d) release or substitute one or more of any endorsers or other guarantors of any of the Obligations. Without limiting the generality of the foregoing, each Guarantor consents to the taking of, or failure to take, any action which might in any manner or to any extent vary the risks of any Guarantor under this Guaranty or which, but for this provision, might operate as a discharge of any Guarantor.

**10.03 Certain Waivers.** Each Guarantor waives (a) any defense arising by reason of any disability or other defense of the Borrower or any other guarantor, or the cessation from any cause whatsoever (including any act or omission of any Secured Party) of the liability of the Borrower; (b) any defense based on any claim that Guarantors' obligations exceed or are more burdensome than those of the Borrower; (c) the benefit of any statute of limitations affecting any Guarantor's liability hereunder; (d) any right to proceed against the Borrower, proceed against or exhaust any security for the Obligations, or pursue any other remedy in the power of any Secured Party whatsoever; (e) any benefit of and any right to participate in any security now or hereafter held by any Secured Party; and (f) to the fullest extent permitted by law, any and all other defenses or benefits that may be derived from or afforded by Applicable Law limiting the liability of or exonerating guarantors or sureties (other than payment in full of the Obligations (other than contingent indemnification obligations for which no claims have been made)). Each Guarantor expressly waives all setoffs and counterclaims and all presentments, demands for payment or performance, notices of nonpayment or nonperformance, protests, notices of protest, notices of dishonor and all other notices or demands of any kind or nature whatsoever with respect to the Obligations, and all notices of acceptance of this Guaranty or of the existence, creation or incurrence of new or additional Obligations.

**10.04 Obligations Independent.** The obligations of each Guarantor hereunder are those of primary obligor, and not merely as surety, and are independent of the Obligations and the obligations of any other guarantor, and a separate action may be brought against any Guarantor to enforce this Guaranty whether or not the Borrower or any other person or entity is joined as a party.

**10.05 Subrogation.** No Guarantor shall exercise any right of subrogation, contribution, indemnity, reimbursement or similar rights with respect to any payments it makes under this Guaranty until all of the Obligations and any amounts payable under this Guaranty have been indefeasibly paid and performed in full and the Commitments and the Revolving Credit Facility is terminated. If any amounts are paid to any Guarantor in violation of the foregoing limitation, then such amounts shall be held in trust for the benefit of the Secured Parties and shall forthwith be paid to the Secured Parties to reduce the amount of the Obligations, whether matured or unmatured.

**10.06 Termination; Reinstatement.** This Guaranty is a continuing and irrevocable guaranty of all Obligations now or hereafter existing and shall remain in full force and effect until all Obligations and any other amounts payable under this Guaranty (other than contingent indemnification obligations for which no claims have been made) are indefeasibly paid in full in cash and the Commitments and the Revolving Credit Facility with respect to the Obligations are terminated. Notwithstanding the foregoing, this Guaranty shall continue in full force and effect or be revived, as the case may be, if any payment by or on behalf of the Borrower or any Guarantor is made, or any of the Secured Parties exercises its right of setoff, in respect of the Obligations and such payment or the proceeds of such setoff or any part thereof is subsequently invalidated, declared to be fraudulent or preferential, set aside or required (including pursuant to any settlement entered into by any of the Secured Parties in their discretion) to be repaid to a trustee, receiver or any other party, in connection with any proceeding under any Debtor Relief Laws or otherwise, all as if such payment had not been made or such setoff had not occurred and whether or not the Secured Parties are in possession of or have released this Guaranty and regardless of any prior revocation, rescission, termination or reduction. The obligations of Guarantors under this Section shall survive termination of this Guaranty.

**10.07 Subordination.** Each Guarantor hereby subordinates the payment of all obligations and indebtedness of the Borrower owing to such Guarantor, whether now existing or hereafter arising, including but not limited to any obligation of the Borrower to any Guarantor as subrogee of the Secured Parties or resulting from such Guarantor's performance under this Guaranty, to the indefeasible payment in full in cash of all Obligations. If the Secured Parties so request, any such obligation or indebtedness of the Borrower to such Guarantor shall be enforced and performance received by such Guarantor as trustee for the Secured Parties and the proceeds thereof shall be paid over to the Secured Parties on account of the Obligations, but without reducing or affecting in any manner the liability of such Guarantor under this Guaranty.

**10.08 Stay of Acceleration.** If acceleration of the time for payment of any of the Obligations is stayed, in connection with any case commenced by or against any Guarantor or the Borrower under any Debtor Relief Laws, or otherwise, all such amounts shall nonetheless be payable by Guarantors immediately upon demand by the Secured Parties.

**10.09 Condition of Borrower.** Each Guarantor acknowledges and agrees that it has the sole responsibility for, and has adequate means of, obtaining from the Borrower and any other guarantor such information concerning the financial condition, business and operations of the Borrower and any such other guarantor as such Guarantor requires, and that none of the Secured Parties has any duty, and such Guarantor is not relying on the Secured Parties at any time, to disclose to any Guarantor any information relating to the business, operations or financial condition of the Borrower or any other guarantor (such Guarantor waiving any duty on the part of the Secured Parties to disclose such information and any defense relating to the failure to provide the same).



**10.10 Limitation on Guaranty.** Notwithstanding any provision to the contrary contained herein, to the extent the obligations of a Guarantor shall be adjudicated to be invalid or unenforceable for any reason (including, without limitation, because of any Applicable Law relating to fraudulent conveyances or transfers) then the obligations of such Guarantor hereunder shall be limited to the maximum amount that is permissible under Applicable Law (as now or hereinafter in effect).

**10.11 Keepwell.** The Borrower at the time the Guaranty or the grant of the security interest hereunder, in each case, by any Specified Loan Party, becomes effective with respect to any Swap Obligation, hereby jointly and severally, absolutely, unconditionally and irrevocably undertakes to provide such funds or other support to each Specified Loan Party with respect to such Swap Obligation as may be needed by such Specified Loan Party from time to time to honor all of its obligations under this Guaranty and the other Loan Documents in respect of such Swap Obligation (but, in each case, only up to the maximum amount of such liability that can be hereby incurred without rendering the Borrower's obligations and undertakings under this Article X voidable under Applicable Law relating to fraudulent conveyance or fraudulent transfer, and not for any greater amount). The obligations and undertakings of the Borrower under this Section shall remain in full force and effect until the Obligations have been indefeasibly paid and performed in full. The Borrower intends this Section to constitute, and this Section shall be deemed to constitute, a guarantee of the obligations of, and a "keepwell, support, or other agreement" for the benefit of, each Specified Loan Party for all purposes of the Commodity Exchange Act.

#### ARTICLE XI MISCELLANEOUS

**11.01 Amendments, Etc.** Subject to Section 3.03 and the last paragraph of this Section 11.01, no amendment or waiver of any provision of this Agreement or any other Loan Document, and no consent to any departure by the Borrower or any other Loan Party therefrom, shall be effective unless in writing signed by the Required Lenders and the Borrower or the applicable Loan Party, as the case may be, and acknowledged by the Administrative Agent, and each such waiver or consent shall be effective only in the specific instance and for the specific purpose for which given; provided, however, that no such amendment, waiver or consent shall:

- (a) waive any condition set forth in Section 4.01 (other than Section 4.01(b)(i) or (c)), or, in the case of the initial Credit Extension, Section 4.02, without the written consent of each Lender;
- (b) extend or increase the Commitment of any Lender (or reinstate any Commitment terminated pursuant to Section 8.02) without the written consent of such Lender;
- (c) postpone any date fixed by this Agreement or any other Loan Document for any payment of principal, interest, fees or other amounts due to the Lenders (or any of them) hereunder or under such other Loan Document without the written consent of each Lender entitled to such payment;
- (d) reduce the principal of, or the rate of interest specified herein on, any Loan or L/C Borrowing, or (subject to clause (iv) of the second proviso to this Section 11.01) any fees or other amounts payable hereunder or under any other Loan Document, or change the manner of computation of any financial ratio (including any change in any applicable defined term) used in determining the Applicable Rate that would result in a reduction of any interest rate on any Loan or any fee payable hereunder without the written consent of each Lender entitled to such amount; provided, however, that only the consent of the Required Lenders shall be necessary to amend the definition of "Default Rate" or to waive any obligation of the Borrower to pay interest or Letter of Credit Fees at the Default Rate;
- (e) without the prior written consent of each Lender directly affected thereby, modify (i) Section 8.03 or (ii) the order of application of any reduction in the Commitments or any prepayment of Loans from the application thereof set forth in the applicable provisions of Section 2.05(b) or 2.06(b), respectively;

(f) change any provision of this Section 11.01 or the definition of “Required Lenders” or any other provision hereof specifying the number or percentage of Lenders required to amend, waive or otherwise modify any rights hereunder or make any determination or grant any consent hereunder (other than the definitions specified in clause (ii) of this Section 11.01(f)), without the written consent of each Lender;

(g) release all or substantially all of the Collateral in any transaction or series of related transactions, without the written consent of each Lender;

(h) release all or substantially all of the value of the Guaranty, without the written consent of each Lender, except to the extent the release of any Subsidiary from the Guaranty is permitted pursuant to Section 9.10 (in which case such release may be made by the Administrative Agent acting alone);

(i) without the prior written consent of each Lender directly affected thereby, subordinate, or have the effect of subordinating, the Obligations hereunder to any other Indebtedness or other obligation (other than Permitted Priority Indebtedness incurred in accordance with Section 7.02 hereof); or

(j) impose any greater restriction on the ability of any Lender to assign any of its rights or obligations hereunder without the written consent of the Required Lenders;

and provided, further, that (i) no amendment, waiver or consent shall, unless in writing and signed by the L/C Issuer in addition to the Lenders required above, affect the rights or duties of the L/C Issuer under this Agreement or any Issuer Document relating to any Letter of Credit issued or to be issued by it; (ii) no amendment, waiver or consent shall, unless in writing and signed by the Swing Line Lender in addition to the Lenders required above, affect the rights or duties of the Swing Line Lender under this Agreement; (iii) no amendment, waiver or consent shall, unless in writing and signed by the Administrative Agent in addition to the Lenders required above, affect the rights or duties of the Administrative Agent under this Agreement or any other Loan Document; and (iv) the Fee Letter may be amended, or rights or privileges thereunder waived, in a writing executed only by the parties thereto. Notwithstanding anything to the contrary herein, no Defaulting Lender shall have any right to approve or disapprove any amendment, waiver or consent hereunder (and any amendment, waiver or consent which by its terms requires the consent of all Lenders or each affected Lender may be effected with the consent of the applicable Lenders other than Defaulting Lenders), except that (x) the Commitment of any Defaulting Lender may not be increased or extended and the maturity date of any of its Loans may not be extended, the rate of interest on any of its Loans may not be reduced and the principal amount of any of its Loans may not be forgiven, in each case without the consent of such Defaulting Lender and (y) any waiver, amendment, consent or modification requiring the consent of all Lenders or each affected Lender that by its terms affects any Defaulting Lender more adversely relative to other affected Lenders shall require the consent of such Defaulting Lender.

Notwithstanding any provision herein to the contrary, if the Administrative Agent and the Borrower acting together identify any ambiguity, omission, mistake, typographical error or other defect in any provision of this Agreement or any other Loan Document (including the schedules and exhibits thereto) or determine that any amendments, modifications or supplements are necessary to this Agreement or to any other Loan Document (including the schedules and exhibits thereto) in connection with the incurrence by the Borrower of Permitted Priority Debt, then the Administrative Agent and the Borrower shall be permitted to amend, modify or supplement such provision to cure such ambiguity, omission, mistake, typographical error or other defect or to amend, modify or supplement this Agreement or any other Loan Document (including the schedules and exhibits thereto) as necessary in connection with the incurrence by the Borrower of such Permitted Priority Debt, and such amendment shall become effective without any further action or consent of any other party to this Agreement.

**11.02 Notices; Effectiveness; Electronic Communications.** (a) Notices Generally. Except in the case of notices and other communications expressly permitted to be given by telephone (and except as provided in subsection (b) below), all notices and other communications provided for herein shall be in writing and shall be delivered by hand or overnight courier service, mailed by certified or registered mail or sent by facsimile or electronic mail as follows, and all notices and other communications expressly permitted hereunder to be given by telephone shall be made to the applicable telephone number, as follows:

(i) if to the Borrower, any Guarantor, the Administrative Agent, the L/C Issuer or the Swing Line Lender, to the address, facsimile number, electronic mail address or telephone number specified for such Person on Schedule 11.02(a); and

(ii) if to any other Lender, to the address, facsimile number, electronic mail address or telephone number specified in its Administrative Questionnaire (including, as appropriate, notices delivered solely to the Person designated by a Lender on its Administrative Questionnaire then in effect for the delivery of notices that may contain material non-public information relating to the Borrower).

Notices and other communications sent by hand or overnight courier service, or mailed by certified or registered mail, shall be deemed to have been given when received; notices and other communications sent by facsimile shall be deemed to have been given when sent (except that, if not given during normal business hours for the recipient, shall be deemed to have been given at the opening of business on the next Business Day for the recipient). Notices and other communications delivered through electronic communications to the extent provided in subsection (b) below shall be effective as provided in such subsection (b).

(b) Electronic Communications. Notices and other communications to the Lenders and the L/C Issuer hereunder may be delivered or furnished by electronic communication (including e-mail, FpML messaging, and Internet or intranet websites) pursuant to procedures approved by the Administrative Agent, provided that the foregoing shall not apply to notices to any Lender or the L/C Issuer pursuant to Article II if such Lender or the L/C Issuer, as applicable, has notified the Administrative Agent that it is incapable of receiving notices under such Article by electronic communication. The Administrative Agent, the Swing Line Lender, the L/C Issuer or the Borrower may each, in its discretion, agree to accept notices and other communications to it hereunder by electronic communications pursuant to procedures approved by it, provided that approval of such procedures may be limited to particular notices or communications.

Unless the Administrative Agent otherwise prescribes, (i) notices and other communications sent to an e-mail address shall be deemed received upon the sender's receipt of an acknowledgement from the intended recipient (such as by the "return receipt requested" function, as available, return e-mail or other written acknowledgement), and (ii) notices or communications posted to an Internet or intranet website shall be deemed received upon the deemed receipt by the intended recipient at its e-mail address as described in the foregoing clause (i) of notification that such notice or communication is available and identifying the website address therefor; provided that, for both clauses (i) and (ii), if such notice, email or other communication is not sent during the normal business hours of the recipient, such notice, email or communication shall be deemed to have been sent at the opening of business on the next business day for the recipient.

(c) The Platform. THE PLATFORM IS PROVIDED "AS IS" AND "AS AVAILABLE." THE AGENT PARTIES (AS DEFINED BELOW) DO NOT WARRANT THE ACCURACY OR COMPLETENESS OF THE BORROWER MATERIALS OR THE ADEQUACY OF THE PLATFORM, AND EXPRESSLY DISCLAIM LIABILITY FOR ERRORS IN OR OMISSIONS FROM THE BORROWER MATERIALS. NO WARRANTY OF ANY KIND, EXPRESS, IMPLIED OR STATUTORY, INCLUDING ANY WARRANTY OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT OF THIRD PARTY RIGHTS OR FREEDOM FROM VIRUSES OR OTHER CODE DEFECTS, IS MADE BY ANY AGENT PARTY IN CONNECTION WITH THE BORROWER MATERIALS OR THE PLATFORM. In no event shall the Administrative Agent or any of its Related Parties (collectively, the "Agent Parties") have any liability to the Borrower, any Lender, the L/C Issuer or any other Person for losses, claims, damages, liabilities or expenses of any kind (whether in tort, contract or otherwise) arising out of the Borrower's, any Loan Party's or the Administrative Agent's transmission of Borrower Materials or notices through the Platform, any other electronic platform or electronic messaging service, or through the Internet.

(d) Change of Address, Etc. Each of the Borrower, the Administrative Agent, the L/C Issuer and the Swing Line Lender may change its address, facsimile or telephone number for notices and other communications hereunder by notice to the other parties hereto. Each other Lender may change its address, facsimile or telephone number for notices and other communications hereunder by notice to the Borrower, the Administrative Agent, the L/C Issuer and the Swing Line Lender. In addition, each Lender agrees to notify the Administrative Agent from time to time to ensure that the Administrative Agent has on record (i) an effective address, contact name, telephone number, facsimile number and electronic mail address to which notices and other communications may be sent and (ii) accurate wire instructions for such Lender. Furthermore, each Public Lender agrees to cause at least one individual at or on behalf of such Public Lender to at all times have selected the "Private Side Information" or similar designation on the content declaration screen of the Platform in order to enable such Public Lender or its delegate, in accordance with such Public Lender's compliance procedures and Applicable Law, including United States federal and state securities Laws, to make reference to Borrower Materials that are not made available through the "Public Side Information" portion of the Platform and that may contain material non-public information with respect to the Borrower or its securities for purposes of United States federal or state securities laws.

