

ALIMERA SCIENCES INC
Form DEFA14A
September 24, 2012

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SCHEDULE 14A

(Rule 14a-101)

Proxy Statement Pursuant to Section 14(a) of the
Securities Exchange Act of 1934

Filed by the Registrant

Filed by a Party other than the Registrant

Check the appropriate box:

- Preliminary Proxy Statement
- Confidential, for Use of the Commission Only** (as permitted by Rule 14a-6(e)(2))
- Definitive Proxy Statement
- Definitive Additional Materials
- Soliciting Material Pursuant to §240.14a-12

Alimera Sciences, Inc.

(Name of Registrant as Specified In Its Charter)

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

- No fee required.
- Fee computed on table below per Exchange Act Rules 14a-6(i)(1) and 0-11.

(1) Title of each class of securities to which transaction applies:

(5) Total fee paid:

.. Fee paid previously with preliminary materials.

.. Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

(1) Amount Previously Paid:

(2) Form, Schedule or Registration Statement No.:

(3) Filing Party:

(4) Date Filed:

Alimera Sciences, Inc.

6120 Windward Parkway

Suite 290

Alpharetta, Georgia 30005

NOTICE OF RESUMPTION OF A SPECIAL MEETING OF STOCKHOLDERS

TO BE HELD OCTOBER 1, 2012

SUPPLEMENT DATED SEPTEMBER 24, 2012

TO

PROXY STATEMENT DATED AUGUST 24, 2012

To the Stockholders of Alimera Sciences, Inc.:

On or about August 27, 2012, we mailed to each of our stockholders a proxy statement, dated August 24, 2012 (the "Proxy Statement") for a special meeting of the stockholders of Alimera Sciences, Inc. (the "Special Meeting") to be held on September 20, 2012. Pursuant to our bylaws, the special meeting has been adjourned and will be resumed at our offices at 6120 Windward Parkway, Suite 290, Alpharetta, Georgia on October 1, 2012 at 11:00 a.m. local time. The accompanying supplement to the Proxy Statement (the "Supplement") is being sent to our stockholders to inform them of the adjournment of the Special Meeting and to provide additional information for our stockholders to consider in connection with casting their vote in connection with the Special Meeting.

If a stockholder has already delivered a properly executed proxy, such stockholder will be considered to have voted on the proposal, and does not need to do anything unless the holder wishes to change its vote.

As previously announced, on July 17, 2012, we entered into a Securities Purchase Agreement (the "Purchase Agreement") with a group of institutional investors, including both existing and new investors (the "Investors") for the sale (the "Transaction") of units consisting of shares of our Series A Convertible Preferred Stock (the "Series A Preferred Stock") and warrants to purchase shares of our Series A Preferred Stock, which is expected to result in gross proceeds to us of \$40,000,000. On September 21, 2012, we entered into an Amendment No. 1 to the Purchase Agreement with the Investors, whereby certain terms of the Transaction were modified, as further described in the Supplement.

This notice of resumption of the Special Meeting and accompanying Supplement are being distributed or made available to stockholders on or about September 24, 2012.

Our board of directors recommend a vote **FOR** the approval of the issuance of preferred stock convertible into our common stock under circumstances which requires stockholder approval pursuant to NASDAQ Listing Rules.

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Important Notice Regarding the Availability of Proxy Materials for the Stockholders Meeting to be held on October 1, 2012: the proxy statement and supplement are available at www.proxyvote.com.

By order of the Board of Directors,

Richard S. Eiswirth, Jr.

Secretary of the Company

Alpharetta, Georgia

Date: September 24, 2012

YOUR VOTE IS IMPORTANT!

Your vote is important. Please vote by using the Internet or by telephone or by signing and returning the enclosed proxy card. Instructions for your voting options are described in the Proxy Statement and the Supplement.

ALIMERA SCIENCES, INC.

6120 Windward Parkway

Suite 290

Alpharetta, Georgia 30005

(678) 990-5740

SUPPLEMENT DATED SEPTEMBER 24, 2012

TO

PROXY STATEMENT DATED AUGUST 24, 2012

This supplement (the **Supplement**) to the August 24, 2012 proxy statement (the **Proxy Statement**) and proxy card are furnished in connection with the solicitation of proxies to be voted at the resumption of a special meeting of stockholders to be held on October 1, 2012 (the **Special Meeting**) of Alimera Sciences, Inc. (sometimes referred to as **we**, the **Company** or **Alimera**), which will be held at our offices at 6120 Windward Parkway, Suite 290, Alpharetta, Georgia 30005 at 11:00 a.m. local time. We are making this Supplement available to stockholders at www.proxyvote.com. On September 24, 2012, we will begin mailing to our stockholders a copy of this Supplement and a proxy card. Except as amended or supplemented by the information contained in this Supplement, including the annexes hereto, the Proxy Statement continues to apply and should be considered (along with this Supplement) in casting your vote in connection with the Special Meeting.

The Special Meeting was originally scheduled to take place on September 20, 2012. However, pursuant to our bylaws, we adjourned the meeting until October 1, 2012. The August 10, 2012 record date for determining holders of shares of our common stock (**Common Stock**) entitled to vote at the Special Meeting has not changed.

Important Notice Regarding the Availability of Proxy Materials

for the Meeting to be Held on October 1, 2012

This Supplement and the Proxy Statement are available on-line at www.proxyvote.com.

QUESTIONS AND ANSWERS ABOUT THIS SUPPLEMENT AND VOTING

The following are some questions that you, as a stockholder of Alimera, may have regarding the resumption of the Special Meeting and this Supplement and brief answers to those questions. They may not include all of the information that is important to you. We recommend that you read carefully the entire Proxy Statement and this entire Supplement, including the annexes and the other documents we refer to in the Proxy Statement and this Supplement.

Why am I receiving this Supplement and proxy card?

We are sending you this Supplement because on September 21, 2012, we amended the terms of the financing transaction detailed in the Proxy Statement. This Supplement provides information on the amended transaction and updates the Proxy Statement. You have received these proxy materials because you owned shares of Alimera common stock as of August 10, 2012, the record date for the Special Meeting, and our board of directors is soliciting your proxy to vote at the Special Meeting. This Supplement describes matters on which we would like you to vote at the

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Special Meeting. It also gives you information on these matters so that you can make an informed decision.

What if I already voted using the proxy you sent me earlier?

If you have already delivered a properly executed proxy, you will be considered to have voted on the proposal, and you do not need to do anything unless you wish to change your vote. If you are a stockholder of record of Alimera as of the record date and you have not already delivered a properly executed proxy, or if you wish to change your vote, please complete, sign and date the enclosed proxy card and return it in the accompanying pre-addressed postage paid envelope or submit a proxy by telephone or on the Internet to ensure that your shares will be represented at the Special Meeting. If you hold your shares in street name, and you have not already delivered a properly executed proxy, or wish to change your vote, you must provide your broker, bank or nominee with instructions on how to vote your shares. Please refer to your voting card or other information forwarded by your broker, bank or other holder of record to determine whether you may vote by telephone or on the Internet and follow the instructions on the card or other information provided by the record holder.

How do I vote?

If on August 10, 2012, your shares were registered directly in your name with our transfer agent, American Stock Transfer & Trust Company, then you are a stockholder of record. Stockholders of record may vote by using the Internet, by telephone or by mail as described below. Stockholders also may attend the meeting and vote in person. If you hold shares through a bank, broker or nominee, please refer to your proxy card, along with this Supplement and any other materials forwarded by your bank, broker or nominee to see which voting options are available to you.

You may vote by using the Internet. The address of the website for Internet voting is www.proxyvote.com. Internet voting is available 24 hours a day and will be accessible until 11:59 p.m. Eastern Time on September 30, 2012. Easy-to-follow instructions allow you to vote your shares and confirm that your instructions have been properly recorded.

You may vote by telephone. The toll-free telephone number is noted on your proxy card. Telephone voting is available 24 hours a day and will be accessible until 11:59 p.m. Eastern Time on September 30, 2012. Easy-to-follow voice prompts allow you to vote your shares and confirm that your instructions have been properly recorded.

You may vote by mail. If you choose to vote by mail, simply mark your proxy card, date and sign it, and return it in the postage-paid envelope. Your proxy card must be received by September 30, 2012.

The method you use to vote will not limit your right to vote at the Special Meeting if you decide to attend in person. Written ballots will be passed out to anyone who wants to vote at the Special Meeting. If you hold your shares in street name, you must obtain a proxy, executed in your favor, from the holder of record to be able to vote in person at the Special Meeting.

What matters will be voted on at the Special Meeting?

The following matter is scheduled to be voted on at the Special Meeting:

Proposal: To approve of the issuance of preferred stock convertible into our common stock under circumstances which require stockholder approval pursuant to applicable NASDAQ Listing Rules, as described in the Proxy Statement and this Supplement. No cumulative voting rights are authorized, and dissenters' rights are not applicable to these matters.

How does our board of directors recommend that I vote?

Our board of directors recommend a vote FOR the approval of the issuance of preferred stock convertible into our common stock under circumstances which requires stockholder approval pursuant to applicable NASDAQ Listing Rules.

How can I find out the results of the voting at the Special Meeting?

Preliminary voting results are expected to be announced at the Special Meeting. Final voting results will be reported on a Current Report on Form 8-K filed with the SEC no later than October 5, 2012.

How have the transactions described in the Proxy Statement changed?

As described in the Proxy Statement, on July 17, 2012, we entered into a Securities Purchase Agreement (the "Purchase Agreement") with a group of institutional investors, including both existing and new investors (the "Investors") for the sale (the "Transaction") of units consisting of shares of our Series A Convertible Preferred Stock (the "Series A Preferred Stock") and warrants to purchase shares of our Series A Preferred Stock (the "Warrants"), which is expected to result in gross proceeds to us of \$40,000,000. On September 21, 2012, we entered into an Amendment No. 1 to the Securities Purchase Agreement with the Investors ("Amendment No. 1"), whereby certain terms of the Transaction were modified, as further described below and elsewhere in this Supplement. In connection with entering into Amendment No. 1, we agreed to revise certain provisions in the Certificate of Designation of Series A Preferred Stock (the "Certificate of Designation") related to the conversion of shares of the Series A Preferred Stock into Common Stock. The changes to the Certificate of Designation, which will be filed with the Secretary of State of the State of

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Delaware prior to the closing of the Transaction to authorize the Series A Preferred, are described below.

Amendment No. 1 to the Purchase Agreement

Pursuant to Amendment No. 1, the Purchase Agreement was amended to, among other things:

provide that the units would be issued and sold to the Investors in a private placement transaction rather than in a direct registered offering;

revise and remove certain of the conditions to closing the Transaction;

amend certain of our representations and warranties to reflect the sale of the units in a private placement transaction; and

extend the termination date of the Purchase Agreement to December 31, 2012.

The closing of the Transaction remains subject to the receipt of approval of our stockholders at the Special Meeting (as required under the applicable regulations of The NASDAQ Global Market ("NASDAQ")) and certain other customary closing conditions. Except as otherwise set forth in the Amendment, the remainder of the Purchase Agreement remains in full effect.

Certificate of Designation

The powers, preferences, rights, qualifications, limitations and restrictions applicable to the Series A Preferred Stock were revised to provide that:

the initial conversion price of \$2.91 of the Series A Preferred Stock will be subject to adjustment based on the occurrence or non-occurrence of certain events, in addition to certain customary price based anti-dilution adjustments. The conversion price will be adjusted pursuant to the first to occur of the following occurrences (such adjusted conversion price being referred to herein as the "Final Guidance Price"):

the then-effective conversion price shall be automatically increased by \$0.25 (as adjusted for stock splits, combinations, stock dividends, recapitalizations and the like with respect to the Series A Preferred Stock) as of the date on which the National Institute for Health and Clinical Excellence in the United Kingdom ("NICE") issues final guidance (following the review of a Patient Access Scheme (as commonly used by NICE), if required) recommending ILUVIEN® (a "Positive Guidance"), provided that such Positive Guidance is issued on or before June 30, 2013;

the then-effective conversion price shall be automatically decreased by \$0.25 (as adjusted for stock splits, combinations, stock dividends, recapitalizations and the like with respect to the Series A Preferred Stock) on July 1, 2013, if ILUVIEN® has not received Positive Guidance on or before June 30, 2013; or

the then-effective conversion price shall be automatically decreased by \$0.25 (as adjusted for stock splits, combinations, stock dividends, recapitalizations and the like with respect to the Series A Preferred Stock) as of the date, on or prior to June 30, 2013, on which: (a) NICE issues final unappealable guidance (following the review of a Patient Access Scheme) failing to recommend ILUVIEN® (a "Negative Guidance") or (b) on which the Company ceases to seek NICE approval of ILUVIEN®. For the avoidance of doubt, the issuance of a Final Appraisal Determination (as commonly used by NICE) by NICE prior to the review of a Patient Access Scheme is not final guidance for these purposes.

in the event of either (a) an acquisition of the Company or (b) an automatic conversion of the Series A Preferred Stock into Common Stock pursuant to the terms of the Certificate of Designation, in each case prior to the determination of the Final Guidance Price, then the conversion price shall be \$2.91 (as adjusted for stock splits, combinations, stock dividends, recapitalizations and the like with respect to the Series A Preferred Stock), subject to certain customary price based anti-dilution adjustments;

any voluntary conversion by the holder of Series A Preferred Stock into Common Stock at any time prior to July 1, 2013 and the determination of the Final Guidance Price shall be at \$3.16 (as adjusted for stock splits, combinations, stock dividends, recapitalizations and the like with respect to the Series A Preferred Stock), subject to certain customary price based anti-dilution adjustments;

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the adjustments to the conversion price for purposes of the price based anti-dilution adjustments shall be determined by reference to an assumed conversion price which does not take into account adjustments made in connection with the Final Guidance Price (i.e., for purposes of the anti-dilution provisions, \$2.91 (as adjusted for stock splits, combinations, stock dividends, recapitalizations and the like with respect to the Series A Preferred Stock), shall be the initial assumed conversion price from which anti-dilution adjustments will be determined); and

the Series A Preferred Stock will vote on any matter presented to the stockholders of the Company on an as-converted basis based on a conversion price equal to \$2.95 (as adjusted for stock splits, combinations, stock dividends, recapitalizations and the like with respect to the Series A Preferred Stock).