(e) Reliance by Administrative Agent, L/C Issuer and Lenders. The Administrative Agent, the L/C Issuer and the Lenders shall be entitled to rely and act upon any notices (including telephonic notices, Committed Loan Notices, Letter of Credit Applications and Swing Line Loan Notices) purportedly given by or on behalf of the Borrower even if (i) such notices were not made in a manner specified herein, were incomplete or were not preceded or followed by any other form of notice specified herein, or (ii) the terms thereof, as understood by the recipient, varied from any confirmation thereof. The Borrower shall indemnify the Administrative Agent, the L/C Issuer, each Lender and the Related Parties of each of them from all losses, costs, expenses and liabilities resulting from the reliance by such Person on each notice purportedly given by or on behalf of the Borrower; provided that such indemnity shall not be available to the extent that such losses, costs, expenses or liabilities are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross negligence or willful misconduct of such Person. All telephonic notices to and other telephonic communications with the Administrative Agent may be recorded by the Administrative Agent, and each of the parties hereto hereby consents to such recording.

(f) ERISA Plans. In the event that, following the Closing Date, the Borrower or any ERISA Affiliate maintains or contributes to a Pension Plan or Multiemployer Plan not listed in Schedule 11.02(f), notice will be provided in accordance with Section 11.02(a) as soon as practicable.

**11.03 No Waiver; Cumulative Remedies; Enforcement.** No failure by any Lender, the L/C Issuer or the Administrative Agent to exercise, and no delay by any such Person in exercising, any right, remedy, power or privilege hereunder or under any other Loan Document shall operate as a waiver thereof; nor shall any single or partial exercise of any right, remedy, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, remedy, power or privilege. The rights, remedies, powers and privileges herein provided, and provided under each other Loan Document, are cumulative and not exclusive of any rights, remedies, powers and privileges provided by law.

Notwithstanding anything to the contrary contained herein or in any other Loan Document, the authority to enforce rights and remedies hereunder and under the other Loan Documents against the Loan Parties or any of them shall be vested exclusively in, and all actions and proceedings at law in connection with such enforcement shall be instituted and maintained exclusively by, the Administrative Agent in accordance with Section 8.02 for the benefit of all the Lenders and the L/C Issuer; provided, however, that the foregoing shall not prohibit (a) the Administrative Agent from exercising on its own behalf the rights and remedies that inure to its benefit (solely in its capacity as Administrative Agent) hereunder and under the other Loan Documents, (b) the L/C Issuer or the Swing Line Lender from exercising the rights and remedies that inure to its benefit (solely in its capacity as L/C Issuer or Swing Line Lender, as the case may be) hereunder and under the other Loan Documents, (c) any Lender from exercising setoff rights in accordance with Section 11.08 (subject to the terms of Section 2.13), or (d) any Lender from filing proofs of claim or appearing and filing pleadings on its own behalf during the pendency of a proceeding relative to any Loan Party under any Debtor Relief Law; and provided, further, that if at any time there is no Person acting as Administrative Agent hereunder and under the other Loan Documents, then (i) the Required Lenders shall have the

rights otherwise ascribed to the Administrative Agent pursuant to Section 8.02 and (ii) in addition to the matters set forth in clauses (b), (c) and (d) of the preceding proviso and subject to Section 2.13, any Lender may, with the consent of the Required Lenders, enforce any rights and remedies available to it and as authorized by the Required Lenders.

**11.04 Expenses; Indemnity; Damage Waiver.** (a) Costs and Expenses. The Borrower shall pay (i) all reasonable and documented out-of-pocket expenses incurred by the Administrative Agent and its Affiliates (including the reasonable fees, charges and disbursements of counsel for the Administrative Agent) in connection with the preparation, negotiation, execution, delivery and administration of this Agreement and the other Loan Documents or any amendments, modifications or waivers of the provisions hereof or thereof (whether or not the transactions contemplated hereby or thereby shall be consummated) (but limited, in the case of fees, charges and disbursements of counsel, to the reasonable and documented, out-of-pocket fees, charges and disbursements of one (1) primary counsel for the Administrative Agent and its Affiliates, taken as a whole, and, if the Administrative Agent reasonably determines that primary counsel does not have the relevant specialty or local expertise, of one (1) special counsel to the Administrative Agent and its Affiliates, taken as a whole, in each relevant specialty and one (1) local counsel to the Administrative Agent and its Affiliates, taken as a whole, in each relevant jurisdiction, and, in the event of any actual or potential conflict of interest, one (1) additional primary counsel, one (1) additional special counsel for each relevant specialty and one (1) additional local counsel for each relevant jurisdiction for each group of similarly situated Persons subject to such conflict, (ii) all reasonable and documented out-of-pocket expenses incurred by the L/C Issuer in connection with the issuance, amendment, extension, reinstatement or renewal of any Letter of Credit or any demand for payment thereunder and (iii) all reasonable and documented out-of-pocket expenses incurred by the Administrative Agent, any Lender or the L/C Issuer (including the reasonable fees, charges and disbursements of one outside counsel for the Administrative Agent, any Lender or the L/C Issuer), in connection with the enforcement or protection of its rights (A) in connection with this Agreement and the other Loan Documents, including its rights under this Section, or (B) in connection with Loans made or Letters of Credit issued hereunder, including all such out-of-pocket expenses incurred during any workout, restructuring or negotiations in respect of such Loans or Letters of Credit.

(b) Indemnification by the Borrower. The Borrower shall indemnify the Administrative Agent (and any sub-agent thereof), each Lender and the L/C Issuer, and each Related Party of any of the foregoing Persons (each such Person being called an "Indemnitee") against, and hold each Indemnitee harmless from, any and all losses, claims, damages, liabilities and related expenses (including the fees, charges and disbursements of any counsel for any Indemnitee but limited, in the case of fees, charges and disbursements of counsel of the Indemnitees, to the reasonable and documented, out-of-pocket fees, charges and disbursements of one (1) primary counsel for the Indemnitees, taken as a whole, and, if the Indemnitees reasonably determine that primary counsel does not have the relevant specialty or local expertise, of one (1) special counsel to the Indemnitees, taken as a whole, in each relevant specialty and one (1) local counsel to the Indemnitees, taken as a whole, in each relevant jurisdiction, and, in the event of any actual or potential conflict of interest, one (1) additional primary counsel, one (1) additional special counsel for each relevant specialty and one (1) additional local counsel for each relevant jurisdiction for each group of similarly situated Indemnitees subject to such conflict), and shall indemnify and hold harmless each Indemnitee from all fees and time charges and disbursements for attorneys who may be employees of any Indemnitee), incurred by any Indemnitee or asserted against any Indemnitee by any Person (including the Borrower or any other Loan Party) arising out of, in connection with, or as a result of (i) the execution or delivery of this Agreement, any other Loan Document or any agreement or instrument contemplated hereby or thereby (including, without limitation, the Indemnitee's reliance on any Communication executed using an Electronic Signature, or in the form of an Electronic Record), the performance by the parties hereto of their respective obligations hereunder or thereunder or the consummation of the transactions contemplated hereby or thereby, or, in the case of the Administrative Agent (and any sub-agent thereof) and its Related Parties only, the administration of this Agreement and the other Loan Documents, (ii) any Loan or Letter of Credit or the use or proposed use of the proceeds therefrom (including any refusal by the L/C Issuer to honor a demand for payment under a Letter of Credit if the documents presented in connection with such demand do not strictly comply with the terms of such Letter of Credit), (iii) any actual or alleged presence or Release of Hazardous Materials at, on, under or emanating from any property owned, leased or operated by the Borrower or any of its Subsidiaries, or any Environmental Liability related in any way to the Borrower or any of its Subsidiaries, or (iv) any actual or prospective claim, litigation, investigation or proceeding relating to any of the foregoing, whether based on contract, tort or any other theory, whether brought by a third party or by the Borrower or any other Loan Party, and regardless of whether any Indemnitee is a party thereto; provided that such indemnity shall not, as to any Indemnitee, be available to the extent that such losses, claims, damages, liabilities or related expenses (x) are determined by a court of competent jurisdiction by final and nonappealable judgment to have resulted from the gross negligence or willful misconduct of such Indemnitee, (y) result from a claim brought by any Loan Party against an Indemnitee for a material breach in bad faith of such Indemnitee's obligations hereunder or under any other Loan Document, if such Loan Party has obtained a final and non-appealable judgment in its favor on such claim as determined by a court of competent jurisdiction or (z) arise solely from a dispute among the Indemnitees (except when and to the extent that one of the Indemnitees party to such dispute was acting in its capacity or in fulfilling its role as Administrative Agent, L/C Issuer, Swing Line Lender or any similar role under this Agreement or any other Loan Document) that does not involve any act or omission of the Loan Parties and their Affiliates. Without limiting the provisions of Section 3.01(c), this Section 11.04(b) shall not apply with respect to Taxes other than any Taxes that represent losses, claims, damages, etc. arising from any non-Tax claim. Notwithstanding the foregoing, each Indemnitee shall be obligated to refund or return any and all amounts paid by a Loan Party under this paragraph to such Indemnitee to the extent such Indemnitee is subsequently determined, by a court of competent jurisdiction by final and nonappealable judgment, to not be entitled to payment of such amounts in accordance with the terms of this paragraph.

(c) Reimbursement by Lenders. To the extent that the Borrower for any reason fails to indefeasibly pay any amount required under subsection (a) or (b) of this Section to be paid by it to the Administrative Agent (or any sub-agent thereof), the L/C Issuer, the Swing Line Lender or any Related Party of any of the foregoing, each Lender severally agrees to pay to the Administrative Agent (or any such sub-agent), the L/C Issuer, the Swing Line Lender or such Related Party, as the case may be, such Lender's pro rata share (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought based on each Lender's share of the Total Credit Exposure at such time) of such unpaid amount (including any such unpaid amount in respect of a claim asserted by such Lender), such payment to be made severally among them based on such Lender's Applicable Percentage (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought), provided, that, the unreimbursed expense or indemnified loss, claim, damage, liability or related expense, as the case may be, was incurred by or asserted against the Administrative Agent (or any such sub-agent), the L/C Issuer or the Swing Line Lender in its capacity as such, or against any Related Party of any of the foregoing acting for the Administrative Agent (or any such sub-agent), the L/C Issuer or the Swing Line Lender in connection with such capacity. The obligations of the Lenders under this subsection (c) are subject to the provisions of Section 2.12(d).

(d) Waiver of Consequential Damages, Etc. To the fullest extent permitted by Applicable Law, no party hereto shall assert, and each party hereto hereby waives, and acknowledges that no other Person shall have, any claim against any other party, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, this Agreement, any other Loan Document or any agreement or instrument contemplated hereby, the transactions contemplated hereby or thereby, any Loan or Letter of Credit or the use of the proceeds thereof. No Indemnitee referred to in subsection (b), above shall be liable for any damages arising from the use by unintended recipients of any information or other materials distributed to such unintended recipients by such Indemnitee through telecommunications, electronic or other information transmission systems in connection with this Agreement or the other Loan Documents or the transactions contemplated hereby or thereby.

(e) Payments. All amounts due under this Section shall be payable not later than ten Business Days after demand therefor.

(f) Survival. The agreements in this Section and the indemnity provisions of Section 11.02(e) shall survive the resignation of the Administrative Agent, the L/C Issuer and the Swing Line Lender, the replacement of any Lender, the termination of the Aggregate Commitments and the repayment, satisfaction or discharge of all the other Obligations.

**11.05 Payments Set Aside.** To the extent that any payment by or on behalf of the Borrower is made to the Administrative Agent, the L/C Issuer or any Lender, or the Administrative Agent, the L/C Issuer or any Lender exercises its right of setoff, and such payment or the proceeds of such setoff or any part thereof is subsequently invalidated, declared to be fraudulent or preferential, set aside or required (including pursuant to any settlement entered into by the Administrative Agent, the L/C Issuer or such Lender in its discretion) to be repaid to a trustee, receiver or any other party, in connection with any proceeding under any Debtor Relief Law or otherwise, then (a) to the extent of such recovery, the obligation or part thereof originally intended to be satisfied shall be revived and continued in full force and effect as if such payment had not been made or such setoff had not occurred, and (b) each Lender and the L/C Issuer severally agrees to pay to the Administrative Agent upon demand its applicable share (without duplication) of any amount so recovered from or repaid by the Administrative Agent, plus interest thereon from the date of such demand to the date such payment is made at a rate per annum equal to the Federal Funds Rate from time to time in effect. The obligations of the Lenders and the L/C Issuer under clause (b) of the preceding sentence shall survive the payment in full of the Obligations and the termination of this Agreement.

**11.06 Successors and Assigns.** (a) Successors and Assigns Generally. The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that the Borrower may not assign or otherwise transfer any of its rights or obligations hereunder without the prior written consent of the Administrative Agent and each Lender and no Lender may assign or otherwise transfer any of its rights or obligations hereunder except (i) to an assignee in accordance with the provisions of Section 11.06(b) and Section 11.07(h), (ii) by way of participation in accordance with the provisions of Section 11.06(d), or (iii) by way of pledge or assignment of a security interest subject to the restrictions of Section 11.06(e) (and any other attempted assignment or transfer by any party hereto shall be null and void). Nothing in this Agreement, expressed or implied, shall be construed to confer upon any Person (other than the parties hereto, their respective successors and assigns permitted hereby, Participants to the extent provided in subsection (d) of this Section and, to the extent expressly contemplated hereby, the Related Parties of each of the Administrative Agent, the L/C Issuer and the Lenders) any legal or equitable right, remedy or claim under or by reason of this Agreement.

(b) Assignments by Lenders. Any Lender may at any time assign to one or more assignees all or a portion of its rights and obligations under this Agreement (including all or a portion of its Commitment(s) and the Loans (including for purposes of this Section 11.06(b), participations in L/C Obligations and in Swing Line Loans) at the time owing to it); provided that any such assignment shall be subject to the following conditions:

(i) Minimum Amounts.

(A) In the case of an assignment of the entire remaining amount of the assigning Lender's Commitment and/or the Loans at the time owing to it or contemporaneous assignments to related Approved Funds (determined after giving effect to such Assignments) that equal at least the amount specified in subsection (b)(i)(B) of this Section in the aggregate or in the case of an assignment to a Lender, an Affiliate of a Lender or an Approved Fund, no minimum amount need be assigned; and

(B) in any case not described in subsection (b)(i)(A) of this Section, the aggregate amount of the Commitment (which for this purpose includes Loans outstanding thereunder) or, if the Commitment is not then in effect, the principal outstanding balance of the Loans of the assigning Lender subject to each such assignment, determined as of the date the Assignment and Assumption with respect to such assignment is delivered to the Administrative Agent or, if "Trade Date" is specified in the Assignment and Assumption, as of the Trade Date, shall not be less than \$5,000,000 unless each of the Administrative Agent and, so long as no Event of Default has occurred and is continuing, the Borrower otherwise consents (each such consent not to be unreasonably withheld or delayed).

(ii) Proportionate Amounts. Each partial assignment shall be made as an assignment of a proportionate part of all the assigning Lender's rights and obligations under this Agreement with respect to the Loans or the Commitment assigned, except that this subsection (ii) shall not apply to the Swing Line Lender's rights and obligations in respect of Swing Line Loans.

(iii) Required Consents. No consent shall be required for any assignment except to the extent required by subsection (b)(i)(B) of this Section and, in addition:

(A) the consent of the Borrower (such consent not to be unreasonably withheld or delayed) shall be required unless (1) an Event of Default has occurred and is continuing at the time of such assignment or (2) such assignment is to a Lender, an Affiliate of a Lender or an Approved Fund; provided that the Borrower shall be deemed to have consented to any such assignment unless it shall object thereto by written notice to the Administrative Agent within ten (10) Business Days after having received notice thereof; and provided, further, that the Borrower's consent shall not be required during the primary syndication of the credit facility provided herein;



(B) the consent of the Administrative Agent (such consent not to be unreasonably withheld or delayed) shall be required for assignments in respect of any Commitment if such assignment is to a Person that is not a Lender, an Affiliate of such Lender or an Approved Fund with respect to such Lender; and

(C) the consent of the L/C Issuer and the Swing Line Lender shall be required for any assignment.