The Purchase Agreement, Amendment No. 1 and the Certificate of Designation are included as Annexes A, B and C to this Supplement. The foregoing description of the material terms of the Purchase Agreement, the Amendment and the Certificate of Designation do not purport to be complete and is qualified in its entirety by reference to such annexes.

How many shares of Common Stock will the securities issued in the Transaction be convertible into?

Each share of Series A Preferred Stock is convertible into Common Stock at any time at the option of the holder at the rate (the Conversion Rate) equal to \$40.00 (the Original Purchase Price) divided by the then current conversion price (the Conversion Price). The Conversion Price is initially \$2.91 (as adjusted for stock splits, combinations, stock dividends, recapitalizations and the like with respect to the Series A Preferred Stock), which assuming the conversion of all shares of Series A Preferred Stock and the exercise and subsequent conversion of all Warrants, will result in the issuance of 17,869,416 shares of Common Stock upon conversion, which would represent approximately 36.24% of all outstanding shares of Common Stock. If ILUVIEN® receives Positive Guidance on or before June 30, 2013, the Conversion Price shall be automatically adjusted to \$3.16, which assuming the conversion of all shares of Series A Preferred Stock and the exercise and subsequent conversion of all Warrants, will result in the issuance of 16,455,696 shares of Common Stock upon conversion, which would represent approximately 34.36% of all outstanding shares of Common Stock. If ILUVIEN® does not receive Positive Guidance on or before June 30, 2013 or if ILUVIEN® receives Negative Guidance, the Conversion Price shall be automatically adjusted to \$2.66, which assuming the conversion of all shares of Series A Preferred Stock and the exercise and subsequent conversion of all Warrants, will result in the issuance of 19,548,872 shares of Common Stock upon conversion, which would represent approximately 38.35% of all outstanding shares of Common Stock. The foregoing is based on our capitalization as of the record date and assumes that there were no price-based anti-dilution adjustments to the conversion price of the Series A Preferred Stock.

How many shares of Common Stock will Palo Alto Investors, LLC beneficially own following the closing of the Transaction?

Following the closing of the Transaction, Palo Alto Investors, LLC (PAI), one of the Investors, assuming the exercise and subsequent conversion of its Warrant (but no other Warrants) and the conversion of its Series A Preferred Stock and including the number of shares of Common Stock currently owned by PAI, will beneficially own approximately 14,356,633 shares of our Common Stock, which is expected to represent approximately 30.13% of the total voting power of the Company s voting securities following the closing of the Transaction. If Positive Guidance is received on or before June 30, 2013, PAI, assuming the exercise and subsequent conversion of its Warrants (but no other Warrants) and the conversion of its Series A Preferred Stock and including the number of shares of Common currently owned by PAI, will own approximately 13,508,402 shares of Common Stock, which is expected to represent approximately 29.13% of the total voting power of the Company s voting securities following the closing of the Transaction. If Positive Guidance is not received on or before June 30, 2012 or if ILUVIEN® receives Negative Guidance, PAI, assuming the exercise and subsequent conversion of its Warrants (but no other Warrants) and the conversion of its Series A Preferred Stock and including the number of shares of Common currently owned by PAI, will own approximately 15,364,307 shares of Common Stock, which is expected to represent approximately 31.24% of the total voting power of the Company s voting securities following the closing of the Transaction. The foregoing is based on our capitalization as of the record date and assumes that there were no price-based anti-dilution adjustments to the conversion price of the Series A Preferred Stock.

INCORPORATION BY REFERENCE

The SEC allows us to incorporate by reference the information we file with it, which means that we can disclose information to you by referring you to those documents. The information incorporated by reference is deemed to be part of this Supplement, except for any information that is superseded or modified by information contained directly in this Supplement or in any other subsequently filed document that is also incorporated by reference herein. This Supplement incorporates by reference the information set forth in the Company s Annual Report on Form 10-K for the year ended December 31, 2011, which the Company filed with the SEC on March 30, 2012, the Company s Quarterly Reports filed for the quarterly periods ended March 31, 2012 and June 30, 2012 filed with the SEC, respectively, on May 11, 2012 and August 14, 2012, and the Company s Current Reports on Form 8-K filed with the SEC on July 18, 2012 and September 21, 2012.

CONTACT FOR QUESTIONS AND ASSISTANCE WITH VOTING

If you have any questions or require any assistance with voting your shares or need additional copies of the Proxy Statement, this Supplement or voting materials, please contact:

Investor Relations

Alimera Sciences, Inc.

6120 Windward Parkway,

Suite 290

Alpharetta, Georgia 30005

or

Call (310) 954-1105

It is important that your shares are represented at the Special Meeting. Whether or not you plan to attend the Special Meeting, please vote by using the Internet, by telephone or by signing and returning the enclosed proxy card, so your shares will be represented at the Special Meeting.

IF YOU HAVE ALREADY DELIVERED A PROPERLY EXECUTED PROXY AND DO NOT WISH TO CHANGE YOUR VOTE, YOU DO NOT NEED TO TAKE ANY FURTHER ACTION

The form of proxy and this Supplement have been approved by the board of directors and are being mailed to stockholders by its authority.

The Board of Directors of Alimera Sciences, Inc.

Alpharetta, Georgia

September 24, 2012

ANNEX A

SECURITIES PURCHASE AGREEMENT

This Securities Purchase Agreement (as may be amended or restated, this Agreement) is dated as of July 17, 2012, between Alimera Sciences, Inc., a Delaware corporation (the Company), and each purchaser identified on the signature pages hereto (each, including its successors and assigns, a Purchaser , and collectively, the Purchasers).

WHEREAS, subject to the terms and conditions set forth in this Agreement and pursuant to an effective registration statement under the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder (the Securities Act), the Company desires to issue and sell to each Purchaser, and each Purchaser, severally and not jointly, desires to purchase from the Company, securities of the Company as more fully described in this Agreement; and

WHEREAS, certain of the Company's stockholders have entered into separate support letters (the Support Letters) whereby such stockholders have agreed to vote their shares in favor of the transactions contemplated by this Agreement.

NOW, THEREFORE, IN CONSIDERATION of the mutual covenants contained in this Agreement, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Company and each Purchaser agree as follows:

ARTICLE I.

DEFINITIONS

1.1 Definitions. In addition to the terms defined elsewhere in this Agreement, for all purposes of this Agreement, the following terms have the meanings set forth in this Section 1.1:

Affiliate means any Person that, directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with a Person, as such terms are used in and construed under Rule 405 under the Securities Act.

Agreement shall have the meaning ascribed to such term in the preamble to this Agreement.

Beneficial Ownership shall have the meaning ascribed to such term in Section 4.10(d).