(iv) Assignment and Assumption. The parties to each assignment shall execute and deliver to the Administrative Agent an Assignment and Assumption, together with a processing and recordation fee in the amount of \$3,500; provided, however, that the Administrative Agent may, in its sole discretion, elect to waive such processing and recordation fee in the case of any assignment. The assignee, if it is not a Lender, shall deliver to the Administrative Agent an Administrative Questionnaire.

(v) No Assignment to Certain Persons. No such assignment shall be made (A) to the Borrower or any of the Borrower's Affiliates or Subsidiaries, (B) to any Defaulting Lender or any of its Subsidiaries, or any Person who, upon becoming a Lender hereunder, would constitute any of the foregoing Persons described in this clause (B), or (C) to a natural Person (or a holding company, investment vehicle or trust for, or owned and operated by or for the primary benefit of one or more natural Persons).

(vi) Certain Additional Payments. In connection with any assignment of rights and obligations of any Defaulting Lender hereunder, no such assignment shall be effective unless and until, in addition to the other conditions thereto set forth herein, the parties to the assignment shall make such additional payments to the Administrative Agent in an aggregate amount sufficient, upon distribution thereof as appropriate (which may be outright payment, purchases by the assignee of participations or subparticipations, or other compensating actions, including funding, with the consent of the Borrower and the Administrative Agent, the applicable pro rata share of Loans previously requested but not funded by the Defaulting Lender, to each of which the applicable assignee and assignor hereby irrevocably consent), to (x) pay and satisfy in full all payment liabilities then owed by such Defaulting Lender to the Administrative Agent, the L/C Issuer or any Lender hereunder (and interest accrued thereon) and (y) acquire (and fund as appropriate) its full pro rata share of all Loans and participations in Letters of Credit and Swing Line Loans in accordance with its Applicable Percentage. Notwithstanding the foregoing, in the event that any assignment of rights and obligations of any Defaulting Lender hereunder shall become effective under Applicable Law without compliance with the provisions of this subsection, then the assignee of such interest shall be deemed to be a Defaulting Lender for all purposes of this Agreement until such compliance occurs.

(vii) Subject to acceptance and recording thereof by the Administrative Agent pursuant to subsection (c) of this Section, from and after the effective date specified in each Assignment and Assumption, the assignee thereunder shall be a party to this Agreement and, to the extent of the interest assigned by such Assignment and Assumption, have the rights and obligations of a Lender under this Agreement, and the assigning Lender thereunder shall, to the extent of the interest assigned by such Assignment and Assumption, be released from its obligations under this Agreement (and, in the case of an Assignment and Assumption covering all of the assigning Lender's rights and obligations under this Agreement, such Lender shall cease to be a party hereto) but shall continue to be entitled to the benefits of Sections 3.01, 3.04, 3.05 and 11.04 with respect to facts and circumstances occurring prior to the effective date of such assignment; provided, that except to the extent otherwise expressly agreed by the affected parties, no assignment by a Defaulting Lender will constitute a waiver or release of any claim of any party hereunder arising from that Lender's having been a Defaulting Lender. Upon request, the Borrower (at its expense) shall execute and deliver a Note to the assignee Lender. Any assignment or transfer by a Lender of rights or obligations under this Agreement that does not comply with this subsection shall be treated for purposes of this Agreement as a sale by such Lender of a participation in such rights and obligations in accordance with subsection (d) of this Section.

(c) Register. The Administrative Agent, acting solely for this purpose as an agent of the Borrower (and such agency being solely for Tax purposes), shall maintain at the Administrative Agent's Office a copy of each Assignment and Assumption delivered to it (or the equivalent thereof in electronic form) and a register for the recordation of the names and addresses of the Lenders, and the Commitments of, and principal amounts (and stated interest) of the Loans and L/C Obligations owing to, each Lender pursuant to the terms hereof from time to time (the "Register"). The entries in the Register shall be conclusive absent manifest error, and the Borrower, the Administrative Agent and the Lenders shall treat each Person whose name is recorded in the Register pursuant to the terms hereof as a Lender hereunder for all purposes of this Agreement. The Register shall be available for inspection by the Borrower and any Lender, at any reasonable time and from time to time upon reasonable prior notice.

(d) Participations. Any Lender may at any time, without the consent of, or notice to, the Borrower or the Administrative Agent, sell participations to any Person (other than a natural Person, or a holding company, investment vehicle or trust for, or owned and operated for the primary benefit of one or more natural Persons, a Defaulting Lender or the Borrower or any of the Borrower's Affiliates or Subsidiaries) (each, a "Participant") in all or a portion of such Lender's rights and/or obligations under this Agreement (including all or a portion of its Commitment and/or the Loans (including such Lender's participations in L/C Obligations and/or Swing Line Loans) owing to it); provided that (i) such Lender's obligations under this Agreement shall remain unchanged, (ii) such Lender shall remain solely responsible to the other parties hereto for the performance of such obligations and (iii) the Borrower, the Administrative Agent, the Lenders and the L/C Issuer shall continue to deal solely and directly with such Lender in connection with such Lender's rights and obligations under this Agreement. For the avoidance of doubt, each Lender shall be responsible for the indemnity under Section 11.04(c) without regard to the existence of any participation.

Any agreement or instrument pursuant to which a Lender sells such a participation shall provide that such Lender shall retain the sole right to enforce this Agreement and to approve any amendment, modification or waiver of any provision of this Agreement; provided that such agreement or instrument may provide that such Lender will not, without the consent of the Participant, agree to any amendment, waiver or other modification described in the first proviso to Section 11.01 that affects such Participant. The Borrower agrees that each Participant shall be entitled to the benefits of Sections 3.01, 3.04 and 3.05 to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to subsection (b) of this Section (it being understood that the documentation required under Section 3.01(g) shall be delivered to the Lender who sells the participation) to the same extent as if it were a Lender and had acquired its interest by assignment pursuant to subsection (b) of this Section 11.06; provided that such Participant (A) agrees to be subject to the provisions of Sections 3.06 and 11.13 as if it were an assignee under subsection (b) of this Section and (B) shall not be entitled to receive any greater payment under Sections 3.01 or 3.04, with respect to any participation, than the Lender from whom it acquired the applicable participation would have been entitled to receive, except to the extent such entitlement to receive a greater payment results from a Change in Law that occurs after the Participant acquired the applicable participation. Each Lender that sells a participation agrees, at the Borrower's request and expense, to use reasonable efforts to cooperate with the Borrower to effectuate the provisions of Section 3.06 with respect to any Participant. To the extent permitted by law, each Participant also shall be entitled to the benefits of Section 11.08 as though it were a Lender; provided that such Participant agrees to be subject to Section 2.13 as though it were a Lender. Each Lender that sells a participation shall, acting solely for this purpose as a non-fiduciary agent of the Borrower, maintain a register on which it enters the name and address of each Participant and the principal amounts (and stated interest) of each Participant's interest in the Loans or other obligations under the Loan Documents (the "Participant Register"); provided that no Lender shall have any obligation to disclose all or any portion of the Participant Register (including the identity of any Participant or any information relating to a Participant's interest in any commitments, loans, letters of credit or its other obligations under any Loan Document) to any Person except to the extent that such disclosure is necessary to establish that such commitment, loan, letter of credit or other obligation is in registered form under Section 5f.103-1(c) of the United States Treasury Regulations. The entries in the Participant Register shall be conclusive absent manifest error, and such Lender shall treat each Person whose name is recorded in the Participant Register as the owner of such participation for all purposes of this Agreement notwithstanding any notice to the contrary. For the avoidance of doubt, the Administrative Agent (in its capacity as Administrative Agent) shall have no responsibility for maintaining a Participant Register.

(e) **Certain Pledges.** Any Lender may at any time pledge or assign a security interest in all or any portion of its rights under this Agreement (including under its Note, if any) to secure obligations of such Lender, including any pledge or assignment to secure obligations to a Federal Reserve Bank; provided that no such pledge or assignment shall release such Lender from any of its obligations hereunder or substitute any such pledgee or assignee for such Lender as a party hereto.

(f) **Resignation as L/C Issuer or Swing Line Lender after Assignment.** Notwithstanding anything to the contrary contained herein, if at any time Bank of America assigns all of its Commitment and Revolving Credit Loans pursuant to subsection (b) above, Bank of America may, (i) upon 30 days' notice to the Administrative Agent, the Borrower and the Lenders, resign as L/C Issuer and/or (ii) upon 30 days' notice to the Borrower, resign as Swing Line Lender. In the event of any such resignation as L/C Issuer or Swing Line Lender, the Borrower shall be entitled to appoint from among the Lenders a successor L/C Issuer or Swing Line Lender hereunder; provided, however, that no failure by the Borrower to appoint any such successor shall affect the resignation of Bank of America as L/C Issuer or Swing Line Lender, as the case may be. If Bank of America resigns as L/C Issuer, it shall retain all the rights, powers, privileges and duties of the L/C Issuer hereunder with respect to all Letters of Credit issued by it and outstanding as of the effective date of its resignation as L/C Issuer and all L/C Obligations with respect thereto (including the right to require the Lenders to make Base Rate Loans or fund risk participations in Unreimbursed Amounts pursuant to Section 2.03(f)). If Bank of America resigns as Swing Line Lender, it shall retain all the rights of the Swing Line Lender provided for hereunder with respect to Swing Line Loans made by it and outstanding as of the effective date of such resignation, including the right to require the Lenders to make Base Rate Loans or fund risk participations in outstanding Swing Line Loans pursuant to Section 2.04(c). Upon the appointment of a successor L/C Issuer and/or Swing Line Lender, (x) such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the retiring L/C Issuer or Swing Line Lender, as the case may be, and (y) the successor L/C Issuer shall issue letters of credit in substitution for the Letters of Credit, if any, outstanding at the time of such succession or make other arrangements satisfactory to Bank of America to effectively assume the obligations of Bank of America with respect to such Letters of Credit.

**11.07 Treatment of Certain Information; Confidentiality.** Each of the Administrative Agent, the Lenders and the L/C Issuer agrees to maintain the confidentiality of the Information (as defined below), except that Information may be disclosed (a) to its Affiliates, its auditors and its Related Parties (it being understood that the Persons to whom such disclosure is made will be informed of the confidential nature of such Information and instructed to keep such Information confidential), (b) to the extent required or requested by any regulatory authority purporting to have jurisdiction over such Person or its Related Parties (including any self-regulatory authority, such as the National Association of Insurance Commissioners), (c) to the extent required by Applicable Laws or regulations or by any subpoena or similar legal process, (d) to any other party hereto, (e) in connection with the exercise of any remedies hereunder or under any other Loan Document or any action or proceeding relating to this Agreement or any other Loan Document or the enforcement of rights hereunder or thereunder, (f) subject to an agreement containing provisions substantially the same as those of this Section, to (i) any assignee of or Participant in, or any prospective assignee of or Participant in, any of its rights and obligations under this Agreement or any Eligible Assignee invited to be a Lender pursuant to Section 2.15 or (ii) any actual or prospective party (or its Related Parties) to any swap, derivative or other transaction under which payments are to be made by reference to the Borrower and its obligations, this Agreement or payments hereunder, (g) on a confidential basis to (i) any rating agency in connection with rating the Borrower or its Subsidiaries or the credit facilities provided hereunder or (ii) the CUSIP Service Bureau or any similar agency in connection with the application, issuance, publishing and monitoring of CUSIP numbers of other market identifiers with respect to the credit facilities provided hereunder, (h) with the consent of the Borrower or (i) to the extent such Information (x) becomes publicly available other than as a result of a breach of this Section 11.07, (y) becomes available to the Administrative Agent, any Lender, the L/C Issuer or any of their respective Affiliates on a nonconfidential basis from a source other than the Borrower or (z) is independently discovered or developed by a party hereto without utilizing any Information received from the Borrower or violating the terms of this Section 11.07. In addition, the Administrative Agent and the Lenders may disclose the existence of this Agreement and information about this Agreement to market data collectors, similar service providers to the lending industry and service providers to the Administrative Agent and the Lenders in connection with the administration of this Agreement, the other Loan Documents, and the Commitments.

For purposes of this Section, “Information” means all information received from the Borrower or any Subsidiary relating to the Borrower or any Subsidiary or any of their respective businesses, other than any such information that is available to the Administrative Agent, any Lender or the L/C Issuer on a nonconfidential basis prior to disclosure by the Borrower or any Subsidiary, provided that, in the case of information received from the Borrower or any Subsidiary after the date hereof, such information is clearly identified at the time of delivery as confidential. Any Person required to maintain the confidentiality of Information as provided in this Section shall be considered to have complied with its obligation to do so if such Person has exercised the same degree of care to maintain the confidentiality of such Information as such Person would accord to its own confidential information.

Each of the Administrative Agent, the Lenders and the L/C Issuer acknowledges that (a) the Information may include material non-public information concerning the Borrower or a Subsidiary, as the case may be, (b) it has developed compliance procedures regarding the use of material non-public information and (c) it will handle such material non-public information in accordance with Applicable Law, including United States federal and state securities Laws.

**11.08 Right of Setoff.** If an Event of Default shall have occurred and be continuing, each Lender, the L/C Issuer and each of their respective Affiliates is hereby authorized at any time and from time to time, to the fullest extent permitted by Applicable Law, to set off and apply any and all deposits (general or special, time or demand, provisional or final, in whatever currency) at any time held and other obligations (in whatever currency) at any time owing by such Lender, the L/C Issuer or any such Affiliate to or for the credit or the account of the Borrower or any other Loan Party against any and all of the obligations of the Borrower or such Loan Party now or hereafter existing under this Agreement or any other Loan Document to such Lender or the L/C Issuer, irrespective of whether or not such Lender or the L/C Issuer shall have made any demand under this Agreement or any other Loan Document and although such obligations of the Borrower or such Loan Party may be contingent or unmatured or are owed to a branch or office or Affiliate of such Lender or the L/C Issuer different from the branch, office or Affiliate holding such deposit or obligated on such indebtedness; provided, that in the event that any Defaulting Lender shall exercise any such right of setoff, (x) all amounts so set off shall be paid over immediately to the Administrative Agent for further application in accordance with the provisions of Section 2.17 and, pending such payment, shall be segregated by such Defaulting Lender from its other funds and deemed held in trust for the benefit of the Administrative Agent and the Lenders, and (y) the Defaulting Lender shall provide promptly to the Administrative Agent a statement describing in reasonable detail the Obligations owing to such Defaulting Lender as to which it exercised such right of setoff. The rights of each Lender, the L/C Issuer and their respective Affiliates under this Section are in addition to other rights and remedies (including other rights of setoff) that such Lender, the L/C Issuer or their respective Affiliates may have. Each Lender and the L/C Issuer agrees to notify the Borrower and the Administrative Agent promptly after any such setoff and application, provided that the failure to give such notice shall not affect the validity of such setoff and application.

**11.09 Interest Rate Limitation.** Notwithstanding anything to the contrary contained in any Loan Document, the interest paid or agreed to be paid under the Loan Documents shall not exceed the maximum rate of non-usurious interest permitted by Applicable Law (the “Maximum Rate”). If the Administrative Agent or any Lender shall receive interest in an amount that exceeds the Maximum Rate, the excess interest shall be applied to the principal of the Loans or, if it exceeds such unpaid principal, refunded to the Borrower. In determining whether the interest contracted for, charged, or received by the Administrative Agent or a Lender exceeds the Maximum Rate, such Person may, to the extent permitted by Applicable Law, (a) characterize any payment that is not principal as an expense, fee, or premium rather than interest, (b) exclude voluntary prepayments and the effects thereof, and (c) amortize, prorate, allocate, and spread in equal or unequal parts the total amount of interest throughout the contemplated term of the Obligations hereunder.

**11.10 Integration; Effectiveness.** This Agreement, the other Loan Documents, and any separate letter agreements with respect to fees payable to the Administrative Agent or the L/C Issuer, constitute the entire contract among the parties relating to the subject matter hereof and supersede any and all previous agreements and understandings, oral or written, relating to the subject matter hereof. Except as provided in Section 4.01, this Agreement shall become effective when it shall have been executed by the Administrative Agent and when the Administrative Agent shall have received counterparts hereof that, when taken together, bear the signatures of each of the other parties hereto, and thereafter shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

**11.11 Survival of Representations and Warranties.** All representations and warranties made hereunder and in any other Loan Document or other document delivered pursuant hereto or thereto or in connection herewith or therewith shall survive the execution and delivery hereof and thereof. Such representations and warranties have been or will be relied upon by the Administrative Agent and each Lender, regardless of any investigation made by the Administrative Agent or any Lender or on their behalf and notwithstanding that the Administrative Agent or any Lender may have had notice or knowledge of any Default at the time of any Credit Extension, and shall continue in full force and effect as long as any Loan or any other Obligation hereunder shall remain unpaid or unsatisfied or any Letter of Credit shall remain outstanding.

**11.12 Severability.** If any provision of this Agreement or the other Loan Documents is held to be illegal, invalid or unenforceable, (a) the legality, validity and enforceability of the remaining provisions of this Agreement and the other Loan Documents shall not be affected or impaired thereby and (b) the parties shall endeavor in good faith negotiations to replace the illegal, invalid or unenforceable provisions with valid provisions the economic effect of which comes as close as possible to that of the illegal, invalid or unenforceable provisions. The invalidity of a provision in a particular jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. Without limiting the foregoing provisions of this Section 11.12, if and to the extent that the enforceability of any provisions in this Agreement relating to Defaulting Lenders shall be limited by Debtor Relief Laws, as determined in good faith by the Administrative Agent, the L/C Issuer or the Swing Line Lender, as applicable, then such provisions shall be deemed to be in effect only to the extent not so limited.

**11.13 Replacement of Lenders.** If the Borrower is entitled to replace a Lender pursuant to the provisions of Section 3.06, or if any Lender is a Defaulting Lender or a Non-Consenting Lender, then the Borrower may, at its sole expense and effort, upon notice to such Lender and the Administrative Agent, require such Lender to assign and delegate, without recourse (in accordance with and subject to the restrictions contained in, and consents required by, Section 11.06), all of its interests, rights (other than its existing rights to payments pursuant to Sections 3.01 and 3.04) and obligations under this Agreement and the related Loan Documents to an Eligible Assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment), provided that:

- (a) the Borrower shall have paid to the Administrative Agent the assignment fee (if any) specified in Section 11.06(b);
- (b) such Lender shall have received payment of an amount equal to the outstanding principal of its Loans and L/C Advances, accrued interest thereon, accrued fees and all other amounts payable to it hereunder and under the other Loan Documents (including any amounts under Section 3.05) from the assignee (to the extent of such outstanding principal and accrued interest and fees) or the Borrower (in the case of all other amounts);
- (c) in the case of any such assignment resulting from a claim for compensation under Section 3.04 or payments required to be made pursuant to Section 3.01, such assignment will result in a reduction in such compensation or payments thereafter;
- (d) such assignment does not conflict with Applicable Laws; and
- (e) in the case of an assignment resulting from a Lender becoming a Non-Consenting Lender, the applicable assignee shall have consented to the applicable amendment, waiver or consent.

A Lender shall not be required to make any such assignment or delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling the Borrower to require such assignment and delegation cease to apply.

Each party hereto agrees that (a) an assignment required pursuant to this Section 11.13 may be effected pursuant to an Assignment and Assumption executed by the Borrower, the Administrative Agent and the assignee and (b) the Lender required to make such assignment need not be a party thereto in order for such assignment to be effective and shall be deemed to have consented to and be bound by the terms thereof; provided that, following the effectiveness of any such assignment, the other parties to such assignment agree to execute and deliver such documents necessary to evidence such assignment as reasonably requested by the applicable Lender; provided, further that any such documents shall be without recourse to or warranty by the parties thereto.

Notwithstanding anything in this Section 11.13 to the contrary, (i) the Lender that acts as the L/C Issuer may not be replaced hereunder at any time it has any Letter of Credit outstanding hereunder unless arrangements satisfactory to such Lender (including the furnishing of a backstop standby letter of credit in form and substance, and issued by an issuer, reasonably satisfactory to such L/C Issuer or the depositing of Cash Collateral into a Cash Collateral account in amounts and pursuant to arrangements reasonably satisfactory to such L/C Issuer) have been made with respect to such outstanding Letter of Credit and (ii) the Lender that acts as the Administrative Agent may not be replaced hereunder except in accordance with the terms of Section 9.06.

**11.14 Governing Law; Jurisdiction; Etc.**

(a) THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS AND ANY CLAIMS, CONTROVERSY, DISPUTE OR CAUSE OF ACTION (WHETHER IN CONTRACT OR TORT OR OTHERWISE) BASED UPON, ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT (EXCEPT, AS TO ANY OTHER LOAN DOCUMENT, AS EXPRESSLY SET FORTH THEREIN) AND THE TRANSACTIONS CONTEMPLATED HEREBY AND THEREBY SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAW OF THE STATE OF NEW YORK.

(b) SUBMISSION TO JURISDICTION. THE BORROWER IRREVOCABLY AND UNCONDITIONALLY AGREES THAT IT WILL NOT COMMENCE ANY ACTION, LITIGATION OR PROCEEDING OF ANY KIND OR DESCRIPTION, WHETHER IN LAW OR EQUITY, WHETHER IN CONTRACT OR IN TORT OR OTHERWISE, AGAINST THE ADMINISTRATIVE AGENT, ANY LENDER, THE L/C ISSUER, OR ANY RELATED PARTY OF THE FOREGOING IN ANY WAY RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT OR THE TRANSACTIONS RELATING HERETO OR THERETO, IN ANY FORUM OTHER THAN THE COURTS OF THE STATE OF NEW YORK SITTING IN NEW YORK COUNTY AND OF THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK, AND ANY APPELLATE COURT FROM ANY THEREOF, AND EACH OF THE PARTIES HERETO IRREVOCABLY AND UNCONDITIONALLY SUBMITS TO THE JURISDICTION OF SUCH COURTS AND AGREES THAT ALL CLAIMS IN RESPECT OF ANY SUCH ACTION, LITIGATION OR PROCEEDING MAY BE HEARD AND DETERMINED IN SUCH NEW YORK STATE COURT OR, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, IN SUCH FEDERAL COURT. EACH OF THE PARTIES HERETO AGREES THAT A FINAL JUDGMENT IN ANY SUCH ACTION, LITIGATION OR PROCEEDING SHALL BE CONCLUSIVE AND MAY BE ENFORCED IN OTHER JURISDICTIONS BY SUIT ON THE JUDGMENT OR IN ANY OTHER MANNER PROVIDED BY LAW. NOTHING IN THIS AGREEMENT OR IN ANY OTHER LOAN DOCUMENT SHALL AFFECT ANY RIGHT THAT THE ADMINISTRATIVE AGENT, ANY LENDER OR THE L/C ISSUER MAY OTHERWISE HAVE TO BRING ANY ACTION OR PROCEEDING RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT AGAINST THE BORROWER OR ANY OTHER LOAN PARTY OR ITS PROPERTIES IN THE COURTS OF ANY JURISDICTION.

(c) **WAIVER OF VENUE.** THE BORROWER AND EACH OTHER LOAN PARTY IRREVOCABLY AND UNCONDITIONALLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY OBJECTION THAT IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT IN ANY COURT REFERRED TO IN SUBSECTION (B) OF THIS SECTION. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF SUCH ACTION OR PROCEEDING IN ANY SUCH COURT.

(d) **SERVICE OF PROCESS.** EACH PARTY HERETO IRREVOCABLY CONSENTS TO SERVICE OF PROCESS IN THE MANNER PROVIDED FOR NOTICES IN SECTION 11.02. NOTHING IN THIS AGREEMENT WILL AFFECT THE RIGHT OF ANY PARTY HERETO TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY APPLICABLE LAW

**11.15 WAIVER OF JURY TRIAL.** EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY OTHER LOAN DOCUMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY OR THEREBY (WHETHER BASED ON CONTRACT, TORT OR ANY OTHER THEORY). EACH PARTY HERETO (A) CERTIFIES THAT NO REPRESENTATIVE, AGENT OR ATTORNEY OF ANY OTHER PERSON HAS REPRESENTED, EXPRESSLY OR OTHERWISE, THAT SUCH OTHER PERSON WOULD NOT, IN THE EVENT OF LITIGATION, SEEK TO ENFORCE THE FOREGOING WAIVER AND (B) ACKNOWLEDGES THAT IT AND THE OTHER PARTIES HERETO HAVE BEEN INDUCED TO ENTER INTO THIS AGREEMENT AND THE OTHER LOAN DOCUMENTS BY, AMONG OTHER THINGS, THE MUTUAL WAIVERS AND CERTIFICATIONS IN THIS SECTION.

**11.16 No Advisory or Fiduciary Responsibility.** In connection with all aspects of each transaction contemplated hereby (including in connection with any amendment, waiver or other modification hereof or of any other Loan Document), each of the Borrower and each other Loan Party acknowledges and agrees that: (i) (A) the arranging and other services regarding this Agreement provided by the Administrative Agent and the Lenders are arm's-length commercial transactions between the Borrower, the Loan Parties and their respective Affiliates, on the one hand, and the Administrative Agent and the Lenders, on the other hand, (B) each of the Borrower and the other Loan Parties has consulted its own legal, accounting, regulatory and tax advisors to the extent it has deemed appropriate, and (C) each of the Borrower and the other Loan Parties is capable of evaluating, and understands and accepts, the terms, risks and conditions of the transactions contemplated hereby and by the other Loan Documents; (ii) (A) the Administrative Agent and the Lenders each is and has been acting solely as a principal and, except as expressly agreed in writing by the relevant parties, has not been, is not, and will not be acting as an advisor, agent or fiduciary for the Borrower, the other Loan Parties or any of their respective Affiliates, or any other Person and (B) neither the Administrative Agent nor any Lender has any obligation to the Borrower, the other Loan Parties or any of their respective Affiliates with respect to the transactions contemplated hereby except those obligations expressly set forth herein and in the other Loan Documents; and (iii) the Administrative Agent, the Lenders, and their respective Affiliates may be engaged in a broad range of transactions that involve interests that differ from those of the Borrower, the other Loan Parties and their respective Affiliates, and neither the Administrative Agent nor any Lender has any obligation to disclose any of such interests to the Borrower, the other Loan Parties or their respective Affiliates. To the fullest extent permitted by law, each of the Borrower and the other Loan Parties hereby waives and releases any claims that it may have against the Administrative Agent and the Lenders with respect to any breach or alleged breach of agency or fiduciary duty in connection with any aspect of any transaction contemplated hereby.

**11.17 Electronic Execution; Electronic Records; Counterparts.** This Agreement, any Loan Document and any other Communication, including Communications required to be in writing, may be in the form of an Electronic Record and may be executed using Electronic Signatures. The Borrower and each of the Administrative Agent and each Lender Party agrees that any Electronic Signature on or associated with any Communication shall be valid and binding on such Person to the same extent as a manual, original signature, and that any Communication entered into by Electronic Signature, will constitute the legal, valid and binding obligation of such Person enforceable against such Person in accordance with the terms thereof to the same extent as if a manually executed original signature was delivered. Any Communication may be executed in as many counterparts as necessary or convenient, including both paper and electronic counterparts, but all such counterparts are one and the same Communication. For the avoidance of doubt, the authorization under this paragraph may include, without limitation, use or acceptance of a manually signed paper Communication which has been converted into electronic form (such as scanned into .pdf format), or an electronically signed Communication converted into another format, for transmission, delivery and/or retention. The Administrative Agent and each of the Lender Parties may, at its option, create one or more copies of any Communication in the form of an imaged Electronic Record ("Electronic Copy"), which shall be deemed created in the ordinary course of such Person's business, and destroy the original paper document. All Communications in the form of an Electronic Record, including an Electronic Copy, shall be considered an original for all purposes, and shall have the same legal effect, validity and enforceability as a paper record. Notwithstanding anything contained herein to the contrary, neither the Administrative Agent, the L/C Issuer nor Swing Line Lender is under any obligation to accept an Electronic Signature in any form or in any format unless expressly agreed to by such Person pursuant to procedures approved by it; provided, further, without limiting the foregoing, (a) to the extent the Administrative Agent, L/C Issuer and/or Swing Line Lender has agreed to accept such Electronic Signature, the Administrative Agent and each of the Lender Parties shall be entitled to rely on any such Electronic Signature purportedly given by or on behalf of the Borrower and/or any Lender Party without further verification and (b) upon the request of the Administrative Agent or any Lender Party, any Electronic Signature shall be promptly followed by such manually executed counterpart.

Neither the Administrative Agent, L/C Issuer nor Swing Line Lender shall be responsible for or have any duty to ascertain or inquire into the sufficiency, validity, enforceability, effectiveness or genuineness of any Loan Document or any other agreement, instrument or document (including, for the avoidance of doubt, in connection with the Administrative Agent's, L/C Issuer's or Swing Line Lender's reliance on any Electronic Signature transmitted by telecopy, emailed .pdf or any other electronic means). The Administrative Agent, L/C Issuer and Swing Line Lender shall be entitled to rely on, and shall incur no liability under or in respect of this Agreement or any other Loan Document by acting upon, any Communication (which writing may be a fax, any electronic message, Internet or intranet website posting or other distribution or signed using an Electronic Signature) or any statement made to it orally or by telephone and believed by it to be genuine and signed or sent or otherwise authenticated (whether or not such Person in fact meets the requirements set forth in the Loan Documents for being the maker thereof).

The Borrower and each Lender Party hereby waives (i) any argument, defense or right to contest the legal effect, validity or enforceability of this Agreement and any other Loan Document based solely on the lack of paper original copies of this Agreement and/or such other Loan Document, and (ii) any claim against the Administrative Agent, each Lender Party and each Related Party for any liabilities arising solely from the Administrative Agent's and/or any Lender Party's reliance on or use of Electronic Signatures, including any liabilities arising as a result of the failure of the Borrower to use any available security measures in connection with the execution, delivery or transmission of any Electronic Signature.



**11.18 USA PATRIOT Act.** Each Lender that is subject to the Act (as hereinafter defined) and the Administrative Agent (for itself and not on behalf of any Lender) hereby notifies the Borrower that pursuant to the requirements of the USA PATRIOT Act (Title III of Pub. L. 107-56 (signed into law October 26, 2001)) (the “Act”), it is required to obtain, verify and record information that identifies the Borrower, which information includes the name and address of the Borrower and other information that will allow such Lender or the Administrative Agent, as applicable, to identify the Borrower in accordance with the Act. The Borrower shall, promptly following a request by the Administrative Agent or any Lender, provide all documentation and other information that the Administrative Agent or such Lender requests in order to comply with its ongoing obligations under applicable “know your customer” and anti-money laundering rules and regulations, including the Act.

**11.19 Acknowledgement and Consent to Bail-In of Affected Financial Institutions.** Solely to the extent any Lender or the L/C Issuer that is an Affected Financial Institution is a party to this Agreement and notwithstanding anything to the contrary in any Loan Document or in any other agreement, arrangement or understanding among any such parties, each party hereto acknowledges that any liability of any Lender or L/C Issuer that is an Affected Financial Institution arising under any Loan Document, to the extent such liability is unsecured, may be subject to the Write-Down and Conversion Powers of the applicable Resolution Authority and agrees and consents to, and acknowledges and agrees to be bound by:

(a) the application of any Write-Down and Conversion Powers by the applicable Resolution Authority to any such liabilities arising hereunder which may be payable to it by any Lender or L/C Issuer that is an Affected Financial Institution; and

(b) the effects of any Bail-In Action on any such liability, including, if applicable:

(i) a reduction in full or in part or cancellation of any such liability;

(ii) a conversion of all, or a portion of, such liability into shares or other instruments of ownership in such Affected Financial Institution, its parent undertaking, or a bridge institution that may be issued to it or otherwise conferred on it, and that such shares or other instruments of ownership will be accepted by it in lieu of any rights with respect to any such liability under this Agreement or any other Loan Document; or

(iii) the variation of the terms of such liability in connection with the exercise of the Write-Down and Conversion Powers of the applicable Resolution Authority.