Board of Directors means the board of directors of the Company.

Business Day means any day except any Saturday, any Sunday, any day which is a federal legal holiday in the United States or any day on which banking institutions in the State of New York are authorized or required by law or other governmental action to close.

CDA shall have the meaning ascribed to such term in Section 3.2(d).

Closing means the closing of the purchase and sale of the Securities pursuant to Section 2.1.

Closing 8-K shall have the meaning ascribed to such term in Section 4.2.

Closing Date means the Trading Day mutually agreed upon by the Company and the Purchasers purchasing at least 70% of the Units at such Closing not later than three (3) Business Days following the date of the Stockholder Approval, provided, that, the conditions set forth in Sections 2.3(a) and 2.3(b) have been satisfied or waived but, pursuant to Section 5.1, in no event later than November 30, 2012.

Commission means the United States Securities and Exchange Commission.

Common Stock means the common stock of the Company, par value \$0.01 per share, and any other class of securities into which such securities may hereafter be reclassified or changed.

Company shall have the meaning ascribed to such term in the preamble to this Agreement.

Company Counsel means Gunderson Dettmer Stough Villeneuve Franklin & Hachigian, LLP with offices located at 850 Winter Street, Waltham, MA 02451.

Company Stockholders Meeting shall have the meaning ascribed to such term in Section 4.10(a).

Conversion Shares means the shares of Common Stock issuable upon conversion of each of the Shares.

Enforceability Exceptions shall have the meaning ascribed to such term in Section 3.1(b).

Exchange Act means the Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

FDA means the U.S. Food and Drug Administration.

GAAP shall have the meaning ascribed to such term in Section 3.1(f).

Intellectual Property Licenses shall have the meaning ascribed to such term in Section 3.1(i).

Intellectual Property Rights shall have the meaning ascribed to such term in Section 3.1(i).

Knowledge of the Company or Knowledge means the actual knowledge, after reasonable due inquiry, of each of C. Daniel Myers and Richard S. Eiswirth, Jr., and, solely with respect to Section 3.1(o), the actual knowledge, after due inquiry, of Susan Caballa.

Lead Purchaser means Palo Alto Investors, LLC a California limited liability company.

Liens means a lien, charge, security interest, encumbrance, right of first refusal, preemptive right or other restriction that has the practical effect of creating any of the foregoing.

Management Rights Letter means a management rights letter substantially in the form of Exhibit B attached hereto.

Material Adverse Effect means: (i) a material adverse effect on the legality, validity or enforceability of any Transaction Document, (ii) a material adverse effect on the Company's authority or ability to perform on a timely basis in any material respect its obligations under any Transaction Document or (iii) a material adverse change in the results of operations, assets, business or condition (financial or otherwise) of the Company.

Money Laundering Laws shall have the meaning ascribed to such term in Section 3.1(q).

Per Share Purchase Price means \$40.00 per share.

Person means an individual or corporation, partnership, trust, incorporated or unincorporated association, joint venture, limited liability company, joint stock company, government (or an agency or subdivision thereof) or other entity of any kind.

Preferred Stock means the Series A Preferred Stock of the Company, par value \$0.01 per share, and any other class of securities into which such securities may hereafter be reclassified or changed.

Press Release shall have the meaning ascribed to such term in Section 4.2.

Press Release 8-K shall have the meaning ascribed to such term in Section 4.2.

Prospectus means the final prospectus filed for the Registration Statement, including the documents incorporated by reference in the Registration Statement, and the documents incorporated by reference in such final prospectus.

Prospectus Supplement means the supplement to the Prospectus complying with Rule 424(b) of the Securities Act that shall be filed with the Commission and delivered by the Company to each Purchaser at the Closing, including the documents incorporated by reference therein.

Proxy Statement shall have the meaning ascribed to such term in Section 4.10(a)

Purchaser and Purchasers shall have the meaning ascribed to such terms in the preamble to this Agreement.

Purchaser Party shall have the meaning ascribed to such term in Section 4.4.

Registration Statement means the effective registration statement filed with the Commission on May 27, 2011 (File No. 333-174586), which registers the sale of the Shares, the Common Stock issuable upon conversion of the Shares, the Warrants, the Warrant Shares and the shares of Common Stock issuable upon conversion of the Warrant Shares to the Purchasers.

Rule 424 means Rule 424 promulgated by the Commission pursuant to the Securities Act, as such rule may be amended or interpreted from time to time, or any similar rule or regulation hereafter adopted by the Commission having substantially the same purpose and effect as such Rule.

SEC Reports shall have the meaning ascribed to such term in Section 3.1(e).

Second Lead Purchaser means Sofinnova Venture Partners VIII, L.P., a Delaware limited partnership.

Securities means the Shares, the Conversion Shares, the Warrants, and the Warrant Shares.

Securities Act shall have the meaning ascribed to such term in the recitals to this Agreement.

Shares means the shares of Preferred Stock issued or issuable to each Purchaser pursuant to this Agreement.

Short Sales means all short sales as defined in Rule 200 of Regulation SHO under the Exchange Act (but shall not be deemed to include the location and/or reservation of borrowable shares of Preferred Stock or Common Stock).

Stockholder Approval shall have the meaning ascribed to such term in Section 2.3(c).

Subscription Amount means, as to each Purchaser, the aggregate amount to be paid for the Units purchased hereunder, in United States dollars and in immediately available funds, the amount as specified below such Purchaser's name on the signature page of this Agreement and next to the heading Subscription Amount;

Trading Day means a day on which the principal Trading Market is open for trading.

Trading Market means any of the following markets or exchanges on which the Common Stock is listed or quoted for trading on the date in question: the NYSE AMEX, the Nasdaq Capital Market, the Nasdaq Global Market, the Nasdaq Global Select Market, the New York Stock Exchange or the OTC Bulletin Board (or any successor exchanges of any of the foregoing).

Transaction Documents means this Agreement, the Warrants, the Support Letters, the Management Rights Letter and the Registration Rights Agreement.

Transfer Agent means American Stock Transfer & Trust Company, with a mailing address of 59 Maiden Lane, New York, NY 10038-4667, and a telephone number of (212) 936-5100, and any successor transfer agent of the Company.

Unit means one share of Preferred Stock and a Warrant to purchase 0.30 shares of Preferred Stock.

Warrant means a warrant to purchase shares of Preferred Stock delivered to the Purchasers at the Closing in accordance with Section 2.2(a)(iii), in the form of Exhibit A attached hereto.

Warrant Shares means the shares of Preferred Stock or Common Stock, as the case may be, issuable upon exercise of the Warrants.

ARTICLE II.