**11.20 Acknowledgement Regarding Any Supported QFCs.** To the extent that the Loan Documents provide support, through a guarantee or otherwise, for any Swap Contract or any other agreement or instrument that is a QFC (such support, “QFC Credit Support”, and each such QFC, a “Supported QFC”), the parties acknowledge and agree as follows with respect to the resolution power of the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act and Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (together with the regulations promulgated thereunder, the “U.S. Special Resolution Regimes”) in respect of such Supported QFC and QFC Credit Support (with the provisions below applicable notwithstanding that the Loan Documents and any Supported QFC may in fact be stated to be governed by the laws of the State of New York and/or of the United States or any other state of the United States):

(a) In the event a Covered Entity that is party to a Supported QFC (each, a “Covered Party”) becomes subject to a proceeding under a U.S. Special Resolution Regime, the transfer of such Supported QFC and the benefit of such QFC Credit Support (and any interest and obligation in or under such Supported QFC and such QFC Credit Support, and any rights in property securing such Supported QFC or such QFC Credit Support) from such Covered Party will be effective to the same extent as the transfer would be effective under the U.S. Special Resolution Regime if the Supported QFC and such QFC Credit Support (and any such interest, obligation and rights in property) were governed by the laws of the United States or a state of the United States. In the event a Covered Party or a BHC Act Affiliate of a Covered Party becomes subject to a proceeding under a U.S. Special Resolution Regime, Default Rights under the Loan Documents that might otherwise apply to such Supported QFC or any QFC Credit Support that may be exercised against such Covered Party are permitted to be exercised to no greater extent than such Default Rights could be exercised under the U.S. Special Resolution Regime if the Supported QFC and the Loan Documents were governed by the laws of the United States or a state of the United States. Without limitation of the foregoing, it is understood and agreed that rights and remedies of the parties with respect to a Defaulting Lender shall in no event affect the rights of any Covered Party with respect to a Supported QFC or any QFC Credit Support.

(b) As used in this Section 11.20, the following terms have the following meanings:

“BHC Act Affiliate” of a party means an “affiliate” (as such term is defined under, and interpreted in accordance with, 12 U.S.C. 1841(k)) of such party.

“Covered Entity” means any of the following: (i) a “covered entity” as that term is defined in, and interpreted in accordance with, 12 C.F.R. § 252.82(b); (ii) a “covered bank” as that term is defined in, and interpreted in accordance with, 12 C.F.R. § 47.3(b); or (iii) a “covered FSI” as that term is defined in, and interpreted in accordance with, 12 C.F.R. § 382.2(b).

“Default Right” has the meaning assigned to that term in, and shall be interpreted in accordance with, 12 C.F.R. §§ 252.81, 47.2 or 382.1, as applicable.

“QFC” has the meaning assigned to the term “qualified financial contract” in, and shall be interpreted in accordance with, 12 U.S.C. 5390(c)(8)(D).

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK;  
SIGNATURE PAGES FOLLOW.]

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

**BORROWER:**

**TANDEM DIABETES CARE, INC.**

By: A. Vosseller

/s/ Leigh

Name: Vosseller

Leigh A.

Title: Vice President, CFO & Treasurer

Executive

**GUARANTOR:**

**SUGARMATE, LLC**

By: A. Vosseller

/s/ Leigh

Name: Vosseller

Leigh A.

Title: Vice President, CFO & Treasurer

Executive

BANK OF AMERICA, N.A.,  
as Administrative Agent

By: Sebastian Lurie  
Name: Lurie  
Title: Vice President

/s/  
Sebastian  
Senior

BANK OF AMERICA, N.A.,  
as a Lender, L/C Issuer and Swing Line Lender

By: Sebastian Lurie

/s/

Name: Lurie

Sebastian

Title: Vice President

Senior

## CONFIDENTIAL INTELLECTUAL PROPERTY AGREEMENT

This Intellectual Property Agreement is by and between **TANDEM DIABETES CARE, INC.**, a Delaware corporation whose address and principal place of business is at 11045 Roselle Street, Suite 200, San Diego, California 92121, U.S.A. ("**Tandem**") and **SMITHS MEDICAL ASD, INC.**, a Delaware corporation with an address and a principal place of business at 1265 Grey Fox Road, Saint Paul, Minnesota 55112, U.S.A. ("**Smiths Medical**").

### RECITALS

- A. Tandem desires to make, have made, use, sell, offer for sale, and/or import ambulatory infusion pumps and related software and accessories for the treatment of diabetes.
- B. Smiths Medical owns or otherwise has the right to sell and/or grant licenses to certain patents and patent applications relating to ambulatory infusion pumps and related software.
- C. Smiths Medical desires to grant to Tandem, and Tandem desires to obtain from Smiths Medical, certain rights as herein defined to patents and patent applications relating to ambulatory infusion pumps and related software.

In consideration of these premises and of the mutual promises set forth below, and for other good and valuable consideration, the adequacy of which are hereby acknowledged, the Parties to this Agreement agree as follows:

### 1. PARTICULAR DEFINITIONS

For purposes of this Agreement, the terms defined in this Article shall have the meaning specified and shall be applicable to both the singular and plural forms wherever used in this Agreement.

1.1 "**Additional Patent Rights**" shall mean each claim of patents and each claim of patent applications, other than the Patent Rights, wherein such patents or patent applications are owned by Licensor and/or its Affiliates as of the Effective Date, and also including (i) all continuing applications of such patents and patent applications including continuations, continuations in part, divisions and substitutions; (ii) any patents issuing on any of the foregoing, including all reexaminations, reissues, and extensions; (iii) all foreign patent applications and patents corresponding to any of the foregoing, and (iv) any patents or patent applications claiming priority to any of the foregoing, but in each case (*i.e.*, of (i), (ii), (iii), and (iv)) only to the extent that such patents Cover (in the case of such patents) or would Cover (in the case of such patent applications), all solely within the Field of Use, the following: (a) Licensee's t:slim® Insulin Delivery System, [\*\*\*], and its designs, and (b) the following additional products and their designs that are owned and in development by Licensee [\*\*\*]:

- A. therapy management software ("t:Connect™");
- B. an insulin delivery system including a pump with an enhanced capacity for delivering larger quantities of insulin (e.g., 500 units) relative to the t:slim® Insulin Delivery System ("t:flex™");
- C. an insulin delivery system including a pump having two or more chambers for delivering one or more additional types of medicament in addition to insulin ("t:dual™"); and
- D. an insulin delivery system including a pump and an accompanying but separate (remote) control unit (t:sport™);

((a) and (b) collectively, the **"Permitted Products"**). Licensee's trademarks T:CONNECT, T:FLEX, T:DUAL and T:SPORT listed above (the **"New Product Trademarks"**) are understood by the Parties only to be references to the described products and designs still under development for which they are listed as of the Effective Date. The New Product Trademarks are not meant to limit in any way the substantive elements of the products and designs for which they are listed. Any or all of the New Product Trademarks may be changed by Licensee in its sole judgment at any time without removing such products and designs from Additional Patent Rights. Licensee agrees to notify Licensor if any of the New Product Trademarks are replaced or materially modified.

1.2 **"Affiliate"** shall mean any individual who, or Entity that, in whatever country organized or resident, directly or indirectly, Controls, is Controlled by, or is under common Control with, a Party. For the purposes of this definition, "Control" means that an individual or Entity (a) possesses directly or indirectly the power to direct or cause the direction of the management and policies of the other person, individual or Entity, whether through the ownership of voting shares, by contract or otherwise; or (b) directly or indirectly has at least a fifty percent (50%) ownership or voting rights interest (whether through stock ownership, stock power, voting proxy, or otherwise), or has the maximum ownership interest that it is permitted to have in the country where such Entity exists; and (c) in either case only for so long as such Control shall continue; and "Controls" and "Controlled" shall be interpreted accordingly.

1.3 **"Agreement"** shall mean this Confidential Intellectual Property Agreement, any exhibit thereto, and any modification or amendment thereto that is made in the manner provided for herein.

1.4 **"Confidential Information"** shall mean, with respect to a Party (the **"Receiving Party"**), all information and materials that are (i) disclosed by the other Party (the **"Disclosing Party"**) to the Receiving Party hereunder and (ii) would be reasonably understood from notices or legends, the nature of such information itself or the circumstances of such information's disclosure to be confidential by a reasonable person familiar with the applicable industry. The terms of this Agreement comprise each Party's Confidential Information. For the avoidance of doubt, all information relating to [\*\*\*] comprise Licensor's Confidential Information.

1.5 **"Cover"** (in all its verb and adjectival forms, such as "Covered" and "Covers") shall mean that, in the absence of a license, the use, sale, offer for sale, manufacture or import of the product or service in question by Licensee or its Affiliates would infringe one of Licensor's patents.

1.6 **"Effective Date"** shall mean July 10, 2012.

1.7 **"Entity"** shall mean any corporation, firm, partnership, proprietorship, or other form of business organization.

1.8 **"Field of Use"** shall mean ambulatory infusion pump systems and related software and accessories for the treatment of diabetes.

1.9 **"Licensor"** shall mean Smiths Medical.

1.10 **"Licensee"** shall mean Tandem.

1.11 **"Licensed Patents"** shall mean, collectively, the Exhibit B Patent Rights and the Exhibit C Patent Rights.

1.12 **"Licensed Product"** shall mean any product or service that is Covered by the Exhibit B Patent Rights and Exhibit C Patent Rights.

1.13 **"Party"** and **"Parties"** shall mean, as applicable, either: (a) Licensor, and/or (b) Licensee, either individually or collectively. An Affiliate of either Party shall mean, as applicable, Licensor Affiliate or Licensee Affiliate.

1.14 “**Patent Rights**” shall mean the patents and patent applications listed in *Exhibits A, B, and C*. The patents and patent applications listed in *Exhibit A* and any and all of their foreign counterparts that have not been abandoned are collectively referred to as the “**Assigned Patent Rights**”; the patents and patent applications listed in *Exhibit B* are collectively referred to as the “**Exhibit B Patent Rights**”; and the patents and patent applications listed in *Exhibit C* are collectively referred to as the “**Exhibit C Patent Rights**”.

1.15 “**Sublicensing Revenue**” shall mean all payments and the cash equivalent thereof (and for equity, less any amounts paid for such equity consideration) paid to Licensee by its sublicensees under the Licensed Patents in consideration for and directly attributable to the grant of such sublicense, and excluding the following: (a) payments made in consideration for the issuance of equity or debt securities of Licensee; (b) payments for direct or fully burdened expenses associated with research or development; (c) loans; and (d) payments for supply of Licensed Products. Sublicensing Revenue does not include amounts received in connection with a merger, consolidation or sale of all or substantially all of the business or assets of Licensee (including the assets of Licensee to which this Agreement relates), except where the merger, consolidation or sale is with a Third Party licensed by Licensee under any of the Patent Rights.

1.16 “**Third Party**” shall mean any person or Entity other than Licensor, Licensor Affiliates, Licensee or Licensee Affiliates.

## **2. REPRESENTATIONS, WARRANTIES AND CONFIDENTIALITY**

2.1 Licensor Warranties. Licensor represents, warrants and covenants to Licensee that:

2.1.1 As of the Effective Date, Licensor is the sole owner of all right, title and interest in and to, and is free to exploit, the Patent Rights free of any liens, encumbrances or restrictions, or other legal or equitable claims that could conflict with the rights granted to Licensee hereunder, except for [\*\*\*].

2.1.2 Licensor has the legal power to transfer the rights granted to Licensee in this Agreement, including the right to cause its Affiliates to transfer the rights granted to Licensee in this Agreement.

2.1.3 As of the Effective Date, to Licensor’s knowledge, Licensor and Licensor Affiliates have not received any notice or claim from any Third Party, the allegations of which would trigger, or if the allegation had or will progress sufficient to trigger, subject matter jurisdiction for declaratory judgment, that the practice of the Patent Rights within the Field of Use infringes any Third Party patent or other intellectual property rights, other than (a) U.S. Patent No. 6,650,951, now part of the Assigned Patent Rights, about which Licensor was contacted by the previous owner of thereof, (b) those patents asserted by Medtronic MiniMed, Inc. in *Medtronic MiniMed Inc. v. Smiths Medical MD Inc.*, Civil Action Number 03-776-KAJ in the United States District Court for the District of Delaware, and (c) allegations by non-practicing entity [\*\*\*] that certain [\*\*\*] and/or certain [\*\*\*] are covered by their patents. As of the Effective Date, (i) there is no action, suit, proceeding or investigation pending or currently threatened against Licensor or its Affiliates alleging invalidity of this Agreement or challenging the right of Licensor to enter into this Agreement or consummate the transactions contemplated hereby and there is no basis for the foregoing; (ii) there is no interference, opposition, cancellation, reexamination or invalidity proceedings pending or threatened relating to the Patent Rights; and (iii) there is no action, suit, claim, proceeding or investigation pending or threatened against Licensor or any of the inventors named on the Patent Rights, which, if decided adversely to Licensor or any of such inventors, would result in a Third Party claim against the Licensed Patents.

2.1.4 The execution and delivery of this Agreement and the performance of the transactions contemplated hereby have been duly authorized by all appropriate Licensor corporate actions.

2.1.5 This Agreement is a legal and valid obligation binding upon Licensor and its Affiliates, enforceable in accordance with its terms, and the execution, delivery and performance of this Agreement by the Parties does not conflict with any agreement, instrument or understanding to which Licensor or its Affiliates is a party or by which it is bound.



2.1.6 As of the Effective Date, if any of the inventor assignments are not up-to-date in the name of Licensor or its Affiliates, Licensor will, immediately upon receipt of Licensee's request, cooperate with Licensee to bring those assignments up-to-date.

2.1.7 Licensor and its Affiliates have not licensed or transferred to any person or Entity any rights under the Assigned Patent Rights.

2.1.8 Except for [\*\*\*], Licensor and its Affiliates have not, as of the Effective Date, licensed or transferred to any person or Entity, any rights under the Exhibit C Patent Rights in the Field of Use. Licensor and its Affiliates will not license or transfer to any person or Entity any rights under the Exhibit C Patent Rights within the Field of Use.

2.1.9 Except for [\*\*\*], Licensor is not party to any agreement that restricts Licensor's or Licensee's ability to enforce claims within the Patent Rights, or to assert claims within the Patent Rights against products or services.

2.1.10 No consent, approval, order or authorization of, or registration, qualification, designation, declaration or filing, with any Third Party on the part of Licensor or its Affiliates is required in connection with its execution, delivery and performance of this Agreement, including without limitation consent of any person or entity that has an ownership interest, or that alleges an ownership interest, in or to the Patent Rights.

2.2 Mutual Warranties. Each Party represents, warrants and covenants to the other Party that (i) such Party has the full right, power, and authority to execute this Agreement and to perform its terms; (ii) its execution of this Agreement and the consummation of the transactions required by this Agreement will not violate or conflict with or breach (a) any charter provision or bylaw of such Party or any of its Affiliates, (b) any mortgage, indenture, note, license, agreement or other instrument or obligation to which such Party or its Affiliate is bound, or (c) any judgment, order, writ, injunction, decree, statute, rule or regulation applicable to such Party or any of its Affiliates; (iii) such Party has taken all required corporate actions to approve and adopt this Agreement; (iv) this Agreement is enforceable against such Party according to its terms; and (v) the person or persons executing this Agreement on its behalf are duly authorized and empowered to do so.

2.3 Standing. Licensor makes no representation that Licensee will have standing to enforce a claim within the Patent Rights without Licensor joining Licensee as a party to the lawsuit.

2.4 [\*\*\*]. As of the Effective Date, Licensor's [\*\*\*] within the Exhibit C Patent Rights [\*\*\*] or by [\*\*\*], and/or to [\*\*\*] within the Exhibit C Patent Rights [\*\*\*] and [\*\*\*], is [\*\*\*] executed by and between [\*\*\*] with respect to those Patent Rights identified as such in *Exhibit C* [\*\*\*]. Licensee acknowledges that [\*\*\*] may thus also [\*\*\*] from [\*\*\*] within the Exhibit C Patent Rights [\*\*\*], and/or to [\*\*\*] within the Exhibit C Patent Rights [\*\*\*] and [\*\*\*].

2.5 Confidential Information.

2.5.1 Either Party receiving Confidential Information (the “**Receiving Party**”) from the other Party (the “**Disclosing Party**”) shall hold all of the Disclosing Party’s Confidential Information in strict confidence and shall not disclose any of the Disclosing Party’s Confidential Information to any Third Party, other than to its Affiliates, employees, and advisors, who need to know such information (“**Representatives**”) and who are bound by restrictions regarding disclosure and use of such information comparable to and no less restrictive than those set forth herein. The Receiving Party shall cause its Representatives to comply with the terms of this Section 2.5, and the Receiving Party shall be responsible for any breach of this Agreement by any of its Representatives. The Receiving Party shall not use the Disclosing Party’s Confidential Information for any purpose other than the performance and/or enforcement of this Agreement. The Receiving Party shall take the same degree of care that it uses to protect its own confidential and proprietary information and materials of similar nature and importance (but in no event less than reasonable care) to protect the confidentiality and avoid the unauthorized use, disclosure, publication or dissemination of the Disclosing Party’s Confidential Information. The Receiving Party shall not make any copies of the Disclosing Party’s Confidential Information except to the extent reasonably necessary to perform or enforce this Agreement. Any such copies made shall be identified as the property of the Disclosing Party and marked “confidential”, “proprietary” or with a similar legend.

2.5.2 Notwithstanding anything to the contrary herein, the Receiving Party may use or disclose the Disclosing Party’s Confidential Information to the extent the Receiving Party is legally compelled to disclose such Confidential Information, provided, however, that prior to any such compelled disclosure, the Receiving Party shall give the Disclosing Party reasonable advance notice of any such disclosure and shall cooperate with the Disclosing Party in protecting against any such disclosure and/or obtaining a protective order narrowing the scope of such disclosure and/or use of the Confidential Information.

2.5.3 Notwithstanding anything to the contrary herein, each Party may disclose the terms and conditions of this Agreement to its Affiliates and: (a) as required by the applicable securities laws, including, without limitation, requirements to file a copy of this Agreement (redacted to the extent reasonably permitted by applicable law) or to disclose information regarding the provisions hereof or performance hereunder to applicable regulatory authorities; (b) in confidence, to legal counsel; (c) in confidence, to accountants, banks, and financing sources and their advisors; (d) in connection with the enforcement of this Agreement or any rights hereunder; and (e) in confidence to any bona fide prospective purchaser of a business to which this Agreement pertains. Any public announcement of the existence and/or terms of this Agreement must be agreed to in advance by an authorized employee of both Parties. Such public announcement shall not include any of the financial terms of this Agreement.

2.5.4 Exceptions. The obligations of this Section 2.5 shall not apply when and to the extent the information of the Disclosing Party:

- (a) was known to the Receiving Party or its Affiliate(s) on an unrestricted basis prior to receipt from the Disclosing Party or its Affiliate, as documented in written records that kept by Receiving Party or its Affiliate(s) in the ordinary course;
- (b) was available to the public prior to receipt from the Disclosing Party or its Affiliate(s);
- (c) through no wrongful act on the part of the Receiving Party or its Affiliate(s), becomes lawfully available to the public;
- (d) was received in good faith on an unrestricted basis by the Receiving Party or its Affiliate(s) from any Third Party, as documented in written records kept by Receiving Party or its Affiliate(s) in the ordinary course; or
- (e) is independently developed by a person working for or on behalf of the Receiving Party or its Affiliate(s) without reliance upon or use of the Disclosing Party’s Confidential Information, as documented in written records kept by Receiving Party or its Affiliate(s) in the ordinary course.

2.5.5 The Receiving Party may disclose the Disclosing Party's Confidential Information to a Third Party to the extent required by law or legal process, provided that the Receiving Party notifies the Disclosing Party of such disclosure before it takes place and cooperates with the Disclosing Party in protecting against any such disclosure and/or obtaining a protective order narrowing the scope of such disclosure and/or use of the Confidential Information.

2.5.6 Within two (2) weeks after the Effective Date, both Parties, except for their respective counsel, shall destroy all information in their possession that was marked "Confidential" and that was received from the other Party for the purpose of negotiating this Agreement. This includes without limitation, whether such information is contained in or represented in tangible or electronic form and includes, without limitation, copies of all term sheets related to the Agreement, patent and patent application offering lists related to the Agreement, draft versions of the Agreement, and email communications related to the Agreement. For the avoidance of doubt, any Confidential Information of the Disclosing Party that cannot be reasonably destroyed (e.g., copies of electronically exchanged Confidential Information made as a matter of routine information technology backup, or electronically exchanged Confidential Information which does not fully delete utilizing normal procedures, or Confidential Information which must be stored by Recipient or its representatives according to provisions of mandatory law or regulation) shall continue to be subject to the confidentiality and non-use obligations according to the terms and conditions set forth herein.

2.6 Patent Validity and Breadth. Without limiting any of Licensor's warranties set forth herein, Licensor makes no representation as to the validity, enforceability, or breadth of the claims of any patent or of any patent application included in the Patent Rights pending as of the Effective Date, and makes no warranty as to whether the claims of any foreign counterparts are broader or narrower than the corresponding U.S. patents and applications that are within the Patent Rights.

## 2.7 Licensee Warranties.

2.7.1 Noninterference. Licensee shall commit no act in the prosecution of patent applications, reissues, reexaminations, or other proceedings within the United States Patent and Trademark Office intending to result in the United States Patent and Trademark Office issuing a double-patenting rejection in the prosecution of either or both U.S. patent applications numbered [\*\*\*] and [\*\*\*]. Licensee agrees that if Licensee presents a claim in the prosecution of patent applications, reissues, reexaminations, or other proceedings within the United States Patent and Trademark Office that results in the Patent and Trademark Office issuing a double patenting rejection or a provisional double patenting rejection in the prosecution of either or both of United States patent applications [\*\*\*] and [\*\*\*] or in the application in which such claim is presented in view of United States patent applications [\*\*\*] and [\*\*\*], Licensee will use reasonable efforts to eliminate the basis for the double patenting rejection and if necessary to eliminate the rejection, Licensee will withdraw such claim.

2.7.2 Licensee has the legal power to accept the rights granted to Licensee in this Agreement.

2.7.3 The execution and delivery of this Agreement and the performance of the transactions contemplated hereby have been duly authorized by all appropriate Licensee corporate actions.

2.7.4 This Agreement is a legal and valid obligation binding upon Licensee and its Affiliates, enforceable in accordance with its terms, and the execution, delivery and performance of this Agreement by the Parties does not conflict with any agreement, instrument or understanding to which Licensee or its Affiliates is a party or by which it is bound.

2.7.5 No consent, approval, order or authorization of, or registration, qualification, designation, declaration or filing, with any Third Party on the part of Licensee or its Affiliates is required in connection with its execution, delivery and performance of this Agreement.

2.7.6 Licensee shall not [\*\*\*] or [\*\*\*] to [\*\*\*] any of the Patent Rights [\*\*\*] to [\*\*\*] as long as it is in legal effect.

### 3. LICENSES AND ASSIGNMENT

3.1 Assignment to Assigned Patent Rights. Licensor and its Affiliates hereby assign to Licensee all of Licensor's and its Affiliates' right, title and interest in and to the Assigned Patent Rights, together with worldwide enforcement rights under the Assigned Patent Rights, free and clear of all liens, mortgages, pledges, security interests, prior assignments and encumbrances of any kind, throughout the world. Such assignment includes the right to (i) sue for (and otherwise assert claims for) and recover damages and obtain any and all other remedies available at law or in equity for any past, present or future infringement, misappropriation or other violation of the foregoing (and settle all such suits, actions and proceedings); (ii) seek appropriate protection therefor (including, where appropriate, the right to seek letters patent); and (iii) claim all rights and priority under the Assigned Patent Rights. Licensor will send to Licensee an executed assignment of the Assigned Patent Rights in the form attached hereto as **Exhibit D ("Assignment")** promptly after Licensee has delivered to Licensor a copy of this Agreement signed by both Parties, in accordance with the requirements of Section 10.6 (Notices). Licensee shall file, at its own expense, the Assignment in such patent offices worldwide as it determines in its sole discretion. Licensor shall provide any and all assistance related to the change of assignment and vesting of title at no cost to Licensee as may reasonably be required. As between the Parties, Licensee has the sole and exclusive responsibility for the maintenance of the Assigned Patent Rights (and shall take such actions as reasonably necessary to assume such responsibility within thirty (30) days of the Effective Date), and shall have the sole and exclusive right to prosecute the Assigned Patent Rights in its sole discretion, except as set forth in Section 4.3.2 of this Agreement.

3.2 Non-Exclusive License to Exhibit B Patent Rights. Licensor and its Affiliates hereby grant to Licensee and its Affiliates, under Licensor's entire right, title and interest in and to the Exhibit B Patent Rights, a non-exclusive, worldwide, fully paid up, royalty-free, non-transferable (except in accordance with Section 10.9), sublicensable license to make, have made, use, sell, offer to sell, have sold and import Licensed Products in the Field of Use.

3.3 Exclusive License to Exhibit C Patent Rights. Licensor and its Affiliates hereby grant to Licensee and its Affiliates, under Licensor's and its Affiliates' entire right, title and interest in and to the Exhibit C Patent Rights, an exclusive, worldwide, fully paid up, royalty-free, non-transferable (except in accordance with Section 10.9), sublicensable license to make, have made, use, sell, offer to sell, have sold and import Licensed Products in the Field of Use.

3.4 Non-Exclusive License to Additional Patent Rights. Licensor and its Affiliates hereby grant to Licensee and its Affiliates, under Licensor's and its Affiliates' entire right, title and interest in and to the Additional Patent Rights, a worldwide, non-exclusive, royalty-free, fully paid up, non-transferable (except in accordance with Section 10.9), non-sublicensable license to make, have made, use, sell, offer to sell, have sold and import Permitted Products in the Field of Use. Included within the scope of this license is a perpetual covenant by Licensor not to sue Licensee or its customers for patent infringement on the Permitted Products. Licensee shall: (i) provide, free of charge, to Licensor the following Permitted Product: one (1) t:slim® Insulin Delivery System manufactured [\*\*\*]; and (ii) [\*\*\*] and [\*\*\*] to [\*\*\*] the [\*\*\*] of the additional Permitted Products during [\*\*\*], or as schedules reasonably allow (the "[\*\*\*]"). Any features added to the Permitted Products after the [\*\*\*] are not covered by the license granted in this Section 3.4. All [\*\*\*] as part of or in connection with the [\*\*\*] that is Licensee's Confidential Information shall be [\*\*\*] and [\*\*\*] ([\*\*\*]) that shall be [\*\*\*] disclosure.

#### 3.5 Grants-Back.

3.5.1 Licensee hereby grants to Licensor, under Licensee's right, title and interest in and to the Assigned Patent Rights, a worldwide, fully paid-up, exclusive, royalty-free, non-transferable (except in accordance with Section 10.9), sublicensable license to make, have made, use, sell, offer to sell, have sold and import products and services outside the Field of Use to the extent any of the foregoing activities would, absent the license granted to Licensor under this Section, infringe the Assigned Patent Rights.

3.5.2 Licensee hereby grants to Licensor, under Licensee's right, title and interest in and to the Patent Rights, a worldwide, fully paid-up, non-exclusive, royalty-free, non-transferable (except in accordance with Section 10.9), non-sublicensable license to make, have made, use and import, but not to sell, have sold or offer to sell, those products commercialized by Licensor as of the Effective Date described in the marketplace as "Deltac Cozmo® insulin pump", "CozMore extension", and "CoZmonitor PC Communications software" (collectively, "**Warranted Products**"), solely for purposes of making or having made Warranted Products and supporting its customers' use of Warranted Products, to the extent any of the foregoing activities would, absent the license granted to Licensor under this Section, infringe any or all of the patents within the Patent Rights. Included within the scope of this license is a perpetual covenant by Licensee not to sue Licensor or its customers for patent infringement on the Warranted Products. Such license shall commence upon the Effective Date and continue through the expiration of the last to expire warranty period of Warranted Products.

3.6 Customers. All licenses expressly granted in this Agreement include the right of the relevant licensee to grant its customers (whether direct or indirect) the right to use, sell (for further use or resale), and/or import the relevant licensed products, and such right shall not be considered a sublicense.

3.7 Release. Licensor acknowledges and agrees that the Fee (defined in Section 5.1) made hereunder by Licensee constitutes full, complete and final settlement of any and all current and/or future patent infringement claims by or on behalf of Licensor against Licensee based on the manufacture, use, sale, offer for sale and import of Licensed Products and Permitted Products at any time prior to the Effective Date. Licensor, itself and on behalf of its Affiliates, and their respective owners, officers, directors, agents, employees, successors and assigns, and any related, affiliated or subsidiary corporations, entities or businesses, hereby irrevocably and absolutely releases, acquits, and forever discharges Licensee, and any related, affiliated or subsidiary corporations, entities or businesses, from any and all claims, demands, damages, debts, liabilities, actions, causes of action, suits, contracts, controversies, agreements, accounts, reckonings, obligations and judgments, whether in law or in equity, which they, or any of them, may have, or their successors or assigns had, owned or held, or now have, own or hold, or hereafter may have, own or hold which arise out of the Permitted Products falling within any patent claims within the Patent Rights and/or Additional Patent Rights. It is the intention of the Parties that, with respect to payment by Licensee of the Fee, this Agreement shall be effective as a full and final accord and satisfactory release of the foregoing patent infringement matters. In furtherance of this intention, Licensor and its Affiliates waive any and all rights under California Civil Code Section 1542, which reads as follows:

"A general release does not extend to claims which the creditor does not know of or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

Licensor, itself and on behalf of its Affiliates, acknowledges having read all of this release, including the above Civil Code Section, and fully understands both the release and the Civil Code Section. In connection with such waiver and release, Licensor, itself and on behalf of its Affiliates, acknowledges and affirms that it is aware that it or its attorneys or accountants may hereafter discover facts in addition to or different from those which it now knows or believes to exist with respect to the subject matter of this release, but that it is its intention hereby fully, finally and forever to settle and release all of the claims, disputes and differences, known or unknown, suspected or unsuspected, which now exist or may exist, and/or which any of them may hold, acquire or become vested with against another party on account of the above described matter or payment by Licensee of the Fee. This release is, shall be, and shall remain in effect as a full and complete release related to such matters notwithstanding the discovery or existence of any such additional or different facts.

#### 4. PATENT PROSECUTION AND MAINTENANCE

4.1 General. For purposes of this Article 4, the right to control prosecution of a patent or patent application shall include the right to control preparing, filing, and prosecuting patent applications therefor, and obtaining and maintaining any resulting patents.

4.2 Licensed Patents.

4.2.1 Licensor shall use reasonably diligent efforts in controlling, filing, prosecuting, and maintaining any and all patents and patent applications within the Licensed Patents and shall hold title to all Licensed Patents, in all cases at its own cost and expense.

4.2.2 Licensee shall have the right of review and comment in respect to the Licensed Patents, meaning Licensor shall consult with Licensee in good faith regarding the preparation, filing, prosecution, and maintenance of the Licensed Patents, including the conduct of interferences, the defense of oppositions and other similar proceedings with respect to claims therein. Without limiting the foregoing, Licensor will timely provide Licensee with a copy of any proposed patent application within such Licensed Patents and any proposed response or submission to any patent office at least [\*\*\*] business days prior to the filing or response deadline; provided, however, that such [\*\*\*] business day period shall be reasonably reduced on a case-by-case basis in the event that, due to no fault of Licensor or its agents and despite reasonable efforts of Licensor and its agents, compliance within such period of time is not feasible in order to timely proceed with the relevant submission or other contemplated action. Licensor will consider in good faith all comments made by Licensee with respect to such draft response or submission, and will not unreasonably fail to act on any reasonable changes recommended by Licensee related thereto (and, notwithstanding Section 4.2.1, any demonstrated reasonable increased cost as a result of Licensee's inputs will be borne by Licensee); provided, however, that in the event of a good faith disagreement between Licensee and Licensor, Licensor shall have the sole right to determine the contents of such submission. To that end, Licensor will keep Licensee reasonably informed of the status of the applicable Licensed Patents, including, without limitation: (a) by providing Licensee with copies of [\*\*\*] received from or filed in patent office(s), or received from or sent to [\*\*\*], with respect to such filing, (b) by providing a docket report at least annually upon request from Licensee and (c) by providing Licensee a reasonable time, but in any event not less than [\*\*\*] business days (subject to possible reductions as set forth in the prior sentence), prior to [\*\*\*] that would [\*\*\*] the pendency of any such filing, with prior written notice of such proposed action or inaction so that Licensee has a reasonable opportunity to review and comment. In furtherance of the foregoing requirements, Licensor shall itself, or shall instruct and use reasonable efforts to ensure that its outside patent counsel, promptly forward to Licensee a copy of [\*\*\*] received from or sent to [\*\*\*] relating to the Licensed Patents, and Licensor and Licensee each agree to [\*\*\*] if deemed advisable by Licensee's and/or Licensor's patent counsel.