PURCHASE AND SALE

2.1 Closing. On the Closing Date, upon the terms and subject to the conditions set forth herein, the Company shall issue and sell to each Purchaser, and each Purchaser shall, severally and not jointly, purchase from the Company, such number of Units equal to the quotient resulting from dividing (a) the applicable Subscription Amount for such Purchaser by (b) the Per Share Purchase Price, provided that any Purchaser may cause one or more investment funds that are Affiliates of such Purchaser to purchase the number of Units allocated to such Purchaser. On the Closing Date, each Purchaser purchasing Units at a Closing (or such investment fund) shall deliver to the Company, via wire transfer, immediately available funds equal to such Purchaser's Subscription Amount, and the Company shall deliver to such Purchaser its respective Shares and Warrants as determined pursuant to Section 2.2(a), and the Company and such Purchaser shall deliver the other items set forth in Section 2.2. The Closing shall occur at the offices of Company Counsel or such other location as the Company and the Purchasers purchasing at least 70% of the Units being purchased by all Purchasers at the Closing shall mutually agree. The Company shall not be obligated to issue Units for an aggregate Subscription Amount in excess of \$40,000,000.00 hereunder.

2.2 Deliveries.

(a) Company Deliverables. On or prior to the Closing Date, the Company shall deliver or cause to be delivered to each Purchaser purchasing Units at the Closing the following:

(i) solely in the case of the Second Lead Purchaser, the Management Rights Letter, duly executed by the Company;

(ii) a copy of the irrevocable instructions to the Transfer Agent, duly executed by the Company, instructing the Transfer Agent to deliver on an expedited basis via The Depository Trust Company's Deposit or Withdrawal at Custodian system Shares equal to such Purchaser's Subscription Amount divided by the Per Share Purchase Price, registered in the name of such Purchaser, to the account(s) identified by such Purchaser;

(iii) a Warrant registered in the name of such Purchaser to purchase up to a number of shares of Preferred Stock equal to 30% of such Purchaser's Shares, with an initial exercise price per share equal to 110% of the Per Share Purchase Price, (such Warrant may be delivered within three (3) Trading Days of the Closing Date), duly executed by the Company;

(iv) the Prospectus Supplement (which may be delivered in accordance with Rule 172 under the Securities Act);

(v) a legal opinion of Company Counsel, addressed to the Purchasers and dated the Closing Date, substantially in the form of Exhibit C attached hereto;

(vi) a certificate of the Secretary of the Company, dated as of the Closing Date, (A) certifying the resolutions adopted by the Board of Directors or a duly authorized committee thereof approving the transactions contemplated by this Agreement and the other Transaction Documents and the issuance of the Units, (B) certifying that the shareholders of the Company have adopted resolutions approving the transactions contemplated by this Agreement and the other Transaction Documents and the issuance of the Units, (C) certifying the current versions of the certificate of incorporation, as amended, and bylaws of the Company, and (D) certifying as to the signatures and authority of persons signing the Transaction Documents and related documents on behalf of the Company;

(vii) an officer's certificate certifying that the conditions to close found in Section 2.3(b)(i) and (ii) have been satisfied;

(viii) a copy of the Registration Rights Agreement executed by the Company; and

(ix) an executed copy of an indemnification agreement with the director of the Company designated by the Second Lead Purchaser.

(b) Purchasers Deliverables. On or prior to the Closing Date, each Purchaser purchasing Units at the Closing shall deliver or cause to be delivered to the Company the following:

(i) such Purchaser's Subscription Amount by wire transfer to the account specified by the Company;

(ii) solely in the case of the Second Lead Purchaser, a copy of the Second Lead Purchaser's Management Rights Letter executed by the Second Lead Purchaser;

(iii) a copy of the Registration Rights Agreement executed by such Purchaser; and

(iv) solely in the case of the Second Lead Purchaser, an executed copy of the indemnification agreement referred to in Section 2.2(a)(ix) above.

2.3 Closing Conditions.

(a) Company Conditions to Close. The obligations of the Company hereunder in connection with the Closing are subject to the following conditions being met or waived by the Company:

(i) the accuracy in all material respects on the Closing Date of the representations and warranties of the Purchasers contained herein (unless as of a specific date therein in which case they shall be accurate as of such date);

(ii) all obligations, covenants and agreements of each Purchaser required to be performed at or prior to the Closing Date shall have been performed; and

(iii) the delivery by each Purchaser of the items set forth in Section 2.2(b).

(b) Purchasers Conditions to Close. The respective obligations of the Purchasers hereunder in connection with the Closing are subject to the following conditions being met or waived by Purchasers purchasing at least 70% of the Units at Closing:

(i) (A) the accuracy in all material respects when made of the representations and warranties of the Company contained herein, (B) the accuracy in all material respects of the representations and warranties of the Company contained in Sections 3.1(a) (f) and (s) on the Closing Date and (C) the accuracy of the representations and warranties of the Company contained in Sections 3.1(g) (r) on the Closing Date, except where any inaccuracies in the representations and warranties in Sections 3.1(g) (r) do not constitute a Material Adverse Effect;

(ii) all obligations, covenants and agreements of the Company required to be performed at or prior to the Closing Date shall have been performed;

(iii) the delivery by the Company of the items set forth in Section 2.2(a);

(iv) since the date of execution of this Agreement, no event or series of events shall have occurred that has had or would reasonably be expected to have a Material Adverse Effect with respect to the Company; provided, however, that no event, change or effect to the extent arising out of, resulting from or attributable to any of the following shall be deemed to constitute, nor be taken into account in determining whether any event or series of events shall have occurred that has had or would reasonably be expected to have a Material Adverse Effect with respect to the Company: (A) changes in the Company's industry or the overall economy, the securities markets, financial markets or capital markets of the United States or worldwide generally; (B) general worldwide economic, business or political conditions; (C) any act of war (whether or not declared), sabotage, terrorism, military action or the escalation thereof; (D) any change in accounting requirements or principles or any change in applicable laws, rules or regulations, provided such change is not applicable solely to the Company; (E) any event, change or effect resulting from the announcement of this Agreement in compliance with the terms of this Agreement, and/or pendency of the transactions contemplated by this Agreement; (F) earthquakes, hurricanes, floods or other natural disasters; (G) any failure, in and of itself, by the Company to meet any internal or published financial projections, predictions, estimates or expectations for any period ending on or after the date of this Agreement; (H) actions taken or the failure to take action as a result of the covenants or restrictions set forth in this Agreement (I) continued losses from operations or decreases in cash balances of the Company, in either case incurred in or resulting from the ordinary course of the Company's business; (J) any decline in the trading price of the Common Stock; or (K) any event, change or effect relating to the review of the Commission or the Trading Market of the transactions contemplated by this Agreement, including, without limitation, the Proxy Statement and the additional listing application relating to the Securities, except, in case of clause (A), (B), (C) or (D), to the extent that such change, effect, event, matter, occurrence or state of facts has a materially disproportionate effect on the Company relative to similarly-situated companies in the industry in which the Company operates;

(v) no stop order suspending the effectiveness of the Registration Statement shall have been issued and no proceedings for that purpose shall have been initiated or threatened by the Commission;

(vi) the Common Stock shall be registered under the Exchange Act and, as of the Closing Date, the Common Stock shall be listed and admitted and authorized for trading on the Trading Market, and, upon request, reasonably satisfactory evidence of such actions shall have been provided to counsel to the Purchasers;

(vii) the Company shall have taken no action designed to, or reasonably likely to have the effect of terminating the registration of the Common Stock under the Exchange Act or delisting or suspending from trading the Common Stock from the Trading Market, nor shall the Company have received any written information from the Commission or the Trading Market, as applicable, suggesting that the Commission or the Trading Market, as applicable, is contemplating terminating such registration or listing;

(viii) from the date hereof to the Closing Date, trading in the Common Stock shall not have been suspended by the Commission or the Trading Market (except for (A) any suspension of trading of limited duration agreed to by the Company, which suspension shall be terminated prior to the Closing and (B) any suspension of trading in securities generally as reported by Bloomberg L.P.);

(ix) no action shall have been taken and no statute, rule, regulation, executive order, decree, ruling or injunction shall have been enacted, entered, promulgated or endorsed by any court or governmental authority of competent jurisdiction that prohibits the consummation of any of the transactions contemplated by the Transaction Documents; and

(x) approval of ILUVIEN shall not have been revoked in any jurisdiction in which such drug was, as of the date hereof, approved and authorized by the proper governmental authority for sale and distribution.