4.2.3 Licensor shall not intentionally abandon the maintenance or prosecution of any patent or patent application within the Licensed Patents (and any abandonment during a bankruptcy proceeding shall be deemed intentional) without submitting written notice to Licensee and an offer to assign for no additional consideration any such patent(s) or patent application(s) to Licensee, provided that Licensee and/or its successor(s) in interest to the Licensed Patents keep Licensor informed of its current address for notices, in which case, if Licensee has so accepted such offer and Licensor has so assigned any such patent(s) or patent application(s), Licensee shall have the sole and exclusive right to control, file and prosecute such patents and patent applications, at its own cost. If one of the patents or patent applications within the Licensed Patents goes abandoned as a result of Licensor's negligence or willful misconduct ("**Abandoned Patent**"), and provided that Licensor notifies Licensee promptly upon becoming aware of such negligence or willful misconduct, then, without limiting Licensee's available equitable remedies, the maximum amount recoverable by Licensee from Licensor with respect to a claim for damages caused by such negligence or willful misconduct will be [\*\*\*] of the [\*\*\*], and, in the aggregate, the maximum recoverable amount shall in no event be more than [\*\*\*] of the [\*\*\*].

4.3 Assigned Patent Rights. Licensor shall use reasonable and customary care with respect to the prosecution and maintenance of the Assigned Patent Rights [\*\*\*] has [\*\*\*] the [\*\*\*] or [\*\*\*] the [\*\*\*] that is [\*\*\*] the [\*\*\*]. Absent Licensor's recklessness or willful misconduct, Licensor shall not be liable for damages stemming from one or more of the foreign counterparts within the Assigned Patent Rights going abandoned before Licensee takes over prosecution.

4.3.1 Licensee shall use reasonably diligent efforts in controlling, prosecuting, and maintaining U.S. patent application numbers [\*\*\*] and [\*\*\*] and any and all patents and patent applications resulting therefrom, (collectively, the "[\*\*\*] and [\*\*\*] **Properties**") in all cases at its own cost and expense. For the avoidance of doubt, the [\*\*\*] and [\*\*\*] Properties are part of the Assigned Patent Rights.

4.3.2 Licensor shall have the right of review and comment with respect to the [\*\*\*] and [\*\*\*] Properties, meaning Licensee shall consult with Licensor in good faith regarding the prosecution and maintenance of the [\*\*\*] and [\*\*\*] Properties, including the conduct of [\*\*\*], the [\*\*\*] and other [\*\*\*] with respect to claims therein. Without limiting the foregoing, Licensee will timely provide Licensor with a copy of any proposed patent application within the [\*\*\*] and [\*\*\*] Properties and any proposed response or submission to [\*\*\*] at least [\*\*\*] business days prior to the filing or response deadline; provided, however, that such [\*\*\*] business day period shall be reasonably reduced on a case-by-case basis in the event that, due to no fault of Licensee or its agents and despite reasonable efforts of Licensee and its agents, compliance within such period of time is not feasible in order to timely proceed with the relevant submission or other contemplated action. Licensee will consider in good faith all comments made by Licensor with respect to such draft response or submission, and will not unreasonably fail to act on any reasonable changes recommended by Licensor related thereto (and, notwithstanding Section 4.2.1, any demonstrated reasonable increased cost as a result of Licensor's inputs will be borne by Licensor); provided, however, that in the event of a good faith disagreement between Licensee and Licensor, Licensee shall have the sole right to determine the contents of such submission. To that end, Licensee will keep Licensor reasonably informed of the status of the [\*\*\*] and [\*\*\*] Properties, including, without limitation: (a) by providing Licensor with copies of [\*\*\*] received from or filed in patent office(s), or received from or sent to [\*\*\*], with respect to such filing, (b) by providing a docket report at least annually upon request from Licensor and (c) by providing Licensor a reasonable time, but in any event not less than [\*\*\*] business days (subject to possible reductions as set forth in the prior sentence), prior to [\*\*\*] or [\*\*\*] that would [\*\*\*] the pendency of any such filing, with prior written notice of such proposed action or inaction so that Licensor has a reasonable opportunity to review and comment. In furtherance of the foregoing requirements, Licensee shall itself, or shall instruct and use reasonable efforts to ensure that its outside patent counsel, promptly forward to Licensor a copy of [\*\*\*] received from or sent to [\*\*\*] relating to the [\*\*\*] and [\*\*\*] Properties and any applications claiming priority to them, and Licensee and Licensor each agree to [\*\*\*] if deemed advisable by Licensor's and/or Licensee's patent counsel.

4.3.3 The provisions of Section 3.1 (Assignment of Assigned Patent Rights) notwithstanding, Licensee shall not intentionally abandon the maintenance or prosecution of any patent or patent application within the [\*\*\*] and [\*\*\*] Properties without submitting written notice to Licensor and an offer to assign for no additional consideration any such patent(s) or patent application(s) to Licensor, in which case, if Licensor has so accepted such offer and Licensee has so assigned any such patent(s) or patent application(s) Licensor shall have the sole and exclusive right to control, file and prosecute such patents and patent applications, at its own cost. However, if one of the U.S. patents or patent applications within the [\*\*\*] and [\*\*\*] Properties goes abandoned as a result of Licensee's negligence or willful misconduct, and provided that Licensee notifies Licensor promptly upon becoming aware of such negligence or willful misconduct, then, without limiting Licensor's available equitable remedies, the maximum amount recoverable by Licensor from Licensee with respect to a claim for damages caused by such negligence or willful misconduct will be [\*\*\*] of the [\*\*\*] within the [\*\*\*] and [\*\*\*] Properties, and, in the aggregate, the maximum recoverable amount shall in no event be more than [\*\*\*] of the [\*\*\*].

## 5. COMPENSATION

5.1 Total Consideration. The total amounts due by Licensee to Licensor ("**Total Consideration**") for all rights conveyed herein shall be, collectively: (i) a fee of five million U.S. dollars (\$5,000,000.00) ("**Fee**"); and (ii) Sublicensing Revenues. Licensee shall pay Licensor the Fee as follows: one million U.S. dollars (\$1,000,000.00) by July 15, 2012, followed by a payment of five hundred thousand U.S. dollars (\$500,000.00) by January 15, 2013, followed by a payment of one million five hundred thousand U.S. dollars (\$1,500,000.00) by July 15, 2013, followed by a payment of one million U.S. dollars (\$1,000,000.00) by January 15, 2014, and followed by the final payment of one million U.S. dollars (\$1,000,000.00) by July 15, 2014. No ongoing or running royalties shall be due Licensor other than any Sublicensing Revenue as described in Section 5.2.

5.2 Sublicensing Revenue. Licensee shall pay to Licensor fifty percent (50%) of Licensee's Sublicensing Revenues within forty-five (45) days of Licensee's receipt thereof.

5.3 Address for Payments. Payments shall be sent to:

Accounts Payable  
Smiths Medical ASD, Inc.  
5200 Upper Metro Place, Suite 200  
Dublin, OH 43017

5.4 Late Payments. Licensee shall be fully responsible for the prompt payment of all payments due to Licensor pursuant to this Agreement. Upon Licensee's failure to timely deliver any payment due hereunder, a late fee of [\*\*\*] of any past due amount shall be assessed upon any installment or royalty payment being late plus [\*\*\*] additional fee each following month, or the highest amount permitted under applicable law, whichever is less, shall be immediately assessed on overdue payments.

## 6. PATENT ENFORCEMENT

6.1 Assertion.

6.1.1 If a Party learns of any actual, alleged or threatened infringement by a Third Party of any of the Patent Rights, such Party shall promptly notify the other Party (subject to any contractual obligations of confidentiality the knowing Party may owe to such Third Party) and shall [\*\*\*] of [\*\*\*].

6.1.2 Licensee shall have the first worldwide right (but not the duty) to enforce the Assigned Patent Rights. Licensor shall have the first right, upon Licensee's prior written consent, which shall not be unreasonably withheld, to enforce the Assigned Patent Rights outside the Field of Use.

6.1.3 Except where prohibited by [\*\*\*], Licensee shall have the first worldwide right (but not the duty) to enforce the Licensed Patents in the Field of Use. Licensor shall have the first right (but not the duty) to enforce the Licensed Patents outside the Field of Use.

6.1.4 Each Party shall notify the other Party reasonably in advance before taking any action to enforce any claim within the Patent Rights against a Third Party ("**Action**"). The Parties shall confer with each other to find out whether or not any agreement entered into by either Party prohibits it from joining as a party to the action. If the Action is subject to such a restriction on one Party, that one Party [\*\*\*] of the [\*\*\*], and [\*\*\*] in such event, [\*\*\*] to the [\*\*\*], the [\*\*\*], and [\*\*\*] the [\*\*\*] and subject to [\*\*\*] and shall be [\*\*\*] the [\*\*\*]. If (i) there is no such prohibition by contract, (ii) the Party that would not be a necessary party desires to pursue an Action and (iii) joinder is reasonably necessary for the Action to proceed, then [\*\*\*] or [\*\*\*]. Each Party's right to enforce the Patent Rights includes the rights to initiate, prosecute, assert, settle, appeal and/or abandon legal action involving the Patent Rights within such Action; provided that neither Party shall settle any Action with an admission or agreement in any way that would be reasonably likely to directly and adversely affect the scope, validity or enforceability of the Patent Rights without the other Party's prior written permission (not to be unreasonably withheld). If the Party [\*\*\*], only under this Section 6.1.4, has a [\*\*\*] under such [\*\*\*] pursuant to a written agreement, the other Party [\*\*\*] to the Party that [\*\*\*] such [\*\*\*] hereunder any [\*\*\*] within sixty (60) days of [\*\*\*].

6.1.5 [Reserved]

6.2 Costs and Expenses.

6.2.1 If either Party brings or joins an Action, then each plaintiff Party's costs of such Action shall be at the plaintiff Party's own expense. Each plaintiff Party shall render at its own expense reasonable assistance to the other Party in so enforcing the Patent Rights. Each plaintiff Party shall be entitled to be represented therein by its own counsel.



6.2.2 If one Party brings an Action and the other Party does not join in the Action, each Party shall be entitled to be represented therein by its own counsel but at the asserting Party's expense, and the non-asserting Party shall take all actions reasonably necessary to assist the asserting Party in such Action at the asserting Party's expense.

6.2.3 The Party incurring reimbursable costs or fees as allowed under this Section 6.2 may invoice the other Party for recovery of such and the asserting Party shall pay all undisputed amounts in such invoice within forty-five (45) days from the date of receipt of such invoice.

6.2.4 If Licensee collects any settlement payment or court awarded payment in an Action that is directly attributable to infringement of the Licensed Patent Rights, then Licensee shall pay Licensor [\*\*\*] of the actual amount collected within forty-five (45) days thereafter, subject to the following deductions: (i) [\*\*\*] associated with Licensed Products, and (ii) litigation costs and fees incurred or paid by Licensee with respect to the Action, including those incurred in paying for Licensor's participation in the Action or reimbursement to Licensor of the same (together, "**Deductions**"). If Licensee collects the settlement payment or court awarded payment in installments, then Licensee shall apply the Deductions to each collected installment until the Deductions are exhausted. Licensee shall provide Licensor with a report showing the above calculation. If such settlement or court award includes running royalty payments, Licensee shall begin paying Licensor [\*\*\*] of its net royalty payments actually received, net of the Deductions.

6.2.5 Licensor shall retain [\*\*\*] of any settlement or damages awarded to it in an Action brought by it, and any royalties paid by such person or Entity to Licensor pursuant to such Action shall continue to flow to Licensor.

6.3 **Marking.** Licensee shall mark all Licensed Products made or sold in the United States in accordance with United States patent laws. Licensor shall mark all products and services covered by the licenses granted in Section 3.5 and made or sold in the United States in accordance with United States patent laws.

## 7. **TERM AND TERMINATION**

7.1 **Term.** The term of this Agreement shall expire on the date that the last patent in the Patent Rights (i) expires or lapses, (ii) is found to be invalid or unenforceable by a judgment of a court of competent jurisdiction, which such judgment is not or cannot be appealed, or (iii) is disclaimed or dedicated to the public.

7.2 **Termination By Licensor.** Licensor may not terminate this Agreement except as expressly permitted in this Section 7.2.

7.2.1 If Licensee is ninety (90) days or more late in paying any installment of the Fee under Section 5.1, then Licensor may (but shall not have the duty to) notify Licensee thereof, and if Licensee does not make such payment within thirty (30) days of receipt of such notice, then Licensor may terminate this Agreement upon notice to Licensee. If Licensee materially breaches a provision of this Agreement other than payment of the Fee, and if such breach is only applicable to the Assigned Patent Rights, then Licensor may (but shall not have the duty to) notify Licensee thereof, and if Licensee does not cure such breach within ninety (90) days of receipt of such notice, then Licensor may terminate this Agreement upon notice to Licensee. If Licensor terminates this Agreement pursuant to this Section, then (i) Licensee's obligation to make further payments hereunder shall cease, (ii) all licenses and any and all covenants not to sue granted Licensee hereunder or by any amendment to this Agreement shall immediately and automatically terminate, (iii) Licensee shall assign the Assigned Patent Rights back to Licensor, and (iv) all licenses and any covenants not to sue granted Licensor hereunder or by any amendment to this Agreement shall immediately and automatically terminate upon Licensor's recording of the assignments of the Assigned Patent Rights.

7.2.2 If Licensee materially breaches any provision of this Agreement other than as described in Section 7.2.1, and if such breach is only applicable to the Exhibit B Patent Rights and/or the Exhibit C Patent Rights, respectively, then Licensor shall give notice to Licensee specifying the breach. Unless such breach is cured within ninety (90) days following Licensee's receipt of such notice, then Licensor may give further notice to Licensee terminating only the corresponding license grant (i.e., Section 3.2 and/or Section 3.3, as applicable). Such termination shall not terminate this Agreement.

7.2.3 If Licensee materially breaches any provision of this Agreement other than as described in Section 7.2.1 or Section 7.2.2 or by abandoning a patent application in breach of Section 4.3.3, then Licensor shall give notice to Licensee specifying the breach. If Licensee has not cured within ninety (90) days, the Parties shall proceed with dispute resolution pursuant to Article 8.

7.3 Termination by Licensee.

7.3.1 [Reserved.]

7.3.2 For Convenience At Any Time. Licensee may terminate the licenses granted under Sections 3.2, 3.3, or 3.4 with respect to any patent or patent application included in the Licensed Patents upon at least thirty (30) days written notice to Licensor; provided, however, that if Licensee has granted a sublicense to any of the patents or patent applications included in the Licensed Patents, it may only exercise its right to terminate one or more of the licenses identified in and pursuant to this Section 7.3.2 with respect to a patent or patent application included in such sublicense if it does so with respect to all patents and patent applications included in such sublicense. Termination of any of the licenses with respect to one or more patents or patent applications under this Section 7.3.2 shall not affect the amount payable by Licensee to Licensor hereunder.

7.3.3 For Cause. If Licensor materially breaches any provision of this Agreement other than by abandoning a patent application in breach of Section 4.2.3, then Licensee shall give notice to Licensor specifying the breach. If Licensor has not cured within ninety (90) days, the Parties shall proceed with dispute resolution pursuant to Article 8.

7.4 Conversion of Licenses and Sublicenses by Licensee Upon Termination. Licensee agrees that (i) any license that it grants to a third party under any of the Assigned Patents before Licensor receives the final installment payment of the Fee under Section 5.1 of this Agreement and (ii) any sublicense that it grants to a third party under any of the Patent Rights it has licensed hereunder shall include a provision converting such license or sublicense, as the case may be, to a license directly from Licensor to the licensee or sublicensee, as the case may be, upon termination of this Agreement pursuant to Section 7.2.1 (in the case of (i) above) or Sections 7.2.2 or 7.3.2 (in the case of (ii) above).

7.5 Products. Notwithstanding the termination of this Agreement, Licensee and its Affiliates may continue to sell, offer to sell, have sold and import Licensed Products that are in inventory as of the effective date of such termination, whether finished product or work-in-process.

7.6 Prior Obligations and Liability. No expiration or termination of this Agreement shall relieve any Party of any obligation accrued prior to the date of expiration or termination of this Agreement or relieve a Party in default from liability for damages for breach of this Agreement.

7.7 Cumulative Remedies; Non-Waiver. Except as otherwise expressly set forth in this Agreement, the termination provisions of this Article 7 are in addition to any other relief and remedies available to either Party. Waiver by any Party of a single default or breach or a succession of defaults or breaches shall not deprive such Party of any right to terminate this Agreement or seek damages arising by reason of any subsequent default or breach.