(c) Company Stockholder Approval. The approval by the Company's stockholders of the transactions contemplated by this Agreement (the Stockholder Approval) shall have been obtained by the Company.

(d) Board of Directors. The Board of Directors shall have appointed, effective as of the Closing, Garheng Kong (or such other individual designated by the Second Lead Purchaser, which other individual is acceptable to the Company) to the Board of Directors of the Company, to serve as a Class II Director.

ARTICLE III.

REPRESENTATIONS AND WARRANTIES

3.1 Representations and Warranties of the Company. The Company hereby makes the following representations and warranties to each Purchaser:

(a) Organization and Qualification. The Company is duly incorporated, validly existing and in good standing under the laws of the State of Delaware, with full corporate power and authority to own or lease and use its properties and assets and to carry on its business as currently conducted. The Company is not in violation or default of any of the provisions of its Restated Certificate of Incorporation. The Company is duly qualified to do business and is in good standing as a foreign corporation in each jurisdiction in which its ownership or lease of property or the conduct of its business requires such qualification, except where the failure to be so qualified or in good standing would not have or reasonably be expected to result in a Material Adverse Effect. The Company does not have any direct or indirect subsidiaries.

(b) Authorization; Enforcement. Subject to obtaining Stockholder Approval, the Company has all requisite corporate power and corporate authority to enter into and to perform its obligations under the Transaction Documents, to consummate the transactions contemplated by this Agreement and each of the other Transaction Documents and otherwise to carry out its obligations hereunder and thereunder, and to issue (or reserve for issuance) the Securities in accordance with the terms thereof. Subject to obtaining Stockholder Approval, the execution, delivery and performance of this Agreement and the other Transaction Documents by the Company and the consummation by it of the transactions contemplated hereby and thereby in accordance with the terms hereof and thereof (including the issuance of the Securities) have been duly authorized by all necessary corporate action on the part of the Company, and no further action is required by the Company or the Board of Directors. This Agreement and each of the other Transaction Documents has been (or upon delivery will have been) duly executed by the Company and, when delivered in accordance with the terms hereof and thereof, will constitute the legal, valid and binding obligation of the Company enforceable against the Company in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, or moratorium or similar laws affecting creditors' and contracting parties' rights generally and except as enforceability may be subject to general principles of equity and except as rights to indemnity and contribution may be limited by applicable laws or public policy underlying such laws (collectively, the Enforceability Exceptions).

(c) No Conflicts. The execution, delivery and performance of this Agreement and the other Transaction Documents by the Company, and after obtaining Stockholder Approval, the issuance of the Securities and the consummation by the Company of the transactions contemplated thereby do not and will not: (i) conflict with or violate any provision of the Company's Restated Certificate of Incorporation or bylaws, (ii) conflict with, violate, or constitute a default (or an event which with notice or lapse of time or both would become a default) under, result in the creation of any Lien upon any of the properties or assets of the Company, or give to others any rights of termination, amendment, acceleration or cancellation (with or without notice, lapse of time or both) of, any agreement, credit facility, debt or other instrument (evidencing a Company debt or otherwise) or other understanding to which the Company is a party or by which any property or asset of the Company is bound or affected or (iii) conflict with or result in a violation of any law, rule, regulation, order, judgment, injunction, decree or other restriction of any court or governmental authority to which the Company is subject (including federal and state securities laws and regulations) or by which any property or asset of the Company is bound or affected; except in the case of clauses (ii) and (iii) above, for such conflicts, defaults, rights or violations which would not individually or in the aggregate, reasonably be expected to result in a Material Adverse Effect.

(d) Filings, Consents and Approvals. The Company is not required to obtain any consent, waiver, authorization or order of, give any notice to, or make any filing or registration with, any court or other federal, state, local or other governmental authority or other Person in connection with the execution, delivery and performance by the Company of the Transaction Documents (including the issuance of the Securities), other than: (i) the filings required pursuant to Sections 4.2 and 4.10, (ii) the filing with the Commission of the Prospectus Supplement, (iii) a Notification Form: Listing of Additional Shares and Notification Form: Change in the Number of Shares Outstanding to the Trading Market for the listing of the Conversion Shares for trading thereon (iv) such filings as are required to be made under applicable state securities laws, and (v) the Stockholder Approval.

(e) Issuance of the Securities: Registration. The Shares are duly authorized and, when issued and paid for in accordance with the applicable Transaction Documents, will be duly and validly issued, fully paid and nonassessable, free and clear of all Liens imposed by the Company. The Warrants are duly authorized, and when duly executed and delivered by the Company in accordance with the applicable Transaction Documents, will constitute the valid and binding obligation of the Company enforceable against the Company in accordance with their terms, except as limited by the Enforceability Exceptions. The Warrant Shares, when issued in accordance with the terms of the Warrants, will be validly issued, fully paid and nonassessable, free and clear of all Liens imposed by the Company. The Conversion Shares, when issued in accordance with the Company's Certificate of Incorporation, will be validly issued, fully paid and nonassessable, free and clear of all Liens imposed by the Company. The Company has reserved from its duly authorized capital stock the maximum number of shares of Preferred Stock issuable pursuant to this Agreement and the Warrants as of the date hereof and the maximum number of Conversion Shares issuable upon conversion of the Shares and the Warrant Shares as of the date hereof. The Units, Shares, Warrants and Common Stock conform as to legal matters in all material respects to the respective descriptions thereof contained in the Registration Statement, Prospectus and Prospectus Supplement and such descriptions conform to the rights set forth in the instruments defining the same. The Company has prepared and filed the Registration Statement in conformity with the requirements of the Securities Act, which became effective on June 17, 2011, including the Prospectus, and such amendments and supplements thereto as may have been required to the date of this Agreement. The Registration Statement is effective under the Securities Act and no stop order preventing or suspending the effectiveness of the Registration Statement or suspending or preventing the use of the Prospectus has been issued by the Commission and no proceedings for that purpose have been instituted or, to the Knowledge of the Company, are threatened by the Commission. At the time the Registration Statement and any amendments thereto became effective, at the date of this Agreement and at the Closing Date, the Registration Statement and any amendments thereto

conformed and will conform in all material respects to the requirements of the Securities Act and did not and will not contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein not misleading; and as of the date of the Prospectus Supplement and at the Closing Date, the Prospectus Supplement, when taken together with the Prospectus, and any amendments or supplements thereto, when taken together with the Prospectus and Prospectus Supplement and any amendments and supplements thereto prior to such date, conformed and will conform in all material respects to the requirements of the Securities Act and did not and will not contain an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. The documents incorporated or deemed to be incorporated by reference in the Registration Statement and the Prospectus, when they became effective or at the time they were or hereafter are filed with the Commission, complied and will comply in all material respects with the requirements of the Exchange Act, and the rules and regulations of the Commission thereunder.