7.8 **Survival.** For the avoidance of doubt, termination of this Agreement under any provision except Sections 7.2.1 shall not terminate Licensee's rights to the Assigned Patent Rights. Subject to any exceptions therein, the provisions of the following Sections shall survive any expiration or termination of this Agreement for any reason: 2.4, 2.5 (for seven (7) years after the date of such termination or expiration), 2.7.6, 3.7, 7.5, 7.7 and 7.8, and also Articles 1, 8, 9 and 10 and the [\*\*\*] by [\*\*\*] (listed in [\*\*\*]). Confidentiality of the information contained within Section 6.1.4 shall survive expiration or termination of this Agreement. No termination of this Agreement shall require refund of any payment made by Licensee to Licensor prior to such termination.

## 8. **DISPUTE RESOLUTION**

8.1 **Dispute Resolution.** If a Party has a dispute or claim arising out of or relating to this Agreement, such Party shall first request a meeting between the Parties' Business Development (or equivalent) team members (or their designees) to attempt to resolve the dispute. The Parties' Business Development (or equivalent) team members (or their designees) shall meet within [\*\*\*] business days, or if a one or more is unavailable, then as soon as their schedules reasonably allow, to attempt to resolve the dispute. If the Parties' Business Development (or equivalent) team members (or their designees) cannot resolve the dispute within [\*\*\*] business days after their first meeting, then either Party may request that the dispute be escalated to [\*\*\*] of both Parties. Such representatives shall meet within [\*\*\*] business days of the request, or if one or more is unavailable, then as soon as their schedules reasonably allow. If such representatives cannot resolve the dispute within [\*\*\*] business days after their first meeting, then the Parties may pursue their other rights and remedies at law or in equity including exercising their termination and other rights under the Agreement as provided herein. During the course of dispute resolution discussions, all reasonable requests made by one Party to the other for non-privileged information that are reasonably related to the dispute shall be honored. Proposals and information exchanged during the informal proceedings described in this Section between the Parties shall be privileged, confidential and without prejudice to a Party's legal position in any formal proceedings.

8.2 **Equitable Considerations.** Nothing in this Article 8 shall preclude any Party from exercising the right, without waiving any right or remedy available to such Party under this Agreement or otherwise, to seek and obtain from any court of competent jurisdiction any interim or provisional relief that is necessary or desirable to protect the rights or property of such Party.

8.3 **Personal Jurisdiction, Venue and Applicable Law.** Any questions, claims, disputes, remedies or procedural matters shall be governed by the laws of the State of Delaware and of the United States of America, without regard to its principles of conflicts of law; provided, that those matters pertaining to the validity or enforceability of the Patent Rights and Additional Patent Rights shall be interpreted and enforced in accordance with the laws of the territory in which such Patent Rights exist. Each Party agrees that the courts of Delaware shall have exclusive jurisdiction over them with respect to this Agreement and agree to submit to the jurisdiction of such courts. Accordingly, any and all dispute resolution, including without limitation litigation relating to this Agreement, the Patent Rights or Confidential Information, shall be brought exclusively in the State of Delaware in the state or federal court having subject matter jurisdiction.

8.4 **Jury Trial Waiver.** The Parties hereby waive, to the extent permitted by law, their right to trial by jury in connection with any claim or cause of action related to this Agreement, the Patent Rights or both.

## 9. **INDEMNITY**

9.1 **By Licensee.** Licensee agrees to indemnify, defend and hold harmless Licensor, its Affiliates, and its and their officers, directors and employees, from and against any and all Third Party claims brought against any of the foregoing persons or Entities (including all loss, cost, liability, damage and expense alleged by such Third Party; all such claims, collectively, "**Licensor Damages**") to the extent arising out of or in connection with or relating to (i) any Licensed Products for or on account of any injury, death or damage to person or property, or (ii) any claim that a Licensed Product infringes the intellectual property of such Third Party except to the extent such claim is attributable to (a) the negligence or willful misconduct of or breach of Section 2.1 by Licensor or its Affiliates, and/or (b) Licensee's unknowing breach of [\*\*\*] after having [\*\*\*] subject to [\*\*\*].

9.2 By Licensor. Licensor shall indemnify, defend and hold harmless the Licensee, its Affiliates and its and their officers, directors and employees, from and against any and all Third Party claims brought against any of the foregoing persons or Entities (including all loss, cost, liability, damage and expense alleged by such Third Party; all such claims collectively, “**Licensee Damages**”) to the extent arising out of or in connection with or relating to (a) any breach by Licensor of Section 2.1 and (b) Licensee’s unknowing breach of [\*\*\*] after having [\*\*\*] subject to [\*\*\*].

9.3 Process. If any Party is seeking indemnification under Sections 9.1 or 9.2 (as applicable) from the other Party (“**Indemnifying Party**”), such Party (“**Indemnitee**”) shall notify the Indemnifying Party of such claim with respect to such Indemnitee as soon as reasonably practicable after the Indemnitee receives notice of the claim. The Indemnifying Party shall immediately take control of the defense and investigation of such claim at its sole cost and expense. If the Indemnitee fails to provide such prompt notice, then the Indemnifying Party shall be relieved of its indemnification obligation to the extent it can establish that it was materially prejudiced by reason of such failure and could not take appropriate action to mitigate the prejudice. No settlement of a claim that involves a remedy other than the payment of money by the Indemnifying Party shall be entered into without the prior written consent of the Indemnitee, which consent shall not be unreasonably withheld. After the Indemnifying Party assumes control of the defense of any such claim, the Indemnitee shall not be liable to the Indemnitee for any legal or related costs and expenses incurred thereafter by such Indemnitee in connection with the defense of that claim. The Indemnitee shall cooperate, at the cost of the Indemnifying Party, in all reasonable respects with the Indemnifying Party and its attorneys in the investigation, trial and defense (as applicable) of such claim and any appeal arising therefrom; provided, however, that the Indemnitee may, at its own cost and expense, participate, through its attorneys or otherwise, in such investigation, trial and defense of such claim and any appeal arising therefrom.

9.4 One Party shall have no liability to the other Party for any damages suffered by the other Party as a result of the other Party’s reliance on legal interpretations made by patent counsel of the one Party.

## 10. MISCELLANEOUS

10.1 Force Majeure. No Party shall be considered in default or be liable for any delay in performance or for any non-performance to the extent caused by circumstances beyond the reasonable control of such Party.

10.2 Third Party Beneficiaries. There are no third party beneficiaries under this Agreement except that persons and Entities who qualify as Indemnitees under Article 9 shall be third party beneficiaries of this Agreement for the limited purpose of enforcing this Agreement solely to the extent necessary to protect their rights under Article 9.

10.3 Limitations. Except as expressly set forth in this Agreement, neither Party grants to the other Party any right or license to any of its intellectual property.

10.4 Export Compliance. Each Party shall comply with all applicable United States regulations concerning export and export of technical data and products.

10.5 Severability. The provisions of this Agreement shall be deemed severable. Therefore, if any part or provision of this Agreement is rendered void, invalid or unenforceable by a court having competent jurisdiction, then such part or provision shall be severed from the remainder of the Agreement. Such severance shall not affect the validity or enforceability of the remainder of this Agreement.

10.6 Notices. Notices under this Agreement shall be in writing and sent by (a) Registered or Certified mail, Return Receipt Requested or (b) overnight courier. Notices sent by Registered or Certified mail, Return Receipt Requested, shall be effective three (3) business days following mailing. Notices sent by overnight courier shall be effective on the next business day of the addressee following the day on which the notice was sent or transmitted. Notices hereunder shall be addressed to:

If to Licensor:

Divisional General Counsel  
Smiths Medical ASD, Inc.  
1265 Grey Fox Road  
St. Paul, Minnesota 55112  
United States of America

If to Licensee:

Attn: Chief Executive Officer  
Tandem Diabetes Care, Inc.  
11045 Roselle Street, Suite 200  
San Diego, California 92121  
United States of America

10.7 Integration. This Agreement sets forth the entire agreement between the Parties relating to the subject matter herein and supersedes all previous and contemporaneous agreements and understandings, whether oral or written, between the Parties with respect to the subject matter of this Agreement.

10.8 Amendment. This Agreement may not be modified, amended or discharged except by a written agreement signed by an authorized representative of each Party.

10.9 Assignment. Neither this Agreement nor any right or obligation hereunder may be assigned, delegated or otherwise transferred, in whole or part, by either Party without the prior express written consent of the other; provided, however, that either Party may, without the written consent of the other, assign this Agreement in whole to an Affiliate, or in connection with the transfer or sale of all or substantially all of such Party's assets or business related to this Agreement, or in the event of its merger, consolidation, change in control or similar transaction. Any permitted assignee shall assume all obligations of its assignor under this Agreement. Any purported assignment in violation of this Section shall be void.

10.10 Succession. This Agreement and the rights and obligations granted and undertaken thereunder shall be binding upon and inure to the benefit of the Parties hereto, and their successors, trustee(s) or receiver(s) in bankruptcy and permitted assignees.

10.11 Section 365(n). All licenses granted under this Agreement are deemed to be, for purposes of Section 365(n) of the U.S. Bankruptcy Code, licenses of right to "intellectual property" as defined in Section 101 of such Code. The Parties agree that each Party, as licensee, may fully exercise all of its rights and elections under the U.S. Bankruptcy Code and any foreign equivalent thereto in any country having jurisdiction over a Party or its assets. Any agreements supplemental hereto will be deemed to be "agreements supplementary to" this Agreement for purposes of Section 365(n) of the Bankruptcy Code.

10.12 Further Assurances. Each Party agrees to execute, acknowledge and deliver such further instructions, and to do all such other acts, as may be necessary or appropriate in order to carry out the purposes and intent of this Agreement. Without limiting the foregoing, Licensor shall, from time to time, upon the reasonable request of Licensee, execute and deliver to Licensee such further documents or instruments of assignment, conveyance, transfer or confirmation and to take such action as may be necessary in order to more effectively assign or license (as applicable) the Patent Rights in accordance with this Agreement. If Licensor is unable or unwilling to execute such documents or instruments, and subject at all times to [\*\*\*], Licensor hereby constitutes and appoints Licensee as Licensor's attorney in fact, with full power of substitution in Licensor's name and stead, solely to take any and all steps, including proceedings at law, in equity or otherwise, to execute, acknowledge and deliver any and all instruments and assurances necessary or expedient in order to vest or perfect such rights and causes of action or to protect the same or to enforce any claim or right of any kind with respect thereto.

10.13 Headings. The article and paragraph headings in this Agreement are for convenience only and shall not constitute a part hereof.

10.14 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed to constitute an original, but all of which together shall constitute one and the same instrument. A Party may evidence execution of the Agreement by electronic means (e.g. facsimile or comparable means).

10.15 Rules of Construction. For all purposes of this Agreement, except as otherwise expressly provided or unless the context clearly requires otherwise: (i) the terms defined herein include the plural as well as the singular and vice-versa; (ii) words importing gender include all genders; (iii) any reference to an "Exhibit", an "Article" or a "Section" refers to an Exhibit, an Article or a Section, as the case may be, of this Agreement; (iv) the Exhibits hereto form part of this Agreement and are incorporated herein by this reference; (v) all references to this Agreement and the words "herein", "hereof", "hereto", "thereof", and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Exhibit, Article, Section, or other subdivision; (vi) the words "including," "included" and "includes" means inclusion without limitation; and (vii) in the event of any conflict between the terms in the body of the Agreement and the terms in the Exhibits, the terms of the Agreement shall prevail to the extent that there is such a conflict.

10.16 No Agency. Nothing contained herein, or done pursuant to this Agreement will constitute the Parties hereto entering into a joint venture or partnership or will constitute either Party hereto being the agent of the other Party for any purpose or in any sense whatsoever.

10.17 Negotiation and Drafting. This Agreement was negotiated between the Parties, each of whom had the opportunity to consult with legal counsel during the negotiation, drafting, and execution of this Agreement; and the Parties agree that this Agreement shall not be construed against any Party as the drafter.

10.18 Representations and Warranties. No Party has relied on any representation or warranty of any kind in entering into this Agreement, or as an inducement to enter into this Agreement, except for those representations and warranties expressly set forth herein.

10.19 Performance by Affiliates. Each Party is responsible and liable to the other Party for the acts and omissions of such Party's Affiliates in respect of this Agreement.

**Smiths Medical ASD, Inc. (Licensor)**

By: /s/ Srinivasan Seshadri

Srinivasan Seshadri

Title: President, Smiths Medical

Date: July 9, 2012

**Tandem Diabetes Care, Inc. (Licensee)**

By: /s/ Kim Blickenstaff

Kim Blickenstaff

Title: President & CEO

Date: July 11, 2012

**EXHIBIT A**  
**ASSIGNED PATENT RIGHTS**

6,650,951  
6,852,104  
7,734,323  
7,751,907  
11/018,706  
11/685,617  
11/755,480  
12/720,306  
12/729,985  
12/774,991  
12/908,218  
12/914,295  
13/281,168  
13/465,570  
13/477,641  
13/477,657  
13/477,666  
13/477,679  
13/477,684  
13/481,228  
13/481,302  
13/482,106  
13/530,404



**EXHIBIT B**  
**EXHIBIT B PATENT RIGHTS**

[\*\*\*]

[\*\*\*]

[\*\*\*]

and, to the extent filed by Licensor on or after [\*\*\*] with respect to the foregoing, patents or patent applications claiming priority to any of the foregoing including but not limited to (i) all provisionals, substitutions, continuations, continuations-in-part, divisionals, supplementary protection certificates, renewals, all letters patent granted thereon, and all reissues, reexaminations, extensions, confirmations, revalidations, registrations, patents of addition thereof, (ii) PCTs, and (iii) all the foreign counterparts to any and all of the foregoing (i) and (ii).





**CERTIFICATION OF CHIEF EXECUTIVE OFFICER  
PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002**

I, John F. Sheridan, certify that:

1. I have reviewed this Quarterly Report on Form 10-Q of Tandem Diabetes Care, Inc.
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Tandem Diabetes Care, Inc.

By: /s/ John F. Sheridan

John F. Sheridan  
President, Chief Executive Officer and Director

Dated: August 3, 2022

**CERTIFICATION OF CHIEF FINANCIAL OFFICER  
PURSUANT TO SECTION 302 OF THE SARBANES-OXLEY ACT OF 2002**

I, Leigh A. Vosseller, certify that:

1. I have reviewed this Quarterly Report on Form 10-Q of Tandem Diabetes Care, Inc.
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Tandem Diabetes Care, Inc.

By: /s/ Leigh A. Vosseller

Leigh A. Vosseller

Executive Vice President, Chief Financial Officer and Treasurer

Dated: August 3, 2022

## CERTIFICATION

## Pursuant to U.S.C. Section 1350, as Adopted Pursuant to Section 906 of the Sarbanes-Oxley Act of 2002

In connection with the Quarterly Report on Form 10-Q of Tandem Diabetes Care, Inc. (the "Company") for the period ended June 30, 2022, as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, John F. Sheridan, Chief Executive Officer of the Company, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that to my knowledge:

1. The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended; and
2. The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company as of the dates and for the periods presented.

Date: August 3, 2022

/s/ John F. Sheridan

John F. Sheridan  
President, Chief Executive Officer and Director

*The foregoing certification is being furnished solely to accompany the Report pursuant to 18 U.S.C. Section 1350, and is not being filed for purposes of Section 18 of the Securities Exchange Act of 1934, as amended, and is not to be incorporated by reference into any filing of the Company, whether made before or after the date hereof, regardless of any general incorporation language in such filing. A signed original of this written statement required by Section 906 has been provided to the Company and will be retained by the Company and furnished to the Securities and Exchange Commission or its staff upon request.*

**CERTIFICATION****Pursuant to U.S.C. Section 1350, as Adopted Pursuant to Section 906 of the Sarbanes-Oxley Act of 2002**

In connection with the Quarterly Report on Form 10-Q of Tandem Diabetes Care, Inc. (the "Company") for the period ended June 30, 2022, as filed with the Securities and Exchange Commission on the date hereof (the "Report"), I, Leigh A. Vosseller, Chief Financial Officer of the Company, certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that to my knowledge:

1. The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended; and
2. The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company as of the dates and for the periods presented.

Date: August 3, 2022

/s/ Leigh A. Vosseller

Leigh A. Vosseller

Executive Vice President, Chief Financial Officer and Treasurer

*The foregoing certification is being furnished solely to accompany the Report pursuant to 18 U.S.C. Section 1350, and is not being filed for purposes of Section 18 of the Securities Exchange Act of 1934, as amended, and is not to be incorporated by reference into any filing of the Company, whether made before or after the date hereof, regardless of any general incorporation language in such filing. A signed original of this written statement required by Section 906 has been provided to the Company and will be retained by the Company and furnished to the Securities and Exchange Commission or its staff upon request.*