(f) SEC Reports: Financial Statements. The Company has filed all reports, schedules, forms, statements and other documents required to be filed by the Company under the Securities Act and the Exchange Act, including pursuant to Section 13(a) or 15(d) thereof, for the twelve (12) months preceding the date hereof (all of the foregoing and all exhibits included therein and financial statements and schedules thereto and documents incorporated by reference therein being hereinafter referred to as the SEC Reports) on a timely basis or has received a valid extension of such time of filing and has filed any such SEC Reports prior to the expiration of any such extension. As of their respective dates, the SEC Reports complied in all material respects with the requirements of the Exchange Act or the Securities Act, as the case may be, and the rules and regulations of the Commission promulgated thereunder applicable to the SEC Reports. To the Knowledge of the Company, none of the SEC Reports, at the time they were filed with the Commission, contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading. The Company has never been an issuer subject to, or identified in, Rule 144(i) under the Securities Act. The financial statements of the Company included in the SEC Reports, the Prospectus and the Prospectus Supplement complied in all material respects with applicable accounting requirements and the rules and regulations of the Commission with respect thereto as in effect at the time of filing. Such financial statements have been prepared in accordance with United States generally accepted accounting principles applied on a consistent basis during the periods involved (GAAP), except as may be otherwise specified in such financial statements or the notes thereto and except that unaudited financial statements may not contain all footnotes required by GAAP, and fairly presented in all material respects the financial position of the Company as of and for the dates thereof and the results of operations and cash flows for the periods then ended, subject, in the case of unaudited statements, to normal, immaterial, year-end audit adjustments.

(g) Material Changes: Undisclosed Events, Liabilities or Developments. Since the date of the latest audited financial statements included within the SEC Reports, except as specifically disclosed in a subsequent SEC Report filed prior to the date hereof, (i) there has been no event, occurrence or development that has had or that would reasonably be expected to result in a Material Adverse Effect, (ii) the Company has not incurred any liabilities (contingent or otherwise) other than (A) trade payables and accrued expenses incurred in the ordinary course of business consistent with past practice, (B) liabilities not required to be reflected in the Company's financial statements pursuant to GAAP or disclosed in filings made with the Commission and (C) additional fees paid or payable in connection with the pursuit of approval of ILUVIEN with the FDA to the consultant referenced in filings made with the Commission, (iii) the Company has not altered its method of accounting (other than in accordance with pronouncements under GAAP), (iv) the Company has not declared or made any dividend or distribution of cash or other property to its stockholders or purchased, redeemed or made any agreements to purchase or redeem any shares of its capital stock and (v) the Company has not issued any equity securities to any officer, director or Affiliate, except pursuant to existing Company stock option plans. The Company does not have pending before the Commission any request for confidential treatment of information other than with respect to Exhibit 10.35 to the Company's Quarterly Report on Form 10-Q filed with the Commission on May 11, 2012.

(h) Litigation. There is no action, suit, inquiry, notice of violation, proceeding or investigation pending or, to the Knowledge of the Company, threatened against the Company or any of its properties before or by any court, arbitrator, governmental or administrative agency or regulatory authority (federal, state, county, local or foreign) which (i) challenges the legality, validity or enforceability of any of the Transaction Documents or the Securities or (ii) would, if there were an unfavorable decision, have or reasonably be expected to result in a Material Adverse Effect.

(i) Intellectual Property. The Company owns, or has rights to use, all patents, patent applications, trademarks, trademark applications, service marks, trade names, trade secrets, inventions, copyrights, licenses and other intellectual property rights and similar rights sufficient for the operation of its business as described in the SEC Reports and which the failure to so have would reasonably be expected to have a Material Adverse Effect (collectively, the Intellectual Property Rights). The Company has not received a notice (written or otherwise) within the two (2) year period prior to the date of this Agreement that any of the Intellectual Property Rights has expired, terminated or been abandoned, or is expected to expire or terminate or be abandoned within two (2) years after the date of this Agreement. Except as otherwise described in the SEC Reports, the licenses relating to Intellectual Property Rights described in the SEC Reports, the Prospectus and the Prospectus Supplement (the Intellectual Property Licenses) are valid, binding upon and enforceable against the Company, and to the Knowledge of the Company, against the parties thereto, in accordance with their terms. The Company has complied in all material respects with, and is not in breach nor has received any written claim of breach of, any Intellectual Property License, and the Company has no Knowledge of any breach or anticipated breach by any other Person to any Intellectual Property License. The Company is not in breach of that certain Amended and Restated Collaboration Agreement by and between pSivida, Inc. (f/k/a/Control Delivery Systems, Inc.) and the Company, dated as of March 14, 2008. The Company has not received, since the date of the latest audited financial statements included within the SEC Reports, a written notice of a claim or otherwise does not have any Knowledge that the Intellectual Property Rights violate or infringe upon the rights of any Person, except as would not have or reasonably be expected to result in a Material Adverse Effect. To the Knowledge of the Company, all such Intellectual Property Rights are enforceable and there is no existing infringement by another Person of any of the Intellectual Property Rights. The Company has taken reasonable security measures to protect the secrecy, confidentiality and value of all of its intellectual properties, except where failure to do so would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect.

(j) Sarbanes-Oxley; Internal Accounting Controls. The Company is in material compliance with any and all applicable requirements of the Sarbanes-Oxley Act of 2002 that are effective as of the date hereof, and any and all applicable rules and regulations promulgated by the Commission thereunder that are effective as of the date hereof and as of the Closing Date. Since the end of the period covered by the most recently filed periodic report under the Exchange Act, there have been no changes in the internal control over financial reporting (as such term is defined in the Exchange Act) of the Company that have materially affected, or is reasonably likely to materially affect, the internal control over financial reporting of the Company.

(k) Certain Fees. Except as set forth in the Prospectus Supplement, no brokerage or finder's fees or commissions are or will be payable by the Company to any broker, financial advisor or consultant, finder, placement agent, investment banker, bank or other Person with respect to the transactions contemplated by the Transaction Documents. The Purchasers shall have no obligation with respect to any fees or with respect to any claims made by or on behalf of other Persons for fees of a type contemplated in this Section 3.1(k) that may be due in connection with the transactions contemplated by the Transaction Documents.

(l) Investment Company. The Company is not and immediately after receipt of payment for the Securities will not be an investment company within the meaning of the Investment Company Act of 1940, as amended.

(m) Disclosure. All of the disclosure furnished by or on behalf of the Company to the Purchasers regarding the Company, its business and the transactions contemplated hereby is true and correct and does not contain any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made therein, in the light of the circumstances under which they were made, not misleading. The Company acknowledges and agrees that no Purchaser makes or has made any representations or warranties with respect to the transactions contemplated hereby other than those specifically set forth in Section 3.2.

(n) Acknowledgment Regarding Purchasers' Purchase of Securities. The Company acknowledges and agrees that each of the Purchasers is acting solely in the capacity of an arm's length purchaser with respect to the Transaction Documents and the transactions contemplated thereby. The Company further acknowledges that no Purchaser is acting as a financial advisor or fiduciary of the Company (or in any similar capacity) with respect to the Transaction Documents and the transactions contemplated thereby and any advice given by any Purchaser or any of their respective representatives or agents in connection with the Transaction Documents and the transactions contemplated thereby is merely incidental to the Purchasers' purchase of the Securities. The Company further represents to each Purchaser that the Company's decision to enter into this Agreement and the other Transaction Documents has been based solely on the independent evaluation of the transactions contemplated hereby by the Company and its representatives.

(o) Regulatory Permits: FDA. The Company possesses all certificates, authorizations and permits issued by the appropriate federal, state, local or foreign regulatory authorities (including, without limitation, those from the FDA and any other federal, state, local or foreign regulatory authorities performing functions similar to those performed by the FDA) necessary to conduct its business as described in the SEC Reports, except where the failure to possess such permits would not reasonably be expected to result in a Material Adverse Effect. There is no pending, completed or, to the Knowledge of the Company, threatened, action (including any lawsuit, arbitration, or legal or administrative or regulatory proceeding, charge, complaint, or investigation) against the Company, and the Company has not received any notice, warning letter or other communication from the FDA or any other governmental entity, which (i) imposes a clinical hold on any clinical investigation by the Company, (ii) enjoins production at any facility of the Company, (iii) enters or proposes to enter into a consent decree of permanent injunction with the Company, or (iv) otherwise alleges any violation of any laws, rules or regulations by the Company, and which, either individually or in the aggregate, would reasonably be expected to have a Material Adverse Effect. The properties, business and operations of the Company have been and are being conducted in all material respects in accordance with all applicable laws, rules and regulations of the FDA.

(p) Clinical Trials. All studies, tests and preclinical and clinical trials conducted by or on behalf of the Company were and, if still pending, are being, conducted in accordance with experimental protocols, procedures and controls pursuant to accepted professional scientific standards and applicable local, state and federal laws, rules, regulations and guidances, including, but not limited to the applicable requirements of Good Laboratory Practices or Good Clinical Practices, as applicable, except as, either individually or in the aggregate, would not reasonably be expected to have a Material Adverse Effect. The descriptions of the results of such studies, tests and trials (including adverse events) contained in the SEC Reports, if any, are not inconsistent with the description made to governmental authorities of such results in any material respects. Except as described in the SEC Reports, no results of any other studies or tests have come to the attention of the Company that have caused the Company to believe that such results call into question the results described in the SEC Reports of the clinical trials. The Company has not received any notices or correspondence from the FDA or any other governmental authority requiring the termination, suspension or modification of any clinical trials currently conducted by, or on behalf of, the Company or in which the Company has participated that are described in the SEC Reports, if any, or the results of which are referred to in the SEC Reports.

(q) Foreign Corrupt Practices; Anti-Bribery; Office of Foreign Assets Control; Money Laundering. Neither the Company, nor to the Knowledge of the Company, any agent or other person acting on behalf of the Company, (i) has directly or indirectly, used any funds for unlawful contributions, gifts, entertainment or other unlawful expenses related to foreign or domestic political activity, (ii) has made any unlawful payment to foreign or domestic government officials or employees or to any foreign or domestic political parties or campaigns from corporate funds, (iii) has failed to disclose fully any contribution made by the Company which is in violation of law, (iv) has violated in any material respect any provision of the Foreign Corrupt Practices Act of 1977, as amended, (v) has taken or proposed to take any action in furtherance of an offer, payment, promise to pay, or authorization or approval of the payment or giving of money, property, gifts or anything else of value, directly or indirectly, to any government official (including any officer or employee of a government or government-owned or controlled entity or of a public international organization, or any person acting in an official capacity for or on behalf of any of the foregoing, or any political party or party official or candidate for political office) to improperly influence official action or secure an improper advantage or (vi) is currently subject to any U.S. sanctions administered by the Office of Foreign Assets Control of the U.S. Treasury Department. To the Knowledge of the Company, the operations of the Company are and have been conducted at all times in compliance with applicable financial record-keeping and reporting requirements of the Currency and Foreign Transactions Reporting Act of 1970, as amended, applicable money laundering statutes and anti-corruption laws and applicable rules and regulations thereunder (collectively, the Money Laundering Laws), and no action, suit or proceeding by or before any court or governmental agency, authority or body or any arbitrator involving the Company with respect to the Money Laundering Laws is pending or, to the Knowledge of the Company, threatened. The Company has instituted policies and procedures designed to promote and achieve material compliance with such laws and with the representation and warranty contained herein.

(r) Waiver of Section 203. The Company's Board of Directors has waived the provisions of Section 203 of the Delaware General Corporation Law with respect to the issuance of the Shares and Warrants to the Purchasers.

(s) Capitalization. (i) The authorized capital stock of the Company consists of 100,000,000 shares of Common Stock and 10,000,000 shares of Preferred Stock, \$0.01 par value per share, of the Company. As of the date hereof, there were (i) 31,432,355 shares of Common Stock outstanding; (ii) no shares of Preferred Stock outstanding; (iii) an aggregate of 3,698,019 shares of Common Stock subject to outstanding stock options of the company; (iv) an aggregate of 85,437 shares of Common Stock subject to outstanding restricted stock units and (v) an aggregate of 152,714 shares of Company Stock subject to outstanding warrants of the Company. All outstanding shares of capital stock of the Company have been, and all shares that may be issued pursuant to any stock option plan of the Company will be, when issued in accordance with the respective terms thereof, duly authorized, validly issued and fully paid.

(ii) Except as set forth in Section 3.1(s)(i) and for issuance of equity awards to officers, directors, employees, consultants, advisors or contractors of the Company pursuant to stock option, stock purchase plans or other equity incentive plans on terms approved by the Company's Board of Directors, there are no issued, reserved for issuance or outstanding (A) shares of capital stock or other voting securities of or ownership interests in the Company, (B) securities of the Company convertible into or exchangeable for shares of capital stock or other voting securities of or ownership interests in the Company, (C) warrants, calls, options or other rights to acquire from the Company, or other obligation of the Company to issue, any capital stock, voting securities or securities convertible into or exchangeable for capital stock or voting securities of the Company or (D) restricted shares, stock appreciation rights, performance units, contingent value rights, phantom stock or similar securities or rights that are derivative of, or provide economic benefits based, directly or indirectly, on the value or price of, any capital stock of or voting securities of the Company.